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A quest for opening up borders
Do human rights enhance a form of
international membership?

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Summary

This thesis touches upon and considers the relation between a person, state, and access to rights, with international freedom of movement as a vanguard. As movement is inherent in humans and allows us to search for other standards of living it is somehow central in this thesis. In relation to access to rights moving, across borders touches upon several issues, for example what is required of a person in order for that person to be able to access rights across borders? These requirements and the implementation of those requirements more or less differ per state. These requirements enable exclusion of persons from having access to rights within and across borders, and this makes freedom of movement far from self-evident. Furthermore, these requirements strongly relate to a person-state relation. This relation, which can have different faces, is in turn strongly connected to state sovereignty. To explore the relation between a person, state and access to rights, different concepts are elaborated upon, such as: nation, nationality, state, state sovereignty, citizenship, and statelessness. Following this conceptual overview, international freedom of movement will get attention, including (unavoidably): migration, borders, requirements similar to the effect of borders, and detention. The main challenge, with international freedom of movement as a vanguard, is to look for complementary ideas and-or alternatives both to enable and to improve access to rights. (Re)considering the present connection between a person, state and access to rights, as it more or less currently stands, some alternatives will be discussed, and will allow us to think about different possibilities. Emphasizing that although from a human rights law perspective certain alternatives or directions of thinking might be more preferable, there is no fixed or single solution for improvement (re)considering the relation. Therefore, new or- complementary ideas and contributions will hopefully emerge.

Abbreviations

e.g.	- exemplum gratii, for example
AI	- Amnesty International
CRC	- Convention on the Rights of the Child
CRS	- Convention on the Reduction of Statelessness
DESA	- Department of Economic and Social Affairs (United Nations)
EU	- European Union
GA	- General Assembly
GATT	- General Agreement on Tariffs and Trade
GBI	- Global Basic Income
GCIM	- Global Commission on International Migration
ICCPR	- International Convention on Civil and Political Rights
ICERD	- International Convention on the Elimination of All forms of Racial Discrimination
ICESCR	- International Convention on Economic, Social and Cultural Rights
ICJ	- International Court of Justice
ICRMW	- International Convention on the Rights of Migrant Workers
IDP	- Internally Displaced Persons
(I)GO	- (International) Governmental Organisation
(I)NGO	- (International) Non-Governmental Organisation
ILO	- International Labour Organisation
IOM	- International Organisation for Migration
MWC	- Migrant Workers Convention
NBI	- National Basic Income
OHCHR	- Office of the United Nations High Commissioner for Human Rights
PASOS	- Policy Association for an Open Society

PCA	- Permanent Court of Arbitration
RI	- Refugees International
UDHR	- United Declarations of Human Rights
UNCTAD	- United Nations Conference on Trade and Development
UNHCR	- United Nations High Commissioner for Refugees – UN Refugee Agency
UNICEF	- The United Nations Children’s Fund
UNDESA	- United Nations Department of Economic and Social Affairs
UNPD	- United Nations Population Division
VCLT	- Vienna Convention on the Law of Treaties
WTO	- World Trade Organisation

1 Introduction

1.1 Human rights

I will start this introduction with addressing human rights in reference to the subtitle, 'Do human rights enhance a form of international membership?' It is clear that human rights are part of a system of regulations that are invented. Human rights are part of the 'polis'. And as there is no 'right to have a right' to be part of the 'polis', one can draw a conclusion that as such "there is no right for *any* human in *any* situation to have human rights" (emphasis added).¹ It may be interesting therefore to look at the relationship between a human being, (human) rights and the invented system of regulations, or polis. This relationship, for the majority of persons, is a central determining factor in the likelihood of survival (to live) and further development. In other words, this relationship determines whether people have access to life-supporting necessities and-or facilities to be able to pursue life, and progressively to develop (in) life, that is, human development.²

An example of a manner used for admittance into some societies ('polis') is birth registration. Lacking birth registration can therefore, in one way or another, exclude a person from being able to have access to facilities that a society provides. Besides birth registration a growing number of 'memberships' as well determine admittance into a society. This then leads to some fundamental questions: what is the justification for the existence of such a society organisation which excludes persons from developing? Or what is the justification for creating memberships which exclude persons from developing?

1 G. Noll, *The Exclusionary Construction of Human Rights in International Law and Political Theory*, November 2003
www.tcd.ie/iiris/documents/discussion/pdfs/iisdp10.pdf last visited on 13 June 2007.

2 See for an impression of what can be understood by human development K. Malhotra. (Coordinator and lead author) & B. Ross-Larson (Principal ed.) *Making Global Trade Work for People* (2003), chapter I and p. 22.

Is there maybe a right that would make acknowledgment, inclusion, of a person in a society self-evident? Can there be a right to human rights or even 'A human right to human rights'? Do human rights have value beyond the self-created system ('polis')? This latter question is very important, even while it is not the main question discussed in this thesis. It leads to thinking beyond borders, beyond the self-created system. As human rights are part of the self-created system, it also leads to thinking beyond human rights. This in order to enable possible opportunities to improve equal access to a human development for everybody. With that I want to emphasise that it is exactly not the values represented by human rights that I deny or 'throw' away. They give us the framework to work with and work within that can be effective and-or- positive. And that is as well the context in which this thesis is written. The questions just mentioned are, moreover, present throughout, as the basis for, the whole thesis.

1.2 International membership, what is that supposed to mean?

International Membership, referring to the last parts of the subtitle 'Do human rights enhance a form of international membership?' might be a possible alternative for a membership beyond, or replacing, state-based membership e.g., citizenship, nationality, different residence permits or birth registration. If viable, how would an international membership look? How will persons be able to obtain such a membership? Is registration for that membership required? If registration is a requirement, what kind of information from and about a person is to be included in a registration procedure? And how should this information be archived? It is not the intention to answer the questions just mentioned and to analyse the possibility of an international membership as such. The idea posed as a question in the subtitle is intended to motivate a (re)consideration of the relation between a person, a membership (state-based or not), and access to (human) rights for persons. In comparison to state-based memberships, a

form of international membership may contribute to improve access to (human) rights. To reconsider the relation, first some concepts relating to the state need to be addressed as well as the organisation of these concepts in international law as it currently stands. And second, memberships within a state and what can be found about these in international law as it currently stands, require some attention. So the main questions addressed in the sections to follow are: 1. How is the membership of individuals to communities organised in international law, as it currently stands? 2. How does international freedom of movement between such communities relate to the membership of individuals to communities, and how is this organised by international law, as it currently stands? 3. Which alternatives to that regime are proposed by thinkers within the fields of international law and political theory, for example and what changes would those alternatives presuppose for international law?

The last part of the thesis will discuss a few alternatives proposed by different thinkers from within different fields. I came across these different ideas, in my research, more or less by coincidence, meaning that I did not choose these persons and-or their ideas beforehand.

Before coming to the last part of the thesis, freedom of movement and moreover international freedom of movement, as an unavoidable link between persons, access to a society, and access to rights, are given some attention.

1.3 Opening up borders

Let us consider one of the more provocative alternatives: the opening up borders. If it is preferable to move away from state-based memberships for access to (human) rights, are borders, in particular state-based borders, still essential? Why should they rather not open up? Can borders really be justified when they obstruct persons from having access to (human) rights?

The relevance of borders is one of the issues that can be considered when thinking about alternatives to state-based memberships that intend to improve access to human development opportunities.

As we shall consider in the second chapter of the thesis, it is recommendable to realise that besides physical, state-based borders (in the form of e.g. walls, barbwire and guards)³, borders have a symbolic meaning. They are part of a symbolic configuration of a nation and-or a community. This more symbolic meaning is essential. In part it of course enables the continuation of the existence of more physical, state-based borders. The symbolic meaning also allows nations, states and-or communities to exist. The subject of borders will be discussed more in the chapter, 'International freedom of movement'.

We are thus ready to consider the middle part of the subtitle, 'Do human rights *enhance* a form of international membership?' Can we argue that human rights have a progressive influence in the development of state-based membership even to the point of moving away from state-based membership? Are human rights contributing progressively in the direction of a more "hospitable approach"?

1.4 Scope and method of the study

1.4.1 The origins of the idea for the study

The idea came into existence and grew from the urge to write about persons regarded as stateless, and about Palestinian people in particular. I use the expression *regarded as stateless* instead of *stateless* as persons are not recognized by a state formally, although these persons are living within state territories. Their access to, or rather lack of access to, certain rights (through the lack of formal recognition by a state), brought me to ask how to

³ Other expressions are e.g. barbwire, radiation techniques, cameras, (security) guards, with and without guns or other weapons, airplane patrols, coastal patrols and techniques such as: visa, language and a variety of other requirements make up borders.

investigate this and, moreover, what to investigate? Soon after beginning to read about Palestinian persons who are regarded as stateless the geographical area, the number of persons regarded as stateless and the amount of topics under study grew and expanded. It brought me to look more closely at the relation between persons, states and-or communities and human rights, and to use international freedom of movement as a vanguard concept. As such the initial focus on persons regarded as stateless developed into a more general discussion on the relation between persons, states and-or communities and human rights.

1.4.2 Scope

Most of the questions mentioned in the first paragraphs, as well as additional questions that arose during the investigation, are discussed throughout the thesis. Chapter two discusses concepts relating to the state and state-based memberships and what international law, as it currently stands, is expressing about these concepts. These elaborations on concepts serve as a first step to discuss freedom of movement, which enables persons to search for other ways of living and for access to (human) rights.

Finally we can come to the main title, 'The quest to open borders'. This is connected to the last chapter. In this last chapter I discuss alternatives and complementary ideas that link to a relation between a person, a state, access to rights, and freedom of movement. To consider if these alternatives offer viable solutions and-or improvements to state-based memberships and access to human rights? This discussion considers the following alternatives: a post-national membership, flexible citizenship, a General Agreement on the Movement of People (GAMP), the idea of a basic income, and opening up borders. A 'wrapping up' will follow in the form of a conclusion.

1.4.3 Method

Mainly I used a literature survey and theoretical consideration as a method of research. English was the main language in which the research and writing took place. Therefore, unfortunately, a huge part of valuable experiences and good ideas from the majority of the earth's population, that presumably exist, could not be included. Not only because of the approximately 7.000 languages (more or less depending what one understands is a language) confronting me, but also the incomprehensible amount of information for which time does not offer a solution. That is a major gap in this thesis. Because if steps are to be made in the direction of more "hospitality", experiences need to be heard and be the basis for considering alternatives to improve access to rights for all humans. This can only be done by including the people. They are part of a process, a process that needs to come *from* the people.

It would have been desirable to present an idea that could be implemented so that human development would be a reality in a very short time and would save several million persons, whose lives now have been taken due to the "simple" reason of lacking access to: healthy food, clean drinking water, medical care, and shelter. Unfortunately, I do not present such an idea.

1.5 Starting notes

Some initial notes are needed before I continue. States represent persons. When I use the word state I think of one or more person(s) making up a government, representing a state. It is useful to realise that a state is not something static. A second point is that I find it very difficult to denote the differences in level of development, i.e. to use certain concepts which refer to this. Using the words North and South is perhaps less troubling compared to using developed or developing as indicators to refer to differences in level

of development. However, the latter two expressions are quite established in mainstream discourses. One of the difficulties that the use of these concepts involves is that perspectives, definitions, and interpretations related and given to concepts cannot point out the specific individual situations and circumstances, and the uncountable differences between persons and within countries.

Used in many documents, articles, debates, conversations, and laws, for example, the word *alien* is commonly used and deserves special attention. What is so special about the word? According to some dictionaries *alien* is described as: foreign, exotic and outside the family, for example, which are rather friendly references. Other descriptions refer to: 'from out of space', strange, conflicting, repulsive, different, and 'not naturalised stranger'.⁴ These latter connotations, though, can have an undignifying, humiliating and degrading effect. Thus the term *alien* carries within it the possibility of marginalisation. It carries within it the likelihood of difference in treatment toward persons and discrimination prohibited according to art.1 (1) ICERD, art.1 (3) UN charter and its preamble, and art.1 UDHR. When there are other alternatives available, why then use the word *alien* in laws, discussions, debates, and newspapers, for example? However, in recognising that, these discussions about terms should not distract from the urgency of equal accessibility for everyone to life-supporting necessities expressed in human rights.

Further, although I prefer to use the word *person* or *human* instead of e.g., *he* only, in order to implement more equality in the use of language, I will quote the original text most of the time for clarity.

A last note relates to the access *of* or *to* rights. This is an often overlooked distinction, but is important and can be illustrated with the example of asylum law. The right *of* asylum is the right to grant asylum, the right *to*

4 Drs F.J.J. van Baars *et al Engels-Nederlands*, PrismaWoordenboek (1990). And Wikipedia describes 14 different uses of the word alien one of which in relation to the use in law stating: "[a] person who is neither a native nor a citizen of their country of residence". The other 13 descriptions at least refer to something out in space, or extraterrestrial and different.

asylum is the right to be granted asylum. Where the latter is referring to the relationship of a person towards a state, about which many commentators share an opinion that there is no 'right *to* asylum', the former is denoting the relationship from a state towards a person, the 'right *of* asylum' and this reference is the rule. Who will *get* asylum and who does not, and how the right of asylum can be practised, are anxiously guarded decisions. States like to keep these decisions sovereign.⁵ 'The right *to*', as we will see, is though many times used in law, documents and literature, for example, and brings up the question whether it should be 'the right to *seek* ' or 'the right *to*' a certain stipulated right. The latter clearly implicates broader obligations regarding implementation and fulfillment. In line with the protection and promotion of human rights one is inclined to think that it is 'the right *to*' and not 'the right to *seek*' the right which should be the rule.

⁵ See D. Kennedy, 'International Refugee Protection', in B.S.Chimni, *International refugee law* (2000), at 104-105.

2 Key Concepts

2.1 Nation

Compared to 'state', which is defined by the Montevideo Convention, the concept of 'nation' is not defined by international law.⁶ The term appears in titles of law, e.g. 'law of nations' (public international law), as well as in names of organisations like the former 'League of Nations' and still existing 'United Nations'.⁷ 'Natio' is the name of a goddess of birth. The Latin word 'nascere' is 'to be born' and 'nation' derives from this, some say. The *modern* use of the word 'nation', others say, is originating from Italian universities. In the latter context it was used for a group of students from a particular region or country banding together for mutual protection and cooperation in a strange land.⁸ It is not necessary that the two possible origins exclude each other though. In a book by E.G. Ferris (1993) one can read that a nation is a unity based on constructed commonalities, which can vary in content and extent. It is a constructed artificiality, as expressed in the following quote "Questions of cultural identity and about what the concept of 'nation' means in this day and age will become burning political issues..."⁹ By presenting it as a 'political issue' one can envision the changeability of the concept 'nation'. Different descriptions exist of what can be understood to be a nation in a more theoretical sense. Examples from India, Indonesia, and Nigeria can illustrate a practise that relativizes the *existence* of nations, however. Prior to the construction of the states India, Indonesia, and Nigeria, nations existed in these territories, according to H. Adelman.¹⁰ Declarations of statehood, sovereignty, and the demarcation of borders, took (-and continue to- take) place while nations existed (and exist) and for

6 The Montevideo Convention on Rights and Duties of States 1933 Art.1 stipulates: "The state as a person of international law should possess the following qualifications: a) a permanent population, b) a defined territory, c) government; and d) capacity to enter into relations with other states." See for this quote and more on state and state criteria P. Malanczuk, *Akehurst's Modern Introduction to International Law* (1997), at 75-90.

7 See in this respect *International law*, in Vol.6 Britannica Encyclopaedia (1993).

8 K.J. Partsch, 'Nations' and 'Peoples,' in R. Bernhardt (ed.) III *Encyclopaedia of Public International Law* (1997) at 511-512.

9 E.G. Ferris, *Beyond Borders* (1993), at 276.

10 „India, Indonesia and Nigeria (for example) are nations forged by states. Rather, each consist of nations that existed prior to the construction of the state., H. Adelman 'Ethnicity and refugees' in World Refugee Survey (1992), in E.G Ferris, *Beyond Borders* (1993), footnote 1 at 273.

which the principle of sovereignty does not seem to be applicable. It relativizes 'nation' as a concept in that it is not an absolutely fixed and in all circumstances respected concept in theory and in practise. Is it the lack of 'strong' nation communities that make it possible to occupy these areas?

When 'nation' is regarded as a unity based on constructed commonalities, and includes a note of 'nation-building', with its sense of unity, negative reactions towards persons 'outside' of that unity can intensify. Negative reactions might also increase when a fear of collapse of a unity exists, whether it is because persons with imperialistic behaviour try to 'enter' the territory or persons looking for life-supporting necessities try to enter the territory. A fear of a collapse of 'unity' might be a fear of exposure of some real weaknesses within the state. That in turn can be a driving element for nationality and 'nation-building'.^{11 12} This fear bears within it a behavioural attitude or approach of marginalisation, discrimination and disrespect towards other humans. This behaviour might be difficult to avoid as 'nation-building', in a variety of ways, -is so integral in societies, even when persons try not to or are not willing to participate.

2.2 Nationality

When referring to the position of a human related to others in a social context, three perspectives of status are quite common.

1. A legal status referring to rights and duties of a person;
2. The different types of valuation of humans in the context of society: e.g., property, power, occupation, charisma. These result in social inequality.
3. The different descriptions of a role in a social structure: e.g., a tribal chief, a minister, electrician, farmer, a mother or a father, child, young adult, etc.¹³

11 See A. Favell, 'Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain' in K. Faulks, *Citizenship* (2000), at 50.

12 See for a description on nation H.G. Gelber, 'The Nation' in *Sovereignty Through Interdependence* (1997), chapter 5.

13 Different 'configurations' in different social contexts are existing and possible. See for more on this M. Bös 'The Legal Construction of Membership: Nationality Law in Germany and the United States', Working Paper Series for a Program for the Study of Germany and Europe No. 00.5, www.ces.fas.harvard.edu/publications/docs/pdfs/Boes.pdf, last visited on 13 June 2007

Separated as concepts, these status perspectives cannot be isolated from each other in a social context. 'Legal status' and 'illegal status' are both relevant here. In international law, nationality denotes a 'legal status'. 'Legal' and 'illegal status' are both umbrella terms for denoting different legal relationships between a person and a state; nationality is one example. 'Legal' status contains a form of acknowledgement by a state; that will be elucidated later. It is interesting that the umbrella function is growing as different or new forms of memberships are established. This is caused in large part by the movement of persons crossing borders and states trying to adapt to that.

Nationality, as one example of a possible person-state relation, can be of tremendous value if it is the recognition of "*the right to have rights*".¹⁴ Beside being used as a reference for a legal status, nationality many times includes subjective criteria as well, as nationality is special for every citizenry and particularly defined. It is particularly important to notice, that while nationality is a universal human right, at the same time every nation-state has the universal right to set particularistic standards.¹⁵ This raises the question: What does 'universal human right' imply when a nation-state is allowed to set particularistic standards? What legitimacy does a nation-state have to set particularistic standards for what is a universal right? When does the standard-setting become so obstructive that it effectively denies the universal human right?

In international law nationality can in principle be granted through birth on a state's territory, referred to as *Ius soli* acquisition, through descent, i.e. acquiring the nationality of one of the parent(s), referred to as *Ius sanguinis* acquisition, or through a combination of both.¹⁶ Residing for a certain period in a particular country, marriage to a local, eligibility through

14 See *Nationality: The Right to Have Rights. Ratification by Romania of the International Conventions on Statelessness*, a seminar 26 June 2002, Senate of Romania – Report www.unhcr.org/home/RSDILEGAL/3dd3c3d4b.pdf, last visited on 13 June 2007.

15 Bös, *supra* note 13, at 22.

16 The possibility of nationality acquisition via the *Ius soli* principle is currently becoming an exception. Many states still applying the *Ius soli* principle want to abolish or restrict it regarding it as an 'easy way' to obtain nationality (and citizenship).

naturalization or having other links established may also be options for obtaining a nationality.^{17 18} In the *Nottebohm* case (*Liechtenstein v. Guatemala* 1954) various elements are described that constitute the basis for the legal bond of nationality. Increasing importance has been given to the concept of *effective link* or *connection* with a state as the determining factor in acquiring nationality, and this was further developed in the 'Nottebohm' case. *Long-term residency* is one of the fundamental means of assessing the significance of the (effective) link between an individual and a state. Beside *long-term residence* (and-or *habitual residence*) by the individual concerned, the centre of his or her interests, family ties, participation in public life, and attachment shown by him or her for a given country and inculcated in his or her children, all seem to be important factors in assessing a 'connection' or 'effective' link.¹⁹

Naturalisation is another way for obtaining nationality. This process, especially relevant for immigrants, carries in it a possibility of naturalisation to a nationality rather than naturalisation to a more 'formal' concept of citizenship. Requirement of basic knowledge of a language, knowledge and approval of the political system of a country, knowledge of history of a country, and economic independence are just a few criteria illustrating that the process of naturalisation has already become ethnized. That less formal criteria become more formalised as requirements to be fulfilled in the naturalisation process can lead to a naturalisation process becoming more ethnized.²⁰ This raises questions such as: What is the level of *basic knowledge* of a language that is required from a person in a process of obtaining nationality? What is expected from a person when a person has to

17 See 'The world's stateless people' in *Questions & Answers*, 1 September 2006, www.unhcr.org/basics/BASICS/452611862.pdf, last visited 14 June 2007.

18 Of interest is Germany's ethnic determination of citizenship (via descent). When Germany was united, with East-Germany after the Cold War, East-German people were welcomed 'home' as members of society possessing nationality. Remarkably this does not apply for the guest workers from e.g. Turkey who were living, and payed taxes for example, in 'West-Germany' for years. For a more complete story see K.Faulks, *Citizenship* (2000), at 45-46.

19 The Court explained: "... a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said ...that the individual upon whom [nationality] is conferred ... is in fact more closely connected with the population of the State conferring nationality than with that of any other state." See for further details on the different factors *Liechtenstein v. Guatemala*, ICJ Reports 1955, pp.4 et seq. in Bhutan: Nationality, expulsion, statelessness and the right to return, *Amnesty International*, 1 September 2000, web.amnesty.org/library/Index/ENGASA140012000?open&of=ENG-NAM, last visited 15 June 2007.

20 See Bös, supra note 13.

approve of a political system? Moreover, in relation to international freedom of movement, these criteria sometimes need to be fulfilled even before a person enters a specific territory. Besides that, they are sometimes excludingly expensive. At a minimum, it can be argued that the right to freedom of movement and the right to seek asylum are infringed by these requirements, both before one enters a country and via a naturalisation process. This also conflicts with article 15 UDHR, for example, stipulating the right to a nationality.²¹ If and as subjective criteria become part of migration and naturalisation processes, then classification, discrimination, and, even worse, racism and xenophobia, can become inherent in the process.

As mentioned, nationality is a universal right. This can be illustrated with, for example, every child's right to an official identity, which is stated unequivocally in the 1948 Universal Declaration of Human Rights and the Convention on the Rights of the Child (CRC) and is reiterated in nine subsequent international agreements. In fact it should be something inherent, naturally present in humans born into this world, as H. Lauterpacht has pointed out. He attempted to get the phrase "every person shall be entitled to the nationality of the State where he or she is born" included in the UDHR, though this was rejected.²² This could have increased the chance for persons to have or to be able to apply for nationality, and with that status have easier access to rights. There is an important contradiction to highlight. As human rights *are* inalienable they are inherent to humans. This means that human rights cannot be awarded via nationality, for example. In other words a relation between a person and a state should not be a requirement for getting access to rights. This is an important point in considering the relation between a person, a state, and (human) rights.

21 Art. 15 UDHR stipulates that:

1) Everyone has the right to a nationality.

2) No one shall be arbitrarily deprived of his or her nationality nor denied the right to change his or her nationality.

22 H. Lauterpacht, 'International law and Human Rights', in Y. Zilbershats, *The Human Right to Citizenship* (2002).

While different interpretations exist regarding nationality, contrary to the concept of 'nation', nationality *is* defined by international law. "... this right [to nationality] is properly considered to be one of the most important rights of man, after the right to life itself, because all the prerogatives, guarantees and benefits man derives from his membership in a political and social community -the State- stem from or are supported by this right."²³ Beside the already mentioned CRC (art.7) and the UDHR (art.15) a right to a nationality is further guaranteed in art.24 International Convention on Civil and Political Rights (ICCPR), art.9 Convention on the Reduction of Statelessness (CRS), art.5 d (iii) Convention on the Elimination of All Forms of Racial Discrimination (CERD), for example.

The Institute of International law formulated in a few sessions that it held in 1895 and 1896, the following concerning nationality:

- 1 no one shall be without a nationality,
- 2 no one shall have two nationalities simultaneously,
- 3 everyone shall have the right to change nationality,
- 4 renunciation pure and simple is not enough to cause loss of nationality and
- 5 nationality of origin shall not be transferred from generation to generation ad infinitum for those born on foreign soil."²⁴ Fifty-three years later, art.15 (1) UDHR states that everyone has the right to a nationality, and art.15 (2) states that no one shall be arbitrarily deprived of his (or her) nationality nor denied the right to change his (or her) nationality, art.15 (2).²⁵ Let us take a closer look. Art.15 UDHR consists of three elements:
 - The right to obtain a nationality - "everyone has a right to a nationality"
 - The right to retain a nationality - "No one shall be arbitrarily deprived of his (or her) nationality..."

23 This quote is retrieved from a case before the Inter-American Commission on Human rights where a number of prominent oppositioners in Chile, in 1977, were deprived of their nationality (Third Report on the Situation of Human Rights in Chile, IACHR OEA/Ser/L/V/II.40 Doc 10,11 February 1977, pp.80-1) in Bhutan: Nationality, expulsion, statelessness and the right to return, *Amnesty International*, *supra* note 19.

24 R.Donner, *The Regulation of Nationality in International Law* (1994), at 44.

25 The 1961 Convention on the Reduction of Statelessness, an instrument developed on an international level, sets out the principles mentioned in Article 15 UDHR. See on this also Bhutan: Nationality, expulsion, statelessness and the right to return, *Amnesty International*, *supra* note 19.

-The right to change a nationality - "...nor denied the right to change his (or her) nationality." ²⁶

The UDHR is of indisputable value, although formally not binding. However, the formulation of Art.15 (1) is vague. No single state is obliged to give effect to it, as it is a collective obligation. The right articulated in art.15 (2) 'not to be arbitrarily deprived of nationality', however, implies an obligation for a particular state.²⁷ It has to be clear that deprivation of nationality that results in statelessness makes the right to nationality itself disputable. This could already lead to incompatibility with the aims and objectives of the UDHR, and the UN and its Charter, for example. In addition, it may be considered as "arbitrary" under art.15 (2).²⁸ If states are not taking up seriously the collective obligation of the right to nationality, meaning putting it into effect, the usefulness of the right as such is questioned.

It is important is that international law provides that states determine nationality acquisition and nationality deprivation. International law contains no guidelines about how to determine acquisition and deprivation of nationality. States are therefore free to decide. The Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) states (art.1): "It 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".²⁹ The limitation for states lies in the obligation to be consistent with international conventions, international custom, and principles of law generally recognised with regard to nationality. What is to be understood by customs and principles of law? To what extent do states feel obliged to abide by these customs and principles? International law, as it currently stands, does require states to

26 Y. Zilbershats, *supra* note 22, at 15.

27 *Ibid*, at 15.

28 Amnesty International, *supra* note 19.

29 A. Randelzhofer, 'Nationality' in: R. Bernhardt (ed.) *Encyclopaedia of Public International Law*, Volume III (1997), at 502.

provide for access to life-supporting necessities. This can be considered as a collective obligation enshrined in the UDHR and art.6 ICCPR 'the right to life' and implicit in many other (law) agreements.

The discussion about the right to nationality remains sensitive. There has been a growing recognition that states' discretion in these matters is circumscribed by principles of international law and human rights standards.³⁰ Perhaps this is because nationality touches upon the most sensitive areas of the states i.e., their sovereignty. Upon what do states base their legitimacy to set particular standards for nationality? This question is perhaps not so difficult to answer. As one of the statehood requirements people give legitimacy to the existence of a state.³¹ Therewith they in fact give the legitimacy to a state to set particularistic standards for nationality. People should therefore have the opportunity to question states' legitimacy, and therewith the legitimacy to set particular standards. However, the opportunity for peoples to effectively question the legitimacy of a state is not to be assumed to be straightforward.

2.3 State

One of the first times the word 'state' was used was by Machiavelli (15th - 16th century), Donner writes. Around that time 'Stato' applied to every form of government.³² For the establishment of the modern state system different occasions are used as a reference. The Peace of Westphalia from 1648 is one example of such a reference.³³ This treaty involved areas mainly within what is currently Europe. It marked the end of a 30-year war following which territories were (re)-bordered. As well, sovereignty was

30 Amnesty International, *supra* note 19.

31 See Montevideo Convention, *supra* note 6.

32 R. Donner, *The Regulation of Nationality in International Law* (1983), at 17.

33 The Peace (or treaty) of Westphalia in 1648 fixed borders to a certain extent. It included the following basic principles:

1. The principle of the sovereignty of nation-states and the fundamental right of political self-determination
2. The principle of (legal) equality between nation-states
3. The principle of non-intervention of one state in the internal affairs of another state

This established a framework for international relations and international law. It can be regarded as quite revolutionary considering the time, 1648, it was established. Wikipedia <en.wikipedia.org/wiki/Peace_of_Westphalia>, last visited 15 June 2007.

acknowledged for the first time.³⁴ These processes laid the foundation for further state-system establishment in other parts of the world. It can be assumed that, these processes only involved a small (elite) number of persons compared to the earth's population. In other words these processes were perhaps not based on the consent of the majority of the earth's population.

The acknowledgment of sovereignty is of major influence still today. Sovereignty is a sensitive subject for states to discuss. Sovereignty in international relations relates in large part to non-interference. Non-interference, in brief, prohibits meddling in the affairs of other states when there is no approval from the state(s) involved. There are questionable applications of this concept in situations where a state claims the validity of the principle of non-interference at a given moment, though ignores it when another state claims application of the principle. Practice shows that the application of the principle of non-interference is not strict and consequent. However, it is certainly imaginable that respect for the principle of non-interference would not have led to colonial and imperial actions, for example.³⁵ Following H. Steinberger, sovereignty was frequently serving as a "juridical cover to mere – power politics"³⁶ But "States are conceived of as existing for the security and well being of their inhabitants, which is a social purpose. One might conclude, therefore, that states may be restricted in their conduct at least insofar as they violate this social purpose."³⁷ The latter quote reminds us that (and makes the logical case that) *the people* are one of the state-hood requirements. The link between non-interference, well-being of the peoples, and the importance of the people as one of the statehood requirements will be clarified in the following paragraphs.

34 See for a conceptual overview and development of sovereignty K. Mills, *Human Rights in the emerging global order, A new sovereignty?* (1998), at 10-53.

35 S. Adejumbi points out: " Colonial political structure was predicated on the logic of dualism, of spatial, institutional, and territorial segregation and laws, ... aptly characterized as a bifurcated state or the logic of decentralized despotism." in S. Adejumbi *Citizenship, Rights, and the Problem of Conflicts and Civil Wars in Africa*, 23.1 Human Rights Quarterly (2001), at 148-170.

36 H. Steinberger, 'Sovereignty' in R. Bernhardt (ed.) *Encyclopaedia of Public International Law*, Volume IV (2000), at 500-518.

37 "States, by virtue of their membership in the club of states, have obligations to the other members of the club and thus restraints on their sovereign power." in K. Mills, *supra* note 34, at 27.

Art 2 (1) and art.2 (7) of the UN charter both refer to sovereignty. Art.2 (1) states that the UN organisation is based on the principle of the sovereign equality of all its members. Art. 2 (7) states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter...". States are entities with exclusive jurisdiction with regard to their territories under international law. Furthermore, states are the original bearers of rights and duties under international law, only states are members of the United Nations, and only states have standing before the ICJ (International Court of Justice).

On the other hand a single state cannot effectively deal with aspects that have global characteristics such as: environmental aspects, migration, diseases, nuclear security issues, and trade, to mention just a few -border-crossing examples. The exponential increase in international relations, and the increase in (I)GOs, (I)NGOs, international conferences, and social and-or civil networks, also illustrate this.^{38 39} Linking these facts to the topics here addressed, Kurt Mills notes: "...Global processes, both natural and humanmade, are demonstrating in a most dramatic fashion the permeability of artificial, socially constructed borders between states, thus undermining the concrete expression of sovereignty."⁴⁰

There are indications that the attempts to preserve sovereignty are increasing. This can be illustrated with, for example, restrictive migration policies, the fortification of borders, and restrictive and selective migration procedures. But, for example also with giving special rights, such as e.g.,: the right to decide about the natural resources and to have an own language formally acknowledged, to persons or groups of persons instead of allowing self-determination. Self-determination could possibly "contra-influence" a

38 The number of NGO's between 1951-1986 accumulated 5,5 times from 832 to 4,649. See K.Mills, *supra* note 34, at 19.

39 UN SC res. 688 urged Iraq in 1991 to give access to international humanitarian organisations to provide aid. An indication that humanitarian aid puts state sovereignty on a balance too.

40 See K. Mills, *supra* note 34, at 18-21.

stronger state.⁴¹ Furthermore, states have exclusive jurisdiction with regard to their territories under international law. This is served by the principle of non-interference, which in turn serves their sovereignty. This in turn is problematic. Served by international law, states tend to be obstacles with regard to the implementation of, especially, human rights.

It remains the case that it is difficult to assess an overall increase or an overall decline of state-sovereignty. Nevertheless, as illustrated, the absoluteness stated in international law regarding sovereignty or sovereign equality is questioned.⁴²

2.4 Citizenship

Citizenship fulfils two principal tasks. The first task is the determination of the criteria of membership. The second task is the nature of the "conversation" between the individual and the state, determined by the rules of citizenship. With regard to the first task, the criteria of membership determine who will and will not belong to 'the people'. The "conversation" between the individual and the state, in relation to the second task, includes the rights and obligations of the citizen. It also includes the kind of access the citizen has to the state, and the kinds of demands the state can make upon the citizen.⁴³ The institution of citizenship is "...that political artefact through which the state constitutes and perpetually reproduces itself as a form of social organization. It is the means through which the modern nation-state, made of various nationalities, seeks to forge a common identity and collective experience for its people..."⁴⁴ A state lays claim to and defines sovereignty, authority, legitimacy, and identity through citizenship. C. Tilly notes that, citizenship is variable, never completely specified and depending on "unstated assumptions about context, modified by practice,

41 See for this last point K.Mills, *supra* note 34, chapter 2.

42 See H. Steinberger, *supra* note 36, at 500-518 and 'Interpretation of Obligations of Equal Treatment and Non-Discrimination' and 'The Prohibition of Arbitrary Discrimination among States under General International Law' in R.Bernhardt (ed.) *Encyclopaedia of Public International Law*, Volume IV (2000) at 665- 669.

43 D. Jacobson, *Rights across borders, immigration and the Decline of Citizenship* (1997), at 7.

44 Quote from R. Brubaker in S. Adejumobi, *supra* note 35, at 148-170.

constrained by collective memory, yet ineluctably involving rights and obligations sufficiently defined", and furthermore, "[t]hat either party is likely to express and take corrective action when the other fails to meet expectations built into the relationship."⁴⁵ Sufficiency of definitions, but lack of efficient, effective procedures to hold persons accountable, allows policy makers to unilaterally set standards regarding citizenship. The variability and changeability of citizenship also causes that the fulfillment of citizenship criteria is to be difficult. When criteria are unclear and difficult to fulfill they lead to exclusion and become instruments of social exclusion.⁴⁶

The state is itself comprised of humans; citizenship therefore is about relations between humans it cannot be defined simply, statically, and unilaterally. Variable, with a dynamic identity and as creative agents, citizens will find new ways to express (their) citizenship. Resulting from that, new rights and duties will develop.⁴⁷ Citizenship was not and is not a 'universal' and common public good. This can be illustrated with an example of peoples struggling for substantive rights and values embodied in citizenship. In Rwanda and Burundi ethnic groups fought and still fight against each other and-or the state for rights. They fight with arms but they also try to use 'democratic' procedures. Identity of the (ethnic) groups in Rwanda and Burundi is created. It is created in a state system, which was 'imposed' by the colonisers. This made it impossible for 'indigenous' people to create a 'national identity' themselves, S. Adejumobi describes. Instead, it led to competition among the groups. Perhaps a developed 'national identity' might have prevented the populations from splintering into several groups. Now the result is that citizenship is exclusionary and bifurcated. Citizenship, and-or an identity, was and continues to be a basis for conflicts and civil war. It illustrates that citizenship is not something simple, static and unilaterally defined.⁴⁸

45 C. Tilly, 'Why Worry about Citizenship?' in M. Hanagan and C. Tilly *Extending citizenship, reconfiguring states* (1999), at 253.

46 R. Brubaker, *supra* note 44, at 148-170.

47 K. Faulks, *Citizenship* (2000), at 6.

48 See S. Adejumobi, *supra* note 35, at 148-170.

Some authors expressed that both nationality and citizenship are eroding. Some do this by arguing that accessibility to social, economic and civic rights for, for example, are extended to e.g.,: guest-workers, and immigrants, not carrying the 'right' papers.⁴⁹ A development which, Y. Soysal suggests, goes beyond borders, and is "...legitimized by a supranational discourse of universal human rights".⁵⁰ Others criticize as too positive the viewpoint of universality of human rights as the basis for change. States, in various ways, try to restrict access of migrants to their territory. If persons are not beneficial to a state, they are simply not welcome to enter the territory of that particular state, shortly described.⁵¹ D. Jacobson writes that, with regard to access to rights, expanding rights to non-citizens blur citizenship. Whether one set of arguments is 'stronger' than the other is difficult to evaluate. The main point is that changes do occur regarding nationality and citizenship; these changes cannot and are not denied. To what extent human rights are the motor for changing the content, extent, and extent of citizenship is difficult to assess. Some persons might even ask the question: Are human rights the motor for changing the content, extent and context of citizenship?

It is worth noting that communities exist without full awareness of the notion and without using citizenship. Citizenship becomes significant and-or crucial when it is *the* link for having access to rights (and obligations). "To be deprived of citizenship of a state, when the state is the key distributor of social resources, is to be deprived of the basis of other rights. This is why the United Nations Universal Declaration of Human Rights (art.15.1) includes the right to citizenship as a fundamental human right upon which the protection of other entitlements is premised."⁵² Art.15 (1) uses the word

49 See for example Y. Soysal *Limits of Citizenship* (1994), D.Jacobsen, *Rights across borders, immigration and the Decline of Citizenship* (1997) and K. Mills, *supra* note 34.

50 Y. Soysal discusses access to rights of migrants mainly in relation to European countries and concludes that as migrants, whether having a 'legal status' or not, do have access to rights similar to citizens in Y. Soysal, *supra* note 49.

51 Increasing border controls, mechanisms and expenses to exclude persons from the territory as well as increase of xenophobia, among other arguments are used to counter Y. Soysal her argument. See e.g., C.Joppke (ed.) *Challenge to the Nation-State, Immigrants in Western Europe and the United States* (1998).

52 K.Faulks, *supra* note 47, at 8.

nationality instead of citizenship. However, the quote raises the importance of the link between the state and a person when that link is crucial for access to rights.

2.5 Statelessness

"Statelessness is an anomaly under international law. It is assumed that an individual has an attachment to a state unless there is evidence to indicate otherwise."⁵³ Alternatively, as K. Faulks puts it, it (statelessness) is the most obvious way that citizenship operates as a privileged status namely through the denial of membership to non-nationals.⁵⁴ Access to basic facilities (expressed in rights) is put into question with the status of statelessness, as persons lack the recognition of being a citizen by any state.⁵⁵ Persons regarded as stateless within and outside a country lack protection of a government. They are not regarded as internally displaced persons. Further, they are not likely to receive refugee status, probably because they do not cross borders. Whether it is citizenship, nationality, residency (e.g. permanent or temporary) or any other reference given to a link between a person and a state it is problematic when this link is the only way for a person to have access to rights. Lacking the link, as persons regarded as stateless do, is therefore problematic. Statelessness is not a new feature. The estimated number of persons regarded as stateless is about as large as the number of persons that have a refugee status or are in a refugee situation; the UNHCR mentions a number of 11 million persons. This number is likely to be higher.⁵⁶ "The problem is so severe that there is no region that has not faced it", former Senior Legal Officer for Statelessness of the UNHCR Carol Batchelor reported. On top of that it can be argued that marginalization of such a large population regarded as stateless, e.g., an

53 C. F. Doebbler, 'A Human Rights Approach to Statelessness in the Middle East', 15 *Leiden Journal of International Law* (2002), at 529.

54 K. Faulks, *supra* note 47, at 38.

55 Peoples regarded as stateless include recognizable groups like some of Europe's Roma people, some Palestinians and Kurds, or groups whose plight is less known, such as people from the former Soviet Union, Bhutanese in Nepal, Muslim minorities in Burma and Sri Lanka, and ethnic minorities of the Great Lakes region of Africa including the Batwa "Pygmy" and the Banyamulenge in UNHCR, *New handbook on statelessness addresses 11 million "forgotten" people*, 20 October 2005, www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.thm?tbl=NEWS&id=4357b384, last visited 15 June 2007.

56 See UNHCR, *supra* note 55.

estimated group of 300.000 Kurds in Syria, decreases the stability of the country and region.⁵⁷ In relation to states' their interests in both security and stability it would therefore appear logical for states to pay a considerable amount of attention to the plight of persons regarded as stateless. It is then also worrying that, when categorisation is used, persons regarded as stateless are not separately mentioned in the UNHCR reporting. The UNHCR uses four categories: refugees, asylum seekers, internally displaced persons and "others of concern". It seems that persons regarded as stateless fall in any of these categories. This leaves too much space for circumvention of their cause.⁵⁸ "Refugees make the headlines as they are the visible victims of persecution and conflicts. The plight of stateless persons is in many ways similar, but they are almost invisible."⁵⁹ ⁶⁰

One of the first reasons that states raise for the lack of attention for persons regarded as stateless is that they find it difficult to identify 'stateless' persons. Lack of resources, technical support and information about the conventions (and how to understand and implement the conventions), are additionally mentioned as reasons.⁶¹ A question that arises is, however, that if there is no lack of resources and support, for example, will states have the will to identify persons regarded as stateless?⁶² For fulfilling its role the UNHCR needs resources including money, money that has to come from

57 M. Lynch & P. Ali, 'Buried Alive: Stateless Kurds in Syria', *Refugee International* 13 February 2006, <refugeesinternational.org/content/publication/detail/7829/>, last visited 15 June 2007.

58 Another example of not specifically mentioning persons regarded as stateless is the reference 'other', including Roma/Gypsies/Sinti/Travellers, and probably as well persons regarded as stateless are to be included in 'Programme of Action' agenda item 9, *World Conference against Racism, Racial Discrimination, Xenophobia and related intolerance, adopted* 8 September 2001, <www1.umn.edu/humanrts/instree/wcarprogrammeofaction.html>, last visited 15 June 2007.

59 Quote from the UN High Commissioner for Refugees Mr.A.Guterres in 'UN alarmed over 'asylum fatigue' , *BBC news*, 19 April 2006, <news.bbc.co.uk/2/hi/4919746.stm>, last visited 15 June 2007. He further noted: "internally displaced people, who had no international legal protection remained the international community's "biggest failure"". However, this remark applies to the cause of persons regarded as stateless as well.

60 UNHCR, *supra* note 55.

61 See UNHCR, 'Preliminary Report concerning the Questionnaire on Statelessness Pursuant to the Agenda for Protection', September 2003, <www.unhcr.org/home/RSDLEGAL/402b5af94.pdf>, last visited 15 June 2007. The questionnaire gathered information received from States on: experience with cases of statelessness; approaches to the acquisition and loss of nationality; approaches to issues concerning family unity, women and children; mechanisms for the identification and protection of stateless persons; steps taken concerning accession to and implementation of the 1954 and 1961 Statelessness Conventions for the report UNHCR, 'Final Report Concerning the Questionnaire on Statelessness Pursuant to the Agenda for Protection: Steps taken by States to Reduce Statelessness and to Meet the Protection Needs of Stateless Persons Protection', March 2004, <www.unhcr.org/home/RSDLEGAL/405f09834.pdf>, last visited 15 June 2007.

62 See on this 'Statelessness: prevention and reduction of statelessness and protection of stateless persons' a document issued by the UNHCR Standing Committee on 14th of February 2006. It is a reaction to the Final report, based on the questionnaires and addressed by states.

the states.⁶³ The requests by states for increase of resources and technical support, as well as for an increase of the role of the UNHCR, to improve the situation for persons regarded as stateless, can therefore be returned to the states. The UNHCR will not be able to give the required assistance, if the states do not provide the UNHCR with resources. Despite its mandate and notable success, only two staff members in the office of the UN High Commissioner for Refugees (UNHCR) are specifically employed to focus on helping persons regarded as stateless. It all appears strange since states themselves regard persons as stateless.

There are two specific treaties in international law relating to persons regarded as stateless: the Convention relating to the status of stateless persons, adopted in 1954, and entered into force in 1960, and the Convention on the reduction of statelessness, adopted in 1961, and entered into force in 1975. Although the former is ratified by 59 states, only 31 states ratified the latter. Renouncing nationality may not be permitted by a state if it renders a person stateless (art.8 (1a) CRS). The art.5 and art.6 CRS together stipulate that any loss of nationality as a consequence of change in personal status (such as: marriage, divorce, legitimation, adoption) or on the grounds of a change in the nationality of a person's parent or spouse, shall be conditional on the possession or acquisition of another nationality.⁶⁴ Further art.7 (6) provides that a person shall not lose his or her nationality if that would render him or her stateless, notwithstanding that such loss is not expressly prohibited by any other provision of the CRS. All this reminds us that international law in principle provides for the right to acquire a nationality. The UNHCR standing committee pointed out that there is a need, however, for renewed efforts to ensure that persons regarded as stateless shall be able to access the rights to which they are entitled in their

63 The money contribution by states is not exaggerated. The annual programme budget for 2007 is \$1,042.9 million, a little bit less compared to 2006 1,145.3 million and in 2005 it was 989 million. This is a small number compared to just only a bill approved by Congress of \$151.1 billion for Iraq www.ips-dc.org/iraq/failedtransition/index.htm, last visited 15 June 2007..

64 Art.7 (3) CRS provides that a national of a contracting state shall not lose his (or her) nationality so as to become stateless on the grounds of departure or residence abroad, except in the case of naturalized citizens who reside abroad for a period of seven consecutive years or more and who fail to indicate their wish to retain that nationality, or, possibly, in some circumstances, in the case of nationals born and residing abroad after attaining majority.

country of residence. They should be able to do so even before they are enabled to acquire an effective citizenship.⁶⁵ This could be expanded to general access of (human) rights. This would mean that (human) rights would also be accessible in other countries and not only in the country of residence. This should be possible before a person is enabled to acquire an effective citizenship. Expanding access to rights in this way could improve situations for many persons. Moreover, it allows for, or requires, reconsideration of restrictive approaches that are currently obstructing the access to (human) rights. The two conventions allow for no less favourable treatment of persons regarded as stateless, than provided to 'aliens' generally. This puts the two conventions in an awkward position. Taking regard of art.1 (1) CERD, which is prohibiting a distinction of any kind, makes the existence of 'persons regarded as stateless' an anomaly.

To conclude this chapter, we wish to recall that a link between humans, states, and access to rights, is essential if not crucial when this link is providing for access to life-supporting necessities. The state can be regarded as responsible for the well-being of its population. We must take note here that the population is one of the statehood requirements. The obligation ought to be on the state to provide evidence for claiming not to be able to care for a person or persons within its borders. It would in fact be in the interests of stability and security for the states to be more inclusive towards persons and their access to rights.⁶⁶ Bluntly stated, denial of access to rights through a link or through the requirement of a link between a person and a state makes states guilty of not upholding the right to life. In that sense states are obstacles in the implementation and access to (human) rights.

It seems that (re)considering the access to (human) rights, with the intention to improve the access to (human) rights, is a matter of "re-creation" and invention (of regulations). This can be stated to remind us of the artificiality of the different concepts discussed and the fact that human rights are part of

65 UNHCR Standing Committee, *Statelessness: prevention and reduction of statelessness and protection of stateless persons* (EC/57/SC/CRP.6), 14 February 2006 www.unhcr.org/excom/EXCOM/43f1f6682.pdf, last visited 15 June 2007.

66 C.F. Doebbler, *supra note* 53, at 530 and 540.

an *invented* system of regulations. Establishing residency as a criterion for access to (human) rights might improve the access to life-supporting necessities. However, residence itself needs to be established. The establishment process can carry in it the possibility of exclusion. The following chapters continue to question the link between humans, states, and access to life-supporting necessities expressed in rights. The purpose is to think about improvement of access to (human) rights.

3 International freedom of movement

Persons who are moving across borders possibly find themselves in vulnerable positions. Not the least as their dignity and respect are infringed.⁶⁷ According to the UDHR entitlement to recognition of inherent dignity and certain inalienable rights, which are the "foundations of freedom and justice in the world", applies to all people. As a part of the "liberty of man" freedom of movement is an inalienable right making it one of the most basic human rights.⁶⁸ "Liberty of movement is an indispensable condition for the free development of a person."⁶⁹ However, freedom of movement let alone international freedom of movement are not concepts that people usually think about in the normal flow of their daily lives. What does freedom to move imply? Does freedom of movement imply being able to leave, enter, and return to any chosen place? Is it not strange to consider (international) freedom of movement as a right?

Article 13 (1) of the Universal Declaration of Human Rights stipulates that everyone has the right to freedom of movement and residence within the borders of each State.⁷⁰ And in art.13 (2) it is stipulated that everyone has the right to leave any country, including a person's own, and the right to return to a person's own country. The ICCPR art.12 states in art. 12 (1) everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose a persons residence. Art.12 (2) stipulates everyone shall be free to leave any country,

67 Quote from Jagerskiold in S.Grant, *International migration and human rights*, September 2005, at 1, www.gcim.org/en/ir_experts.html, last visited 15 June 2007.

68 S. Gees, Study guide on the freedom of movement, *Human Rights Learning Centre*, 2003, www.hrea.org/learn/guides/freedom-of-movement.html, last visited 15 June 2007.

69 C. Harvey and R. P. Barnidge, jr, *The right to leave one's own country under international law*, September 2005, www.gcim.org/en/ir_experts.html, last visited 15 June 2007.

70 Defined as well in e.g: Art.5 (d)(i) International Convention on the Elimination of all forms of Racial Discrimination, Art. 26 of the Convention Relating to Status of Refugees, Art. 2 and Art.3 of the fourth protocol to the European Convention for the protection of Human rights and Fundamental Freedoms, Art. 12 of The African Charter on human and people's rights, Art. 22 American Convention on Human Rights.

including a person's own. Further art.12 (3) states that the above-mentioned rights shall not be subject to any restrictions except those, which are provided by law and are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. The article ends with art.12 (4) stipulating that no one shall be arbitrarily deprived of the right to enter a person's own country.

Both these articles, art.13 UDHR and art.12 ICCPR, make a connection between freedom of movement and state territory. This can be illustrated with the segments 'within the borders of each state', 'lawfully within the territory of a state', and 'the right and freedom to leave any country'. These segments illustrate that freedom of movement is restricted. They illustrate that a person does not have to worry about being 'lawfully within the territory' of a state when having citizenship, for example. This connects freedom of movement to membership of a person with a state. Again this is a link that is not self-evident for persons regarded as 'non-citizens' and-or as 'stateless'. Whether a person is awarded with a citizenship or a status of being 'lawfully within the territory of a state' is generally a matter of policies and laws determined by states. This as we saw in chapter two in for example the paragraph on nationality is an authority affirmed in international law. However, the Human Rights Committee stated in General Comment (GC) 27 that a person whose status has been regularized, after entering the State 'illegally', must be considered to be 'lawfully within the territory' for the purposes of art.12 ICCPR.^{71 72} This indicates that states are not fully free in setting standards unilaterally. The Committee further notes that art.12 should be consistent with the fundamental principles of equality and non-discrimination. The Committee clarifies that it would be a clear violation of art.12 (1) and 12 (2) if distinctions are made of *any* kind. This would be incompatible with the restrictions permissible under art.12 (3).⁷³ Art.12 (3)

71 General Comment no.27, *freedom of movement (Art.12)*, CCPR/C/21/Rev.1/Add.9 (1999), para. 1, point 4.

72 "...whose status has been regularized...", the regularisation of a status could proceed via various procedures, which can be unclear, variable and-or arbitrary and cannot be excluded from being discriminatory as well eventhough the article implicitly prohibits discrimination.

73 See GC 27, *supra* note 71, at para. 3, point 18.

illustrates that restrictions seem to be permissible. However, the restrictions must be consistent with all other rights in the ICCPR and must be provided by law and necessary in a *democratic society* for the protection of the purposes mentioned in the article. Those purposes are '...national security, public order (*ordre public*), public health or morals or the rights and freedoms of others...' ⁷⁴ Of course, a question such as what is to be understood by a democratic society is important for the interpretation and implementation of the article. Furthermore, restrictions have to comply with the rights and freedoms of others and they have to comply with other rights mentioned in the covenant. By allowing restrictions, although limited, art.12 (3) does seem to provide a basis for discrimination. One step further would be to argue that article 12 ICCPR provides for a basis to restrict freedom of movement and therefore does not stipulate freedom of movement.

Another question is what exactly entails 'the right to leave ones country'? This right is stated in the just-mentioned art.13 (2) UDHR and art.12 (2) ICCPR. In conjunction with that question, another question is, if there is no right *to* asylum but a right *to seek* asylum, what exactly entails the right *to seek* asylum? The 'right to leave ones country' requires a complementary right to be able to enter another. When a person, in practise, is not able to enter a territory of a state (or a country, following the text of the articles) both 'the right to leave ones country' and 'the right to seek asylum' are obstructed. It may therefore be that 'the right to enter a country' is implicit in art.13 UDHR and art.12 (2) ICCPR. However, this interpretation is not established in international law. This clause, 'the right to leave one's country', therefore leaves open the possibility of excluding people from entering a territory and that leads to obstructing international freedom to movement.

The right *not to be arbitrarily deprived of* 'the right to return to one's own country' is mentioned in both art.13 UDHR and art.12 (4) ICCPR. What is meant by arbitrary deprivation? Moreover, is there a 'non-arbitrary'

⁷⁴ See GC 27, *supra* note 71, at para. 3, point 11.

possibility to be deprived of 'the right to return to one's own country'? The Human Rights Committee points out that 'One's own country' allows for a broader interpretation than 'country of nationality'.⁷⁵ This is significant as it allows moving away from a 'strict' interpretation of a relationship between a person and a state. A person who is not a 'national' cannot "be considered a mere alien...", the Committee notes; this, under the condition that special ties or claims in relation to a given country exist. Long-term residence, an effective link, and habitual residence, as mentioned in the paragraph on nationality, all are important determinants to prove a connection, a special tie or a relation, to 'one's own country'. It becomes more difficult to refuse a person from returning to the habitual residence; the longer a person has been living in a certain country. It also gives opportunities to 'enter one's own country', when proving nationality or citizenship is difficult under certain circumstances. It has to be notified that there is no separate reference in those two articles to persons regarded as stateless. They perhaps are included in those articles but that is not obvious. It remains, however, difficult to prove 'a home', habitual residence, an effective link or another connection, when one is regarded as stateless.

3.1 Migration

International freedom of movement indisputably requires a connection to be made with migration. Compared to international movement of persons for business travelling or holiday travelling, for example, migration might account for a rather small number of persons. Although their number is comparatively small, they make up a very important share of the international movement of persons. It led UN Secretary General, Kofi Annan (Secretary General from 1997-2007) in 2002 to express that, he identifies migration as a priority issue for the international community. It led him at the same moment to ask for the establishment of a Global

⁷⁵ See for examples illustrating that the right to return and/or enter one's own country does not necessarily depend on formally possessing that country's nationality Amnesty International, *supra* note 19.

Commission on International Migration (GCIM).⁷⁶ The GCIM, established in December 2003, presented a report on the 5th of October 2005 with the title: '*Migration in an interconnected world: New directions for action*' (hereafter GCIM report).⁷⁷ The focus of the report is on international migration.

Between 1960 and 2000, the total number of persons migrating since 1960 until the year 2000 increased from around 2.5 % to 3%, as a percentage of the total population of the earth.⁷⁸ In the latest United Nations World Migration Report (2003) the estimated number of persons migrating (persons outside their country of birth) increased from 84 million in 1985 to 175 million in the year 2000 and is projected to increase to 230 million in 2050.⁷⁹ Slightly different is the following viewpoint. The fastest growth in numbers of persons migrating is the number of persons migrating to 'developed' countries. The number increased from 32.1 million in 1960 to 110.3 million in 2000. In the 'developing' countries this number was respectively 43.8 million and 64.6 million in 2000.⁸⁰ However, of the total number of persons migrating, around 57 % moved from *non*-OECD (Organisation for Economic Co-operation and Development) countries to other *non*-OECD countries.⁸¹ ⁸² This implies that more than half of the numbers of persons migrating are not migrating to OECD countries. The *non*-OECD countries in comparison with OECD countries, however, are in

76 K. Annan (Former Secretary General of United Nations 1997-2006), *Strengthening of the United Nations: an agenda for further change*, 9 September 2002 A/57/387, <unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN005675.pdf>, last visited 15 June 2007.

77 Noteworthy is that almost no African and Asian countries were involved in the 'Core Group of State', which in August 2005 included 32 governments from all regions, forming an informal consultative body to the Global Commission (GCIM). That might at a minimum seem strange as persons from African and Asian regions are rather much involved in migration movement. It would therefore be logic to include more persons or representatives from those regional countries in the *consultative* body.

78 D. Sriskandarajah, *Migration and development* (2005), at 4, www.gcim.org/en/ir_experts.html, last visited 15 June 2007.

79 H. Graeme, *Migrants in society: diversity and cohesion* (2005), at 2, www.gcim.org/en/ir_experts.html, last visited 15 June 2007.

80 See D. Sriskandarajah, *supra* note 78, table 1 at 3.

81 Current OECD members are: AUSTRALIA: 7 June 1971, AUSTRIA: 29 September 1961 BELGIUM: 13 September 1961, CANADA: 10 April 1961, CZECH REPUBLIC: 21 December 1995, DENMARK: 30 May 1961, FINLAND: 28 January 1969, FRANCE: 7 August 1961, GERMANY: 27 September 1961, GREECE: 27 September 1961, HUNGARY: 7 May 1996, ICELAND: 5 June 1961, IRELAND: 17 August 1961, ITALY: 29 March 1962, JAPAN: 28 April 1964, KOREA: 12 December 1996, LUXEMBOURG: 7 December 1961, MEXICO: 18 May 1994, NETHERLANDS: 13 November 1961, NEW ZEALAND: 29 May 1973, NORWAY: 4 July 1961, POLAND: 22 November 1996, PORTUGAL: 4 August 1961, SLOVAK REPUBLIC: 14 December 2000, SPAIN: 3 August 1961, SWEDEN: 28 September 1961, SWITZERLAND: 28 September 1961, TURKEY: 2 August 1961, UNITED KINGDOM: 2 May 1961, UNITED STATES: 12 April 1961

82 Which is 77.9 million persons of 136.7 million persons migrating in total following Harrison et al.(2004) in D. Sriskandarajah, *supra* note 78, table 2 at 4.

a less 'fortunate' position to provide persons a (better) standard of living. These different indications of migration may provide useful information, or they may on the other hand lead to confusion and distortion of the context. The GCIM expressed, in relation to that latter point, that certain politicians and media outlets have found it easy to mobilize support by means of populist and xenophobic campaigns that project systematically negative images of migrants. Numbers prove to be useful for the purpose of mobilizing support. The question arises: do states have a particular responsibility to counter these trends, because, for example they have a certain responsibility for the well-being of their population?⁸³

Labour migration accounts for a significant share of the total number of migrating persons. It is a topic that receives a lot attention in discussions on migration and international movement. It deserves attention as labour is a means through which a person is able to improve his or her standard of living. IN consideration of the access to rights, the Migrant Workers Convention (MWC) protects all migrant workers and members of their families irrespective of their legal status. It provides for many basic rights, reaffirming and complementing existing human rights instruments, it places human rights in the specific context of migration. Nevertheless, the rights granted to documented and undocumented workers are not identical. Accordingly, there are two main divisions in the MWC. The first is rights applicable to *all* migrant workers irrespective of their legal status (part III *Human rights of all migrant workers and members of their families*). The second is those rights applicable to migrant workers in a regular situation (part IV *Other rights of migrant workers and members of their families who are documented or in a regular situation*). The human rights for all migrant workers, fortunately, include the right to life (art.9) which ought to be comprehensive enough to include a basic standard of living. When looking closer at states that are members of the MWC it is significant, and also shameful, to see that since its entry into force, in July 2003, no single 'western' state ratified or signed the convention. Among those state that have

83 See the GCIM report (2005), at 43.

neither ratified nor signed the MWC are: the Netherlands, Germany, Sweden, the U.K., U.S., France, Belgium, Switzerland, Austria, Italy, Spain, Norway, Canada, Denmark, and Iceland. It is worth noting that specifically among those states, and in some more so than others, important national economic use is made of the labour that migrating persons offer.

Before coming to the next paragraph discussing the subject of borders and other requirements, 'the right to life' mentioned in art.9 of the MWC deserves more attention. 'The right to life' is also mentioned in for example art.11 (1) of the International Convention on Economic, Social and Cultural Rights (ICESCR). Art. 11 (1) ICESCR describes 'the right of everyone' to an adequate standard of living for himself and herself and his and her family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. That includes, following art.11 (2) ICESCR the right of everyone to be free from hunger.⁸⁴ The article requires the states parties to take appropriate steps to ensure the realisation of these rights. One of the questions the states should ask in relation to (labour) migration is what causes persons to migrate? The first question to ask has to be what leads persons to search for a better standard of living? Aware of the fact that labour is used as a means to improve the standard of living, persons may want or are urged to migrate when in the 'habitual residence' the means for pursuing a human development do not suffice. This results in, what is referred to as, migration out of pressure. As the Cairo Conference (1994) pointed out, international economic imbalances, poverty, and environmental degradation, combined with the absence of peace and security, human rights violations and the varying degrees of development of judicial and democratic institutions are causative factors for international migration.⁸⁵ It is clear that for the pursuit of the 'right to life', and a better standard of living, that is human development, international freedom of movement is

84 Art.11(2) ICESCR mentions the right of everyone to be free from hunger, and that states parties (and signatories to act in accordance to the object and purpose of the treaty) shall take, measures which are needed.

85 See S. Grant, *supra* note 68, at 4. And also 'International Migration and Development', 1994, at para.10.1. The Final programme of action agreed to in Cairo. *Cairo Conference Programme of Action*, www.iisd.ca/Cairo/program/p10001.html, last visited 15 June 2007.

essential. It leads also to the more general question of how movement can be made acceptable, and not fiercely controlled.

3.2 Borders and other requirements

"Borders are central to the theory and practice of sovereignty. They establish the categories of citizen and alien. This is seen as a fundamental element of sovereignty."⁸⁶ Frontiers are inviolable and are not to be insulted (Helsinki Final Act 1975).⁸⁷ In various ways frontiers or borders are part of the, current, state system-society. In a variety of ways and on a daily basis borders are crossed. Money transfers cross borders in seemingly fictitious amounts practically unnoticed. These money transfers exercise international freedom of movement to a high degree. For persons regarded as stateless, migrants, persons seeking refuge, asylum seekers and internally displaced persons, exercising international freedom of movement is many times one of vulnerability, if exercising international movement is possible at all.⁸⁸

Do borders and other mechanisms contribute positively to the accessibility of improving a standard of living? Are borders and other mechanisms contributing to security, and a form of peaceful living together? For whom are borders functioning? Are borders and other mechanisms feasible approaches to prevent migration out of pressure? Regardless of the answers to these questions, it is a fact that no physical or imaginary border will stop people from moving. Could it for example help "...to engender amongst citizens a commitment to their institutions of government, without having to rely on a spurious cultural unity" to make movement acceptable?⁸⁹ Can this

86 K. Mills, *supra* note 34.

87 Art. 1a III Helsinki Final Act states: "The participating states regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers." Art. 1a I states: "Within the framework of international law, all the participating States have equal rights and duties. They will respect each other's rights to define and conduct as it wished its relations with other States in accordance with international law (emphasis added) and in the spirit of the present Declaration. They consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement." Final Helsinki act, Helsinki 1 August 1975.

88 See S. Gees, *supra* note 68.

89 K. Faulks, *supra* note 47, at 52.

commitment be established? For a commitment to institutions of government, mutual trust is a necessity. This mutual trust is not likely to become stable when governments via its institutions find reasons to intensify its borders e.g., high fences, concrete walls, expanded control mechanisms, restrictive policy procedures, and excessive force by border guards, policemen, and other 'authorities'. With intensifying borders, for example, a message of fear is expressed. Furthermore, it obstructs access to a territory, access to basic rights, and freedom of movement, which are enshrined in international law. On top of that, the right to seek asylum, and the right to life, for example, are seriously at stake.

Although not physical like borders, visa requirements and restrictive and punitive laws make it increasingly difficult, if not impossible for persons to flee their country. In a hurry to leave, as their lives are being threatened, in the broadest sense of the word, persons are obstructed from fleeing their country. The access to rights and freedom of movement are obstructed. The 'right to leave one's country' and 'the right to seek asylum' are obstructed. To enter a Schengen country persons are required to possess and show a valid visa. On top of that the visa price has risen from 35 Euro to 60 Euro, from 2007. This was needed because of the biometric data collection. This made the expenses higher of the border control systems, F. Frattini EU justice commissioner argued.⁹⁰ J. Lovitt, executive director of the NGO Policy Association for an Open Society (PASOS), notes the following in reaction to that: "Higher visa fees, is not going to make any difference against, for instance, cross-border crime or human trafficking", "The cost will not affect those who are not bothered by paying a higher visa-fee, like wealthy criminals, but rather ordinary poor people for whom the cost of € 60 would mean that they cannot afford to visit family on the other "wrong" side of the border." Compared to the investments made for biometric data collection, and administrative execution of the higher visa price, etc., giving visas for free would probably have been a cheaper solution.⁹¹ As J. Lovitt points out,

⁹⁰ T. Küchler, 'EU votes through visa price hike plan' (2006).

⁹¹ *Ibid.*

a double price will likely prevent persons from coming to a Schengen country. The high visa price functions as a barrier or a border for persons to migrate. In fact these requirements place 'borders' more and more outward. In the Netherlands, the language requirement and basic exam (the latter for no less than 350 Euros!) that were introduced in the Netherlands and entered into force March 2006 need to be fulfilled even before one sets foot on 'Dutch' territory. It likely withholds persons from attempting to apply for asylum. One starts to wonder where the process to *seek* asylum starts? Does it start with the moment of visa application or already before the application? The various steps before one can actually migrate are accumulating. Further the various steps are put forward in time. This trend is problematic from a human rights perspective.

This "selling" of nationality for high prices, via passports, visas or other documents, and requirements, is exclusionary. It is a practice referred to as "special regulations for investors". Special regulations, which some pay with their lives. The GCIM, in relation to these procedures, commented that, states might be more willing to recognise and respect rights if they are able to decide who is a citizen and who is not. Whether states are more willing to respect rights is questionable. With the decision of who is a citizen and who is not certain rights are disrespected. It seems a contradiction in terms that, because of the ability of making the decision of who is a citizen and who is not, states would be more willing to respect rights. These policies and actual measurements, that in effect function as borders, are referred to as the replacement of non-réfoulement for non-entrée.^{92 93} Unfortunately, no effective accountability mechanism exists for challenging these policies and measurements.⁹⁴

92 *Additional to the Dutch language requirement policy*, one can order, in addition, an education package for 65 Euro, when own means do not suffice, to get the required basic language and society knowledge level. This is not necessarily a small amount of money to pay for being able to move freely, making use of one's rights.

93 The principle of non-refoulement contains that a state cannot deport an 'alien' (a person) in any manner to a border of a territory where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership in particular social group, or political opinion. As persons are send away by being stopped from entering a territory many lives are put in uncertainty, possibly left in destitute situations for example threatening freedom of movement, the right to life and freedom from torture for example.

94 K. Mills, *supra* note 34, at 104 -105.

3.3 A contradiction

Detention is a clear contradiction to freedom of movement. It is highly disputable, in particular for migrating persons who besides the physical borders and procedural mechanisms additionally face detention. During 2004 the total number of asylum applications, first instance or appeal applications, reduced by 19% according to the 2004 Global refugee trends from the UNHCR. A *decrease* of asylum *cases* when asylum *applications* are increasing or are stable indicates that the procedures have become more efficient. A *decrease* of applications is therefore ambiguous. From about 444.000 claims for asylum 49.500 individuals were granted refugee status, 33.100 persons could remain on humanitarian grounds, the report from the UNHCR indicates.⁹⁵ These numbers are interesting and they pose the question: where are the other 361.400 persons who applied for asylum? Applications are possibly pending, but where in the meantime are the applicants residing? Moreover, how in the meantime is their situation?

What can be understood by detention is not clear. It is also not clear what kind of facilities or "shelters" are used for detention. First, the use of the word detention is mostly avoided. Second, facilities or "shelters" can be quite general or more 'special' buildings. They can vary from existing prisons, to airport facilities. When detained in prisons, persons are sometimes detained among detainees convicted for crimes. An airport, representing movement, is a cynical example of a place where persons are detained. It is critical for the reason that governments claim that these areas are 'neutral': that they do not have any jurisdiction over these airport areas. That persons are kept somewhere to wait for their application or to wait for transferral to another country is indisputable. Precise numbers and other data about persons and their situation in detention are difficult to find and trace. Different names are used for different facilities, such as for example

⁹⁵ See the 2004 Global Refugee Trends, 'Overview of Refugee Populations, New Arrivals, Durable Solutions, Asylum-Seekers, Stateless and other Persons of Concern to UNCHR', 17 June 2005, at 35- 40, www.unhcr.org/statistics/STATISTICS/42b283744.pdf last visited 15 June 2007.

'deportation' centre or 'camps'. This makes the search for information complicated. It is quite astounding that a large organisation such as the International Organisation for Migration, if not the largest in relation to international migration, is not providing for any information or link(s) on its website that at least lead to some information about detention.⁹⁶ There are messages, reports, and laws mentioning immigrants' detention. And sometimes this is done quite openly.⁹⁷ The main point is that detailed information about detention of migrating persons is not eagerly provided and accessible. This contrasts with the detailed information available and accessible for and saved by authorities about persons migrating, for example in the Schengen Information System (SIS). This makes the process of detention even more "delicate". Persons being detained often find themselves in a limbo situation: with possible difficulties to understand the language and-or have access to translators. First, they need to know why they are detained on what grounds. They further need clarity about the proceedings that apply to their situation(s) should be available. Above all persons need access to immediate and effective proceedings that can challenge their detention and discuss compensation or the like. In the meantime, held in detention, persons are robbed from their freedom of movement.⁹⁸

As a clear infringement of freedom of movement, detention is violating the most basic right(s) of people, especially people in vulnerable situations. From a moral perspective, it is hard to understand that persons who are in search for a better standard of living and are willing to work are detained. In general there is the danger that detention becomes generalised. This infringes human dignity and moreover the right to life. Not surprisingly, it

96 It seems that all over Europe over 100 'camps' exist. This information and a definition of 'camps' as well as examples and elaboration on policies adopted can be found in Migreurop *'From European migration and Asylum policies to camps for foreigners'*, 2005, www.migreurop.org/rubrique45.html?lang=en, last visited 15 June 2007.

97 An example can be retrieved from a new bill in the U.S. clearly proposing the establishment of new detention facilities for immigrants. See for the bill on detention facilities D. Crary, 'Immigrant bills raise detention facility concerns, critics question expansion plan', 25 June 2006, www.boston.com, last visited 15 June 2007.

98 Recently a new law entered into force, the Military Commissions Act of 2006 which abandons the right of habeas corpus. Meaning that when one is regarded as an enemy combatant one can be detained, in principle, forever without having the right to challenge the detention, which as well can be in a detention centre in an other part of the world if under U.S. command. This without any clear indications of who can be regarded as an enemy combatant.

does not comply with norms, ideas, goals and obligations stipulated in e.g., international treaties.

To conclude this chapter, J. Carens notes: "...one has only to ask whether the right to migrate freely *within* a given society is an important liberty. The same sorts of considerations make migration across state boundaries important"⁹⁹ "If individuals may leave a country at their pleasure, why may not more do so when it is to their advantage to change the seat of their fortunes at the same time?", Pufendorf asked.¹⁰⁰ A part of the answer can perhaps be found in the following. During the 1990s, governments in the global South urged for a United Nations world conference on migration. They wished to link migration to development. In the global North governmental colleagues were more interested in improving migration control first.¹⁰¹ The willingness to talk open about the interest(s) playing a role in restricting (international) freedom of movement seems limited.

99 J.Carens, 'Aliens and Citizens: The case for open Borders' in R. Beiner (ed.) *Theorizing Citizenship* (1995), at 237.

100 R.Donner, *supra* note 25, at 24.

101 G. Noll, 'The Euro-African migration conference: Africa sells out to Europe', openDemocracy, 14 July 2006, www.opendemocracy.net/people-migrationeurope/migration_conference_3738.jsp, last visited 15 June 2007.

4 The Quest for Opening up Borders

In the 18th century Immanuel Kant gave some enlightened ideas about, among other subjects, world citizenship.¹⁰² "The Law of World Citizenship Shall Be Limited to Conditions of Universal Hospitality". This is the phrase with which the 'third definitive article for a perpetual peace' begins. Kant clarifies that world citizenship limited to conditions of universal hospitality constitutes that a person is not to be treated like an enemy when arriving in another country. No hostile treatment is allowed as long as a person is peacefully occupying a place. It is, though, a right of temporary sojourn, a right to associate, which all persons have by virtue of their common possession of the surface of the earth. The surface of the earth where one cannot infinitely disperse and hence must finally tolerate the presence of each other, Kant writes.¹⁰³ Interestingly, refusal may be allowed, but only when it is possible without destruction of a person.¹⁰⁴ Even though all human beings have the common right to the surface of the earth, he writes that, the right of hospitality does not extend further than to conditions of the possibility of seeking to communicate with inhabitants. In this way persons are able to seek "peaceable" relations with each other, he notes. These relations could then be publicly established by law.¹⁰⁵ "Since the narrower or wider community of the peoples of the earth has developed so far that a violation of rights in one place is felt throughout the world, the idea of a law of world citizenship is no high-flown or exaggerated notion. It is a supplement to the unwritten code of the civil and international law, indispensable for the maintenance of the public human rights and hence also

102 See I.Kant 'Perpetual Peace: A Philosophical Sketch' (1795), available on www.mtholyoke.edu/acad/intrel/kant/kant1.htm, last visited 15 June 2007.

103 One cannot demand a right to be a permanent visitor, a special beneficent agreement is needed when a person wants to get a right to become a fellow inhabitant, in I.Kant, *supra* note 102.

104 What is meant by 'destruction' of a person is not further clarified. The interpretation of destruction of a person, is however essential when it can come to a refusal of a person seeking communication on the ground of destructing an other person.

105 The form of publicity is implied by every legal claim, since without it there can be no justice, See Appendix II 'Of the harmony which the transcendental concept of public right establishes between morality and politics' in I.Kant, *supra* note 102.

of perpetual peace."¹⁰⁶ Questions in relation to e.g., the more practical idea of world citizenship should be asked. What does, for example, world citizenship entail? Is it a state-based relationship, requiring a state-based organisation? How should international law adapt? What is the role for human rights or which role are they playing? The alternatives below touch upon these questions. They do not consider a world citizenship and international freedom of movement only. The question: 'Is a relationship between a person and a state, or the world, in the case of *world citizenship*, a prior necessity for equal access to life-supporting necessities and human development?' will serve that purpose.

4.1 Flexible citizenship

Flexible citizenship is an idea described by B.S. Frey, for example. He refers to COM which stands for citizenship: organizational and marginal. It is organizational as persons can become citizen of not only states but also of other organisations. Other organizations such as for example non-profit organisations, non-governmental organisations, and clubs. Citizenship is marginal, because it can be temporary, multiple, and partial (the latter meaning that it can be restricted to some functions only). COM is based on voluntary contracts. Those voluntary contracts cannot be determined as "...it is impossible to state all contingencies that the future might bring."¹⁰⁷ Further a citizen cannot contract for any individual service, which would be possible on a market. Contracts are in that sense public. It is interesting to know how one can obtain an individual service, whatever that maybe, when one is not able to contract for an individual service. Goods with public characteristics are, in a COM context, referred to as "club" goods and can be consumed by citizens. "Non-members can be excluded" from the use of "club" goods.¹⁰⁸ A citizen can participate in consuming public goods supplied by the organization of which she or he is a member. It is interesting

¹⁰⁶ I.Kant, *supra* note 102.

¹⁰⁷ B.S. Frey, *Flexible Citizenship for a global society* (2001), at 12.

¹⁰⁸ Frey refers here to Buchanan(1965) with regard to 'public goods'. *Ibid.*, at 15.

to know what these public goods entail. Can they provide all persons with life-supporting necessities, for example? Furthermore a person is not obliged to change or add a citizenship.

Citizenship entails a special relation. It consists both of rights and obligations that go far beyond short-term and egoistic exchanges between individuals and the state, Frey notes. The concept of citizenship has traditionally been reserved exclusively for the nation-state. But states have proved to be unable to meet the challenges of a global world. The existing state monopoly of citizenship is too narrow and inefficient. It conflicts with the tasks to be solved by public activities.¹⁰⁹ A COM, in the formula just described, might give some answers to these changes. The relationship resorts to the intrinsic motivation of the citizens and to the community of people who share loyalty and identity (Eriksen and Weigard 2000), Frey writes. The citizen "owes allegiance" to the state, must be public spirited, and exhibit civic virtue, he writes. This goes beyond an exchange of taxes. He points out that these intrinsic aspects expose a crucial difference between flexible citizenship and purely being a customer or member of an organization. In this way flexible citizenship is heading away from the idea of a market solution, he notes. Regarding its feasibility the following points come up as suggestions from different persons and Frey comments upon these:

- Citizenship is unnecessary as everything can be obtained by private market contracts. This is simply not true, he notes. Markets cannot substitute for everything. Intrinsic motivation is necessary for commitment to an organization, and for realizing public activity.
- The new concept has high transaction costs, it will cost something. Nevertheless, Frey argues, citizenship now also costs something and this will likely rise as choices increase because of globalisation.
- The new system of citizenship is overall infeasible. This can be countered with some already existing examples of flexible citizenship.

¹⁰⁹ *Ibid.*, at 26-27.

- It will be opposed politically; as well as by persons who now benefit from the fact that other persons do not have an other alternative. Frey notes here, that they oppose it simply because it does and will undermine their power.¹¹⁰

With this short discription, following Frey's article, we get an idea of how a COM should look like. It seemingly adapts to changes and moves a way from state-based memberships. Will the idea of COM, however, differ essentially from state-based memberships? Will it essentially differ from other memberships with clubs or organizations already existing? Will it improve access to (human) rights (a returning question in this paper)? How should a COM be visualised? Let us imagine the establishment of an organisation. One of the purposes is to let other persons become members of the organisation.¹¹¹ The establisher(s) of the organisation, at least in the beginning, will likely make the decision of how a person can become a member. Probably certain criteria need to be fulfilled to become a member. Otherwise one would *be* a member automatically. This picture of the establishment of an organisation resembles what is discussed in this thesis. It resembles a state deciding about state membership, who can become a member and how. It is quite likely that different criteria need to be fulfilled before one can become a member of one of the different organisations or clubs. There are essential questions to ask. What if, for example, a person chooses not to join or change or add 'COM' citizenship(s)?¹¹² Will that person be excluded from any 'public goods'? Will that person depend, or remain dependent, on a state-based citizenship? Will food be included or considered to be a 'public good'? Will a 'food organisation' be established to obtain food? If so, it seems self-evident that everybody wants to become a member of that organisation. Criteria for such an organisation are hard to imagine, and probably unnecessary as we all need food.

110 *Ibid.*, at 23- 26.

111 The organisation can be a voluntary and community based organisation, without official member registration e.g. based on an oral agreement. One can think of for example a sports or bingo club, a political party, a regional or international organisation such as the European Union (EU) or Amnesty international, or the United Nations.

112 The preliminary exclusion when somebody voluntary chooses not to join in a membership can in fact be interpreted as discrimination.

How should international law adapt or contribute to the idea of COM, or flexible citizenship? Can it contribute? How will human rights be protected? How to prevent discrimination? Is there a "back-up" available to provide life-supporting necessities when organisations fail to provide for them? Will 'new' international law, with behavioural codes for organisations (states included) for example, be able to guarantee accessibility to, for example, work? What indicates that a COM will enable and improve equal opportunities to access a certain standard of living? ¹¹³

4.2 Post-national membership and a universal personhood

Based on a universal discourse of human rights, Y. Soysal developed the idea of a possible post-national membership. This idea may develop towards a universal personhood. "Do human rights enhancing an international membership?" is a question inspired by her writings.¹¹⁴ "Intensifying global discourses on rights and pluralistic conceptions of identity, as celebrated by the UN, UNESCO, and the like, provide impetus for social movements and penetrate their vocabularies of action. Accordingly, migrant organizations adopt these discourses in their claims and strategies and negotiate new modes of belonging beyond the confines of national boundaries."¹¹⁵ Soysal found that persons without full citizenship do have access to rights citizens have access to. Her findings are based on the results of her investigation from data mainly from France, Switzerland, UK, Germany, the Netherlands and Sweden. The findings challenge the more 'traditional' citizenship and show that not everything, not every access to (human) rights, can be denied.

"...[P]ost-national membership (advocates can show that such membership) is a recurrent, transmittable, and positively valued status with its own

¹¹³ Additional questions such as, how should the COM be implemented, and what are the costs of the COM are necessary to ask.

¹¹⁴ Y. Soysal, *supra* note 49.

¹¹⁵ *Ibid.* at 84- 85.

institutional apparatus...", Joppke notes.¹¹⁶ From his viewpoint post-national membership advocates disregard the political importance of membership of a society.¹¹⁷ He notes that, in essence the civic and social rights are grounded "first in the modern rule of law, which allows no distinctions on the basis of race, ethnicity, and (in certain respects) nationality; and secondly, in the residence- rather than nationality-based inclusion principle of the welfare state..."¹¹⁸ As practice shows relying upon the modern rule of law can be dubious and a delicate issue. A point C. Joppke and Y. Soysal both seem to agree with is the idea that inclusion into the welfare state is based on residence rather than nationality. This is an aspect Y. Soysal illustrated with her investigation, and a point referred to in the paragraph on nationality in chapter two. Not refuting the idea of a post-national membership completely, C. Joppke criticizes Y. Soysal for her optimism. He first points out that, immigration is only a small part of society. This makes it difficult to talk about a 'general' post-national membership. Secondly he mentions that human rights are not a solid substitute for enforceable municipal rights. Domestic factors are prominent and would therefore counter-argue the influence of human rights. A wrong dualism is drawn between nation-states and individual rights. Thirdly, regarding what he refers to as a 'spatial marker', western states incorporated human rights just to be able to have a form of exclusive citizenship. This is an argument against a generalised, global view that post-nationalists carry out. It does not counter-argue, however, that a development of a post-national membership or universal personhood is based on, not unimportantly, the influence of migrants in a society. And a last point is that there is a lack of a temporal marker: it has no end.

Joppke is of the opinion that: "...as long as there is no supranational or even world polity, there is no alternative to national citizenship..."¹¹⁹ Different forms of existing residence permits can lead us to argue that alternatives to

116 C.Joppke, *supra* note 51, at 28.

117 *Ibid.*, at 25

118 *Ibid.*, at 26-27

119 *Ibid.*, at 28

national citizenship already exist. Beside the question what he means by (a) world polity, it is not clear to me what he means by: "Non-citizenship is tolerable in the interim, but not in principle."¹²⁰ It leaves an impression that in interim stage non-citizenship is "allowed". This might include a membership beyond a state-based membership. This affirms the residence-based approach that, regarding inclusion into the welfare state, both Joppke and Soysal seem to favour.

To what extent human rights influence this process is difficult to assess. It seems that Y. Soysal at least attempted to illustrate and make valid the argument that, an influence of human rights cannot be denied and-or ignored. Although Joppke is not denying the influence of human rights, he may be right in his argument that state-based concepts exist. And, his argument may also be right that those state-based concepts strongly influence the decisions of who is becoming a member of a state and to what extent. It is questionable, considering improvement of access to and the protection of human rights, if international law as it currently stands, is able to contribute to an improving influence of human rights. This reminding that states, via direct and indirect implementation methods, are still the main implementers of international law.

Other alternative and additional ideas for citizenship exist e.g., a gay and lesbian citizenship. The proponents of a gay and lesbian citizenship justly addressed the point that, as world citizens, gay and lesbian persons are excluded in many ways from and within society. A gay and lesbian citizenship might help to enable them to get equal access to rights. This might include them into society. Another example is planetary citizenship. This citizenship is concerned with e.g., the awareness about interdependence between all things. This interdependence leads us to consider that in fact everything is one, one Earth, one world. We all live on that one world. We are able to do so through a mechanism that supports life. This life-supporting mechanism asks for a harmonious approach to maintain and

120 *Ibid.*, at 29

enable life.¹²¹ These two examples already illustrate the wide perspective of possible alternatives.

4.3 A General Agreement on the Movement of People

Some states ask for a more efficient and effective management of migration, in particular, labour migration. A General Agreement on the Movement of People (GAMP) could contribute to meeting that request. The GAMP resembles the title of GATT, standing for a General Agreement on Tariffs and Trade. The latter agreement used to exist. It is now merged into the WTO. The GAMP is an idea discussed by T. Straubhaar.¹²² His proposal suggests, looking for a situation of optimal allocation of the workforce. 'Economic need' requires that national migration politics shifts to an international regime of migration politics, to make the allocation of the workforce optimal. An unregulated movement of people will lead to 'rich' centers and poor peripheries. A GAMP could help to 'manage' this. Clear regulations might help migrants, governments, and persons in general, to know how to act. He illustrates his points by making an analogy between clubs and nations, respectively clubs with 'club goods' and nations with 'public goods'. It resembles the description in the paragraph about flexible citizenship. Straubhaar points out that a membership of a club is required to make use of 'club goods'.¹²³ For the moment we accept the fact that membership of clubs is probably required. The difference with citizenship and nationality is, for example, that clubs can exist on many levels. Clubs can exist in different forms, for different reasons, in different places in the world, and are not necessarily limited by state borders. Membership of clubs would therefore be different from citizenship and nationality. Another

121 N. Myers *The Gaia Atlas of Future Worlds, Challenge and opportunity in an age of change* (1990).

122 T. Straubhaar, 'Why do we Need a General Agreement on Movements of People (GAMP)?' in B. Ghosh (ed), *Managing Migration* (2000), at 110-135. Also available online <opus.zbw-kiel.de/volltexte/2003/689/pdf/94.pdf>, last visited 15 June 2007.

123 Club goods differ from private goods in that they are non-rival in consumption within a specific capacity. This resembles public goods in that aspect. But when a specific capacity is reached, costs might arise, e.g. 'congestion costs'. What the amount of these costs will be is not clear, but might be decisive for accessibility to a club. See Thomas Straubhaar, *supra* note 122, at 125 note 18.

aspect of this idea is that clubs might compete in the provision of 'the best' club goods. This would resemble the (idea of a liberal) market economy. And it questions the benefits for persons in relation to their individual and-or group needs. Examples of clubs mentioned by Straubhaar are the EU and UN. He further mentions regulations mechanisms such as the IMF, WTO and World Bank. The latter examples indicate that some 'clubs' might not guarantee improvement of access to rights, or a human development for everybody. Another aspect he addresses is compensation of the 'brain-drain' effect. This is an aspect that is regularly discussed in relation to migration, more specifically labour migration. His idea is to introduce a tax or fee for the valuable knowledge floating out of a country. It also is a compensation for the impact immigrants have on a welfare system of a host country.¹²⁴ This raises, to begin with, practical questions, such as: What kind of system or organisation is required to calculate and implement the fee or tax?¹²⁵ How will the issues be taken into account that there are communities existing that do not rely upon money and-or prefer not to use money? How will the situation of refuge be taken into account? Do persons who flee for, for example, a war situation or any other dire situation also have to pay this tax or a fee? Overall the question raises what is the beneficial contribution of a GAMP to a better allocation of the workforce, moreover the labour migration movement? How will a GAMP contribute to international freedom of movement and, the returning issue, to improved access to and protection of other human rights? Will a GAMP, compared to already existing treaties and other state-based mechanisms, contribute significantly to improve the access and protection of human rights?

If economic inequality is to be addressed, other means than making labor migration more effective and efficient might be more suitable.¹²⁶ The economy, especially economic growth, is not necessarily inclusive, meaning

124 For more on the subject of 'Brain drain' and the impact on welfare systems *see also for example* the GCIM report, *supra* note 83.

125 And there are more questions to raise, for example how to take into account the differences between persons with a lower income and persons with a higher income? And how will conversion rates be taken into account?

126 *See* M.W. Howard 'Basic Income and Migration Policy: A Moral Dilemma?', September 2004, at 12, <www.globalincome.org/English/References.html>, last visited 15 June 2007.

that, it is not accessible and profitable for everybody in an equal way.¹²⁷ Reports from diverse institutions show that the gap between persons in terms of economic means is continuously widening.^{128 129} Trade, economy and wealth should not serve as ends in themselves. They are means, means for human development (Rodrik 2001). The liberalisation of regulations in relation to certain (trade) markets did not prove to be reliable and sustainable for human development.^{130 131} Why would a GAMP, within international law, make a difference compared to the already existing international law?

4.4 A basic income

What is entailed by the idea of a basic income? Does it purport welfare on a global level? Is it an idea that reaches too far practically? Will it provide for everybody the possibility to have access to healthy food, clean drinking water, healthcare, education, and housing, or in other words a human development? Will it require a certain membership in, for example a state, club, or organisation? The idea of a basic income (hereafter BI), shortly explained, resembles an amount of money that could be paid to cover at least the 'basic' living expenses. It is crucial of course to ask: what is to be understood by a 'basic' living? A BI resembles a certain amount of money one is able to obtain in some 'welfare' states. The difference is that this 'welfare' money can be retrieved only after fulfilling certain criteria. Questions similar to the ones raised in relation to the idea of a GAMP can be raised here as well. What kind of organisational setting is required to distribute the money and how? How to assess the specific amount of money

127 See K. Faulks, *supra* note 47, at 136 e.g.

128 See for example 'Growth is Failing the Poor: The Unbalanced Distribution of the Benefits and Costs of Global Economic Growth', working paper no.20 from DESA (Department of Economic and Social Affairs (United Nations)) March 2006.

129 Künneemann and Epal-Ratjen reflect this, for me, with their title 'Still Hungry After All These Years?' in Künneemann and Epal-Ratjen: 'The right to food: A Resource Manual for NGOs' (2004), first introductory paragraph.

130 See Rodrik in K. Malhotra (Coordinator and lead author)& Bruce Ross-Larson (Principal ed.) 'Making Global Trade Work for People' (2003), at 1, 4, 41.

131 See 'Alternative explanations: Great Power politics and theories of modernization' in T. Risse (ed.) *et al. The power of human rights, international Norms and Domestic Change* (2002), at 267-270.

that can be distributed? How to take into account the communities that do not use or prefer not to use money as a means for daily subsistence? Moreover, will a BI guarantee equal access to a human development?

Different forums for describing and discussing the possibility of a BI exist. Furthermore, they vary in extent, and they use different concepts. K. Faulks is one author who wrote about what he refers to as, a Citizen Income. It entails a "...guaranteed sum of money paid to each adult citizen (with perhaps a lower rate for children) regardless of employment status. [It is] [f]unded by taxation on businesses and individuals."¹³² This, he writes, is a universal social right. Its significance is that it "frees citizenship from market constraints". Once constituted, it is "likely to be more secure than those social rights that are linked more clearly to shifts in employment patterns".¹³³ A new approach to social rights can "better balance between the imperatives of the market and the requirements of citizenship", he continues.¹³⁴ To realise what he regards as the strengths of liberalism, such as: equality, individual rights, perfectionism, and universal citizenship, and to solve problems globally and locally, a postmodern approach of citizenship is required. Here he seems to connect with Y. Soysal. Both acknowledge the movement away from a pure state-based citizenship. Masculinity and military duty both linked to citizenship, weakened opportunities for more care-oriented approaches to citizenship. Reflecting the importance of the relationship between an individual and a community, a Citizen Income would prioritise the welfare of its members rather than the needs of the market.¹³⁵ Another important point he makes is that no "community's citizenship can be assured" when huge inequalities are allowed and continue to exist. Furthermore, a Citizen Income allows a broader interpretation of the concept of work. This is necessary because much work that is now excluded, of which especially women notice(d) the

132 K. Faulks, *supra* note 47, at 170.

133 *Ibid*, at 119.

134 See 'rethinking social rights', Chapter 5, *Ibid*, at 116-119.

135 K. Faulks, *supra* note 47, at 120.

consequences, needs to be included.¹³⁶ Regarding the implementation of a Citizen Income or a BI it is not the economic feasibility which is the crux. The political will, justice, and self-interest, do play a more important role. That is why Faulks writes that, "Devolution of power and the democratisation of the state and economy" are necessary.¹³⁷

M.W. Howard, although favouring a Global Basic Income (hereafter GBI), regards a GBI not yet feasible. Therefore he takes a national basic income (hereafter NBI) as an illustrative example to express his ideas.¹³⁸ Highlighting the relation between an NBI and migration he develops a line of reasoning that is worthwhile (even essential) to mention. He starts with a proposition of "...a possible dilemma between generous egalitarian welfare policy, epitomized by NBI and egalitarian immigration policy, epitomized by relatively open borders".¹³⁹ He considers that in this proposition, 'egalitarians' have two options: 1. A generous BI and restrictive immigration policies, or 2. More open immigration policies, but a less generous or a more qualified welfare policy.¹⁴⁰ He follows up with the question if there is a dilemma between favouring a generous welfare policy, especially a BI, and favouring an egalitarian immigration policy. This is, he writes, his main question.¹⁴¹ In relation to that he asks: What kind of defensible immigration policy could be compatible with a national basic income? This question needs to be asked, because, Howard notes: "...people would fear welfare migration and would not support anything like an unconditional basic income."¹⁴² Even if some welfare migration is economically sustainable, there is a possibility that it is not politically sustainable, he points out. Referring to Pioch he points out that, in the EU and countries close to the EU large differences exist between the existing wage levels. These large

136 Recommendable for more about Citizen Income *cf.* the website of CORI (Conference of Religious of Ireland)

www.cori.ie/justice/basic_income/index.htm, last visited 15 June 2007.

137 K. Faulks, *supra* note 47, at 122.

138 M.W.Howard, *supra* note 126.

139 *Ibid.*, at 3.

140 More qualified, he refers to, could be for example a BI for citizens only or benefits subject to sorts of means-tests and willingness-to-work requirements or even further erosion of a commitment to a welfare state, *Ibid.*, at 3. The means-tests and willingness-to-work requirements is already included in many state migration procedures.

141 *Ibid.*, at 1.

142 *Ibid.*, at 3-4

differences could undermine the political viability of a basic income considering that, 'generous' states will face 'welfare migration' (this favours the idea of a GBI).¹⁴³ Pioch, however, acknowledges that the predictions of all economic models were in general overestimating migration from Eastern to Western Europe. This illustrates that, according to Howard, economic viability was not undermined. That in turn, could favour political sustainability.

Howard makes two distinctions regarding political feasibility. The first distinction is *political expediency*; *inexpediency* would mean that a political party or politician can by favouring a certain idea or policies not win an election. This can be because, for example, people will not tolerate the idea or policies, media will ridicule it, etc. This inexpediency can be established on rather irrational prejudices and fears, and Howard elaborates more on that later. The second distinction is *political reasonableness*. This refers to or includes rationality and morality. A policy is politically *unreasonable* if it imposes unreasonable demands on citizens. In relation to the first distinction, irrational fears and falsehoods are not the hardest to rebut, according to Howard, but related self-interest(s) are. Additional costs related to immigration policies might be problematic for a person who via taxes, for example, contributes to these policies. Putting it on a balance, and considering moral justification, it might, though, be justified.¹⁴⁴ Certain welfare rights might cause a magnet effect on immigration, and an increase of immigrants might increase costs for the average taxpayer by 15%. An alternative to the cost increase could be reducing movement of persons 'effectively'. This can be realised with, for example, more borders and harsh border controls. These latter alternatives might (possibly) result in more dangerous journeys for persons migrating and it might also lead to even more deaths while persons are migrating. Compared to the tax increase moral considerations can help to justify and lead to the acceptance of the idea of a Basic Income.

¹⁴³ *Ibid.*, at 5.

¹⁴⁴ *Ibid.*, at 7. When most additional money is going to education and health care for children, who are not in the 'host' country by their own choice e.g. costs are maybe reasonable to bear.

Should an NBI be for citizens only, is the next question Howard asks. He argues that for persons not receiving a basic income, living and working conditions are likely to become poor. After the implementation of NBI, wages might develop to a lower level than in the absence of NBI. The consequence of that might be that (im)migration decreases. Dire situations, in which persons wanting to migrate are doomed to stay when no aid is offered or a GBI is implemented, might continue to exist or worsen. This from a human rights perspective, and from a moral perspective as well, is unacceptable. Migration on the other hand might also be stimulated. Immigrating persons are maybe willing to accept jobs that NBI receivers refuse to accept. Already these arguments, according to Howard, favour an NBI for all residents and not only for citizens. A GBI could perhaps contribute to a reduction of the pressure(s) to leave a country. That could stem the immigration influx. The additional costs for taxpayers relating to immigration policies might then not be that high or even decrease. This could in turn make a GBI more politically sustainable. Compared to an NBI political viability and sustainability favour a GBI. Citizenship or any other possible form of membership is not required, however, for NBI entitlement. However, Howard does mention that a short period of residence, but not 5 or 7 years, could be required.¹⁴⁵ Seemingly more inclusive than state-based memberships, from the perspective of non-discrimination the residence requirement will be problematic. It is important to note that, an NBI or a GBI would possibly provide for life-supporting necessities.

How could international law contribute to the idea of a NBI or a GBI? It is quite likely that organisation(s) and complementary rules that require adherence, are a necessity. A Basic Income might soon resemble a state-based membership or make use of state-based structures similar to a flexible citizenship and a GAMP. This is not necessarily a negative point, as long as equal opportunities for everybody to access (human) rights, a human development, continue to be the basis and the starting point of analysis.

¹⁴⁵ *Ibid.*, at 8.

States, state-based organisations, and state structures, will for the near future continue to exist and therefore need to be taken into account. The point of equality of opportunity and accessibility to (human) rights for all persons is an issue and will likely remain an issue.

4.5 Opening up borders

"Does fairness require open borders, or something less?"¹⁴⁶ There are weak arguments against states controlling entry and maintaining sovereignty of their territory if there are other ways to address global economic differences that are better than allowing free movement, according to Howard.

Continuing his line of reasoning, relating to his dilemma, much depends on the condition, if no deep moral dilemma exists between a generous NBI and a restrictive immigration policy. If "wealthier states fail to find ways to address the just claims on their resources by the world's less favored, one might be forced to favor migration as the only available means of addressing global inequality," Howard writes.¹⁴⁷ This is a "nightmare scenario", Barry (1995) writes, if it means significantly worsening the condition of the worse-off in the 'wealthier' states (not even addressing the worsening of the conditions of the well-off in the 'wealthier' states, Barry writes).¹⁴⁸ What about the worsening conditions of persons not able to enter, or in other words not welcomed by 'wealthier states'? Their situation might end up being much worse than the situation of the worse-off in the 'wealthier' states. Therefore, Howard counters, if the worse-off in the not 'wealthy' state are better off at this equilibrium than they would be under the continuation of restricted borders, it is worth pursuing open borders.¹⁴⁹

Howard argues that, immediate needs and just claims to a fair share of the resources ask for an agreement on a world minimum, to which "everyone is

146 *Ibid.*, at 11.

147 *Ibid.*, at 12.

148 M.W. Howard refers here to Brian Barry (1995) 'The quest for consistency: A sceptical view' in Barry and Goodin (1992), at 279–87, *Ibid.*, at 16.

149 *Ibid.*, at 17.

raised as soon as possible". Failing that, "...there should be toleration of immigration that results from the pressures of survival..."^{150 151} As there is no lack of resources the picture looks rather positive. Decisive for enabling equal opportunities for everybody to access (human) rights, human development creates the basis for the will: the will to prioritise, to change policies, to change behaviour in order not to focus on economic growth, and to (re-)distribute resources.

The different alternatives in this chapter indicate the tendencies to improve access to rights from different aspects. Acknowledging the existence of international relations the development of the 'persons-state-access to rights' relation requires moving away from the strict, static, state-based, approach. From a human rights perspective a focus or approach on economic growth is for various reasons problematic. Addressed in part in the paragraph about GAMP. One of the convincing arguments is that, a focus on economic growth does not guarantee equal opportunities for access to (human) rights, and a human development. The Committee on Human rights set some examples in relation to the ICCPR and ICESCR for improving and maintaining access to human development. The basis for these examples is interrelatedness. It is an important notification for considering alternatives. Reminding that it connects to planetary citizenship to which short reference is made in the introduction paragraph of this chapter. Alternatives and subjects cannot be (re)considered in isolation. This in fact applies to every alternative considered. It requires overall a more inclusive interpretation of, for example, (international) law. Another step could be to step away from the strict 'national', static approach indicated by some ideas.

Let us rethink the idea of world citizenship. World citizenship does not exclude 'local' citizenship. Rather, those two prolong each other, Kant writes. It first requires to promote freedom, law and justice in a persons direct surrounding. This is a positive stimulation that comes with what can

¹⁵⁰ *Ibid*, at 19.

¹⁵¹ Doing justice to the claims of the world's poor "...steady growth should build in a process of transfer of wealth (and/or a reasonable flow of new immigrants to share the wealth), so that over time, the world distribution will converge toward an ideally just distribution.", *Ibid*, at 18.

be regarded as good. This positive stimulation is necessary for creating conditions that can be part of for example a state system. This positive stimulation can as well lead to creation of conditions that go beyond state-based systems. It is very important to note that, this focus on the direct surroundings of persons for creating freedom, law, and justice cannot be a justification for closing borders focusing on the inside only, or making the rest of the world an instrument for one's own well-being, Kant continues. No rule leads to prioritising one's 'own' population first.¹⁵² It is essential for 'hospitality' to look further, across borders, and at the same to be able to offer help. To start with the own surroundings is therefore essential. One cannot be 'hospitable' towards others in a constructive manner, beyond borders, if one is not 'hospitable' in (oneself and in) one's direct surroundings. Besides that the earth's 'natural' environment requires from us that 'hospitality' ought to be reflected in attempts to establish new treaties, institutions and organisations.¹⁵³

152 See P. Kleingeld, Oration 'Wereldburgers in eigen land: Over kosmopolitisme en patriottisme', 30 September 2005, www.filosofie.leidenuniv.nl/index.php3?c=179, last visited 15 June 2007.

153 See I. Kant, *supra* note 102, the first supplement and the explanation on republicanism. As well P. Kleingeld, *supra* note 152.

5 Conclusion: Putting Things Back Together

'The quest for opening up borders'? Do human rights enhance a form of international membership?

Respect both for life and for ways of living seem to be central to the discussion (re)considering the relationship between persons, states and access to rights. 'Everyone has the right to life, liberty and security of person', is a sentence enshrined in, for example, the Universal Declaration of Human Rights. What does this sentence mean? It ought to mean the right to have access *to* life-supporting necessities. As examples of life-supporting necessities one can think of access to: healthy drinking water, healthy food, shelter, clothes, healthy environment, personal health, education, freedom of movement, and progressive development of some of these aspects. Some of these life-supporting necessities are literally mentioned in (international) law and other documents, for example, the ICESCR. If not explicitly mentioned, these life-supporting necessities are implicitly mentioned in many laws and documents. One of the main questions was, if the link between a person, state, and access to rights, is a necessity for access to rights? With the use of, for example, selective processes of memberships persons are excluded from having access to fundamental human rights. The universal applicability of human rights is therefore questioned if a person is not able to enter a territory of a state. Moreover, it leads to ask the question: Is the respective state excluded from responsibility to give access to fundamental human rights when a person is not able to enter a territory? Is territorial jurisdiction decisive for access to fundamental human rights? Many questions asked lead to next questions raised.

One of the first and earliest ways to get a state membership is, in some countries, via birth registration. Birth registration allows states to organise and plan their policies in structured ways. It gives states an opportunity to

obtain an income, via taxes, for example. It gives persons on the other hand an opportunity to access many facilities provided by the state. It remains to be asked for whom universal birth registration is important? It seems that besides the difficulty of assessing the overall benefits of birth registration, birth registration or any other link between a person and a state does not guarantee equal access to human rights. This is so, as residence became and is becoming a more important factor for establishing a membership in a state for access to rights.¹⁵⁴ The question remains, what will guarantee or improve full (human) rights application? Nationality of origin is an inherent attribute of man and women, his and her natural right, and therefore not "... a gift or favour bestowed through the generosity or benevolence of the State...", as the Inter American Commission on Human Rights noted.¹⁵⁵ What or who then can, or is 'allowed' to decide that a link between a person and a state is required for having access to rights?

States decide who are its nationals, citizens or members under international law. As the main actors in international law, they are able to determine nationality, citizenship or any other form of membership on the basis of territorial jurisdiction and (to some extent) the sovereignty principle. There are guidelines in international law for establishing nationality. However, nothing similar exists for any other form of membership with a state. The acquisition and-or deprivation of any other form than nationality is not regulated by international law. That consequently creates opportunities for states to determine the extent of access to (human) rights. We have to remind ourselves that states though are not able to decide, under (international) law, who is and who is not a human. As human rights *are* inalienable they are inherent to humans. This means that human rights cannot be awarded via nationality, for example. In addition, other indications exist and influence states to adapt. States do not have complete freedom to decide whatever they want to decide. States cannot, for example, completely ignore recommendations from authoritative institutions like the

154 See 'UN Declaration on the human rights of individuals who are not nationals of the country in which they live' GA res. 40/144 (1985), www.unhchr.ch/html/menu3/b/o_nonnat.htm, last visited 15 June 2007. And also D. Jacobson, *supra* note 45, at preface vii.

155 Inter-American Commission on Human rights, *supra* note 24.

Human Rights Committee. The clearly established, border-crossing influences, such as pressure on the earth's nature and civil society, cannot be ignored.

In relation to this the people, the population of a state, ought to be able to challenge the state for violating their interests and their rights. They can do this on the basis of statehood requirement as discussed above in the respective paragraph on state. Does a state fulfil the statehood requirements when it is not providing for minimum standards of living? In line with the principle mentioned in art.2 (3) ICESCR, states ought to provide for a minimum standard of living when they do have the means and resources available to do so. According to that principle 'developing' countries are given the opportunity to determine to what extent they would guarantee the economic rights to non-nationals recognized in the ICESCR, without making distinctions between citizens and non-citizens. They are given this opportunity considering the reserves and other means available to them, and with due regard to human rights.¹⁵⁶ Considering that persons have a justified claim to a better standard of living, the burden of evidence of a state claiming not to be able, or not to have the means, to provide for access to a better standard of living, ought to rest upon the state.¹⁵⁷ ¹⁵⁸ However, no such procedures are available and existing in international law as it currently stands. A problem currently existing is that, as G. Corneliise writes, the system of law-protection takes territorial prepositions as the starting point. According to Corneliise that system has a blind spot for problems which cannot be reduced to a territorial solution. For persons in between borders the place to be offered, in the beginning of the 21st century, seems to be the camp. The behaviour towards those persons is not inherently different now than half a century ago even while in the meantime binding international norms should guarantee the dignity of humanity. Territoriality leads to violations for which current international law does not have an answer. It is

156 D.Weissbrodt, 'Final report on the right of non-citizens', para. III, point 19, U.N. Doc. E/CN.4/Sub.2/2003/23 (2003), <www1.umn.edu/humanrts/demo/noncitizenrts-2003.html>, last visited 15 June 2007.

157 See R. Künnemann & S. Epal-Ratjen, *supra* note 129, Chapter 5.

158 Via the VCLT states can hold each other accountable for both ratified or signed treaties Art.18 and 60 VCLT. It clearly stipulates how states should behave as being a party to conventions in international law.

not realistic to expect that the basis for political power in the short term will change. However, we can use our imagination to shape international law in such a way that it does not necessarily raise inconsistencies when looked at from the perspective of the universal aspirations of human rights, Cornillisse suggests.¹⁵⁹ Will states tolerate changes regarding territorial jurisdiction and sovereignty in other ways than via time evolving changes?

"First, the right to go where you want to go is itself an important freedom.... Second, freedom of movement is essential for equality of opportunity. You have to be able to move to where the opportunities are.... Third, freedom of movement would contribute to a reduction of political, social and economic inequalities."¹⁶⁰ Inherent in nature, movement allows humans to search and find other ways and improving ways for their standard of living. The movement of persons is not likely to stop. That movement of persons stands in strong relation with a relation between a person, a state, and access to rights, is indisputable. It perhaps illustrates why states under international law have the sole right to set standards on nationality, citizenship and (assumingly) other memberships with a state, and why they fiercely want to maintain that authority. How can human development be stopped at (or with) state borders? Barring persons from access to a territory is barring persons from access to their (human) rights as long as access to basic rights is connected to access to territory.

There are many persons with ideas and a whole spectrum of ideas that did not reach my attention. The last chapter, therefore, addresses a few possible developments and alternatives to improve the relation between a person, state, and access to rights. These alternatives cannot be considered in isolation. From a human rights perspective some alternatives are better able to contribute to improvement of access to (human) rights. Within the atmosphere of simultaneous influences to improve equal access to human

159 G. Cornillisse, 'Immigratiedetentie: rechteloosheid en de moderne staat', *Nederlands Juristen Blad*, 21 April 2006, www.geenkindindecel.nl/getimage.php?type=file&id=13, last visited 15 June 2007.

160 J.H. Carens, 'Migration and morality: A liberal egalitarian perspective' in Barry and Goodin (1992), at 25–47, See M.W.Howard, *supra* note 126, at 11.

development I consider one of the ideas to be better able to improve access to human rights for everyone. This is the idea of opening up borders and progressively having no borders. I refer here to what Kostakopoulou wrote: "...how we perceive borders and the role they play in human interaction is crucial to the nature of citizenship: 'conceiving community in terms of the nation state [is to project] boundaries as barriers (stopping points) and not as permeable membranes (meeting points)' ".¹⁶¹ Not excluding, as stated, other possible options and contributions, the option of opening up borders is not studied or considered well enough. Two persons that present rather comprehensive ideas or philosophies relating to opening up borders are K. Mills and M. Howard. The clearest argument K. Mills uses is that the right to leave a country does not make any sense when there is no right to enter another. For both citizens and non-citizens this is an essential realisation. M. Howard makes the sensing remark that immediate needs and just claims to a fair share of the resources call for an agreement on a world minimum, a minimum to which everybody is raised as soon as possible. Failing that, there should be a toleration of immigration. If the 'worse off' can be better off than under continuation of restricted borders it is worth pursuing open borders. One of the questions raised in the introduction, 'can borders be justified?' must therefore be answered with: borders cannot be justified, as they violate international freedom of movement, the right to life and its related rights.

How international law currently can contribute to improve the relation among a person, state, and access to rights, is via inclusive interpretations of laws; with the complementary requirement of states to implement them accordingly. It ought to be their priority to allow persons international freedom of movement and access to life-supporting necessities. This ought to be a priority not only for the benefit of the people as one of the statehood requirements, but because the people are one of the statehood requirements. Opening up borders is not argued to be the solution. As indicated, more (complementary) ideas and contributions are necessary for improving access

¹⁶¹ Kostakopoulou in K. Faulks, *supra* note 47, at 52.

to rights, with international freedom of movement as a vanguard. It might well be that there is a more suitable idea to enable progress in this. The alternatives discussed are meant to give inspiration to think about improvements.

Coming back to the subtitle of the thesis: 'Are human rights enhancing an international membership?' The answer has to include a yes and a no. Yes, because state-based memberships are changing. The different chapters touch upon the different influences that cross borders and go beyond borders. These influences cause state-based memberships, and all the related aspects and procedures, to change. Human rights are undeniably part of society organisation and undeniably part of these influences. To what extent they influence changes is difficult to assess. The answer also includes a no. International membership as a fixation for improvement of access to rights for everybody is a too-fixed road to walk. The idea, although possibly evolving from the influence of human rights, might not be necessary or desirable. As an intermediary step in development, the question needs to be asked if states are willing to let such a membership emerge in the first place. Are they willing to accept an international membership independent from the link to a particular state, crossing or ignoring borders, and in favour of human development?

The conclusion must be that, as we cannot look into the future, we don't know if a form of international membership will come into existence, 'replacing' a state-based membership. What we do know is that human rights consist of essential values that go beyond state-based memberships. This makes it possible to change every aspect of life towards a life-supporting perspective. It makes it possible to argue in favour of acknowledgment and inclusion of human development for all humans. This is the reason why I refer and link to rights, human rights in particular, in the process of thinking about improving the access to, moreover, the inherent values human rights possess. But I realise that the context, the environment we are required to work with and within, is the 'polis' which is a created system of rules.

Persons, states and human rights are a part of that system. However, the fact that it is a created system of rules allows us to recreate. That system does not in anyway restrict us from thinking and considering ideas for improvement.

A peculiar way of reasoning? a dialogue. The 'traditional question peace of Hume' or referred to by Russell as: 'the scandal of the philosophy':

Woman: Doctor, Doctor, help me please. My husband thinks he is a chicken.

Doctor: How awful. How long has he been already thinking this?

Woman: As long as I can remember.

Doctor: But why then didn't you come earlier?

Woman: That was my intention, but we needed the eggs so badly.

If the Doctor would say that he also needed the eggs, then the situation would be analogouse to the problem of induction.¹⁶²

What does this say?

The conclusion goes further then the premises. Many times we assume that arguments deliver true conclusions, based on true premises. But why? If something will happen again, because it always did is something we do not know and cannot prove. To use an indicative argument again (the Doctor also needs the eggs) in response, would deliver a circular argumentation. How does this relate to the topics here addressed? The arguments in favour or against the opening up of borders can show the same critical point of induction. If we would write the same dialogue but then using governments and/or population instead:

Government and/or population: Government, Government, help please there are thousands of people in front of my door.

¹⁶² J. Allen Paulos, original title: 'I think, therefore I laugh; An Alternative Approach to Philosophy', translation by Bettelou Los: 'Ik denk, dus ik lach; een alternatieve benadering van de filosofie', (1993).

Government ((I)GO's) : How awful. How long has this been the case?

Government and/or population: As long as I can remember.

Government ((I)GO's): But why then didn't you come earlier?

Government and/ or population: That was our intention, but we needed the people so badly.

If then the Government will answer: I need them badly too, the situation containing the problem is maintained. I tried to look at the different aspects that, in my opinion, relate to the continuing acceptance that the majority of persons do not have equal access to life-supporting necessities, living in extreme poverty, being stateless, kept in detention, not having a full membership within a state and so interfering the human development. No matter how the topics and related aspects are investigated I keep coming back to this tragedy. Trying to avoid inductive arguments, we, governments, populations, continue arguing and behaving in such a way that persons live on the margins of subsistence in desperate and life-threatening conditions as it benefits some of us, using and accepting inductive argumentation. Does it really benefit us? We don't know the answer, especially not for the future. Therefore, it should lead us to question the arguments and premises causing the exclusion of the majority of persons to be able to equally access human development and try to do the best we can.

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