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The Utility of the Emerging Right to Democratic Governance in a Mobile World

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Summary

This thesis seeks to investigate whether the emerging right to democratic governance, as conceptualised by Thomas Franck, is of any use to the large numbers of migrants within and arriving to the EU. Focusing on Europe, it does this by assessing whether the right can be considered a human right, using the lens of universality and inalienability: it assesses whether migrants still have the right to democratic governance once they leave their country of citizenship. After mapping out the three generations of human rights that make up Franck's formulation – namely self-determination, freedom of expression and free and fair elections – the thesis focuses on the right to free and fair elections is derived from: the right to vote. This right is decisive for the right to democratic governance being a human right as if there is no human right to vote, the formulation of the right to democratic governance as a human right becomes insufficient.

Approaching the right to vote from an international law perspective, the thesis finds that there is no human right to vote. Before dismissing the utility of the right to democratic governance for migrants it goes on to investigate whether there is a human right to citizenship that will confer voting rights on to the migrant citizen. This is done in two stages, first by assessing international treaty law and then by assessing the jurisprudence of the European Court of Human Rights (“the ECtHR”) and the state practice of European states. Determining that there is also no human right to citizenship, the thesis assesses whether it is appropriate to predict that such a right will soon emerge, in view of the changeable nature of international law. Concluding that it is difficult for such predictions, the thesis calls for ideas of belonging and limits of political communities to change to meet the needs of an increasingly mobile world. Without rethinking these ideas the emerging right to democratic governance will remain useless to migrants.

Preface

I did not write this thesis by myself and I would like to take this chance to thank those who helped me on the way. Without the help of my supervisor, Leila Brännström, I would still be struggling to put square pegs in round holes. Without her guidance and her readiness to respond to and address all my concerns, I would probably still not know what direction I want to take. The level of her engagement in this project is something I appreciate greatly.

Thank you to my family for supporting my desire to be a perpetual student. Without you I would not have been able to take the opportunity to complete this thesis, let alone begin it. Thank you, Oda for your optimism and your printer credits. And thank you to Holly and Sara for untangling my mind and straightening it, as well as offering valuable advice, which I greatly needed.

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Abbreviations

“American Convention”

American Convention on Human Rights, 1969

“Copenhagen Document”

OSCE, ‘Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE’, 29 June 1990

“ECHR”

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

“ECN”

European Convention on Nationality, 1997

“ECJ”

European Court of Justice

“ECtHR”

European Court of Human Rights

“Friendly Relations Declaration”

UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/25/2625

“Hague Conflict Convention”

Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930

“I-ACtHR”

Inter-American Court of Human Rights

“ICCPR”

International Covenant on Civil and Political Rights, 16 December 1966

“Moscow Document”

OSCE, ‘Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE’, 3 October 1991

“OHCHR”

United Nations Human Rights Office of the High Commissioner

“Paris Charter”

OSCE, ‘Charter of Paris for a New Europe’, 21 November 1990

“Stateless Person Convention”

Convention Relating to the Status of Stateless Persons, 1954

“TEU”

Consolidated version of the Treaty on European Union 2012/C 326/01

“The Charter”

Charter of the United Nations, 1945

“The EU”

The European Union

“The Refugee Convention”

The Refugee Convention, 1951 and its 1967 Protocol

“UDHR”

Universal Declaration of Human Rights, 1948

“UN”

The United Nations

“UNHRC” or “HRC”

United Nations Human Rights Committee

“UNICEF”

United Nations Children’s Emergency Fund

1 Introduction

The Arab Spring began on 18 December 2010 in Tunisia, before spreading to other countries throughout North Africa and the Middle East. These were a series of civilian uprisings against dictatorships, calling for democracy. In Tunisia, Ben Ali was overthrown, and in Egypt Hosni Mubarak was overthrown, with elections held before the military took power. In Libya and Syria, the uprisings led to civil wars that have not yet been resolved. The international community has supported the goals of the uprisings, intervening in different ways in both conflicts and calling for the dictator to step aside and let the will of the people decide the future, for instance.¹

Due mainly to these conflicts, the deteriorating situation in countries such as Iraq and Afghanistan, as well as other reasons, such as oppression in Eritrea, the number of refugees into the European Union (“the EU”) increased dramatically in 2015. With just under 300,000 arriving in 2014, the number increased by three to four times to over one million refugees leaving their home and fleeing to the EU.² This is part of a wider refugee problem, with the UNHCR counting 59.5 million refugees and forcibly displaced people worldwide.³ With such numbers leaving their homes, questions arise about how they will be treated and how they will live. One such question is of democracy. Democracy requires, at its minimum, the consent of those who are governed, allowing those people to in some way influence their political sphere. This consent is traditionally shown through voting, and other democratic guarantees such as freedom of expression (and not rioting); voting is generally the privilege of citizens. Some states grant non-citizens the ability to vote, others take away the right for their citizens but the general rule is that citizens at least have a general presumption that they can vote as of right and non-citizens a general presumption that they cannot vote as of right. With so many non-citizens leaving their home and moving to other states at this time, the idea that European democracies can claim to portray the will of the people without non-citizens having the vote may be questioned.

The idea, first conceived by Thomas Franck in 1992, that there is an emerging human right to democratic governance, may be of assistance to these migrant populations. Franck’s article was incredibly well received and is considered an important contribution to international law scholarship. This is shown by Google Scholar listing it as being cited 2053 times.⁴ Franck’s democratic entitlement is made up of three ‘generations’ of rights:

¹ UN Security Council Resolution 2254 of 18 December 2015

² *BBC*, Migrant Crisis: Migration to Europe Explained in Seven Charts, 4 March 2016. Available at: <http://www.bbc.com/news/world-europe-34131911>

³ *UNHCR*, Figures at a Glance: statistics yearbook, available at: <http://www.unhcr.org/figures-at-a-glance.html>

⁴ Google Scholar, 6 June 2016, available at: https://scholar.google.se/scholar?hl=en&q=the+emerging+right+to+democratic+governance&btnG=&as_sdt=1%2C5&as_sdtp=

self-determination; freedom of expression; and the right to free and fair elections;⁵ it is the ‘promise of popular sovereignty and political equality’.⁶ The first two generations of rights have become, according to Franck, universally accepted,⁷ with the right to free and fair elections being more and more accepted – hence the right’s emerging nature. Importantly, democracy was fast becoming the only form of government which gave governments legitimacy.⁸ Sovereignty was shifting to the people,⁹ and it was their ability to express their will that created legitimacy. However, sovereignty has only shifted to a static population. The modern-day fact of mobile populations presents a problem for static sovereignty.

Franck believed that due to states ‘craving’ legitimacy, they had allowed international bodies to monitor their electoral process and develop norms for the best practice of elections.¹⁰ States had, in effect, allowed international norms to influence the domestic sphere, which was once jealously guarded in the concept of state sovereignty. This ability to dictate to the domestic sphere means that democratic governance can be ‘pushed’ onto states which are not yet democratic. This ability has come through years of pragmatism and a slow chipping away of the idea – argued for with passion by Apartheid South Africa – that the domestic sphere was the sole realm of the state, and that the international community had no right to even comment on this realm. It is apparent that such a view no longer holds.

It is the underpinnings of the emerging right to democratic governance that can be seen in the international community’s support for the Arab Spring and its calls for democracy; the international community saw it as these populations’ right to be democratic and felt able to forego the concept of state sovereignty in aid of them. This is why the international community intervened in Haiti in 1985,¹¹ and why the UN General Assembly has passed a number of resolutions on democracy – under different headings – since 1999, with the first one being called *The Promotion of the Right to Democracy*.¹² Although the right has not yet become a settled international norm, it is asserted that it will eventually become one and that it will eventually be accepted as a human right. The purpose of this thesis is to test whether the emerging right to democratic governance, as formulated by Franck, can be said to be a human right. That is, whether it is universal, inalienable and indivisible. Being universal and inalienable means that people everywhere must be entitled to it, that it cannot be taken away from anyone, and indivisibility means that it cannot be ‘compromised’ in favour

⁵ T. Franck, ‘The emerging right to democratic governance’, *EJIL* (1992) pp. 46-90, p. 52

⁶ T. Kuhner, ‘The Democracy to Which we are Entitled: human rights and the problem of money in politics’, *Harvard Human Rights Journal* vol. 26 (2013): 39-90, p. 41

⁷ As demonstrated in sections 3.1 and 3.2

⁸ *Supra* note 5, p. 47

⁹ See for example, W. Riesman, ‘Sovereignty and Human Rights in International Law’, *American Journal of International Law* 84, (1990), p. 869

¹⁰ *Supra* note 5, p. 50

¹¹ Following the Coup against Aristide. The intervention led to his restoration as president.

¹² UN Commission on Human Rights, *Promotion of the right to democracy*, 27 April 1999, E/CN.4/RES/1999/57

of other rights.¹³ Their universality is found in Article 1 of the Universal Declaration of Human Rights, 1948 (“the UDHR”): “[a]ll human beings are born free and equal in dignity and rights,” with the preamble of the UDHR and International Covenant on Civil and Political Rights, 1966 (“the ICCPR”) mentioning the “inalienable rights of all members of the human family.”¹⁴ The Vienna Declaration and Programme of Action 1993 confirms such an interpretation within the international community, stating “all human rights are universal, indivisible and interdependent...”¹⁵

Many of the refugees that have arrived and that are arriving to Europe are fleeing conflicts begun by the domestic populations’ calls for democracy. These calls were supported by the international community, seeing democracy as the right of the population. As refugees in the countries that supported their calls for democracy, these people are generally precluded from voting in the elections of their host country; they are deprived of one of tenets of democracy and the chance to participate in one of the processes of democratic governance of the host country. Crossing a border appears to result in the loss of democratic governance, as voting is a necessary component of democracy (although it is much more than only elections by universal suffrage)¹⁶. Can Franck’s formulation of the emerging right to democratic governance be of any use to the refugees in this situation, as well as be of any use to the large numbers of migrants – regular and irregular – around the world? Can it be invoked to support arguments that migrants should be given a voice in the democratic governance of the country they reside in? Although the right is still emerging as an international norm, there is consensus that it has achieved the status of a regional norm within Europe. This provides the opportunity to analyse the right at work, in the form that Franck intended. For this reason, the thesis will focus primarily on the right to democratic governance within Europe.

This is an important question to raise at this time. In addition to the large numbers of refugees arriving to and already within Europe, there is estimated to be roughly 70 million migrants¹⁷ already residing in Europe. It is further estimated that Europe will need tens of millions more migrants by

¹³ United Nations Population Fund, ‘Human Rights Principles’, 2005, at: <http://www.unfpa.org/resources/human-rights-principles>

¹⁴ UDHR and ICCPR preambles paragraph 1. The OHCHR and UNICEF also confirm that “human rights are inalienable”, see <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> and http://www.unicef.org/crc/index_framework.html

¹⁵ The Vienna Declaration and Programme of Action 1993, Article 5

¹⁶ *Supra* note 6, p. 40

¹⁷ UN Department of Economic and Social Affairs, ‘International Migration Report 2015’, ST/ESA/SER.A/375, available at: http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015_Highlights.pdf. Further, “the term migrant can be understood as “any person who lives temporarily or permanently in a country where he or she was not born, and has acquired some significant social ties to this country”, UNESCO, at: <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/migrant/>

2050 to continue its economic growth¹⁸ at similar levels. Without the ability to vote, the risk is run of a significant number of the territorial population of European states being ruled by decree. This will increase the sense of exclusion and inequality that migrants, who may come from different cultures and might speak different languages, may already be feeling. It adds to the sense that these people do not belong and that they should be in another place.

In the face of European states reasserting their ‘embattled sovereignty’¹⁹ through stricter immigration controls, through rising nationalism and through the increased demonization of immigrants, the ability to vote would be a symbol of belonging but more importantly, a tool to speak and be heard within a democratic system of governance; a tool for the migrant to counter, through voting, this shift towards exclusion and illiberal democracy.²⁰ It is for this reason that the focus of the thesis will be on the ability to vote. A right to democratic governance that does not prescribe that migrants can participate in the democratic process through voting of their host nation would be of no use to the increasing numbers of migrants in the world. Further, it could not be called a human right, like it is now.

1.1 Research Questions and Purpose

The research question of this thesis is therefore: is the emerging right to democratic governance as conceptualised by Franck of any use to migrants within Europe? Central to its usefulness is whether or not it is a human right.

The sub-questions that require answering in order to answer the main research question are:

1. What are the principles of democracy that can be drawn from the three generations of rights that Franck invokes as forming his right to democratic governance? This is important in defining what is meant by democratic governance.
2. Is there a human right to vote within the international legal corpus?
3. If not, is there a human right to obtain or change citizenship that includes voting rights within the international legal corpus?

¹⁸ P. Hansen, *The European Union’s External Labour Migration Policy; Rationale, Objectives, Approaches and Results 1999-2014*, OSCE doc: DELSA/ELSA/MI(2015)2, 4 June 2015, p. 2

¹⁹ Dauvergne as quoted by Kesby, A. *The Right to Have Rights: Citizenship, Humanity, and International Law*, Oxford University Press (2012), p. 47

²⁰ *Bloomberg*, ‘Orban says he seeks to end liberal democracy in Hungary’, 28 July 2014, available at: <http://www.bloomberg.com/news/articles/2014-07-28/orban-says-he-seeks-to-end-liberal-democracy-in-hungary>

1.2 Methodology and Material

This thesis will analyse whether Thomas Franck's formulation of the emerging right to democratic governance can be considered a human right. The right is framed as a human right and it will be from this perspective that the right will be analysed. Following the consensus that human rights are universal, inalienable and indivisible that flow from the human individual, the thesis will therefore investigate whether the right to democratic governance exists meets these standards. The focus will be, however, on universality and inalienability (together shortened herein to "universality"), rather than indivisibility, as the right's interaction with other rights will not be assessed. This will be done from the perspective of international law. In order for the human right to democratic governance, as conceived by Franck, to be considered a human right, there must be: international legal obligations requiring states to ensure democratic governance; those obligations must be derived from human rights; and these human rights must be universal, inalienable and indivisible.

The situation of the migrant in Europe will be used to carry out such an analysis. This is for two reasons. The first is that migrants highlight the universality of rights, or to be more precise, highlight which rights are universal. This connects with the second reason, which is that migrants generally lack the full privileges of citizenship that states tend to provide. If migrants do not have the ability to access the right to democratic governance, then it will point to the right being a citizen right rather than a human right. Access to democratic governance in this context refers to democracy as consent of the governed, meaning that those who are affected by the decisions of a government have the opportunity to consent to that government through periodic free and fair elections. This means that the ability of a migrant to participate in the democratic governance of the country of which they are a citizen is not of use to the migrant as they are not affected by those decisions. It is whether a migrant has the right to participate in the democratic processes of the country the migrant has moved to that will show whether the right to democratic governance is a human right, as it will show whether the right is contingent on people not leaving their country of citizenship. It will point to the right being universal; the migrant tests this directly.

Following Franck, the thesis will begin by mapping the three human rights that Franck's right to democratic governance consists of: self-determination; freedom of expression; and free and fair elections. References from the inter-American system will be used as a counterpoint but will not form part of the *lex lata* analysis. This will be done in order to determine the principles of the right to democratic governance that Franck believes are essential to ensure a government is democratic. Next, I will use the right to free and fair elections as a stepping-off point and assess the ability of migrants to participate politically in international human rights. This will be done through the lens of the right to vote and stand for election (together shortened to 'the right to vote' herein), as without a right to vote and

individual has no right to participate in free and fair elections. It is therefore decisive for the emerging right to democratic governance. Failing there being a human right to vote, the international legal corpus will be further assessed for a right to obtain and change citizenship, as this could also confer voting rights and therefore the ability to participate in free and fair elections. Acknowledging that Franck sees the right as emerging and not fully formed, the prospect of a democratic entitlement emerging, which includes voting rights, will be assessed by looking at trends for and trends against postnationalism within the Council of Europe and the EU in order to show the difficulty of such predictions.

In order to carry out this investigation Thomas Franck's *The Emerging Right to Democratic Governance* will be used to set out his argument and the three generations of rights. International conventions and the jurisprudence of the treaty bodies, jurisprudence of courts and regional conventions and declarations will be used to flesh out these rights and add greater clarity to their underlying principles. These materials will also be used in order to assess the existence of the right to vote and the right to obtain and change citizenship. Scholarly articles will be used to highlight and clarify issues that arise in the investigation.

1.3 Limitations

The emerging right to democratic governance is not a fully accepted international norm, which is why it is said that it is still emerging. This creates difficulties in assessing its utility as a human right for migrants. However, it is presented in a teleological manner, meaning that it is posited that the right will eventually become internationally accepted in the form that Franck has described. Despite this, there is general consensus that the right has emerged within Europe and for this reason I will restrict my analysis of the right to migrants within Europe. Europe is not defined strictly, but will mean those countries within the Council of Europe, the OSCE, and within the EU, as these institutions have developed norms contributing to the acceptance of democratic governance within Europe.

In addition, the main focus will be on migrants legally resident within states. This is because they do not come into conflict with immigration rules as often and, as such, their right to democratic governance can be assessed purely through whether or not they have such a right, rather than whether or not they have the ability to claim such a right due to their immigration status. The tension between territorial sovereignty and the ability to claim human rights will be addressed, however, when focusing on the issue of whether the regional institutions of Europe point to a 'recasting' of the nation-state which will lead to voting rights.

1.4 State of Research

Current research focuses on the acceptance by the international community of such an international norm for democratic governance. They look at state practice in areas such as interventions – both military and economic –, electoral monitoring, development and *opinio juris* in the form of statements and declarations made by various international, regional and national bodies and courts. Research is focused on legality and acceptance of the right, focusing on whether or not it has emerged and whether or not it will emerge, or the form of democracy it prescribes. For instance, Susan Marks' *What has become of the emerging right to democratic governance?* (2011) lists three different ways the right can be seen as being accepted and utilised by the international community: the current legal status of the right; military interventions; and democratisation in development programs. Research tends to work from the presumption that the democratic entitlement as formulated by Franck has, at least in theory, the potential to be a human right, rather than questioning its ability to be a human right. As such, my research diverges from this discourse in order to assess whether or not such a right is in fact a human right, rather than whether or not it has emerged as a norm.

1.5 Structure

Chapter 2 will outline the emerging right to democratic governance as Franck conceptualised it. It will establish the basis of his claim, as well as outlining features such as electoral monitoring (section 2.1) and enforcement (section 2.2). It will also outline the challenges facing the right (section 2.4) and explain the democratic framework in Europe (section 2.5)

Chapter 3 will look in more depth at the three generations of rights, in order to find the principles of democratic governance within them. Section 3.1 details self-determination, section 3.2 details freedom of expression, and section 3.3 details electoral rights. The principles gleaned will then be discussed in section 3.4, with section 3.5 going on to assess whether there is a human right to vote.

Chapter 4 will examine citizenship. Section 4.1 will detail citizenship in order to understand its privileges and its interaction with international law. Section 4.2 will then assess whether there is a human right to citizenship. This will first look at the law detailed in international conventions (section 4.2) and second look at court jurisprudence and state practice (section 4.3). Section 4.4 will address issues raised in section 4.3, namely predictions of postnationalism and the emerging democratic entitlement, by detailing difficulties in claiming rights for both non-EU citizens (section 4.4.1) and EU citizens resident in another EU state (section 4.4.2).

Chapter 5 will then assess the answers to the research questions outlined on page 9, using these answers to assess the utility of the emerging right to democratic governance for migrants.

2 The Emerging Right to Democratic Governance

In 1992, Thomas Franck postulated that there was an emerging right to democratic governance.²¹ Franck cited his evidence, used in a teleological manner, to show where international law concerning democracy would, and must, end up. In 2011, Susan Marks posited that the idea of the right to democratic governance had become accepted, although not as a settled norm, but rather still as an emerging proposition of international law.²² This partly accepted and partly rebuffed his thesis and this could be due to the lack of clarity of this right's content.²³ This chapter will provide an overview of Franck's thesis. The following chapters will test this thesis.

Franck traced the right from what he believed its roots to be, self-determination and decolonization, through the human rights movement and particularly freedom of expression, to the greater elucidation of participatory rights, specifically the right to free and fair elections. Added to these rights were the increasing practice of international electoral monitoring – increasing the international legitimacy of the right – and the 'enforcement' of democracy, both through violent and non-violent means. That it had come more to the fore at this time was because "throughout socialist Eastern Europe and in most of the dictatorships of Africa and Asia, the people have rejected both theories..." This left only democracy, and specifically liberal democracy, as the only remaining theory of governance which validated government.²⁴ Although liberal democracy's victory was not complete, this was the only outcome of historic events. This assertion is supported by the fact that the percentage number of countries that are democracies has risen dramatically since the end of the Cold War, now at roughly 58% globally.²⁵

Franck rooted the democratic entitlement in the international norm of the right to political participation, found in Article 21 UDHR and Article 25 of the ICCPR. Fox and Roth see this right as unlike other rights, as 'individual enjoyment' is dependent on 'collective effort'. What is meant by this is that there is no individual political participation without there also being many other individuals participating politically and creating a politics. From the standpoint of liberal democracy, it is the right to oust political leadership,

²¹ *Supra* note 5

²² S. Marks, 'What has become of the emerging right to democratic governance?', *EJIL*, vol. 22 (2011), p. 511

²³ G. H. Fox, 'Democracy, Right to, International Protection', in *Max Planck Encyclopedia of Public International Law* (2007), p. 4

²⁴ *Supra* note 5 p. 49

²⁵ S.M. Mitchell & Paul Diehl, 'Caution in What you Wish For: The consequences of a right to democracy', 48 *Stan. J. Int'l L.* 289 (2012): 290, 303-304

the ability to exert political power through the ‘will of the people’.²⁶ Focusing on this, Franck’s thesis was based on the belief that the legitimacy of a government was determined by whether it reflected the true will of the people, and that it was becoming increasingly more accepted that the legitimacy of a national government could be assessed at an international level. Shortly, he believed, international conceptions of democratic governance could be imposed at a national level. He cited Soviet and Haitian cases to show that the international community “asserted that *only* democracy validates government.”²⁷ Validity was, in Franck’s eyes determined by whether the government represented ‘the people’s sovereignty rather than the sovereign’s sovereignty’.²⁸

Fox and Roth point to two assertions of the democratic entitlement, which lead to the conclusion the government legitimacy could be validated internationally. The first is that the vagueness of the right to political participation found in human rights conventions has become less vague due to democratic institutional practices. The second is that there is now also a ‘determinate relationship’ between the mechanisms that ensure political participation and those that exercise political power. As the ‘will of the people’ is the basis for the ‘authority of government,’²⁹ the rulers of states are duty bound to allow themselves to be voted out of political power. As such, sovereignty ‘belongs to the people’, which can only be shown when governments submit to the will of the people. If this is not demonstrated, measures can be taken by other nation-states to enforce democratic rights.³⁰ Although Franck, has been circumspect in making such an assertion that intervention, or at least military intervention, is warranted in such cases.³¹ That such measures are not uniformly taken against the number of democratic abuses that exist in the world today challenges this assertion. It is still an emerging right, however, and the fact that measures now appear less unusual can be used to support its continued emergence.

Franck pointed to the growing number of international human rights treaties, the growing number of regional laws requiring democracy, and increased state practice, confirming the requirement of democratic governance. Through these, “we can see the outlines of this new world in which the citizens of each state will look to international law and organization to guarantee their democratic entitlement”.³² Such an entitlement would “establish democracy as an internationally guaranteed human right”.³³ At this moment, there are relatively few examples of democracy being

²⁶ G. Fox and B. Roth, ‘Democracy and international law’, *Review of International Studies* 27 (2001), p. 335

²⁷ *Supra* note 5, p. 47

²⁸ *Supra* note 9, p. 869

²⁹ Article 21 UDHR

³⁰ *Supra* note 26, p. 336

³¹ Franck, *The Empowered Self: Law and Society in the Age of Individualism*, (2000), Oxford University Press, pp. 272-273

³² *Supra* note 5, p. 50

³³ S. Marks, ‘The End of History? Reflections on Some International Legal Theses’, *3 EJIL* (1997) 449-477 p. 460

described as a right. Between 1999 and 2005, only the first UNHRC resolution on the right to democracy³⁴ mentioned it as a right, although only in its title.³⁵ This lack of formal recognition of the right can explain why Franck has framed it through three generations of rights, and why he points to international legitimisation to demonstrate its acceptance through state practice.³⁶

Franck believes that governments ‘crave’ legitimacy, and when their population is unable to give this to them, they turn to the international community. One method that has developed to show legitimacy is through inviting international bodies to monitor elections. This allows the host government the opportunity to show that one of the main procedures and institutions of democratic governance – elections – is carried out in a way that ensures that they are free and fair, which in turn ensures that the ‘will of the people’ is found in the result of the election. As well as aiding claims of governmental legitimacy, electoral monitoring serves a second purpose in the development of the emerging right to democratic governance. In allowing international monitors in to assess elections, the host state also allows a degree of scrutiny into its domestic sphere by the international sphere. These two spheres are traditionally kept separate, for instance the rights of citizenship are traditionally a purely domestic matter; by allowing the international into the domestic the host state paves the way for the international to influence and hold sway over the domestic, pointing to the establishment of an international norm. I will detail electoral monitoring and enforcement in section 2.1 and 2.2 for completeness to showing fully the argumentation for the democratic entitlement’s emergence as a human right, in that they show the necessary state practice for the right to become accepted. They do not form the focus of the analysis of this thesis, however, which is the universality of the right to democratic governance – namely whether it applies to every individual.

2.1 Electoral Monitoring

Electoral monitoring plays an important role in ensuring that elections are free and fair, which is why the HRC called for the creation of independent electoral authorities.³⁷ However, their independence can be questioned. Therefore, a large part of the legitimisation process of democratic

³⁴ UN Commission on Human Rights, *Promotion of the right to democracy*, 27 April 1999, E/CN.4/RES/1999/57. General Assembly resolutions have refrained from referring to democracy as a right, preferring “Promotion of a democratic and equitable international order”; “Promoting and Consolidation democracy” or the phrase “promotion of democratization” instead. There are generally two to three resolutions a session on these subjects.

³⁵ *Supra* note 23, p. 3

³⁶ This being one half – the other *opinio juris* – of ICJ statute’s requirement for a customary norm to develop as set out in Article 38.

³⁷ Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para 20

governance was the development of international bodies monitoring the elections of various nation-states. However, the ICJ in its *Nicaragua*³⁸ decision has stated that states do not have a duty to submit their elections to international validation: “the principle of non-intervention is to be treated as a sanctified absolute rule of law”.³⁹ This means that the rule is voluntary, which could lead to the conclusion that the norm’s legitimacy is reduced; without obligations, rights are empty promises. Despite this, Nicaragua did request international monitoring in 1989⁴⁰, which the UN Secretary-General accepted, creating ONUVEN⁴¹ on 6 July 1989 with ONUCA⁴² being established on 7 November 1989 as a more permanent presence in Central America. Both were approved by the Security Council.⁴³ Since then, the UN Secretary-General created an Electoral Assistance Division,⁴⁴ which works with the UNDP in providing electoral assistance to states. They have created a large number of international standards which have been iterated so much that the specificities of election monitoring missions are now considered uncontroversial.⁴⁵ The Secretary-General has also prepared guidelines for states requesting assistance, making it clear that assistance depends on fairness within the electoral process being ensured.⁴⁶

This puts pressure on the requesting state to already be in compliance with democratic principles if it wishes to obtain the legitimacy of UN electoral monitoring bodies. The focus has been on ensuring independent national electoral authorities, equal access to the media and party pluralism.⁴⁷ Due to these developments, Franck argues that election monitoring is now the rule, rather than the exception, with the remit of the UN electoral monitoring service being increased.⁴⁸ Given the extent of electoral monitoring operations, this does seem correct. A desire for legitimacy has led governments to habitually submit their elections to international validation. Franck believes that the ability to validate democracy by the international community, and therefore declare whether a government is or is not legitimate, has led to a greater desire and ability by the international community to ‘enforce’ democracy, either militarily intervening, or through political and economic isolation.

³⁸ *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ, Judgment of 27 June 1986

³⁹ Separate Opinion of Judge Nagendra Singh, para 3

⁴⁰ *The Situation in Central America: Threats to International Peace and Security and Peace Initiatives*, UN Doc. A/44/642 (1989), p. 2

⁴¹ The United Nations Observer Mission to verify the electoral process in Nicaragua

⁴² The United Nations Observer Group in Central America

⁴³ ONUVEN on 27 July 1989 (SC resolution 637 (1989)); ONUCA by SC resolution 644 (1989)

⁴⁴ UNGA Resolution, *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, 17 December 1991, A/RES/46/137

⁴⁵ Fox, ‘The right to political participation in international law’, in (eds. Fox and Roth) *Democratic Governance and International Law*, (2000), Cambridge University Press, p. 81

⁴⁶ Franck, T ‘Legitimacy and the Democratic Entitlement’, in (eds. Fox and Roth) *Democratic Governance and International Law*, (2000), Cambridge University Press, p. 39, 40

⁴⁷ *Supra* note 45, p. 81-82

⁴⁸ *Supra* note 46, p. 40

2.2 Enforcement

Franck argues that the democratic entitlement has ‘trumped the principle of non-interference’,⁴⁹ as it is nearly impossible to remove autocrats without the assistance of the international community. Recent events, such as the 2010 Arab Spring, show how difficult is to overthrow an autocrat, with Tunisia being the only (somewhat) successful revolution.⁵⁰ However, this was done without much international assistance. What concerns the international community now is whether an intervention in accordance with the UN’s Chapter VII⁵¹ powers, rather than unilaterally.⁵² Some argue that interventions in places such as Libya show a ‘renewed readiness’ of the international community to intervene when values such as democracy are attacked.⁵³ The legitimacy of such intervention would further increase should electoral monitoring become an international obligation, with a refusal to be monitored having consequences.⁵⁴ There are opponents to the idea that monitoring and interference will use democracy as a cover for neo-colonialism, and they argue for the principle of non-interference to be respected;⁵⁵ criticisms of governments, in this view, are seen as interventions in the domestic sphere, and international law’s purpose is to ensure a diverse group of national governmental systems.⁵⁶ This view can be found in the General Assembly Resolution ‘Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in Their Electoral Processes’⁵⁷ which stated that interference with the “free development of national electoral processes...violates the spirit and letter of the principles established in the Charter”.

Countering these assertions, Fox supports Franck’s argument that the principle of non-interference is flawed. First, he points out that every major human rights instrument contains an article on political participation, which makes it difficult to show that rights concerning elections cannot become subject of a treaty obligation. Second, it is hard to see how sovereign discretion can be applied to participatory rights but not to other human rights norms. Third, there is a shift in the locus of sovereignty, from the

⁴⁹ *Supra* note 46, p. 46

⁵⁰ It is hard to call Egypt successful, despite overthrowing Hosni Mubarak and despite holding elections, as now the military is governing the country after toppling the freely elected government.

⁵¹ Charter of the United Nations, 1945, Articles 39-51. These articles detail the mechanism the UN must utilise to authorise the use of force against or within a particular nation-state.

⁵² Which would breach Article 2(4) of the UN Charter’s prohibition on the use of force (unless in self-defence following Article 51 of the UN Charter)

⁵³ P. Thielbörger, ‘The Status and Future of International Law after the Libya Intervention’, *Goettingen Journal of International Law* 4 (2012) 1: 11-48, p. 38

⁵⁴ *Supra* note 46, p. 46-47

⁵⁵ *Supra* note 46, p. 45

⁵⁶ *Supra* note 45, p. 87

⁵⁷ UNGA Resolution 45/151 (1990), para 3

state to the people. This is because the will of the people is the basis for the authority of government, and regimes that do not listen to the will of the people are illegitimate.⁵⁸ Therefore, interference in the internal affairs of a state should be considered if such a state does not abide by democratic principles. The nature of the intervention is still contested, however, with a worry that it challenges the prohibition, enshrined in Article 2(4) of the UN Charter, on the use of force. Therefore the democratic entitlement could increase the danger of powerful nations enforcing their will on weaker ones, whilst claiming the legitimacy of ‘pro-democratic’ interference’.⁵⁹ There is little evidence of this ‘pro-democratic’ approach being confirmed by international law (or that pro-democratic interventions ensure long-term democracy)⁶⁰ and, as such, it has been argued that military non-intervention is still a principle which is ‘enlightened’ on the international stage.⁶¹ Despite being no confirmation by international law of a principle of interference, there are mechanisms within it allowing the international community to interfere when participatory rights are stifled, from the UN’s Chapter VII powers, to the EU’s Consolidated version of the Treaty on European Union (“the TEU”), to the Council of Europe’s human rights court, to the Inter-American Convention on Human Rights (“the American Convention”) and its court system, which speak against the non-interference argument. For example, the OAS demanded the replacement of the Somaza regime in Nicaragua and noted the “deplorable acts of violence and disorder” in Haiti.⁶² These have all whittled away at the concept of non-interference. Given the increased human rights framework, the growing acceptance that sovereignty has shifted to the people, and the growing argument for a ‘responsibility to protect’ it seems that Fox has it right when arguing that non-interference is flawed in principle. However, when it comes to ensuring democracy, military interference is usually in the context of a lack of participation combined with other human rights abuses, or in the context of ensuring a country does not retreat from democracy, as with Haiti.⁶³ This shows interference is still seen as an exceptional measure.

For the purpose of this thesis, and its focus on Europe, which is already democratically stable, the nature of the interference is not of the utmost importance and it will not be investigated further. That there is a trend to greater interference, in the form of regional courts and EU mechanisms (which will be elaborated on in section 2.5) is enough to frame the

⁵⁸ *Supra* note 45 pp. 87-89

⁵⁹ *Supra* note 22, p. 512

⁶⁰ See, for example: S.M. Mitchell & Paul Diehl, ‘Caution in What you Wish For: The consequences of a right to democracy’, 48 *Stan. J. Int’l L.* 289 (2012), pp. 289-317, specifically page 302: “our analysis indicates that regardless of the coercive mechanisms involved – military interventions, occupations, imposed constitutions, and economic sanctions – their utility is extremely limited, whether such actions are permitted under international law or not.”

⁶¹ Roth, ‘Popular Sovereignty: The Elusive Norm’, *Am Soc Int’l L Proceedings* 91 (1997), p. 370

⁶² *Supra* note 23, p. 65

⁶³ N. Peterson, ‘The Principle of Democratic Teleology in International Law’, *Preprints of the Max Planck Institute for Research on Collective Goods*, April 2008, p. 40

democratic entitlement as an emerging norm. I will now summarise the democratic entitlement.

2.3 The Democratic Entitlement

The democratic entitlement, as conceived by Franck, therefore comprises: (a) three generations of human rights, (b) acceptance of international interference in domestic affairs, primarily through electoral assistance; and (c) acceptance that democratic governance can be enforced by the international community, showing increasing state practice. Further, it progresses from these elements passively, as an overwhelming conclusion to the journey that these elements have been on. According to Marks, establishing the right to democratic governance would mean three things:

1. Government legitimacy being assessed by international standards and practices;
2. That these standards and practices state that it is only democratic governments that are legitimate; and
3. Democracy would be established ‘as an internationally guaranteed human right,’ requiring and justifying international monitoring and enforcement.⁶⁴

It is the third of these that this thesis will question. In order for it to be considered a human right, it must emanate from the human, whether through her dignity or something else. In short, it must be located in the individual. This is the general consensus of the international community.⁶⁵ Does such a right to democratic governance locate in every individual? In order for it to do so, the right must be applicable and claimable to an individual who crosses a border; for this reason, the rights of migrants will be assessed. The right, as Franck formulated it, will be mapped and assessed through self-determination, freedom of expression and the right to free elections, with a focus on the latter right. Whether the international community accepts them as universal human rights is essential in confirming that the emerging democratic entitlement is an entitlement to a human right. Self-determination and freedom of expression are well-established norms, which can be considered universally applicable (whether or not they are universally applied). The right to free elections is still not an established norm. This is a right derived from the right to vote and stand for election and it is this right that will be looked at more closely to assess whether the right to democratic governance is a human right. If there is no human right to vote or human right to have a right to vote and stand for election, the legitimacy of the right to free elections and therefore a human right to

⁶⁴ *Supra* note 33, p. 460

⁶⁵ For instance, the website of the Office of the High Commissioner of Human Rights states that “Human rights are inherent to all human beings,”
<http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>

democratic governance in its current form may be questioned if large numbers of non-citizens are not able to participate. “This is because the principle underlying a universal democratic entitlement is that participatory rights of persons in shaping their civil society may not be abridged arbitrarily by governments. This principle has powered the rights of self-determination and freedom of expression and, now, energizes the move to provide international protection for electoral rights.”⁶⁶ However, that it is still emerging is due to it not gaining universal acceptance. Some reasons for this outlined in section 2.4.

2.4 Obstacles

The development of the norm as an obligation, not only from a state to its citizens, but also between states, has not met with uniform acceptance. As well as opposition coming from clearly tyrannical States, opponents to election monitoring have feared that monitoring will be used to re-impose a form of neo-colonialism under the guise of democratization.⁶⁷ Marks notes that the idea of regime change and democracy are not so far apart, citing Aristide being removed as president of Haiti in 2004.⁶⁸ Peter Hallward has argued that democracy promotion in Haiti may have done nothing more than weaken the prospects for domestic control over the economy, opening it up to the world market through IMF-driven structural adjustment programmes, which only help US penetration into the local market.⁶⁹ This fear has combined with one of the cruxes of international law: state sovereignty, as the *Nicaragua* decision shows, in that international bodies have no right to monitor internal elections. As such, it is deemed a norm that is voluntary rather than obligatory. This tension between interference and state sovereignty is a large reason as to why the norm is not universally accepted.

Fox has also identified two further reasons why the right must be seen as still emerging. First, there is no agreed definition of what democracy means. Without an internationally agreed upon definition, evaluating state conduct becomes problematic. Second, there are clear regional differences in the recognition of the democratic entitlement. For instance, there is a lack of democracy promotion efforts in the Middle East and Asia, unlike in Europe and the Inter-American practice, which challenges the idea of an international norm.⁷⁰ This has caused other scholars to deny any legal basis for a right to democratic governance, rather being an aspirational⁷¹ ‘policy element’.⁷² However, writing with Roth, Fox believes that the idea that democracy can be pursued through legal means is accepted, further stating

⁶⁶ *Supra* note 5, p. 82

⁶⁷ *Ibid*

⁶⁸ *Supra* note 22, p. 521

⁶⁹ Hallward, *Damning the Flood: Haiti, Aristide and the politics of containment* (2007) as quoted in Marks, *Supra* note 19, p. 521

⁷⁰ *Supra* note 23, paras 35-36

⁷¹ *Supra* note 23, p. 4

⁷² Murphy, as quoted in Marks, *Supra* note 22, p. 512

that “the failure to do good everywhere should not be seen as a bar to doing good anywhere”.⁷³ This quote carries with it the implication that in Europe, for instance, the emerging right has been accepted. This view is backed up by Wheatley, who argues that the democratic entitlement is now an established regional norm in Europe.⁷⁴ This claim, together with the current refugee crisis within the EU, is what has led me to focus on Europe for this thesis. For this claim to be made, it must entail the conclusion that the democratic entitlement, as conceived by Franck, exists in Europe; the law has completed its teleological progression. It does seem that such an entitlement does exist within Europe, as demonstrated briefly in section 2.5.

2.5 The Democratic Framework in Europe

The majority of states within Europe are democratic.⁷⁵ The two exceptions are Belarus, ruled by Lukashenko, and Ukraine, which although normally democratic, is currently a war-torn nation. Wheatley argues that the transition to a norm of democratic governance in Europe is ‘complete’. As such, any government that is not deemed democratic will be in breach of its international/regional obligations and in breach of the rights its citizens should have. There are two major factors in the norm having emerged in Europe: the Council of Europe and the EU.

The role that the Council of Europe has played in the establishment of a democratic norm can be seen through reference to *The Greek Case*.⁷⁶ This comprised both a claim being made in the old European Commission, as well as political pressure from the Council. The case was sparked by events on 21 April 1967, when a group of Greek military officers staged a *coup* in Greece. In their first announcement, they issued Royal Decree Number 280, which suspended a number of articles of the Greek constitution,⁷⁷ which were those protecting human rights (Greece had ratified the European Convention on Human Rights (“the ECHR”) in 1953).⁷⁸ As well as suspending these constitutional articles, the junta cancelled the elections that were to take place in May, and began a pattern of intimidation, violence and authoritarianism to strengthen its grip on power. It justified this course of action, and the suspension of human rights, as necessary to stop a

⁷³ G. Fox and B. Roth, ‘Democracy and International Law,’ *Review of International Studies* (2001) 327, p. 338

⁷⁴ Wheatley, ‘Democracy in International Law: A European perspective’, *Int’l & Comparative LQ* 51 (2002), p. 225

⁷⁵ At least, ostensibly democratic.

⁷⁶ Joint applications of *Denmark, Norway, Sweden & Netherlands v Greece* (apps. nos. 3321/67; 3322/67; 3323/67; and 3344/67) (1967), Report of the Sub-Commission

⁷⁷ Report of the Sub-Commission, para 2

⁷⁸ J. Becket, ‘The Greek Case Before the European Commission’, *1 Hum. Rts.* 91 (1970-1971), p. 93; the articles in the ECHR that it was said to suspended were articles 5, 6, 8, 9, 10, 11, 13 and 14 (para 3 of the report of the sub-commission). Claims of breaches of Article 3, as well as Article 3 of the First Protocol were later joined to the claim.

Communist takeover, invoking the derogation allowed in Article 15 on the ECHR.⁷⁹

This course of action led the Consultative Assembly of the Council of Europe to call upon “the Greek authorities to restore the constitutional regime and system of parliamentary democracy”.⁸⁰ Later, in June, it requested its members to refer the situation taking place in Greece to the Commission, as Greece had not ratified the right for individuals to petition the Court in the event of human rights breaches.⁸¹ Denmark, Norway, Sweden, and, later, The Netherlands heeded this call. The resulting report of the sub-committee found that the conditions stipulated in Article 15 were not satisfied,⁸² and the Commission further found breaches of articles 5,⁸³ 6,⁸⁴ 8,⁸⁵ 9,⁸⁶ 10,⁸⁷ 11,⁸⁸ 13,⁸⁹ 14⁹⁰ and Article 3 of the First Protocol of the ECHR.⁹¹ In reaching its conclusion, the Commission stated that “Article 3 of the First Protocol presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society”.⁹²

As well as the claim in the Commission, the Council exerted considerable political pressure on the Greek military junta to return to democracy. On 25 September 1967, it made Recommendation 498 calling for the re-establishment of a democratic parliamentary regime.⁹³ On 31 January 1968, it passed Resolution 361⁹⁴ stating that if democracy did not return to democracy by the spring of 1969, it would be expelled from the Council of Europe. And on 26 September 1968 the assembly passed Decision 385, calling for free and fair elections to take place within six months. Finally, on 30 January 1969, the consultative assembly passed Recommendation 547,⁹⁵ which called for Greece to be expelled from the Council by the Committee of Ministers. However, before the Committee acted on this call, Greece withdrew from the Council of Europe on 12 December 1969.⁹⁶ It remained a dictatorship until 24 July 1974.

⁷⁹ *Id.*, p. 93

⁸⁰ Order No. 256 of 26th April

⁸¹ *Supra* note 78, p. 94-98

⁸² Report of the sub-commission, para 144

⁸³ Para 198

⁸⁴ Para 234

⁸⁵ Para 251

⁸⁶ Para 274

⁸⁷ Para 274

⁸⁸ Para 298

⁸⁹ Para 305

⁹⁰ Para 274

⁹¹ Para 319

⁹² Para 319

⁹³ Recommendation 498 of 25th September 1967 of the Parliamentary Assembly

⁹⁴ Resolution 361 of 30th and 31st January 1968 of the Parliamentary Assembly

⁹⁵ Recommendation 547 of 30th January 1969 of the Parliamentary Assembly

⁹⁶ E. G. G. Pedaliu, ‘Human Rights and Foreign Policy: Wilson and The Greek Dictators, 1967-1970’, *Diplomacy and Statecraft* 18 (2007), pp. 199-204

This series of events shows the foundations of the Council of Europe as being democratic. Its Commission required there to be a representative legislature as a prerequisite for free and fair elections, for there to be a democratic society. Without this, a state would breach its obligations under the ECHR. In addition, it showed that the Council as a political body would not accept a dictatorship among its membership, applying pressure and eventually forcing Greece's hand in leaving the Council. Without democracy, Greece was no longer welcome within the Council, and its government had lost legitimacy. Further, the other Council members saw it as their duty to intervene into the internal political arrangements of another member state. The Council refused to accept the legitimacy of a military junta, viewing the junta as against the will of the people, and therefore against the sovereignty of the state, as it is imbued in the people. It is telling that the only remaining (recognised) dictatorship within Europe, Belarus, is not a member of the Council of Europe.

Since this time, the case law of the ECtHR (the successor of the Commission) has shed further light on how it views a democratic society. In *United Communist Party of Turkey and others v Turkey*, the ECtHR has declared that democracy is the “only political model contemplated by the ECHR...and the only one compatible with it.”⁹⁷ This case concerned the banning of a political party, which brought a claim under Article 11 freedom of association. The Court found a violation of Article 11, stating that the expression of the free will of the people in the choice of the legislature under Article 3 of the First Protocol is “inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population.”⁹⁸ It went on to confirm that “[d]emocracy is without doubt a fundamental feature of the European public order”, which is clear from the preamble to the ECHR, “which establishes a very clear connection between the Convention and democracy...”.⁹⁹ Although, *Refah Party and others v. Turkey*¹⁰⁰ shows the ECtHR's limits of plurality, in allowing a political party to be banned as its plans were incompatible with the concept of a “democratic society” and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate...¹⁰¹

These democratic foundations are further reinforced by the rules of the EU, which has considerable overlap with the Council of Europe, but not complete overlap. Article 2 of the TEU founds the EU on the principles of ‘democracy, respect for human rights and fundamental freedoms...’ among other things. Article 7 allows the European Council to “suspend certain of the rights deriving from the application of the Treaties to the Member State

⁹⁷ *United Communist Party of Turkey and others v Turkey*, (app. No. 19392/92), 30 January 1998, para 45

⁹⁸ *Id.*, para 44

⁹⁹ *Id.*, Para 45

¹⁰⁰ *Refah Party and others v. Turkey* (apps. nos. 41349/98, 41342/98, 41343/98 and 41344/98), 13 February 2003

¹⁰¹ *Id.* 132

in question...”¹⁰² should it find “existence of a serious and persistent breach by a Member State of the values referred to in Article 2...”.¹⁰³ The Article 7 powers have yet to be used within the EU, however, the first part of the process began in relation to Poland on 13 January 2016, with a debate on the changes the government has made to its constitutional court and state media, believing them to go against the ‘rule of law monitoring mechanism’ adopted in 2014. An investigation is ongoing, the result of which could lead to enforcement proceedings, and possible referral to the CJEU. Hungary, however, has pledged to veto any such move.¹⁰⁴ Any enforcement action would further solidify the democratic norm within Europe, showing that it reaches beyond situations where an outright non-democratic regime is in power, to ones where certain democratic necessities, such as a free media, are taken away.

Article 6(2) states that the EU will accede to the ECHR, with the fundamental rights therein constituting general principles of the EU’s law.¹⁰⁵ This will mean that it will have to apply the interpretation given by the ECtHR to the articles within the convention, including Article 3 of the First Protocol. In addition, the EU’s institutions are set up so as to encompass democratic principles.¹⁰⁶ Concerning membership to the Council of Europe, the Netherlands Minister of Foreign Affairs conducted a study to find out what is expected of a state which wished to join the Council. The answer was that applicant States “must be plural democracies; they must regularly hold free elections by secret ballot; they must respect the rule of law; [and] they must have signed the ECHR...”¹⁰⁷

As well as these two law-creating institutions, there is also the Organisation for Security and Co-operation in Europe (“OSCE”), which Franck sees as norm creating.¹⁰⁸ It has created two important documents, The Copenhagen Document¹⁰⁹ and The Paris Charter,¹¹⁰ which set out its vision for a democratic Europe. The Copenhagen Document details the OSCE’s vision of how a free and fair election should take place, and is discussed in section 3.3.2. The Paris Charter sets out ten principles to achieve the aims of human rights based democracy, prosperity through economic liberty and social

¹⁰² Article 7(3) Treaty on European Union

¹⁰³ Article 7(2) Treaty on European Union

¹⁰⁴ Aleks Szczerbiak, ‘How will the EU’s ‘rule of law’ investigation affect Polish politics?’ available at: <http://blogs.lse.ac.uk/europpblog/2016/02/06/how-will-the-eus-rule-of-law-investigation-affect-polish-politics>; European Commission, ‘Fact Sheet’, available at: http://europa.eu/rapid/press-release_MEMO-16-62_en.htm; *Politico*, ‘What is Article 7?’ 13 January 2016, available at: <http://www.politico.eu/article/hungary-eu-news-article-7-vote-poland-rule-of-law/>

¹⁰⁵ Article 6(3) Treaty on European Union

¹⁰⁶ Title II of the Treaty on European Union

¹⁰⁷ Letter from the minister for foreign affairs (H. van den Broek) to the Advisory Committee on Human Rights and Foreign Policy (June 20, 1990), as quoted in Franck, *Supra* note 5, p. 76

¹⁰⁸ *Supra* note 5, p. 67

¹⁰⁹ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990

¹¹⁰ Charter of Paris for a New Europe, 21 November 1990

justice and equal security for the membership countries. The OSCE sees “democracy as the only system of government of our nations”¹¹¹ and it is a form of government “based on the will of the people, expressed regularly through free and fair elections”.¹¹² It puts forward the belief that everyone has “the right” to “participate in free and fair elections.”¹¹³ It further puts forward the belief that “the free will of the individual, exercised in democracy...forms the necessary basis for successful economic and social development.”¹¹⁴ It also makes institutional arrangements for the creation of an office for free elections, which will monitor elections, implementing articles 6-8 of the Copenhagen Document which relates to electoral monitoring.¹¹⁵

The democratic principles that can be gleaned from this overview is that democracy within Europe requires a representative legislature, periodic elections based on the will of the people, ensured by plurality of political parties and a belief in human rights, ensured through the free will of the individual in democracy. There is also a possibility that these principles may extend to a free press and judiciary, although the outcome of the investigation into Poland (and possibly Hungary) will have to be seen. It seems that it is possible to say that, based on state practice and *opinio juris*,¹¹⁶ there is at least a customary regional norm for democratic governance within the Europe, based on a minimal democracy. That is, based on periodic elections that represent the will of the people; everyone has the right to participate in these elections and the free will of the individual is demonstrated through these democratic processes. Although the EU has adopted a rule of law mechanism, and the ECtHR has protected certain political rights, the inclusion of states such as Turkey, Russia, and now Poland and Hungary, within the Council of Europe, who all seek to reduce criticism of the government within their respective countries, makes it difficult to point to a customary norm which encompasses more substantive democratic principles. As such, the focus on democratic governance within Europe will be on periodic elections representing the will of the people, rather than related rule of law issues, which although important, would require deeper investigation to uncover, which is outside the scope of this thesis.

I will now turn my attention to the three generations of rights that make up the democratic entitlement to give greater specificity to what it entails.

¹¹¹ Charter, para 5

¹¹² Charter, para 7

¹¹³ Charter, para 10

¹¹⁴ Charter, para 16

¹¹⁵ Supplementary document to give effect to certain provisions contained in the Charter of Paris for a New Europe, Section G

3 Three generations of rights

As stated above, the three generations of rights that make up Franck's democratic entitlement are: (a) self-determination; (b) freedom of expression; and (c) free and fair elections. I will give a brief overview of self-determination and freedom of expression, as it is the right to vote as the derivative of free and fair elections that will be the focus of this thesis.

3.1 Self-Determination

Self-determination is the embodiment of the right of a people who are organised within a territory to determine its collective political destiny in a democratic fashion. It is therefore the heart of the democratic entitlement.¹¹⁷ The right's modern conception was at the Versailles Peace Conference, although it was not conceived in a broad sense, as powerful nations held on to their colonies. It was further enunciated in Article 1 of the UN Charter ("the Charter"), which could be considered the point at which the concept was universalized and internationalised.¹¹⁸ Article 73 of the Charter also discussed governance, stating that States with trust territories pledge to "develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions". That the concept gained normative legitimacy and primacy can be seen in the tripling of the membership of the UN, without recourse to war or revolution, for the most part. It further helped to legitimate an international presence at elections immediately following independence.¹¹⁹ Although self-determination within the Charter was not drafted so as to pose a threat to state territorial sovereignty, the UN constructed such a challenge to sovereignty through promoting 'external' self-determination, which became a priority for all under colonial rule.¹²⁰

The Declaration on the Granting of Independence to Colonial Countries and Peoples¹²¹ 1960, attempted to elucidate the test for determining whether a territory was non-self-governing within the meaning of Article 73 of the Charter, and therefore able to claim external self-determination. A country was, in this respect, non-self-governing if its territory was geographically distinct from the country which administered it¹²², and other elements could be taken into consideration if they arbitrarily placed the concerned territory into a subordinate position.¹²³ If the territory did not satisfy such conditions, internal self-determination through political means within the state framework was the route populations would be pointed towards. The UN

¹¹⁷ *Supra* note 5, p. 52

¹¹⁸ *Supra* note 5, p. 54

¹¹⁹ *Supra* note 5, p. 55

¹²⁰ *Supra* note 74, p. 228

¹²¹ General Assembly Resolution 1541 (XV) of 15 December 1960

¹²² Principle IV of the Resolution

¹²³ Principle V

General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970 (“Friendly Relations Declaration”) further elaborated on the principle of self-determination, reiterating the duty to end colonialism and to allow each colonial territory to undertake a “political status freely determined” by its population. It also speaks of “all peoples”, rather than merely colonial inhabitants, granting “the right freely to determine, without external interference, their political status...and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour”¹²⁴

Its prominence in this era was confirmed by Common Article 1 of the International Bill of Rights, which states:

*“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”*¹²⁵

It shows the rejection of the idea that self-determination applies only to colonial peoples. This shows the desire to allow “citizens of all nations to determine their collective political status through democratic means,”¹²⁶ confirming a principle that democracy can be a right at a collective level.¹²⁷ This norm has been interpreted to provide for internal self-determination because Article 27 of the ICCPR shows that minority rights are to be realized within the state apparatus, rather than through secession: it has become the right to participate. This means the right of all peoples in all states to “free, fair and open participation in the democratic process of governance freely chosen by each state.”¹²⁸ Meaning if there is a significant minority within a country, their first recourse should be through state-based politics. It is the denial of political participation internally that can lead to secessionist claims of self-determination. A regime which was elected to only represent one clan within a state is unlikely to achieve international legitimacy, as the government must represent ‘the whole people belonging to the territory’,¹²⁹ and the government would not be acting in line with the principle of self-determination. Wheatley argues that self-determination therefore belongs to the whole population of the state, which comprises the ‘people’, rather than a specific ethnicity or culture that considers a territory its ‘homeland’. It also requires a mechanism to ensure the right on a continuing basis, which is the right of ‘popular participation in the government of the state’. As such, internal self-determination requires a democratic form of governance, some seeing it as the right to democratic

¹²⁴ *Supra* note 5, p. 58

¹²⁵ ICCPR and ICESR Article 1(1)

¹²⁶ *Supra* note 5, p. 58

¹²⁷ J. Crawford, ‘Democracy and the Body of International Law, in (eds. Fox and Roth) *Democratic Governance and International Law* (2000), p. 94

¹²⁸ *Supra* note 5, p. 59

¹²⁹ Friendly Relations Declaration

governance of peoples within a state.¹³⁰ This interpretation seems to be the correct interpretation, and it has been confirmed by state reports to the HRC, including from, among others, Bolivia, Korea, Jamaica, Lebanon and Sudan and India, which stated: “[T]he internal aspects of self-determination, it is suggested, includes the right of the people to choose their own form of government and the right to democracy...”¹³¹ With Cassese believing that internal self-determination meant the people of a sovereign state ‘can elect and keep the government of its choice’, with minority groups having ‘a right not to be oppressed by the central government’.¹³² Senaratne believes that internal self-determination merely references democratic guarantees within the state’s political system, ‘an aspect which gets promoted even when recognising the right to vote’.¹³³

In addition, state practice, and therefore acceptance of this principle, which is unquestionable, can be seen in the periodic reports to the UN of States responsible for trust territories during the first 40 years of the UN, as well as the continuing body of law and interpretation of UN bodies, following the ratification of the Covenant, which has laid down a system for attaining greater determinacy.¹³⁴ Self-determination is broadly accepted as a right of peoples’ within the international community. It is what drove the decolonisation movement. Any contestations that arise are not a result of whether or not it should be a right but whether or not it applies in a particular situation. For instance, Turkey insists that Kurdish people have access to the internal state political machinery, with the Kurds forming the PKK.¹³⁵ They use this as one argument against a separate Kurdish state being a right in international law.

Although a peoples’ right, the reasons for Franck’s use of it as the first generation of rights are apparent. It, similar to democracy, is the idea that a people should determine their own political path. It is also necessary to lay the groundwork for the remaining rights relating to democracy, as a democratic norm cannot be achieved if peoples’ do not have a right to rule themselves. However, self-determination is not a guarantor of democracy: “states may meet all the criteria of national self-determination and still be blots on the planet. Human rights is the way of reaching the deeper

¹³⁰ K. Senaratne, ‘Internal Self-Determination in International Law: A critical third-world perspective’, *Asian Journal of International Law*, 3 (2013); 305-339, p. 307

¹³¹ *Supra* note 74, p. 230-232

¹³² A.Cassese as quoted in *Supra* note 130, p. 306

¹³³ *Supra* note 130, p. 312

¹³⁴ *Supra* note 5, p. 59

¹³⁵ Principle V of the General Assembly Resolution Defining the Three Options for Self-Determination, 1541 (XV) states: “Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a *position or status of subordination*, they support the presumption that there is an obligation to transmit information under Article 73(e) of the Charter” (emphasis mine). The question of whether the Kurdish people are in a position of subordination is a question of fact, rather than law.

principle, which is individual self-determination.”¹³⁶ This formulation of individual self-determination shows the link between a peoples’ right and a human right to democratic governance, in that everyone should have the opportunity to determine, or play a part in determining their political path. Franck believed it was the ICCPR that played a role in this shift, as it changed the focus from ‘peoples’ to persons, ‘from decolonisation to personal political participatory entitlements in independent nations’.¹³⁷ This view is shown by the HRC, stating that “the rights under article 25 [ICCPR; political participation] are related to, but distinct from, the right of peoples to self-determination.”¹³⁸ However, the similarity between self-determination and political participation rights is why Wheatley believes that it is the internal aspect of the right to self-determination that provides the strongest grounds for the right to democratic governance.¹³⁹ Without additional rights, and its grounding in article 25 ICCPR, it would however remain a peoples’ right. This would conflict with the idea of ‘personal political participatory entitlements’, showing the need for additional rights on top of internal self-determination.

This section has shown the link between self-determination and democracy. It has also allowed some important principles of self-determination to be drawn out, which can also be seen as principles of the democratic entitlement. These are:

1. It is for people within a territory to shape their own collective political destiny;
2. This political destiny must be freely determined by the population of a territory;
3. A government of a territory must represent the whole people belonging to a territory;
4. All peoples have a right to free, fair and open participation in the democratic process; and
5. With respect to internal self-determination, it belongs to the whole population of the state.

A sixth principle could be included here, in that once peoples’ self-determination is achieved, individual self-determination, through participatory rights, begins.

A difficulty with these principles is determining whether a ‘people’ is the same as the population of a state. Without entering into a discourse on the meaning of ‘people’, it is apparent that internal self-determination intends to

¹³⁶ Arthur Schlesinger as quoted in S. Moyn, *The Last Utopia: Human rights in history*, Belknap Harvard (2010), p. 118

¹³⁷ *Supra* note 46

¹³⁸ Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para 2

¹³⁹ *Supra* note 74, p. 228

ensure the democratic rights of everyone within a nation-state, using the existing political framework of the state, rather than to provide a basis for secessionist claims, preserving the territorial sovereignty of a state.¹⁴⁰ Although it may not amount to a right to autonomy for minorities, it could be said to amount to a right of inclusion within the democratic process.¹⁴¹ This ambiguity may be why Franck chose to add two further rights to his right to democratic governance, rather than elaborate on the specificities of the internal self-determination of people,¹⁴² to overcome difficulties arising from a peoples' right and a human right. Instead, he preferred to elaborate on the idea of individual self-determination. The additional rights he adds are freedom of expression, opinion and peaceful assembly.

3.2 Freedom of Expression

The rights to freedom of expression, freedom of opinion and peaceful assembly (for ease of reference referred to herein as freedom of expression) are essential parts of the democratic process. They allow people to make known their opinion to those in charge, and to appear in the public realm. This is why they are often some of the first rights to be taken away by totalitarian or dictatorial governments; they provide the opportunity for disagreement, for the challenging of the ruler. Democracy cannot exist without disagreement meaning that freedom of expression is an 'essential' prerequisite for free and fair elections and therefore the democratic entitlement:¹⁴³ they are "essential conditions for the effective exercise of the right to vote and must be fully protected".¹⁴⁴ First, I will look at the freedom's inscription in international law before moving on to its inscription in European law.

3.2.1 International

The right to freedom of expression was first set out in the UDHR, and is now considered to be a part of customary international law.¹⁴⁵ Article 19 recognises the right to freedom of opinion and expression, and Article 20 recognises the right to peaceful assembly. This right is laid down with greater specificity in the ICCPR, which recognises freedom of thought (Article 18), freedom of expression (Article 19) and freedom of association (Article 22). These rights are generally inscribed as applicable to everyone, for instance Article 19 of the ICCPR states that "*everyone* shall have the right to hold opinions without interference" (emphasis added). Freedom of

¹⁴⁰ This why the 1975 Helsinki Final Act saw the term 'peoples' as all people within a state, see *Supra* note 130 for further elaboration on this point.

¹⁴¹ *Supra* note 130, p. 312-313

¹⁴² Which would encompass a right of a population to overcome a tyrannical ruler.

¹⁴³ *Supra* note 5, p. 61

¹⁴⁴ Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para 12

¹⁴⁵ *Supra* note 5, p. 61

expression and freedom of association do contain restrictions, meaning it is not an absolute right, and can be limited for the protection of national security or public order,¹⁴⁶ for instance. However, these restrictions cannot be aimed at non-citizens alone, as it would be in contravention of Article 2(1), the non-discrimination clause of the convention. This means that there is no distinction in these articles between citizens and non-citizens. That these rights are for *everyone* shows an understanding by the international community of the need to participate in a community and influence the way the world is shaped.

Freedom of Expression is also found in Articles 13, 15 and 16 of the American Convention on Human Rights 1969, showing broad acceptance of it as a right in the international community.

The right's importance for democracy was highlighted by the United Nations Human Rights Committee ("UNHRC" or "HRC"), when it found there to be a violation of Article 19(2). The violation was found because the petitioner to the body was not allowed to freely engage in political and trade union activities.¹⁴⁷ The treaty body has also found a violation of Article 19(3) when petitioners had been detained due to "subversive association", which was related to their political views and connections.¹⁴⁸ It is noteworthy that both of these violations took place during Uruguay's military dictatorship.

3.2.2 Europe

Freedom of expression is also enshrined in Article 10 of the ECHR, in much the same terms as the ICCPR. This is the same for other important political rights such as the rights to freedom of thought, conscience¹⁴⁹ and assembly¹⁵⁰. These rights are also not absolute, and contain restrictions in cases of national security,¹⁵¹ etc. Further, Article 14 prohibits discrimination on much the same terms as Article 2(1) of the ICCPR, suggesting that they are applicable equally to everyone, conforming to international standards. However, there is a separate clause which allows for these rights to be restricted specifically for non-citizens. Article 16 of the ECHR, headed "restrictions on political activity of aliens," reads:

"Nothing in Articles 10, 11, and 14¹⁵² shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."

¹⁴⁶ ICCPR, Art 19(3) and Art 22(2)

¹⁴⁷ *Alba Pietroroia v Uruguay*, Communication R. 10/44, 1981 Report

¹⁴⁸ *Perdoma and De Lanza v Uruguay*, Communication No. R. 2/8, U.N. Doc. Supp. No. 40 (A/35/40) at 111 (1980)

¹⁴⁹ Both in Article 9 ECHR

¹⁵⁰ Article 11 ECHR

¹⁵¹ Article 10(2) ECHR

¹⁵² Prohibition of discrimination

Article 16 is an interesting article. It was written before the ICCPR was even conceived of and was written at a time when it was considered reasonable to restrict the rights of non-citizens. This article has only been addressed in any meaningful way¹⁵³ once by the court, in *Perinçek v. Switzerland*.¹⁵⁴ It noted that it “reflected an outdated understanding of international law”, that the Council of Europe’s Parliamentary Assembly had called for it to be repealed and that it had never been applied by the Commission or the Court. It reasoned that relying on it in this case would run counter to previous rulings which found non-citizens were entitled to these rights and that the wording up Article 10 included “regardless of frontiers.” However, it also found that Article 16 should be construed as allowing restriction only on activities that directly affect the political process.¹⁵⁵ It has also been suggested that the principle of proportionality should apply to this article as well, which would further limit its reach.¹⁵⁶ Article 16 still, then, restricts indirect political rights if they are directly related to a political process. However, given that its repeal has been called for¹⁵⁷ and that it is hardly ever used as a justification for restriction of rights, it seems to be a lame duck, reflecting the position in the past rather than now. It therefore does not represent European divergence on the view that freedom of expression is applicable to everyone.

This section has demonstrated the broad consensus of the international community to the rights of freedom of expression, association and opinion. They are vital to the democratic process, and cannot be limited to harm the democratic process. This is because it allows the individual to participate in the process of disagreement inherent in all democracies, allowing opinions to be formed and shared. Without this process, the self-determination of the individual is hindered. With this process, there is more chance of an informed choice at the ballot box, in selecting a candidate from a plurality of options. This plurality is one aspect of the right to free and fair elections, which is described below.

3.3 Electoral Rights and democracy

Electoral rights represent the last aspect of Franck’s formulation. It is the large scale uptake of both free and fair elections and the acceptance of monitoring that caused Franck to declare the emerging right to democratic

¹⁵³ The other case is that of *Piermont v France*, app. No (15773/89, 15774/89), 27 April 1995, which did not consider that Article 16 could be invoked against the applicant as the applicant was a national of Germany.

¹⁵⁴ App. No. (27510/08), 15 October 2015

¹⁵⁵ European Court of Human Rights, Information Note on the Court’s case-law 189 (Legal Summary), No. 189, October 2015, para 8

¹⁵⁶ R. Mandal, ‘Political Rights of Refugees’, *Legal and Protection Policy Research Series*, November 2003, UNHCR PPLA/2003/04, p. 7

¹⁵⁷ *Ibid*

governance. Free elections allow individuals to direct power and assert their own rights. Further, they discourage those in power from doing what they think is best, or doing what is in their own interests, and rather doing what voters believe is best:¹⁵⁸ they are “essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them”.¹⁵⁹ Once again I will begin with the right as it is found internationally, before turning to regional iterations of it. The principles of this right will then be brought out.

3.3.1 International

Article 21 of the UDHR declared the right of all persons to take part in government, as well as in “periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

The ICCPR expanded on the UDHR’s right, adding more content in its Article 25, stating:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.”

The HRC has said that Article 25 “lies at the core of democratic government based on the consent of the people...”¹⁶⁰ Franck sees this article as entitling ‘all peoples in all states’ to free, open participation in the democratic processes of each state.¹⁶¹ Despite the greater specificity, the ICCPR does not clarify the meaning of a “genuine election” which guaranteed “the will of the electors”, which left some states to argue that single party elections met these requirements.¹⁶² However, Gregory Fox contends that the text of

¹⁵⁸ R. Blackburn, ‘The right to vote’, in (ed. R. Blackburn), *Rights of Citizenship*, p. 75

¹⁵⁹ Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para 9

¹⁶⁰ Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para 1

¹⁶¹ *Supra* note 46, p. 34

¹⁶² *Supra* note 45, p. 55

the treaty supports the idea of a multi-party system, citing provisions for universal suffrage, secret ballots, and the free expression of the will of the electors. If the electorate was unable to vote for a particular party or candidate, it could not express its opinion, and therefore the election would not be genuine.¹⁶³ Of course, this does not prohibit one party systems, if those systems allowed for a diversity of candidates within the party which represented the views of the entire electorate.¹⁶⁴

The HRC has further added to the international acceptance of this right, providing jurisprudence which has helped to add substance and clarity to it. It has been sceptical that one party systems can hold genuine elections, and found that one-party systems impose inherent limitations on genuine choice.¹⁶⁵ It has also seen a violation in complainants being arbitrarily deprived of their rights by their political party being banned and through being barred from taking part in an election.¹⁶⁶

Further legitimacy was given through the UN General Assembly resolution, 'Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections' (Feb 17, 1991). This stressed its:

“conviction that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights”

It further went on to state that a process which provides for equal opportunity to all citizens to become candidates is necessary in determining the will of the people.

A second resolution, with the same title confirmed that genuine periodic elections are a requirement for the effective enjoyment of a number of other human rights.¹⁶⁷ This resolution also established a procedure allowing for the monitoring of national elections. Throughout the 1990s, the general assembly has regularly passed such resolutions.¹⁶⁸

In April 1999, the Commission on Human Rights, in its resolution on the Promotion of the Right to Democracy, confirmed “the right to full participation and the other fundamental democratic rights and freedoms inherent in any democratic society.”¹⁶⁹ This detailed the specifics of the

¹⁶³ *Id.*, p. 57

¹⁶⁴ *Supra* note 45

¹⁶⁵ *Chiiko Bwalya v. Zambia*, Communication No. 314/1988, Human Rights Committee, U.N. Doc. CCPR/C/48/D/314/1988 (1993)

¹⁶⁶ *Massera v. Uruguay* (R.1/5), ICCPR, A/34/40 (15 August 1979) 124

¹⁶⁷ Resolution 46/137, December 17, 1991

¹⁶⁸ *Supra* note 23, p. 5

¹⁶⁹ E/CN.4/RES/1999/57, preamble paragraph 6

right to democratic governance, including, *inter alia*, freedom of opinion and expression, universal and equal suffrage, and the right of political participation. However, although it was passed, a resolution to remove the Right to Democracy from the title of the resolution was defeated by 12-28 with 13 abstentions, showing that the idea of democracy, as a right, was not universally accepted.¹⁷⁰ In a seminar in 2005, the HRC further linked human rights with democracy, stating that they, along with the rule of law, are indivisible.¹⁷¹

3.3.2 Regional

Regionally, the Charter of the Organisation of American States 1967 (“the American Charter”), also establishes a duty to promote effective representative democracy in Article 5. It also adopted a resolution on representative democracy on 5 June 1991, that contains operating sections if there is an interruption of democratic institutions in one of the member states.¹⁷²

The jurisprudence of the inter-American Court of Human Rights (“E-ACtHR”) is also informative. It has concluded that an “authentic election” occurs when there exists “some consistency between the will of the voters and the result of the election.” The Commission based this opinion on the ACHR, whose provisions on participatory rights it has described as “fundamentally coinciding” with Article 25 of the Political Covenant.¹⁷³ It further added weight to the international aspect of this right, by holding that these rights were of international concern¹⁷⁴, holding itself competent to rule in members’ international political processes.¹⁷⁵

Within the Council of Europe, Article 3 of Protocol 1 to the ECHR states that parties “undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”.¹⁷⁶ This was applied in the *Greek Case* (1969) (above), interpreting the protocol to require a representative legislature, which is elected at a national level. Further, it has deemed the European Parliament to be a ‘legislature’ for these purposes.¹⁷⁷ Though, proportional representation is not required.¹⁷⁸ This appears to be in keeping with the drafters of the ICCPR, which left it to states to decide

¹⁷⁰ J. Crawford, ‘Democracy in International Law – A reprise’, in *Democratic Governance and International Law*, G. H. Fox & B. R. Roth (eds.), 2000, p. 116

¹⁷¹ *Supra* note 23, p. 6

¹⁷² *Supra* note 23, p. 65

¹⁷³ I-ACtHR, Annual Report of the Inter-American Commission on Human Rights 1989-1990, Resolution No. 1/90, Cases 9768, 9780 and 9828, Mexico, 17 May 1990, para 39

¹⁷⁴ *Ibid*, para 36

¹⁷⁵ *Ibid*, p. 96 (ii)

¹⁷⁶ See also case of *Mathieu-Mohin* at 22 (1977)

¹⁷⁷ *Matthews v the United Kingdom*, (app. no. 24833/94), ECtHR, 18 February 1999, para 54

¹⁷⁸ *X v United Kingdom*, Application 7140/75, 7 Eur. Comm’n H.R. 95, 97 (1977)

which electoral system was to be used.¹⁷⁹ In addition, the European Commission has confirmed that a simple majority system, although functioning to the detriment of a small party, is not, in itself, discriminatory.¹⁸⁰

The Court has further stated that “democracy is without doubt a fundamental feature of the European public order,”¹⁸¹ and has found that the Protocol ensures an implicit guarantee of individual rights.¹⁸² These rights include the right to vote and the right to stand for election to the legislature.¹⁸³ These rights are not unconditional.¹⁸⁴

The OSCE has also added legitimacy to the right to democratic governance. In its 1990 Copenhagen Document, it spelled out the contents of the right to participate in free and open elections, affirming “democracy is an inherent element of the rule of law”, and recognizing “the importance of pluralism with regard to political organisations.”¹⁸⁵ The document is extremely detailed, giving citizens the right to expect:

- “free elections at reasonable intervals, as established by law”
- A national legislature in which at least one chamber’s membership is “freely contested in a popular vote”
- A system of universal and equal adult suffrage
- A secret ballot or its equivalent
- Free, non-discriminatory candidature for office
- Freedom to form political parties that compete “on a basis of equal treatment before the law and by the authorities
- Free and fair campaigning
- “no legal or administrative obstacle” to media access, which must be available “on a non-discriminatory basis for all political groups and individuals wishing to participate in the electoral process”
- And a guarantee that the “candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise” terminated in accordance with the law¹⁸⁶.

This document also commended the practice of allowing international observers in foreign elections.¹⁸⁷ In its Paris Charter, the OSCE commits its members “to build, consolidate and strengthen democracy as the only

¹⁷⁹ *Supra* note 45, p. 55

¹⁸⁰ *Liberal Party v the United Kingdom*, (app. no. 9765/79), ECHR, 18 December 1980 at 221

¹⁸¹ *United Communist Party of Turkey and Others v Turkey* (30 January 1998)

¹⁸² *Mathews; Mathieu-Mohin and Clerfayt v Belgium* (1987); *W. v Belgium* (1975)

¹⁸³ *Mathieu-Mohin*, pp. 22-23

¹⁸⁴ *Supra* note 45, p. 61

¹⁸⁵ Paragraph 3 of Copenhagen Conference Document (1990)

¹⁸⁶ *Id.*, para 7

¹⁸⁷ *Supra* note 5, pg. 67

system of government of our nations.”¹⁸⁸ The leaders also pledged “to cooperate and support each other with the aim of making democratic gains irreversible”.¹⁸⁹ The Paris Charter is set up in the language of *opinio juris*, and can be seen as deliberately norm creating. Further, it sets democracy up an ideal that is owed not only by a government to its people, but also by each member state to all other member states. To ensure this took place, the Charter contains monitoring mechanisms.¹⁹⁰

Finally, the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, in October 1991, confirms the organisations belief that issues relating to democracy is an issue of international concern. In the Meeting, the member states “categorically and irrevocably declared that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating states and do not belong exclusively to the internal affairs of the State concerned.”¹⁹¹

Despite the detail of the OSCE documents, Fox believes that free and fair elections consist of four elements: (1) universal and equal suffrage; (2) a secret ballot; (3) elections at reasonable periodic intervals; and (4) an absence of discrimination against voters, candidates, or parties.¹⁹² To go further than this, state practice needs to be established. It is in election monitoring that Fox is able to find such state practice.

Monitoring is an important aspect of the democratic entitlement, as it shows that the international community is able to assess the domestic sphere of a state and enforce the right should any wrongdoings take place in the electoral process. It also highlights that states are willing to be bound by international norms on the electoral process. Through looking at election monitoring in Nicaragua, Haiti, and Namibia, Fox believes that the norms developed by UN election monitors are similar to the standards developed in global and regional treaties.¹⁹³ Further, there is an Electoral Assistance Division in the UN. Its activities revolve around post-conflict reconstruction, the rule of law, and conflict resolution, with democracy promotion also one of its activities.¹⁹⁴ However, there is no formal linkage between these two sources of law, as treaty-based participatory rights do not provide for election monitoring, and neither do regional/global treaty systems. Despite this, the Article 31(1) of the Vienna Convention on the Law of Treaties can be applied. This allows for the “ordinary meaning” of treaty terms to be derived from sources not linked formally to a treaty. An ordinary meaning of a term is one which does not change with the context it

¹⁸⁸ Paris Charter at 193

¹⁸⁹ *Id.* at 195

¹⁹⁰ *Supra* note 5, pg. 67

¹⁹¹ Conference on Security and Cooperation in Europe, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Oct 3 1991, preamble, at 2

¹⁹² *Supra* note 45, p. 69

¹⁹³ *Id.* p. 85

¹⁹⁴ *Supra* note 22, p. 511

is used in but one that has a universal understanding. It has been argued by Fox that participatory rights have this status:¹⁹⁵

*“This is evident in the following trends: (1) more states have ratified instruments protecting participatory rights; (2) regional bodies from Europe, Latin America, and Africa have pursued virtually identical agendas of consolidating electoral democracy; (3) leaders’ credibility in describing their states as “democratic” turns increasingly on the judgments of international actors; (4) the criteria of fairness applied by the UN monitors has become so widely accepted that their terms are repeated virtually verbatim from mission to mission; and (5) all parties to the major human rights conventions also have voted to establish the UN monitoring missions and to approve reports detailing participatory rights scrutinized by the observers. Through this State practice the language of electoral fairness has become both more universal and more uniform.”*¹⁹⁶

With roughly 58% of states being deemed democratic, it may not be quite correct that participatory rights have achieved *universal* acceptance, though it may be moving to this direction.

What can be gleaned from the above is that free elections are important, in that they:

1. Protect the rights and interests of the governed;
2. Are a crucial factor in the enjoyment of a wide range of other human rights, when allowing for everyone to take part in the government of their country;
3. Ensure the implicit guarantee of individual rights, including the right to vote and stand for election;
4. Provide a mechanism for individual self-determination; and
5. Determine the will of the people, through providing for all citizens to become candidates.

For free and fair elections to achieve this, they must ensure, at the very least:

1. A multi-party system;
2. Periodic elections;
3. Non-discrimination;
4. Universal suffrage; and
5. Secret Ballots.

Fox believes that these factors are so uncontroversial they are now ‘pedestrian’. Even factors such as plurality and an independent media are not contested. The only thing that is remarkable about it is the mundanity of the international consensus surrounding it.¹⁹⁷ With Poland, Hungary, and Turkey all moving to censure the media in Europe at this time, the consensus may be failing, however.

¹⁹⁵ *Supra* note 45, p. 85

¹⁹⁶ *Supra* note 45, p. 86

¹⁹⁷ *Supra* note 45, p. 89

Sections 3.1-3.3 have uncovered the principles of the democracy that the democratic entitlement is based on, answering the first research question. I will now discuss the relationship between these principles and the democratic entitlement as a human right.

3.4 Observations

It is ‘universal suffrage’, ‘non-discrimination’, ‘multi-party systems’, ‘secret ballots’ and ‘periodic elections’ that demonstrate the ‘will of the people’. These are, unsurprisingly, the basics of democracy. For Franck democracy is a form of governance which is consented to by the governed.¹⁹⁸ The latest General Assembly resolution mentioning democracy¹⁹⁹ sees democracy as “a universal value based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives”.²⁰⁰ Susan Marks sees democracy as ‘an idea of potentially universal pertinence’, when referring to the ideal of ‘self-rule on a footing of equality among citizens.’²⁰¹ This ideal unlocks ‘the emancipatory and critical force that democracy might have.’²⁰² It is seen “as the ultimate guarantee for the respect of all other human rights...it is conducive to economic, social, and cultural progress...”²⁰³

What connects these forms of democracy is the idea that rule is legitimated by the will of the people who are governed, whether it is wielded through direct self-rule, or through a process of consultation. Through such a mode of governance, it is thought human rights, equality and social inclusion will flourish: “in the end a democratic society, as envisaged by the human rights treaties, is one which respects the basic rights of its members.”²⁰⁴ This is why democracy is said to empower the individual to shape their political environment and why it is said sovereignty has shifted to the people. This is why many see it as desirable that such a form of government should be an obligation for states and a right for people. The form democracy must take to provide empowerment is, of course, contested. But the different theories of democracy all reach consensus on empowerment; it is where that empowerment begins and ends which is contested.

According to Gregory Fox, there are two different definitions of democracy within international law, neither of which has gained ascendancy: the

¹⁹⁸ *Supra* note 5, p. 75

¹⁹⁹ ‘Strengthening the Role of the United Nations in enhancing the periodic and genuine elections and the promotion of democratization’, Resolution adopted by the General Assembly on 17 December 2015

²⁰⁰ *Id.* para 1

²⁰¹ *Supra* note 33, p. 450

²⁰² *Ibid.*, p. 450

²⁰³ D. Shrager, ‘The Security Council and Human Rights – from Discretion to Promote to Obligation to Protect’, in (ed. Bardo Fassbender) *Securing Human Rights? Achievements and challenges of the UN Security Council*, Oxford (2011), p. 16

²⁰⁴ J. Crawford, ‘Democracy and the Body of International Law’, in (eds. Fox and Roth) *Democratic Governance and International Law* (2000), p. 93

procedural and substantive definitions.²⁰⁵ However, Marks believes that the practice of the international community points to it favouring procedural democracy.²⁰⁶ The procedural definition is, as the name suggests, focused on the procedures of democracy, focusing mainly on elections and other political rights without concerning itself with other human rights. This definition is similar to what has been called minimalist democracy, which holds the belief that “elections will be not just a foundation but a key generator over time of further democratic reforms.”²⁰⁷ In other words, it is a form which believes that economic, social and cultural rights will come once political rights are secured. This form of democracy is reflected in the mapping of free and fair elections above. The substantive view treats democracy and human rights as necessary to each other, with part of democracy’s definition stemming from human rights and specifically political rights.²⁰⁸ This view is encapsulated by a participant in a UNHRC seminar in 2005, who Fox quotes as saying:

*“In a practical sense, democracy, rule of law and respect for human rights were indivisible and interdependent because democracy without human rights and the rule of law was oppression, human rights without democracy and rule of law was anarchy, and rule of law without democracy and human rights was tyranny.”*²⁰⁹

Whether procedural or substantive, Fox believes that both rest on a theory of popular sovereignty, where sovereign power resides in the whole people;²¹⁰ rule by the people for the people, in other words. It is a form of sovereignty that is intended to empower the individual to shape her own political sphere, ensuring against the potential for exclusion or inequality. Fox sees popular sovereignty as being encapsulated by Article 21 of the UDHR, which states that “the will of the people shall be the basis of the authority of government.” The words of the Friendly Relations Declaration – “representing the whole people belonging to a territory” (above) – add another dimension to Article 21. Although the declaration was made in the context of self-determination, it is one of the building blocks of the democratic entitlement. It should therefore, be informative as to what is intended. Democracy, then, rests on consent of the people, and these people are those who are governed. Consent can be gleaned in many ways, but the clearest indication of consent is voting. Democratic governance, therefore, must include a conception of free and fair elections which confer consent upon those who govern, with those who govern being accountable to the people. According to the *Greek Case* the objective of free and fair elections is to achieve a ‘democratic society’,²¹¹ which means that the interests of all

²⁰⁵ *Supra* note 23, pp. 5-6

²⁰⁶ *Supra* note 22, p. 511

²⁰⁷ T Carothers, *The End of the Transition Paradigm*, *Journal of Democracy* 13(1), p. 14

²⁰⁸ *Supra* note 23, pp. 5-6

²⁰⁹ *Id.*, p. 6

²¹⁰ I. Gassanma, ‘Ballots and Bullets: The Right to Democratic Governance in International Law after the Egyptian Coup’, 621 *Wisconsin International Law Journal*, Vol. 32 No. 4 (2014), p. 19

²¹¹ *Supra* note 74, p. 245

groups, rather than the majority are taken into account, meaning that ‘all citizens have the chance to participate in decision-making which affects them’.²¹²

Further, for the right of democratic governance to be universal, and therefore applicable to migrants as a human right, migrants must be able to vote in free and fair elections. If they cannot, they have no democratic entitlement (in Franck’s conception). Without the ability to vote, the democratic nature of a government is open to scrutiny, as not all individuals within a society have the ability to shape their own political environment, and therefore the lack individual self-determination. The net of participatory entitlements should be equally applicable to every individual, and not be dependent on that individual’s location. Should a person leave their country of origin and choose to live somewhere else, they should enjoy the same participatory entitlements as those they live beside. As was seen with the freedoms of expression and association, this was the case in law, although it can be difficult for some migrants to claim their entitlements in fact, making it difficult for them to participate in the political process, as is explained in section 4.4.1. The next section will investigate whether a person has the same entitlement to the right to vote should they leave their country of origin. If they cannot, the question of ‘why not’ will also be investigated.

3.5 The Right to Vote

The rights to vote and to stand for election give individuals the chance for their own voice to be heard²¹³ in the direct decision-making processes of government. As such, they are generally seen as rights that represent the close relationship between the individual and their state.²¹⁴ This is why, as evidenced below, the rights to vote and stand for election have been restricted to citizens. It is a symbolic right, as well, as it represents inclusion into the political community of the state on a basis of equality, underpinning other rights.²¹⁵ This section will assess whether there is any human right to vote at both the international and the European level. I will focus on non-citizens who are legally resident on a territory. This is to avoid the complexities and debates surrounding the ability to claim universal human rights, which would go beyond the scope of this thesis. In a section 4.4.1 I will, however, briefly underline the difficulties some non-citizens face in claiming human rights when outlining the difficulty in arguing that postnationalism is emerging. This is done to show that although human rights are universal, this does not mean that they are always ensured, with certain rights being better understood as citizen rights. However, that they are not always ensured does not defeat their universality, rather it shows that

²¹² S Marks, *The Riddle of all Constitutions: International law, democracy, and the critique of ideology*, Oxford University Press (2000), p. 60

²¹³ *Supra* note 156, p. 19

²¹⁴ *Id.*, p. 3

²¹⁵ R. Blackburn, ‘The Right to vote’, in (ed. R. Blackburn), *Rights of Citizenship*, p. 75

human rights law cannot be applied in a vacuum, as other spheres of law are also at work. Universality in this sense means international consensus that everyone *should* have the right, as was the case with freedom of expression being for ‘everyone’. It is such a consensus that is desirable when assessing the utility of the democratic entitlement for migrants.

3.5.1 The Right to Vote: International

In order to frame the question of the right to vote, Article 25 ICCPR is reproduced here, below the corresponding article in the UDHR.

Article 21 of the UDHR reads:

“(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

Article 25 of the ICCPR reads:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.”

The UDHR gives everyone the right to take part in the government of ‘*his country*’, and the ICCPR provides the right to vote in elections to every ‘*citizen*.’ These two articles show a tension between the universality of human rights and state sovereignty, which has resulted in concessions being made to state sovereignty,²¹⁶ so that the right to vote is not inscribed as a universal right. Rather, it is inscribed as a citizen right. Although other rights can also be described as ‘citizen rights’, especially when it comes to the ability of illegal immigrants claiming such rights, due to them being

²¹⁶ As was the case with the right to nationality within the ICCPR. See section 4.2.1, p. 56

contingent on positive state action, these articles are unique in that they formally separate citizen and non-citizen. Another important point to note is that whilst nation-states can deny certain human rights to non-regularised non-citizens through the invocation of immigration status, they are unable to do this for regularised non-citizens, to such an extent. It is only with the political right to vote and stand for election that a nation-state is allowed, from an international human rights law perspective, to differentiate between two sets of individuals living legally within a territory.

3.5.2 The Right to Vote: Europe

There is no right to vote inscribed within the ECHR, nor within the EU Charter, or associated treaties of union. There is, however, a right to free elections under Article 3 of the first Protocol of the ECHR. The case of *Mathieu-Mohin & Clerfayt v Belgium*,²¹⁷ did confirm that this article conferred a right to vote but suggested that any right to participate in these elections belonged to citizens of the state in question, emphasising “the principle of equality of treatment of all *citizens* in the exercise of their right to vote and their right to stand for election.”²¹⁸ However, in *Aziz v Cyprus*²¹⁹ the court did find a violation of Article 3 of the First Protocol together with Article 14 (prohibition of discrimination). This was because a Cypriot national of Turkish origin was banned from registering on the Greek-Cypriot electoral role, due to his national origin. This did not confer a right on every non-citizen to vote, only a right to vote should one group of non-citizens be excluded – due to, for instance, their national origin – when others have not. That the court chose the word citizens over people points to this. Article 16 of the ECHR (discussed above) reinforces this separation of citizens and non-citizens, containing a clause allowing for restrictions to be imposed on ‘*the political activity of aliens*’.²²⁰

In addition to the Protocol, there is also the 1992 European Convention on Participation of Foreigners in Public Life at Local Level. This convention requires state parties to allow lawfully resident non-citizens, who have been on the territory for at least four years, to vote in local elections.²²¹ This has, however, only been ratified by nine members of the Council of Europe, and cannot therefore point to a Europe-wide right to vote for non-citizens even at a local level.

²¹⁷ App. (No 9267/81), 2 March 1987

²¹⁸ Paragraph 54 of judgment (emphasis added)

²¹⁹ *Aziz v Cyprus* (app. no. 69949/01), 22 June 2004; similar conclusions was drawn in *Sjdic and Finci v Bosnia and Herzegovina*, (app nos. 27996/06 and 34836/06), ECtHR, 22 December 2009; and *Tanase v Moldova* (app. no. 7/08), ECtHR, 27 April 2010

²²⁰ This provision has the potential of going beyond the distinction between citizen rights and non-citizen rights which the UDHR envisaged, allowing for the complete denial of any political human rights of non-citizens in certain instances.

²²¹ *Supra* note 156

Article 22 of the TEU allows EU citizens residing in a member state they are not a national of to vote and stand for elections in European and municipal elections. However, Directive 94/80/EC of 19 December 1994 and Directive 93/109/EC of 6 December 1993 allow for some exceptions and limitations to this right.

There are some nations, such as the UK, which give some non-citizens the right to vote in all elections. The UK does this for historical reasons, allowing resident Irish and Commonwealth people the vote.²²² There are yet more nations, such as Sweden, Ireland and Norway, among others, who allow non-citizens the right to vote in local elections. This practice is not widespread enough, nor consistent enough, to point to any state practice which could lead to a regional customary rule.²²³ In fact, customary international law appears to be of little help in this area.²²⁴

The above articles place a condition and a limitation on the right to political participation, namely that the individual in question must be a citizen of a nation-state and that it is only indirectly that a non-citizen can influence the political sphere. They show two sets of political human rights at the international level. The first, conferred upon everyone, are those rights that allow an individual to influence her political sphere indirectly, through speech and action, as freedom of expression (“indirect political rights”). The second, conferred upon citizens, are those rights that allow an individual to influence her political sphere directly, through decision-making, such as the right to vote (“direct political rights”). This reasoning appears to be confirmed by the HRC which has said that direct participation takes place when public issues are decided “through a referendum or other electoral process conducted in accordance with paragraph (b) [of ICCPR]”.²²⁵ Whereas, participation in public affairs through debates and dialogues “is supported by ensuring freedom of expression, assembly and association”.²²⁶ It is the holders of these rights who make the final decision on the path taken, after the multitudes of opinions have been voiced. In this light, what is being denied is not a right to the public realm, or the right to appear in public.²²⁷ What is being denied is participation in the decision-making of the public realm. It is likely that the reason for this separation was made due to the perceived danger to the cohesion of the nation; such cohesion being lost

²²² *Supra* note 156, p. 18

²²³ This would also point to it not being an international customary rule.

²²⁴ *Supra* note 156, p. 1

²²⁵ Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para 6

²²⁶ Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para 8

²²⁷ This, of course, ignores the practical difficulties of an illegal immigrant appearing in the public realm. This is not an issue created by the inscription of human rights laws, rather a problem of the relation between human rights law and immigration law. Although a closely related problem, it is not within the scope of this thesis to delve into this separate issue deeply. This thesis is concerned with the denial of certain types of political rights, not the denial of all rights.

if those who do not ‘belong’ are able to decide the fate of those who do ‘belong’. Ruman Mandal sees the granting of political rights to refugees as a ‘delicate balance’ between ensuring the dignity of each individual and the desire for states to respect the concept of state sovereignty, whilst protecting their own communities as well.²²⁸ Here, she acknowledges a trade-off between human rights, as dignity, and state sovereignty.

This delicate balancing act is highlighted by the legal difference between the citizen and the non-citizen, raising the political issue of states not wanting to allow non-citizens to take part in their own government forming process. Non-citizens did not belong; they had another ‘place of their own’²²⁹ and should participate politically in that place. Entering a place which is not one’s own, crossing a border, cleanses the individual of their decision-making power. This political ethos has transposed itself into law and brought into question the universality of political human rights.

Juxtaposing these articles with the articles on freedom of expression is striking as they make a clear distinction between persons. They explicitly provide for a difference in treatment, rather than being ineffective in avoiding a difference in treatment when immigration issues arise, as is the case with freedom of expression. Some people residing in a territory are able to vote, and other people residing in a territory are not able to vote. If voting is a human right, it presents a problem to the concept of the universality of human rights. The difference in protection between (a) the different types of non-citizens and (b) citizens and non-citizens with the right to freedom of expression does not show a difference between the concept of universality and human rights law; it shows concessions made to state sovereignty and the interaction with immigration law. However, the difference in provision of political rights between citizens and non-citizens shows a difference between the concept of universality and human rights law. The concession to sovereignty is made prior to, rather than after, the inscription of political rights.

It may be argued that a regularised non-citizen still has a right to vote, it is just that she must use it in voting for the government of her country of origin; she has a right to vote for a government that does not have any influence over her day-to-day life. This raises the question of what the point in a human right to vote – and therefore the right to democratic governance – is for. Is it so that someone can secretly place a cross in a box next to a candidate’s name, even if that candidate is in a territory that is not now home? Alternatively, is it to have a say in how the government which impacts you is formed and which direction it takes; is it to be able to shape one’s own political sphere; is it to enact individual self-determination? If it is to place a cross in a box, then the human right to vote can be satisfied in this instance through postal voting, for example;²³⁰ if it is to shape one’s

²²⁸ *Supra* note 156, p. iv, 1

²²⁹ N. Oudejans, ‘The Right to Have Rights as the Right to Asylum’, *Netherlands Journal of Legal Philosophy* (43) 1, 2014, p. 17-18

²³⁰ Notwithstanding issues that arise through immigration status and refugee status.

own political sphere, it must be said that it is not satisfied in such an instance. Further, this discussion does not help the human rights of non-regularised non-citizens due to practical issues (i.e. claiming rights will necessarily entail presenting oneself to the authorities, who could then initiate deportation proceedings), stateless persons, as they have no country of their own, or *de facto* stateless persons who lack the protection of the government they fled and would unlikely be allowed to vote in any elections that may take place. If the right to vote is denied to *de facto* stateless people in their host territory, and they are unable to realise the right to vote in their home territory, they are denied wholly a fundamental right (even if this right is fundamental only to a citizen). Expanding the right to vote beyond the citizen would address this denial, and return a fundamental right to this set of people.

Another point to note is that other mechanisms that allow direct political access, without the right to vote do exist, which helps to ensure minority communities are not marginalised. For instance, there is the National Consultation Structure for Minorities in the Netherlands, which opens up a dialogue between minority groups and the government, giving these groups direct parliamentary contact, or the Refugee Council in the UK, which seeks to provide refugees and asylum seekers with a voice.²³¹ Both of these organisations utilise freedoms of expression and association effectively to bring minorities into the political fold. However, these arrangements cannot be seen as a true alternative to voting rights. They funnel a multitude of views from various individuals into one voice. As such, they do not give these individuals a proper chance to have their own voice heard, which is something the right to vote does.²³²

The second research question is therefore answered in the negative, meaning that there is no human right to vote internationally and no right to vote within Europe seems to be in keeping with the general view that it is only citizens who should have the right to vote due to the closeness of their relationship with the state.²³³

3.5.3 Observations

On 23 June 2016, the UK will have a referendum on its continuing membership within the EU. The result of this referendum will have huge repercussions for the UK, whichever way it votes. The economy, jobs, immigration, travel, and even ‘security’ will be affected. Such a decision will affect everyone who lives and has built their life within the UK. Despite this, it is only UK citizens (as well as Irish or Commonwealth citizens) who will be able to vote in the referendum.²³⁴ In 2014, there were 8.3 million

²³¹ *Supra* note 156, p. 18

²³² *Id.*, p. 19

²³³ *Id.*, p. 3

²³⁴ *Gov.uk*, ‘Types of election, referendums, and who can vote’, available at: <https://www.gov.uk/elections-in-the-uk/referendums>

foreign-born people within the UK, 5 million of which were citizens of the UK. This leaves 3.3 million non-citizens within the UK in 2014.²³⁵ Another organisation suggests that three are 3 million EU citizens alone.²³⁶ The most recent study puts it at 2.15 million EU migrants.²³⁷ Whatever the number, what is apparent is that a significant number of people will be unable to vote, a significant number of people who will be unable to shape their own political destiny. They are subject to the opinions and feelings of other people, and although they can attempt to influence them, they cannot have a final say in the decision. It is not known what would happen if the UK chooses to leave the EU, and what arrangements would be made for those non-citizens already living there who come from the EU. What we do know is that there is currently a rule that immigrant workers from outside of the EU must earn over £35,000 a year in the UK, otherwise they will be deported.²³⁸ Whilst already being significant to non-EU migrants, if applied to EU migrants it would also represent a major challenge to them, as they would no longer be able to take advantage of the foundational free movement principle of the EU, meaning they may be subject to the same immigration rules as non-EU citizens.²³⁹ It would also represent a major change in their lives and it is something they have no voice in deciding. A referendum on continued membership of the EU is also unique, in terms of elections, as there is no equivalent election that non-citizens – both EU and non-EU – can vote in. This is a one off, set in a specific time and place. The ability to vote somewhere else does not exist in this instance. In this sense, non-citizens are like the *de facto* stateless who cannot utilise their right to vote anywhere else, despite formally being able to. This exemplifies why the right to vote can be, and is, so important to non-citizens. Without it, they are being ruled by decree, unable to shape their own destiny.

Does holding a referendum on such an important question, whilst excluding a significant number of the population from participating in the decision-making process, match the ideals of democratic governance? The ideals being: free and fair elections, with a multi-party system to ensure the views of the whole population can be represented, in which the whole population within the territory has the opportunity to vote to both ensure that the will of the people is freely expressed and that individual self-determination is

²³⁵ The Migration Observatory, 'Migrants in the UK: an overview', 28 January 2016. Available at:

http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Migrants%20in%20the%20UK-Overview_0.pdf

²³⁶ *Full Fact*, 'EU Immigration to the UK', 30 March 2016, available at:

<https://fullfact.org/europe/eu-migration-and-uk/>

²³⁷ *The Guardian*, 'Number of EU migrants working in UK rises to record level', 18 May 2016, available at: <http://www.theguardian.com/world/2016/may/18/number-of-eu-migrants-working-in-uk-rises-to-record-level>

²³⁸ *The Guardian*, 'The non-EU workers who'll be deported for earning less than £35,000', 12 March 2016, available at: <http://www.theguardian.com/money/2016/mar/12/eu-workers-deported-earning-less-35000-employees-americans-australians>

²³⁹ David Cameron has stated that there is no guarantee over a right to residency, right to own property or right to access healthcare should Britain vote to leave the EU. See: *The Guardian*, 'Brexit offers no residency guarantees for Britons or Europeans, PM says', 24 May 2016

fulfilled. First, as this is a referendum, the need for a multi-party system can be dismissed. Next, is the election free and fair if not everyone can vote in it? Is the view of the whole population taken into account when at most 8.3 million at least roughly 3 million people cannot vote, and therefore cannot express their will? They have not had the opportunity to vote, suggesting that the answer is no. Such a significant number of people cannot reasonably be excluded from the meaning of “expression of the free will of the people”. As such, if migrants cannot vote in this instance, the will of the people has not been expressed. Further, if they cannot vote in the direction the UK should take in such an important and potentially life changing referendum, it cannot be argued that they are enjoying individual self-determination. When assessing this referendum from the perspective of the migrant, it does not meet the criteria of the democratic entitlement, nor achieve the purposes behind the desire for a right to democratic governance. This shows the decisiveness of the right to vote for the democratic entitlement. It brings into question the legitimacy of the referendum. That it is the migrant that brings this into question points to the right not being universal. If the right to democratic governance was inherent to the individual, migrants would have a right to participate in the democratic process of the host country, allowing the questions answered in the negative above to be answered in the positive. Here, it is only citizens able to participate in the democratic process and claim their democratic entitlement.

When it comes to the right to vote, it appears that law and fact have merged, in that migrants do not have a *human right* to vote, which enshrines in law their exclusion from this aspect of the political process.²⁴⁰ As can be seen, to have and retain direct political rights requires an individual to stay within the territory of which they are a citizen. Crossing a border results in a loss of these direct political rights. Further, it confines an individual’s democratic entitlement to a specific time and a specific place. It is a right formulated for static populations, which loses its efficacy in the face of mobile populations. If the right to vote is not a human right, the formulation of the democratic entitlement as comprising three generations of rights is deficient, and it also cannot be said to be a human right. This is because the right to free and fair elections is derived from the right to vote. As the right to vote is not a human right, it cannot be said that the right to free and fair elections is one either. It is clear that it is alienable from the human and particular to the location of the human. The democratic entitlement is therefore a citizen right and cannot assist migrants in their quest for full political participation, and full inclusion within society. By shifting direct political rights onto the citizen, international law has further managed to avoid overstepping into the sovereignty of states.

A possible solution to this problem of universality is the right to obtain or change citizenship. If non-citizens are unable to influence their political sphere, by having a human right to citizenship, they will be able to realise these rights, as well as their democratic entitlement. Further, it will help

²⁴⁰ As opposed to law prescribing a right but the factual circumstances depriving an individual of the ability to claim the right. See page 40 and section 4.4.1, below

concretise the third generation of rights as universal, rather than particular, helping to reinforce its emergence as an international norm based within the 'human rights fabric'.²⁴¹ A universal right to citizenship would mean that the right to vote would be universal, in that as everyone has the right to be a citizen, no matter where they are, everyone will also have a right to the privileges attached to citizenship, one such privilege being voting. A human right to citizenship could be formulated in such a way as to oblige the state that shapes a particular individual's political sphere²⁴² to grant that individual citizenship. In this way, the right to citizenship is a right to public sphere decision-making, which in such a light may be seen as the right to politics, which is a substantive element of the right to citizenship.

²⁴¹ *Supra* note 5, p. 79

²⁴² In the sense that the state is able to make decisions that impact on the individual's everyday life.

4 The Privilege of Citizenship

This chapter will investigate whether there is a human right to obtain or change citizenship that confers voting rights on the citizen. In order to do this, the right to citizenship within international treaty law will be determined, as will the right citizenship through the state practice of European states and the jurisprudence of the regional courts in Europe. This is in order to determine if a regional norm has developed beyond the international sphere. First, however, citizenship and its purpose will be looked at, in order to better understand why voting is preserved for the citizen and why this has presented a problem for a human right to citizenship.

4.1 Citizenship

To understand why citizens are given voting rights over non-citizens, it would be helpful to briefly highlight what citizenship entails. Citizenship is a concept which is not easily defined²⁴³ but it is generally accepted as being a preferential legal status within a society which confers on that person rights and duties. In this sense it represents full ‘membership and inclusion’ within a society,²⁴⁴ assigning individuals to a specific polity.²⁴⁵ The case of *Luria v U.S.*²⁴⁶ stated that “citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of society. These are reciprocal obligations one being a compensation for the other”.²⁴⁷ Later, in 1997, the European Convention on Nationality (“the ECN”) defined nationality as “the legal bond between a person and a state and does not indicate the person’s ethnic origin.”²⁴⁸ Aristotle had a pleasingly simple formulation, which was that a citizen is an individual who participated in ‘both the ruling and being ruled’.²⁴⁹

There are two dominant alternative concepts of what citizenship means, which are labelled as republican and liberal ideals. Republicans believe that citizenship requires active participation in the political community – which is how the ‘good life’ is attained – whereas liberals believe that citizenship

²⁴³ M. Vink, *Limits of European Citizenship: European integration and domestic immigration policies*, Palgrave Macmillan (2005), p. 25

²⁴⁴ E. Roman, *Citizenship and its Exclusion: a classical, constitutional, and critical race critique*, p. 4

²⁴⁵ *Supra* note 243, p. 24

²⁴⁶ 231 U.S.9. (1913)

²⁴⁷ As quoted in Y. Zilbershats, *The Human Right to Citizenship*, Transnational Publishers, Inc. (2002), p. 3

²⁴⁸ Article 2(a)

²⁴⁹ As quoted in, R. Blackburn, ‘Introduction’, in (ed. R. Blackburn) *Rights of Citizenship*, p. 2

only confers rights with passive, or voluntary, political participation; they have the option to participate if they want to. It is within the private sphere that the 'good life' is located.²⁵⁰ Both concepts, however, see citizenship as a formalization of equality, in that it grants all citizens equal rights.²⁵¹

This formulation of citizenship as granting equal rights has as its foundation the enlightening analysis of human rights and citizenship made by Hannah Arendt, in which she demonstrated that outwith a political community an individual has no rights. She described as a paradox that those with only human rights, and no political community rights, had in fact no rights:

*"The paradox involved in the loss of human rights is that such loss coincides with the instant when a person becomes a human being in general – without a profession, without a citizenship, without an opinion, without a deed by which to identify and specify himself – and different in general, representing nothing but his own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance"*²⁵²

By a human being in general she was referring to the stateless people in the interwar period who had no protection from a state; all they had left were their human rights, which meant nothing during that period. Outside a political community, individuals were not equal and were considered by her as 'beyond oppression', which led them being deemed 'superfluous' and to the 'logic' of the Nazi holocaust.²⁵³ In order to avoid such inequality, Arendt formulated what she believed to be the only true human right:

*"we became aware of the existence of the right to have rights (live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation"*²⁵⁴

This 'Right to Have Rights' can be seen as a right to political community, or the right to politics. It is an attempt to ensure that everyone is guaranteed a place in the world where their opinions are significant and their actions are effective. This formulation may be described as a 'proto-human right'²⁵⁵, in that it only ensures the ability to receive rights. These rights are guaranteed by the nation-state, showing that it is the nation-state that is the only real political community that can ensure rights. Therefore, it is only the citizen of a nation-state that is able to enjoy the protection of rights.

²⁵⁰ *Supra* note 243, p. 25

²⁵¹ E. Balibar, 'Propositions on Citizenship', *Ethics* 98, (1988), p. 723

²⁵² H. Arendt, *The Origins of Totalitarianism*, Harpress Publishing (2013, 1962), p. 302

²⁵³ *Id.*, p. 296

²⁵⁴ *Id.*, p. 297

²⁵⁵ A. Schaap, 'Enacting the Right to have Rights: Jacques Ranciere's critique of Hannah Arendt', *EJPT* 10(1), 2011, 22-45, p. 28

Since the time Arendt was writing about, the human rights regime has expanded drastically, starting with the UDHR, and it now encompasses regional courts, specific treaty bodies with reporting procedures and a large number of NGOs. This has conferred many rights on those without political communities, or those who live in different political communities to those they 'belong' to, through citizenship; for instance, a Mexican citizen living within the UK. However, Monika Krause maintains that as states still retain the ability to grant and refuse residency to non-citizens, the experience of stateless people has not changed. As they are at threat of immediate deportation, they do not have the ability to appear in public to claim their human rights. They lack the ability to act and it is through action which freedom is achieved. Freedom through action is what she believes to be the point of politics, and this means that 'politics and freedom are two sides of the same coin'. So, despite the progress of the human rights regime, citizenship is still desirable, as it allows for action and therefore freedom. Krause saw this 'right to action' as being denied to stateless people.²⁵⁶ Citizenship, as Krause sees it can be equated with 'freedom', with lack of citizenship being equated to 'unfreedom'. This inability to act can also be found in an inability to vote and stand for election, which is the same for regularised and non-regularised non-citizens. Non-citizens are 'unfree' to act fully in politics, being denied the right to vote. As such, a denial of the right to vote equates to a denial of freedom, or full freedom; non-citizens are bound by the results of elections they have no say in. Further, as voting rights are bound with citizenship, those without citizenship are not fully included into a political community, remaining in a space where their opinions are not significant and their actions are not effective.

The above indicates that the granting of citizenship onto an individual is a granting to that individual of a place in the world, where their speech and action are effective. It represents the full inclusion into a political community and a special bond between the individual and the political community. It is when an individual 'belongs' that she is therefore granted voting rights. The next section will look at what full inclusion and 'belonging' entails.

4.1.1 Aspects of citizenship

Maarten Vink distinguishes between two features of citizenship: membership and rights. Membership represents the bond that exists between an individual and her state, whether it be cultural or legal. It is the ideal of the political community, which in a time when the prevalent political community is the nation-state, has led, in Vink's eyes, to the conflation of the citizen and the national, which can be seen in the above quote from the ECN. The national is an identity based on culture or ethnicity, rather than the political identity of the citizen. However, within the nation-state, the

²⁵⁶ M. Krause, 'Arendt and Stateless and Undocumented Migrants', in (eds. C. Sawyer & B. k. Blitz) *Statelessness in the European Union* (2011), p. 31, 34

citizen and the national can be seen as a ‘duality’, which leads to debates regarding admitting individuals as citizens to the political community as being more about admittance to the nation than the state. This duality was expressed in the case of *The Yean and Bosico Children*, in which the I-ACtHR called nationality a “political and legal bond”²⁵⁷ connecting an individual to a state. This is part of the reason why Vink believes naturalization to represent the ‘ultimate form of inclusion of aliens in the national political community’.²⁵⁸

Rights can be considered the substance, or content, of citizenship, providing the value, or ‘goods’²⁵⁹ of membership. In an oft-quoted analysis of how English citizenship developed, Thomas Humphrey Marshall²⁶⁰ noted that citizenship rights increased between the 18th and 20th centuries, from civil in the 18th, to political in the 19th and social in the 20th. This means that all citizens, on this analysis, should be conferred with liberty, the right to justice, freedom of speech, the right to social welfare and the right to participate ‘in the exercise of political power’.²⁶¹ Matthew Gibney has termed these rights ‘goods’ and separated them into ‘voice’ and ‘security’, which are the privileges of citizenship. ‘Voice’ is the right to air political views in public and to participate in, or be elected to, political organisations, which mould a nation-state’s direction. This is why rights such as voting and standing for election are seen as the embodiment of citizenship and why it is essential that democracy and citizenship are defined along the same lines.²⁶² ‘Security’ is found in citizenship through the right to reside in a state, with citizens often not deported or extradited, being able to leave and re-enter the state, and receive diplomatic protection.²⁶³ It is such rights that led Arendt to observe that state sovereignty ‘is nowhere more absolute than in matters of “emigration, naturalization, nationality and expulsion”’.²⁶⁴ This bundle of rights is seen as a privilege by the state, with parts being denied to some citizens who are deemed not worthy of them. These privileges are usually voting privileges, such as with women before they were granted the vote, or prisoners in the UK.²⁶⁵ This shows the importance of voting and the high esteem it is given by the nation-state. It is a privilege that can be lost as it is a right that theoretically shapes the destiny of the nation.

Paul Weis sees this separation of the political bond from the legal and cultural bond as revealing nationality to be distinct from citizenship. He sees

²⁵⁷ *The Yean and Bosico Children v Dominican Republic, Inter-Am Ct. H.R., (Ser.C), No. 130 (2005)*, para 137

²⁵⁸ *Supra* note 243, p. 28, 29, 139

²⁵⁹ M. J. Gibney, ‘Rights of non-citizens to membership’, in (eds. C. Sawyer & B. K. Blitz) *Statelessness in the European Union* (2011), p. 43

²⁶⁰ T.H. Marshall, *Class, Citizenship and Social Development* (1965), Garden City, NY: Anchor Books), p. 78

²⁶¹ *Supra* note 243, p. 29

²⁶² R. Blackburn, ‘Introduction’, in (ed. R. Blackburn) *Rights of Citizenship*, p. 2

²⁶³ M. Gibney, ‘Rights of non-citizens to membership’, p. 43

²⁶⁴ *Supra* note 252, p. 278

²⁶⁵ Despite a number of ECtHR decisions ruling it a violation of Article 3 of Protocol 1, the most recent being *McHugh and Others v UK* (app. no. 51987/08 and 1,014 others) ECtHR, 10 February 2015, prisoners are still denied the vote in the UK

nationality as being concerned with the external aspect of membership of a state – such as diplomatic protection and the right of entry and residence – and ‘citizenship’ as being concerned with the internal aspect – the relationship between the individual and the state. This can be seen as ‘full membership’ and usually includes political rights such as the right to vote.²⁶⁶ It is when these two concepts are disentangled from each other that inequality between nationals is created and sustained. Everyone is a national but not everyone is a citizen. Everyone has the right to enter and reside in a State but not everyone has the right to vote within a State and influence the political sphere in which they reside. Despite, for instance, prisoners who cannot vote being considered ‘less than full members’ they still retain their right to enter and reside within the state and they still have the protection of the ECHR: they still retain their nationality.²⁶⁷ This shows to Weis that citizenship is not something which international law can legislate for; it is for the state to decide what rights nationals as citizens may have, beyond the rights the state is bound by under the ECHR. Nationality, here, is a ‘unified whole’, which is constant and cannot be lost in part, unlike citizenship.²⁶⁸

Nationality as conferring rights can be seen as separate from both citizenship as conferring rights and humanity as conferring rights with this approach.²⁶⁹ It is an approach based on attachment to a territory, rather than political recognition. Such attachment goes beyond mere presence and indicates a web of social attachments, such as family, and labour attachments. It is the formal status of nationality which international law is concerned with, how it is defined at a domestic level is beyond international law’s reaches. The definition of nationality at a domestic level is, in reality, part of the discussion relating to citizenship (which is a political rather than legal status), which shows the separation of nationality and citizenship.²⁷⁰ However, such a separation can reduce nationality to a ‘purely formal international legal status’ which provides for protection from statelessness at the expense of creating different classes of nationals within a state.²⁷¹ This is a particular worry at this time as states will attempt to reassert their sovereignty through nationality laws by legislating for a narrower, more formal legal citizenship.²⁷² This will affect those who cannot rely on their citizenship or do not have any citizenship for protection of their rights, as the rights afforded through ‘attachment’ to a territory will be reduced. Whether there is any basis for the right to vote being conferred under this conception will be investigated below, as something describing attachment to a territory but deprived of diplomatic protection.

²⁶⁶ A. Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law*, Oxford University Press (2012), p. 43

²⁶⁷ *Id.*, p. 45

²⁶⁸ *Ibid.*, p. 45

²⁶⁹ It is this separation – between citizenship, nationality and humanity – that the next chapter will delve into.

²⁷⁰ *Supra* note 266, p. 40

²⁷¹ *Id.*, p. 45

²⁷² Dauvergne as quoted by A. Kesby, *supra* note 266, p. 47

Ayelet Schachar sees the contradiction between the ability of the state to exclude, which is being reasserted with a vengeance in the EU at this time, and the human need for inclusion within a nation-state, which will treat them equally and with dignity, as a ‘perennial dilemma’.²⁷³ And it is this dilemma which has resulted in a human right to democratic governance being a citizen right to democratic governance, which would be considered meaningless, once it emerges, by Arendt. The overriding view that sovereignty over matters of citizenship is left to nation-states can be seen in the history of the treatment of citizenship in international law, discussed in section 4.1.2.

What can be seen from this is that citizenship is a special status as it comprises a bundle of privileges, which give an individual ‘voice’ and ‘security’, as well as duties.²⁷⁴ It provides a basis for equality amongst other citizens, providing freedom in the form of the ability to act. The recognition of someone as a citizen implies an acceptance into the nation, which is part of the reason why it is such a hotly contested issue. A person must prove their attachment, and perhaps loyalty, to a nation-state, before they are conferred with the privileges that come with citizenship. It is an idea that seems at home in a world where enemies are all around, and friends must stick together; a conception where people are related to one, and only one, community and where people stay in one place.

4.1.2 Citizenship in Early International Law

Prior to the true proliferation of human rights law, international law treated citizenship as a purely domestic matter, as it was considered as within the state’s sovereignty, and therefore not something that international law could legislate for. However, once citizenship (as nationality) interacts with the international sphere, through the invocation of diplomatic protection for instance, the international realm can dictate to it.

The case that affirmed the principle that nationality and citizenship and the definition thereof are matters for the state to decide²⁷⁵ was the advisory opinion in the PCIJ of the League of Nations, *Nationality Decrees Issued in Tunis and Morocco (French Zone) on 8 November 1921*,²⁷⁶ where the Court stated:

“The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the

²⁷³ A. Schachar, ‘Introduction: Citizenship and the ‘right to have rights’’, in (eds. G. Brahm and A. Schachar) *The Politics of Citizenship in Immigrant Democracies: The experience of the United States, Canada, and Australia*, p. 1

²⁷⁴ Such as loyalty

²⁷⁵ C. Sawyer, ‘Legal Frameworks of Statelessness in Europe’ in (eds. C. Sawyer & B. K. Blitz) *Statelessness in the European Union* (2011), p. 70

²⁷⁶ *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco*, 4, Permanent Court of International Justice, 7 February 1923

*development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain”.*²⁷⁷

As well as confirming that questions of nationality are reserved to be answered by a particular state, it is interesting to note that the Court did not see this as an absolute, eternal situation, referring to the ability of international law to change over time.

The Harvard Law School publication, *Research in International Law*²⁷⁸ in 1929 supported the stance of the court.²⁷⁹ In 1930, the Hague Convention on Nationality²⁸⁰ was entered into. It confirms the position that it is “for each State to determine under its own law who are its nationals”²⁸¹ and that it is for the law of the state to determine whether a person is the state’s national.²⁸² The net effect of these influences was to reinforce the idea that it was within a state’s own jurisdiction to determine who were and who were not its nationals.²⁸³

This left states to their own devices when deciding how they would grant citizenship and they used a mix of four methods in determining who their nationals are. *Jus soli* grants citizenship on the basis of a person being born on its territory; and *jus sanguinis* grants citizenship on the basis of being a child of a national, whether they were born on the territory or not. Citizenship can also be granted through residence, or through choice of the individual²⁸⁴ (which is rare).²⁸⁵ *Jus soli* and *jus sanguinis* are the two most used forms and this can be seen in the development of international law below. They rely on a static population to determine citizenship, which is problematic when large-scale migration takes place.

Despite this, the *Nottebohm*²⁸⁶ case did show that international law was able to have some influence over a state’s decision, requiring an attachment between the individual and the state, for the rights attached to nationality to be claimed against other states. This claim was brought by Liechtenstein as the “government of Guatemala had acted towards Mr. Friedrich Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law.”²⁸⁷ In considering the admissibility of the claim, and whether Liechtenstein could

²⁷⁷ Paragraph 8 of Section IV of the judgment

²⁷⁸ Part 1, *Nationality*, (1929), Cambridge, MA: Harvard University, p. 70 Press, in C. Sawyer, *supra* note 275

²⁷⁹ *Supra* note 275, p. 70

²⁸⁰ Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930)

²⁸¹ Article 1

²⁸² Article 2

²⁸³ *Supra* note 275, p. 70

²⁸⁴ These last two could comprise a *jus connectionis*, which would grant citizenship on the basis of where a person led their lives.

²⁸⁵ *Supra* note 275, p. 72

²⁸⁶ *Nottebohm (Liechtenstein v. Guatemala)* (second phase), ICJ, 6 April 1955

²⁸⁷ *Nottebohm* case summary, available at: <http://www.icj-cij.org/docket/index.php?sum=215&p1=3&p2=3&case=18&p3=5>

offer diplomatic protection to Nottebohm, the court considered “whether nationality has been conferred in circumstances such as to give rise to an obligation on the part of the respondent state to recognise the effect of that nationality”.²⁸⁸ With such a formulation, the Court both recognised that the naturalisation of individuals by certain states, and the rules thereof, were the sole domain of that particular nation-state, whilst also deeming it necessary for those rules to conform with the general aim of nationality which require an effective link between a state and an individual, in order for other states to recognise such naturalisation and allow for a state to be able to offer diplomatic protection for the naturalised individual: “nationality is a legal bond having as its basis as social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”²⁸⁹ A genuine connection, varying from case to case, can be based on such things as “the habitual residence of the individual concerned...his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.”²⁹⁰ Making its assessment, the court ruled that Liechtenstein could not offer diplomatic protection to Nottebohm by virtue of his naturalisation alone, as there had to be a sufficient bond between individual and state, which did not exist in this case. This is because Nottebohm had kept family and business interests with Germany over the years, had settled in Guatemala for 34 years, and had only become naturalised in Liechtenstein as a result of being refused entry to Guatemala. Further, he had no “settled abode, no prolonged residence” and “the application [for naturalisation] indicates that he was paying a visit there [to Liechtenstein]”.²⁹¹ That Nottebohm was a citizen yet was not deemed to be a national, which *had effect* in the international sphere, shows the distinction between the two concepts in that the citizen is of the domestic sphere and the national is of the international sphere, which international law can regulate. In this case, it regulated whether one state could afford diplomatic protection to an individual against another state; it was only the national with a genuine connection to a state which has the right of diplomatic protection. It is the focus on ‘attachment’ to a territory which is the basis of conceptions of nationality. Such attachment can be discerned by such facts as habitual residence, family and business interests and it is through this route that human rights brought about state duties to non-citizens.

As can be seen, it is the privileges of citizenship, as well as some concepts of the nation (manifested through connection requirements), that make citizenship special. They represent a close attachment to a nation-state, and it is only those with such a close attachment, those who belong, who are trusted with decision-making rights. Since this early consensus of citizenship being the sole preserve of the sovereign state, the development of international law, and in particular human rights law, has led to a closer scrutiny of state practice when it comes to defining citizens and their rights,

²⁸⁸ *Nottebohm* pp. 21-22

²⁸⁹ *Id.*, p. 23

²⁹⁰ *Id.*, p. 22

²⁹¹ *Id.*, p. 25

requiring states to ensure many rights to non-citizens. Does this encroachment of international law into the sovereignty of the nation-state reach into the definition of a citizen? Does international law prescribe a human right to obtain or change citizenship?

4.2 Is there a human right to citizenship?

The purpose of this section is to determine whether there is a human right to obtain or change citizenship, *with voting rights attached*. This is important because the purpose of determining whether there is a human right to citizenship is to assess whether the right to democratic governance has any pertinence to migrants. If citizenship comes without voting rights, it would mean that the democratic entitlement will have no use for migrants. This would also be the case if there was no human right to citizenship, of course.

Therefore, this section will explore the prospect of a human right to citizenship from two angles. The first will be to assess international treaties to determine whether states are obliged to grant citizenship. The second part will assess claims that interpretation of treaty law together with state practice can confer citizenship on people, or at the least reduce the importance of citizenship. This splits the idea of citizenship into *de jure* citizenship, where states acknowledge citizenship, and *de facto* citizenship, where states do not acknowledge citizenship but grant and ensure the same rights as citizens to *de facto* citizens. A *de facto* citizenship that confers a right to vote or stand for election will have to be apparent for such a conception of citizenship to assist non-citizens. Further, it must be a right to citizenship, which confers a right to *change* citizenship for such a right to be useful to the majority of migrants in the context of the democratic entitlement.

4.2.1 De Jure Citizenship

This section will look at whether there is any basis for a human right to obtain or change citizenship within international law, in which states explicitly recognise such citizenship. Here, nationality will be treated as being one and the same as citizenship, as this seems to be how international treaty law treats these two terms. First, the major human rights instruments will be looked at, before turning to less well known conventions.

Article 15 of the UDHR provides for a right to nationality:

*“(1) Everyone has the right to a nationality.
(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”*

Although this states that every person has a right to a nationality, there is no corresponding obligation on a state to grant nationality to every person within its territory. Neither does it provide for a right to change nationality. It is an attempt to promote the idea that every person must be a national of at least one state.²⁹²

A right to a nationality also appears in article 20 of the ACHR. This is the only human rights convention²⁹³ that requires states to provide a nationality to individuals who are born within a state's territory, if that individual does not have the right to be a national of another state.²⁹⁴ It also does not provide for a right to change nationality.

The ICCPR does not include a right to a nationality, or a right to citizenship. This was due to fears that it violated state sovereignty.²⁹⁵ Despite this, Article 24(3) does provide for the right of every child to acquire a nationality, though not to change nationality.

The ECHR and its protocols do not make mention of a right to a nationality and neither does the African Charter, although it does state that “the State shall ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions” (Article 18(3)), of which the right to a nationality is one.²⁹⁶

The ECtHR has confirmed that no right to nationality can be derived from the ECHR,²⁹⁷ with the Court in the recent case of *Petropavlovskis v Latvia* reaffirming the position that decisions on the conferral of “nationality are matters primarily falling within the domestic jurisdiction of the state”.²⁹⁸ Further *Fehér v Slovakia*²⁹⁹ showed the court did not find any violation occurring when citizenship was taken away, as the applicant held another citizenship, so the decision was not arbitrary.

The above shows that within the main human rights convention, there is no right to nationality. However, there are a number of other international conventions that address this issue.

²⁹² *Supra* note 247, p. xiii, 16

²⁹³ *Id.*, p. 18

²⁹⁴ Article 20(2) reads: “Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.”

²⁹⁵ *Supra* note 247, p. 11

²⁹⁶ *Id.*, p. 12

²⁹⁷ *Fehér & Dolník v Slovakia* (apps. nos. 14927/12 and 30415/12), 21 May 2013, paragraphs 41-42. The Court found the application manifestly ill-founded at dismissed it.

²⁹⁸ *Petropavlovskis v Latvia* (app. No. 44230/06), 13 January 2015, para 8

²⁹⁹ (apps. nos. 14927/12 and 30415/12), ECtHR, 21 May 2013

4.2.1.1 Other International Conventions addressing Nationality

There are a number of international conventions that deal with a right to a nationality, some being: the Hague Convention on Nationality, which was ratified by only 13 states;³⁰⁰ the Refugee Convention, has 145 states-parties, and its 1967 Protocol, ratified by 146 states;³⁰¹ the Convention Relating to the Status of Stateless Persons (1954) (“the Stateless Person Convention”), which has 86 states-parties; and the Convention on the Reduction of Statelessness, which has 65 states-parties (1961).

The ratification numbers show that, although the question of nationality has not had universal attention, a significant number of states do consider it important that questions of nationality are dealt with at an international level. It is notable that France is not a party to the Convention on the Reduction of Statelessness Convention, given its ongoing dispute with its *sans papiers*. For the purposes of this thesis, I will work from the presumption that the rights within these treaties have broad acceptance within the international community, in order to give the greatest possible chance of finding a right to obtain or change citizenship.

The Hague Convention on Nationality, discussed above, was the first convention to address issues of nationality. However, it was as much concerned with the ensuring everyone had a nationality as it was in ensuring that everyone had *only one* nationality:

*“Being convinced that it is in the general interest of the international community to secure that all its members should recognise that every person should have a nationality and should have one nationality only”.*³⁰²

Focusing on the ‘problem’ of multiple nationalities, it also does not ensure a right to change nationality. This Convention also does not really concern itself with those who are already stateless, or those who become stateless. For instance, Articles 8 and 9 ensure that a wife will not be without a nationality should she marry someone of another nationality. The Convention does ensure that children of stateless parents are not themselves left stateless, in Article 15:

“Where the nationality of a State is not acquired automatically by reason of birth on its territory, a child born on the territory of that State of parents

³⁰⁰ Nationality, including Statelessness – Analysis of Changes in Nationality Legislation of States since 1930 – Memorandum Prepared by Mr. Ivan S. Kerno, Expert of the International Law Commission, A/CN.4/67, 6 April 1953

³⁰¹ The number of states that have ratified both is 142; UNHCR, ‘States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol’, available at:

<http://www.unhcr.org/3b73b0d63.html>

³⁰² Preamble paragraph 2

having no nationality, or of unknown nationality, may obtain the nationality of the said State.”

It is the Refugee Convention which first hints at a broader right to nationality. Its article 34 states that “Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons”. Within the context of this convention, a stateless person is a refugee (someone fleeing persecution) who is also a stateless person. This does not amount to an outright obligation to provide citizenship, or an unconditional right to citizenship. It is more of an urging of the state to provide citizenship. And only to those who do not have a citizenship of their own.

The Convention on Stateless Persons seeks to fill in the gap left by the Refugee Convention, in that only “stateless persons who are also refugees”³⁰³ were covered by the previous Convention. It is these people who its Article 32 on naturalisation apply. Its Article 32 is formulated in exactly the same way as the Refugee Convention, both seemingly pointing to the idea that there should be the ability to change nationality, though not specifically giving such a right.

The Convention on the Reduction of Statelessness attempts to tie up the loose ends which previous conventions left, filling in the blanks so that no one is left without a nationality. Article 8, for instance, prohibits depriving someone of their nationality if this would render them stateless. It is arguable that it fails in its attempts, though. Although providing for a child born on a State’s territory to attain nationality³⁰⁴, whether or not its parents were a national of that state, it only provides for the granting of nationality to a stateless person if the nationality of one of the person’s parents was of that state.³⁰⁵ Further, conditions are placed on the granting of nationality.³⁰⁶ Once again, there is no right to change citizenship in this convention.

The above shows that stateless persons are more privileged than refugees who are *de facto* stateless persons (as they no longer have the protection of their state of citizenship), when it comes to obtaining citizenship. Within the international legal corpus, recognising someone as stateless is the first step in acquiring a nationality.³⁰⁷ This is because if someone still holds a nationality, regardless of whether it is functioning or not, the nation-states to which these people have fled avoid granting them nationality status, as their main desire is to return them ‘home’, waiting for the situation to improve. That is where they belong; this feeds into the larger discussion around citizenship, the nexus with a political community of one’s own and entry into a nation (comprising part of the nation-state). ‘That’ political community is the suitable one for the *de facto* stateless to participate in. As such, on an international level, *de facto* stateless are treated as refugees,

³⁰³ Preamble, paragraph 3

³⁰⁴ Articles 1(1) and (4), and 2

³⁰⁵ Article 4(1)

³⁰⁶ See articles 1(2), (5), and 4(2)

³⁰⁷ *Supra* note 229, p. 22

even if they spend the rest of their lives in their host country, unable to become nationals of the state to which they form a strong attachment, and in which they live their lives. The designation of refugee is attached to a designation of nationality. Both of these statuses take account of the legal situation rather than the factual situation, with the status of refugee flowing from the designation of nationality. This results in those who factually have none of the bearings of nationality – interstate protection, etc. – but who still have a nationality being nonetheless labelled refugees, rather than stateless persons, and denied the right to a nationality in a more suitable state. This situation leaves the *de facto* stateless without a place in the world, other than a formal legal place which, if utilised, would be perilous to that individual.³⁰⁸ Further, it leaves them, internationally, without the prospect of obtaining citizenship, in that there is no nation-state obligation to provide them with citizenship.

The above has shown that, although the international community has attempted to reduce statelessness through conferral of nationality, it has not gone further to create a human right to obtain or change citizenship. This points to nation-states wishing to retain control over whom they grant citizenship to, and its continued privileged status. Although there is no human right to citizenship, it may be possible to find a regional right to citizenship in treaty law.

4.2.1.2 European Conventions on Nationality

This section will look at regional conventions specifically related to nationality, rather than the general human rights conventions investigated above.

Within the Council of Europe there are two prominent conventions, the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Case of Multiple Nationality (1963); and the ECN Nationality (1997),

The Multiple Nationality Convention is concerned with allowing people of dual nationalities to renounce one of their nationalities. Rather than concerning the right to a nationality, it moves towards the right to renounce a nationality, which goes against the idea of changing nationality. The European Convention, however, appears to provide for the greatest ambit in attaining nationality for stateless people. However, it has only been ratified by 20 out of 29 states-parties. This also shows that it is not every member of the Council of Europe which has even signed it. Its Article 6 provides that states should grant nationality to, amongst others children born or found on a state's territory.³⁰⁹ It further requires states to “provide in its internal law

³⁰⁸ *Supra* note 229, p. 22

³⁰⁹ Article 6(1) and (2)

for the *possibility* of naturalisation of” (emphasis mine) lawfully residing non-nationals,³¹⁰ and “*facilitate* in its internal law the acquisition of its nationality” (emphasis mine) for “stateless persons and recognised refugees lawfully and habitually resident on its territory”.³¹¹ What is significant about Article 6(3) is that it addresses the idea that both non-nationals and *de facto* stateless people should be able to change their nationality. Other than the European Nationality Convention, no international instrument focuses on the ability of *de facto* stateless to obtain nationality, with the instruments focusing on those who already lack nationality. However, the wording is stronger, yet similar, to that of the Refugee and Stateless Conventions, and cannot be said to provide a right to change nationality. It is merely obliging the state-party to have a mechanism in law which will provide a route to changing nationality. There is nothing which will stop this mechanism containing conditions. There have also been a number of reservations to the convention, with a large number of them highlighting that the particular state does not wish to be bound by the prohibition of discrimination on the basis of race or ethnic origin in Article 5(1).³¹² The Convention also does not address those who are not on a territory legally, and those who are not recognised as refugees. As such, it does not provide for acquisition or change of a nationality as right within Europe.

What can be seen from the above mapping of the human right to citizenship in international treaty law is that, there is no clear body of law which creates an explicit obligation on states to grant citizenship to every individual on their territory, due to the piecemeal fashion in which the various obligations in the various treaties have arisen.³¹³ It appears that it is the states-parties to the ECN that have the broadest duty to grant nationality to individuals within their borders. However, it cannot be said that there is a right to citizenship within Europe. This is because states only have obligations (and not complete obligations of granting citizenship) towards regularised non-citizens; non-regularised non-citizens are owed no duty. Further, as states-parties are not prohibited from placing conditions on acquisition of nationality, the right to acquire a nationality is contingent on fulfilling these conditions. Such a contingency rails against the idea of nationality being granted by virtue of the dignity of the human person. It points away from the possibility of the right in Europe being viewed as a human right and towards citizenship being the privilege of those deemed to belong.

Within treaty law, states still retain the ability to decide who decides, so to speak. This shows the desire of the international community to confer direct political rights exclusively on citizens.³¹⁴ However, within Europe, and through the jurisprudence of the ECtHR, it has been argued that there is now

³¹⁰ Article 6(3)

³¹¹ Article 6(4)(g)

³¹² EUDO Citizenship Policy Brief No. 4, ‘European Convention on Nationality (ECN) 1997 and European Nationality Laws, p. 1, available at: <http://eudo-citizenship.eu/docs/policy%20brief%20International%20Law.pdf>

³¹³ *Ibid.*, p. 66

³¹⁴ *Supra* note 247, p. 59

an ability to claim *de facto* citizenship. This may lead to a form of citizenship that confers voting rights on the *de facto* citizen.

4.3 De Facto Citizenship

De facto citizenship emanates from the idea that rights are now no longer ensured by states, through citizenship, but rather through supra-national bodies that tie the hands of nation-states, and impose obligations on those nation-states to those who reside (and, for some rights, those who are merely present) on a territory. This section will assess some arguments for this idea, and investigate whether *de facto* citizenship can confer voting rights on non-citizens. As will be seen, a human right to *de facto* citizenship could be construed teleologically, as an emerging right, due to the increasing number of conventions on nationality, discussed above, coupled with the increased amount of human rights obligations owed to non-citizens.

It has been argued by Jacobson that transnational migration, together with the increasing acceptance and ubiquity of human rights law, which place importance on the universality of rights, is gradually reducing the traditional concept of citizenship.³¹⁵ Soysal is of the same opinion, believing that a move is being made towards a universal mode of membership, in which rights are no longer linked to territories,³¹⁶ as such, citizenship is no longer a more advantageous status than non-citizenship.³¹⁷ This is for two reasons: increased globalisation and universal ideals of rights – rather than particular ideas – that have been codified in international law. Migrants are thus able to claim rights based on universal ideals, rather than particular ones, reducing the relevance of citizenship.³¹⁸ This does not mean that the nation-state is no longer important, but that its role changes to an organisational role, ensuring politics and universal rights, which have now been legitimised. This leads to more people participating within national politics through claiming their political rights which are universal, rather than because they are members of a specific community. This in turn leads to people becoming members of a variety of communities, be they ‘local, regional, national or transnational’, which challenges the idea of ‘belonging’ to one specific community. This makes both legal and territorial borders less relevant, as individuals no longer identify with communities in such a black and white way³¹⁹ presenting a solution to the tension between mobile populations and static sovereignty. As will be seen later in section 4.4, recent developments have presented a challenge to this ‘postnational’³²⁰ theory of citizenship. Three concepts of *de facto* citizenship will be looked

³¹⁵ D. Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship*, The John Hopkins University Press (1997), pp. 8-9

³¹⁶ Y.N. Soysal, *Limits of Citizenship: migrants and postnational membership in Europe*, (1994), Chicago University Press, p. 3

³¹⁷ *Supra* note 243, p. 1

³¹⁸ *Id.*, p. 2

³¹⁹ *Supra* note 243, p. 2

³²⁰ *Supra* note 316, p. 3

at here, all derived from the opening of borders within Europe and the rights ensured by the ECtHR.

4.3.1 Nationality recast

Jacobson and O’ Leary see Europe as an excellent example of territorial borders becoming less relevant. O’Leary has posited that the EU has played a major part in disrupting the idea of national citizenship. This is because it codifies the free movement of people,³²¹ requires welfare benefits to be paid to EU citizens in a state that they are not citizens of³²² (if resident), and requires EU citizens to be allowed to participate in politics, up to a certain (and not national) level.³²³ It has also brought into being an ‘EU citizenship’, codified in article 9 of the TEU, which is seen by O’Leary as an attempt to restructure citizenship beyond the national.³²⁴

Jacobson argues that when attachment to a territory is based on universal, transnational criteria – as opposed to national and particularistic criteria – the nation-state loses its ability to determine who may and who may not reside and naturalise in its territory. This is why the European Commission of human rights “found that the Contracting Parties agreed to restrict the free exercise of their powers under general international law, including the power to control the entry and exit of aliens, to the extent and within the limits of the obligations which they assumed under the treaty” so that in some cases “the deportation of a person may thus be contrary to the Convention...”.³²⁵ The “community of character” which is the ‘defining element of nationhood’ is no longer determined by the state but by a new international order. For instance, refugees are admitted due to criteria laid down in universal instruments, rather than particularist national criteria, of which race or ethnicity could be determinative. Within the jurisdiction of the ECHR, it is through, among other things, social ties, rather than a nation-state’s own interests that an attachment to a territory is found.³²⁶ Such attachment to a territory brings with it – in Convention countries – the protection of the ECHR. This principle was accepted by the ECtHR under article 8 (right to private and family life) in *Berrehab v the Netherlands*,

³²¹ For instance, the 2009 Treaty of Lisbon states in its Article 3: “the union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured...”

³²² Directive 2004/38/EC of 29 April 2009

³²³ Article 22 of the Consolidated Versions of the Treaty on European Union allows EU citizens residing in a member state they are not a national of to vote and stand for elections in European and municipal elections, although Directive 94/80/EC of 19 December 1994 and Directive 93/109/EC of 6 December 1993 allow for some exceptions and limitations to this right.

³²⁴ S. O’Leary, *The Evolving Concept of Community Citizenship*, (1996), Kluwer Law International, p. 23

³²⁵ *East African Asians v the United Kingdom*: Report adopted by the Commission on 14 December 1973 pursuant to Article 31 of the Convention (Made public by Resolution of 21 March 1994), para 186, p. 50

³²⁶ *Ibid*, p. 118

where it weighed the “seriousness of the interference [being deportation] with the applicant’s right to respect for family life”.³²⁷ Citing the fact that the applicant “had already lawfully lived there [The Netherlands] for several years, who had a home and a job there” and “had real family ties,”³²⁸ the Court found a violation of article 8 in refusing a residence permit and expelling the applicant, as the correct balance had not been struck. This does not rule out that the state could expel someone who had real family ties, just that there must be overwhelming evidence that leads to its necessity for it to take place. *Boultif v Switzerland*³²⁹ affirmed the position that non-citizens have no right to enter or reside in a state, but that it would amount to an infringement to remove a non-citizen if they had close ties to the country.³³⁰ In this cause, the weighing up procedure was deemed to be in violation despite the applicant committing a violent crime.³³¹

The case of *Mmes X, Cabales and Balkandali v the United Kingdom*,³³² is used by Jacobson to show that the ECHR provides to those within a country’s jurisdiction the rights contained within the Convention, and that it judges this attachment through the social ties a person has built, rather than through recognition of citizenship.³³³ This case concerned the right to family life. The applicants were women who wished for their husbands to join them in living in the UK. The first was a stateless person, the second a citizen of the Philippines, and the third a UK citizen born in Egypt. They all had the right to reside in the UK; however, their husbands did not.³³⁴ This case was actually brought on grounds of discrimination, as men in the applicants’ position would have been able to unite with their wives.³³⁵ That a violation was found shows two things. The first is that the UK, as a Convention party, had recognised that non-citizens who had a sufficient attachment to the country – i.e. permanent residence – could have similar rights to citizens. The second is that non-citizens who had a sufficient attachment to the country were protected by the ECHR in times when their human rights were violated. Here, the applicants were discriminated against. Without such attachment the applicants would not have been able to bring their claims against the UK and it is this test of attachment which Jacobson sees as nationality ‘recast’; attachment to a territory brings nationality (or de facto citizenship) and, therefore, rights. It is helpful that the ECtHR adopts a broad definition of family life that includes “the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of private life within the meaning of Article 8.”³³⁶ This broad definition can be seen in a human rights case decided in

³²⁷ *Berrehab v the Netherlands*, (app. no. 10730/84), 21 June 1988, para 29

³²⁸ Para 29

³²⁹ *Boultif v Switzerland*, (app. no. 54273/00), 2 November 2001

³³⁰ *Id.* Para 39

³³¹ *Id.* Paras 49, 55, 56

³³² Apps nos. 9214/80, 9473/81 and 9474/81 (1983)

³³³ This is reliance on and type of attachment it reminiscent of the *Nottebohm* case

³³⁴ European Commission of Human Rights, *Mmes X, Cabales and Balkandali* against United Kingdom: Report of the Commission (adopted on 12 May 1983), paras 2-5, p. 7

³³⁵ *Id.*, para 6, p. 7

³³⁶ *Kuric & ors v Slovenia*, app. no. 26828/06 (2010), para 352

the UK, applying the Convention. In *R(on the application of Bajai & others) v Secretary of State for the Home Department (Nos 1 and 2)* (2008), an illegal immigrant's right to marry was given precedence over the state's immigration control.³³⁷ The application of this broad definition to provide rights to illegal immigrants, points to nationality being recast as an attachment to a territory. Jacobson argues that *de facto* citizenship is therefore a tool to ensure states are accountable for the human rights of its residents – rather than its citizens – based on universal international human rights law. The state is reduced to a forum for enforcing these rights.³³⁸

Jacobson's reasoning goes further than the well-established principle that states should ensure the human rights of those on their territory; otherwise those who are merely visiting a country would be endowed with *de facto* citizenship. This is why he grounds the argument in Article 8, in that the duty of ensuring the right to family life is only expected to be carried out by a state in respect of non-citizens who have built up an attachment to the state in which they live. It is this social attachment and the European Court's willingness to recognise it, which points to recognition of a right to *de facto* citizenship within Europe, according to Jacobson. Despite recasting nationality in such a way, Jacobson does accept that the ECHR does treat citizens and non-citizens differently in its Article 16 (discussed above), which restricts the political rights of non-citizens. He believes this is the exception that proves the rule; that discrimination against non-citizens is only allowed when explicitly stated. The explication of discrimination in this case shows that it is not the norm, but that equality of treatment is the norm.³³⁹ Whether or not it is the exception that proves the rule, what this does show is there is a difference between citizens and non-citizens within the Council of Europe. Further, it shows that, whether or not there is a right to nationality – as conceived by Jacobson – there is no deeper right to political rights or citizenship through this reasoning, as Article 16 combined with the Court's assertion that voting rights derived from Article 3 of Protocol 1 are citizen rights, means that the exception that proves the rule strikes at the heart of the right to vote for non-citizens.

4.3.2 Voting rights through the democratic entitlement

A *de facto* citizenship which contains political rights has also been put forward through application of the emerging right to democratic governance. This argument is predicated on the idea that there must be a convergence between those permanently resident and those who elect a government. It is the requirement for government legitimacy to be based on the will of the people that creates a right to *de facto* citizenship. For

³³⁷ *Supra* note 266, p. 103

³³⁸ *Ibid.*, p. 117

³³⁹ *Supra* note 315, p. 90

Orentlicher, this is in effect an emerging right to a de facto citizenship for those who are permanent residents within a territory.³⁴⁰ Following the logic that the ECHR confers rights upon permanent residents in territories, for instance the right to family reunification, de facto citizenship in this formulation can be gleaned from Article 3 of the First Protocol to the ECHR, which requires free elections to be held in state parties, which will “ensure the free expression of the opinion of the people...”. However, as was shown above, despite the Court accepting that Article 3 of the First Protocol did confer voting rights, it only conferred them to citizens. Nothing in the court’s jurisprudence suggests that it intended to go further than this. In addition, the formulation of an emerging right to de facto citizenship, as something which confers voting rights therefore coincides with the emerging right to democratic governance. A right to a de facto citizenship formulated on such terms is contingent on their being democratic governance, and a right thereof. The right to democratic governance must be established before any right involving a right to vote – and therefore right to nationality – can be declared. And it must be a right to democratic governance that prescribes the right to vote to non-citizens. As seen, this is not the case on Franck’s formulation.

It is argued that there is a right to de facto citizenship – in this formulation – within members of the EU. As well as Article 3 of the First Protocol to the ECHR, the founding principles of the EU are democracy, rule of law and human rights.³⁴¹ These principles are backed up by a mechanism in Article 7(3) whereby the Council can suspend certain rights of member states deriving from the treaty should there be a determination of “the existence of a serious and persistent breach of the values referred to in Article 2...”.³⁴² This means that member states have a duty to be democratic, which confers a corresponding right of the citizens of the EU and its member states to democratic governance. This, in concert with the jurisprudence of the ECtHR, conferring rights ensured in the convention to permanent residents and thereby conferring de facto citizenship on permanent residents, may be enough to show that there is a right to a nationality within the EU. However, a duty to be democratic is not the same as a duty to provide voting rights to regularised non-citizens. Once again, there is no duty for states to provide voting rights to non-citizens.

Further, it also overlooks those who are not regularised within a Convention state. Should a right to de facto citizenship come to exist through this conception, it is unlikely that these individuals will overcome their status to be conferred a right to de facto citizenship. Once they appear to the State they become the subject of immigration law before they become subjects of human rights law. It is only when a state is prohibited from deporting such an individual that such a right may be triggered. That there is no obvious rights holder in the formulation of this right may point to why this has not

³⁴⁰ *Supra* note 266, p. 58

³⁴¹ Article 2 of the consolidated Treaty on European Union.

³⁴² Article 7(2) of the consolidated Treaty on European Union.

been addressed in the ECtHR. Additionally, the ‘people’³⁴³ is a particularly difficult word to define. In the democracies of Europe, it could be argued that the people’s voice has been heard in the majority of elections prior to the current refugee crisis (notwithstanding concerns as to electoral systems). To challenge this, and interpret the rights within the ECHR to provide direct political rights, would require a factual change of great proportions, as well as acceptance by judicial institutions, if not states. It may be that the current refugee crisis is that factual change, with an unprecedented number of people arriving in Europe, all of which now lack direct political rights, all of which will be unrepresented in elections. The will of the people may soon no longer be reflected in the results of elections.

4.3.3 Substantive membership

Another possible route to a right to de facto citizenship with voting rights is through substantive membership. This is a form of de facto citizenship that, as well as encompassing an international legal status, also encompasses legal, political and social citizenship within the state of the de facto citizen.³⁴⁴ Audrey Macklin terms this ‘social citizenship’, meaning the “voluminous package of rights, responsibilities, entitlements, duties, practices and attachments that define membership in a polity, and situate individuals within that community.”³⁴⁵ It is hoped by Kesby that such a conception will help those who fall between the cracks of the Stateless and Refugee Conventions obtain the rights that are meant to be a birth right, i.e. the de facto stateless, or as Macklin puts it, those who have ‘nominal citizenship in a failed state’.³⁴⁶ This right is conferred through genuine links to a territory – a *jus connectionis* – a “right of attachment” which grants de facto citizenship to an individual of the state to which she is most closely attached.³⁴⁷ This would be similar to the attachment required in the *Nottebohm* case, as well as found in the European Convention on Nationality (which refers to residence, though does not give a right to nationality based on residence).³⁴⁸ This right would have to include all the rights which other nationals would be endowed with, and would be a step towards reducing the formality of legal solutions to statelessness, embracing a solution which looks at the facts on the ground. It would reduce the number of those who are not protected by any state, as well as those who are without any state.³⁴⁹ This formulation, in that it speaks to the need for political, social, economic and cultural rights, appears similar to a right to

³⁴³ This is the wording within Article 3 of the First Protocol.

³⁴⁴ *Supra* note 266, p. 61

³⁴⁵ A. Macklin, ‘Who is the Citizen’s Other? Considering the Heft of Citizenship’ (2007) 8(2) *Theoretical Inq L*, p. 334, as quoted in A. Kesby, *supra* note 266 p. 61

³⁴⁶ A. Macklin as quoted in A. Kesby, *Supra* note 266 p. 64

³⁴⁷ *Supra* note 266, p. 63

³⁴⁸ Article 6(3)

³⁴⁹ *Supra* note 266, p. 62

citizenship, and has been termed citizenship's "progressive project".³⁵⁰ This is because it not only incorporates a right of substantive nationality to those who are without nationality but also to those with a nationality that no longer protects them. It is therefore more far reaching. Once again, the international legal corpus does not support the right to a de facto citizenship conceived as such. It is hard to see this even as an emerging right; at the most it is based on an idea of where international norms may move to. It is an argument that does not suggest that there is currently a right to a nationality comprising voting rights at this time.

Therefore, there is no indication that voting rights can be obtained through a right to de facto citizenship. The conception of de facto citizenship as something granted through residence and something which entails the rights granted by the ECHR – which is the most compelling argument for a separate right to de facto citizenship within Europe – does not to grant direct political rights in any event.

Despite there being no human right to obtain or change citizenship (or de facto citizenship) explicitly inscribed in international law or provided through court decisions and state practice, states do tend to grant citizenship to people, either through birth, through descent,³⁵¹ or through naturalisation after a period of residence. The various national laws have not been created in a uniform manner, which means two things. The first is that it would be difficult to find consistent state practice for the purposes of seeking a customary rule in the granting of nationality. The second is that a lack of uniformity breeds dissonance, which results in people falling through the cracks and being left without a nationality.³⁵² The lack of uniformity may be explained by states being unwilling to limit their own sovereignty in controlling who may and who may not reside on its territory.³⁵³ Further, if there is no international obligation requiring states to grant citizenship to non-citizens, states which nonetheless do so, grant citizenship by grace and by favour. There is nothing stopping these states withdrawing these graces and favours. For instance, in Denmark, following the rise of the Danish People's Party, which is now part of the ruling coalition, tougher citizenship laws were introduced on 15 October 2015. These laws mean that applicants will have to demonstrate a higher standard of the Danish language, prove their financial self-reliance, face a tougher citizenship exam, and face further challenges if they have a criminal record.³⁵⁴ With anti-immigration parties in power in Hungary and Poland, Austria coming within 1% of voting for a far-right president, and a general rise in anti-immigration rhetoric throughout Europe, it is foreseeable that further tough citizenship laws will come into effect. None of these would breach a human right.

³⁵⁰ Rubenstein and Adler, 'International Citizenship: the Future of Nationality in a Globalised World', p. 547, as quoted in A. Kesby, *supra* note 266 p. 64

³⁵¹ *Supra* note 247, p. 66

³⁵² *Ibid*, p. 66

³⁵³ *Ibid*, p. 66

³⁵⁴ *The Local*, 'Denmark approves tougher citizenship rules', 5 October 2015, at: <http://www.thelocal.dk/20151005/harder-danish-citizenship-requirements-approved>

In addition, the very fact of a resurgent immigration control in Europe, shows that “citizenship in liberal democracy is after all a protection of relative privilege rather than a bundle of rights that appeal to universalistic values”.³⁵⁵ This goes against the idea that citizenship has been devalued in some way; it is still a privileged status. This shows that the rights pertaining to citizenship are rights granted by political communities rather than international law, and it is within those communities that rights are protected. It is not the international, universal man that has the protection of rights, but the national, particular man.³⁵⁶ An example of this can be seen in the case of *The Yean and Bosico Children*³⁵⁷ in which the court stated that nationality was a precondition for being a subject of rights: “a stateless person...does not have recognized juridical personality, because he has not established a juridical and political connection with any State; thus nationality is a prerequisite for juridical personality.”³⁵⁸

It is still true, therefore, that it is for the state, rather than international bodies, to have the final say of whether to accept non-citizens within the political community, which can be done through reducing the privileges of citizenship. For instance, the labour market and social security systems can be accessed through long term residence, rather than citizenship.³⁵⁹ In the UK, for instance, a national insurance number is required for these things, which is provided to those who have a right to work within the UK³⁶⁰, gained either through EU membership or a visa. Hammar³⁶¹ termed those who had these rights, but not full citizenship, denizens. If the human rights regime (and the EU) has facilitated the creation of any type of individual through universal rights, it is an individual who bares striking similarity to the denizen. They are protected by universal rights but without the particular rights to vote and stand for office, and without diplomatic protection and the right to enter and reside. They lack individual self-determination, lacking the right to citizenship and therefore the right to vote. As such, sovereignty, as the will of the people, remains static despite the rise of the denizen. It is those who remain in place who belong and are rewarded with the privileges of citizenship. The third research question must also be answered in the negative. The lack of a human right to citizenship reinforces the deficiency of Franck’s formulation of the democratic entitlement. The right to free and fair elections is derived from citizen, rather than human, rights.

The above conceptions of *de facto* citizenship are all expressions of modes of postnationalism. They focus on examples of states being unable to make

³⁵⁵ Bauböck as quoted in M. Vink, *Limits of European Citizenship*, p. 9

³⁵⁶ H. F. van Panhuys, as quoted by A. Kesby, *supra* note 266, p. 55

³⁵⁷ *The Yean and Bosico Children v Dominican Republic*, Inter-Am Ct. H.R., (Ser.C), No. 130 (2005)

³⁵⁸ *The Yean and Bosico Children*, para 178

³⁵⁹ *Supra* note 243, p. 11

³⁶⁰ *Gov.uk*, ‘Apply for a national insurance number’, available at: <https://www.gov.uk/apply-national-insurance-number>

³⁶¹ T. Hammar, *Democracy and the Nation-State*, (1990), Avebury

the final decision about certain aspects of their own sovereignty, such as which rights to confer to residents, and who may reside within their borders. Such things as free movement and the conferral of rights are guaranteed by supranational bodies, such as the EU and the ECtHR, which have supplanted some of the traditional institutions of the nation-state. Within Europe, people no longer have to be citizens of a particular nation to be conferred with rights and freedoms, leading to the increasing irrelevance of the nation-state. Europe is therefore moving beyond the nation-state. The general trends within Europe are presented in such a way as to lead the reader to this overwhelming conclusion. However, leaving aside the question of whether or not this is desirable, certain other trends are ignored to support the unimpeded march towards postnationalism (as is the case with other forms of teleological argument). Two examples, one being the difficulty of non-EU migrants to claim their rights, the other being the restrictions on free movement for EU citizens, will now be presented to highlight why it is difficult to predict the eventual destination of anything, especially international law conferring voting rights to non-citizens, which is so laden with political incentive.

4.4 The problem with teleology

The concepts of postnationalism described in section 4.3 are all founded in a teleological argument of where international law is going. As such, it could be argued that, although these conceptions do not confer voting rights now, seen from a teleological perspective, they will do so eventually. This is also important in the context of the democratic entitlement because although the preceding parts of this thesis have shown that it is not a human right as it is now, it may be unfair to judge it on Europe as it is now. The assertions that the right to democratic governance is established in Europe were not made by Franck. As such, the claim that a teleological democratic governance is still emerging could still hold sway, with the deficient formulation being rectified by increased recognition of the need for non-citizen voting rights. After all, international law is changeable, as human rights law has shown. Although it is impossible to assess whether or not this is the case, this section will attempt to highlight the difficulty with such teleological argumentation using two examples. The first example will demonstrate the difficulty in claiming rights when not a citizen of a nation-state within the EU. This will counter Jacobson's argument that the ECHR confers rights to non-citizens, even those who are not present legally within a territory. The second will counter arguments that the EU is moving towards an enlightened postnationalism.

4.4.1 The difficulty in claiming some human rights

Jacobson's view of nationality 'recast' indicates that, in theory, non-citizens have the same rights as citizens, within the Council of Europe (except, of

course, voting rights).³⁶² That international human rights instruments confer rights on ‘everyone’ confirms such a theoretical standpoint. Despite this, it is apparent that it is usually the legal immigrant who enjoys the broadest protection of rights. In fact, illegal immigrants and asylum seekers find it the most difficult to claim rights, with illegal immigrants having the least protection. This is because for non-regularised non-citizens, their appearance as subjects of human rights coincides with their appearance as illegal immigrants. When such a person appears in the public domain they face exclusion. This can either be the exclusion of a specific right, such as, for example, healthcare, or exclusion as expulsion,³⁶³ where the state authorities exercise their right to control who resides in the state’s territory. Another example of the difficulty for illegal non-citizens to claim rights is state’s right to control borders affirmed within human rights law; there is an exception within Article 5(1)(f)³⁶⁴ of the ECHR which allows for the liberty to be taken away of those where “action is being taken with a view to deportation...”. There is no requirement for necessity of deprivation of liberty within the ECHR³⁶⁵, although the Human Rights Committee has interpreted this exception strictly^{366 367}.

Access to healthcare provides the starkest example of the state maintaining the ability to exclude, even when a right as important as life-saving healthcare – and by extension the right to life – is what is being denied through exclusion. In the context of facing deportation whilst suffering from HIV, a number of cases have been brought under Article 3 of the ECHR (as there is no explicit right to health in the ECHR) – freedom from torture or inhuman or degrading treatment or punishment. In a number of decisions, the ECtHR has determined that the fact that the country of return will not provide adequate healthcare – meaning a high chance of an undignified death – does not necessarily lead to a violation, thereby allowing deportation to take place.³⁶⁸ It is not an obligation for states to provide for disparities in countries not of the ECHR, and do not have any duty to continue providing treatment to applicants who have no right to reside. This

³⁶² Within Europe, regularised non-citizens and citizens also have the same non-political rights, with both having, for instance, the same access to healthcare, to housing, to religion and to education. In theory, this is generally the same for non-regularised non-citizens, with some exceptions such as the ability to restrict liberty in deportation matters.

³⁶³ G. Noll, ‘Why Human Rights Fail to Protect Undocumented Migrants’, *European Journal of Migration and Law* 12 (2010), p. 243

³⁶⁴ The ability for the state to derogate from certain human rights is another example of the disparity between the supposed universality of human rights and their reality as contextual rights.

³⁶⁵ *Chahal v UK*, (app. no. 22414/93) [1996] ECHR 54 (15 November 1996), para 112

³⁶⁶ *A v Australia* Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997), para 9.2

³⁶⁷ *Supra* note 266, p. 108

³⁶⁸ See *D v the United Kingdom*, ECtHR (app. no. 30240/96), 2 May 1997; *N v the United Kingdom*, ECtHR (app. no. 26565/05), 27 May 2008; *Yoh-Ekale Mwanje v Belgium*, ECtHR (app. no. 10486/10), 20 December 2011; and *S.J. v Belgium*, ECtHR (app. no. 7005/10), 19 March 2015. *D* did find a violation but only due to the fact that the illness was at a very advanced stage, with St Kitts providing adverse living conditions that would increase the applicant’s suffering. *S.J.* was discontinued as a case because the Belgian authorities came to grant the applicant and her children residence permits.

understanding is present within EU immigration policy, with governments avoiding giving permanent residence to labour migrants.³⁶⁹ It seems, then, that the ECHR does not automatically confer those present within a territory with the rights within the convention. It does not completely tie the hands of the state, only loosely with regards to Article 8 family life. This may be different if there was a right to health within the ECHR.

What is at issue here is not simply a question of whether human rights are universal. It is the ability to claim the right that causes the differences in protection between the regularised and non-regularised non-citizen. At the moment an irregular immigrant seeks to claim what is theirs by right, a conflict arises between the universality of human rights and territorial sovereignty, a conflict which has resulted in concessions being made to territorial sovereignty.³⁷⁰ This shows not that human rights are not universal, but rather that human rights law is only part of a fragmented international law, in which some parts, at different times and for different reasons, take precedence over other parts. It is not a denial of human rights in theory or in law, rather a denial of protection of human rights, as Gregor Noll puts it, “at a certain time and in a certain place: here and now on the territory, within the jurisdiction of the state in question; or in the future and somewhere else”.³⁷¹ The ability of the state to deny of rights *here* provides a counter-weight to the idea that nationality has been ‘recast’.

As well as failed asylum seekers, issues arise for refugees and *de facto* stateless persons who have been given permission to reside in a country. *De facto* stateless persons are those who have a citizenship and a nationality but are no longer afforded the protection that they confer. In essence, they are refugees. Importantly, they are unable to return to the state of nationality, either permanently or indefinitely. This could be, for instance, someone who is a political dissident in their home country, or an LGBTQ person in a country which criminalises people who identify in these ways. Although members of these states, they are no longer in practice citizens or nationals. This leaves them without the protections that citizenship and nationality confer. Essentially, they are refugees. Their relation with their state has been ‘perverted’ so that rather than offering protection, state authorities persecute the individual. In this sense, it is a matter of fact, rather than law, that they are unprotected.³⁷² And it is a matter of fact, rather than law, that they are without a state, which would confer protection.

³⁶⁹ P. Hansen, ‘More Barbwire or More Immigration, or Both? EU Migration Policy in the Nexus of Border Security Management and Neoliberal Growth, 11 *Whitehead J. Dipl. & Int’l Rel.* 89, 2010, p. 98. Hansen demonstrates this by quoting the Swedish Minister for Migration, who said in 2008: “In this context, we must recognize that the old paradigm of migration for permanent settlement is increasingly giving way to temporary and circular migration.”

³⁷⁰ The State will – generally – initially begin deportation proceedings. It is only if any issues of non-refoulement arise that human rights will create an obstacle to the state carrying out the deportation.

³⁷¹ *Supra* note 363, p. 246

³⁷² *Supra* note 229, p. 22

Their issues in claiming rights generally revolve around finding suitable work and integrating within the community properly. Although conventions such as the 1954 Stateless Person Convention have meant that, historically, these people were to be accorded “the same treatment as is accorded to aliens generally”³⁷³, the current view is that *de facto* stateless persons are protected by human rights law. Being universal, this should mean having the same rights as any other individual, be they a citizen or a non-citizen. It is their humanity, rather than their legal status that confers rights, and the rights they are conferred are the same as are conferred to any other person, regardless of legal status. In this sense, international human rights law has ‘denationalised protection’.³⁷⁴ It is however, politically a different issue, with refugees seeking work considered ‘low-skilled’³⁷⁵ or presumed as unable to integrate within the western culture, with there being particular focus on sexual assaults at this time.³⁷⁶ This has led to distrust and, at worse, reprisal attacks – such as the ones in Stockholm³⁷⁷ in January, where masked men targeted migrants, distributing leaflets saying “It’s enough now!” These attacks followed a rise in tensions where an employee at an asylum seeker centre was stabbed to death by a 15-year-old asylum seeker. This shows that despite being afforded protection from human rights abuses in international instruments, as well as through national laws, it is difficult to provide a fuller human rights protection without implementing integration strategies and policies.

This ties in with the sense that in the face of a “swarm of people”³⁷⁸, states are reasserting their ‘embattled sovereignty’ through nationality laws.³⁷⁹ Increased immigration controls have been introduced based on the state’s right to control who enters the territory. For instance, the UK has just increased its court fees for challenging deportation decisions by over 500%, from £80 to £490.³⁸⁰ Although not a direct border control, it reduces the ability to challenge decisions of deportation and thus makes it easier for the UK to assert its sovereignty in this way. Rather than an immigration control, it is the removal of an obstacle to immigration control. Such measures, and such threats from citizens could cause *de facto* stateless people to avoid appearing in public, and therefore not utilising their freedom of expression, for instance.

³⁷³ Article 7, Stateless Convention 1954

³⁷⁴ *Supra* note 266, p. 62, 92 (also *Yean Bosico* case)

³⁷⁵ Miguel Peromingo, ‘Work and Refugee Integration in Sweden’, *Forced Migration Review Online*, available at: <http://www.fmreview.org/faith/peromingo.html>

³⁷⁶ *Voice of America*, ‘Refugees in Sweden Seek to Rebuild Trust After Sexual Assaults’, 21 March 2016, available at: <http://www.voanews.com/content/refugees-sweden-rebuild-trust-sexual-assaults/3248025.html>

³⁷⁷ *BBC*, ‘Sweden masked gang ‘targeted migrants’ in Stockholm’, 30 January 2016, available at: <http://www.bbc.com/news/world-europe-35451080>

³⁷⁸ David Cameron, as quoted in *The Guardian*, ‘Calais crisis: Cameron condemned for ‘dehumanising’ description of migrants’, 30 July 2015, available at: <http://www.theguardian.com/uk-news/2015/jul/30/david-cameron-migrant-swarm-language-condemned>

³⁷⁹ Duvergne, as quoted by A. Kesby, *supra* note 266, p. 47

³⁸⁰ <http://www.theguardian.com/uk-news/2016/apr/21/asylum-and-immigration-court-fees-set-to-rise-by-over-500>

This is a curious attack – comprising stricter immigration controls and greater difficulty for migrants to obtain permanent residency – on the very people that Europe will require to ensure future prosperity. As stated, a denial of permanent residency is in keeping with a denial of rights. As such, the EU needs migrants but does not wish to offer them anything in return; it wants labour disassociated from the person. This decoupling of migration and social incorporation may risk worsening the exclusion migrants are increasingly facing within Europe and deepening the migration crisis.³⁸¹

The idea that a more open Europe, with rights of residents ensured by regional courts above the individual nation-states, being an example of postnationalism contrasts with the EU's treatment of non-EU migrants. As well as restricting the ease that migrants can obtain residence permits, the EU had been on a trend of reducing the number of asylum applications; in 2006 it recorded the lowest number of applications in the previous twenty years.³⁸² The trend has obviously been bucked by the recent refugee crisis, but this has in turn triggered a rise in nationalist sentiment, proposals to shoot people smugglers' boats, and the controversial EU-Turkey migrant deal, in which (as of 18 May 2016) only 177 refugees had been resettled in the EU.³⁸³ The political goal is still to reduce the number of incomers to the EU.

The idea that a postnational Europe could confer voting rights on non-EU migrants seems to be very far away, with a focus on keeping migrants out rather than integrating them. The postnational thesis suggests that asylum policy should be weakened, rather than strengthened, in a more open, rights-focused Europe, in which the nation-state fades away. Of course, this has not happened,³⁸⁴ and this dents the viability of the concept. The ills and injustices that have emanated from the idea of nation and its sovereignty are many, "but it is a serious mistake to...assume human rights and cosmopolitan values will automatically fare better once national sovereignty recedes" and decisions are made at a supranational level.³⁸⁵ Hansen goes further, arguing that deference to a regional body like the EU will cause 'hypernationalism' within Europe, favouring a European 'common good' and thus treating those from outside the EU with a common and reinforced disdain, in an arena where national accountability is hidden and democratic accountability is 'far weaker'.³⁸⁶ However, if there is no postnational Europe for non-EU migrants, perhaps there is more hope of this for EU citizens, as a necessary step towards a broader postnationalism – which could also be called cosmopolitanism – involving non-EU migrants as well. In

³⁸¹ *Supra* note 369, p. 99

³⁸² P. Hansen, 'Post-national Europe – without cosmopolitan guarantees'. In *Race & Class* vol. 50(4): 20-37 (2009), p. 26

³⁸³ *The Guardian*, 'Only 177 Syrian refugees resettled in EU under deal with Turkey', 18 May 2016, available at: http://www.theguardian.com/world/2016/may/18/europe-relocates-177-syrian-refugees-turkey-eu-deal?CMP=share_btn_tw

³⁸⁴ *Supra* note 382, p. 27

³⁸⁵ *Id.* p. 32

³⁸⁶ *Id.* p. 33

teleological terms, perhaps EU postnationalism can indicate where the world will end up. The next section will attempt to show why it is problematic to claim this within the EU.

4.4.2 Not so free movement

The above shows that the nation-state can still exert its control over the right to reside of non-EU migrants. However, it could still be argued that postnationalism is emerging within Europe for EU Citizens, due to the EU free movement rules. Recent developments have brought this in question. One symbolic development is the re-emergence of border checks within the Schengen area. Although EU Citizens can still move freely, they still must present their passport at the border, reinforcing the distinctness of territories and the separation of nations. Another development is the retaliation against perceived benefit tourism, where EU citizens move to another member state and access its social assistance benefits. For instance, Germany has made it harder for out of work EU citizens to stay in the country and claim child benefits that they should have a right to under EU law. This is despite the number of child benefit claims being insignificant to the welfare budget.³⁸⁷ This issue was also addressed in an EU directive, and a number of ECJ judgements.

The EU's 2004 Citizen Directive³⁸⁸ sought to unify the many different pieces of legislation concerning citizens. It sets out the terms of free movement for EU citizens, and the conditions that are attached to both temporary and permanent residence. It provides for: a right of entry to other EU states for EU citizens;³⁸⁹ the right for EU citizens to reside within a member state for up to three months without any conditions;³⁹⁰ the right for EU citizens to remain resided in another member state for more than three months, subject to conditions;³⁹¹ and the right for EU citizens to permanently reside within another member state (after residing there continuously for five years), which is not subject to conditions.³⁹² The directive is an attempt to be a "genuine vehicle for the integration into the society of the host Member State"³⁹³ in order to "strengthen the feeling of Union citizenship" which is a "key element of promoting social cohesion".³⁹⁴

The conditions in Article 7 (right to reside for longer than three months) emanate from the idea that EU citizens should not "become an unreasonable

³⁸⁷ P. Hansen, 'Undermining free movement: migration in an age of austerity', *Eurozine*, 6 February 2015

³⁸⁸ Directive 2004/38/EC of 29 April 2009

³⁸⁹ Article 5

³⁹⁰ Article 6

³⁹¹ Article 7

³⁹² Article 16

³⁹³ Recital 18

³⁹⁴ Recital 17

burden on the social assistance system of the host Member State,”³⁹⁵ and should therefore be essentially self-sufficient until they have resided in the country and paid into the social assistance system for long enough. It is noteworthy that it is the social assistance of a host state which is singled out for being at risk of being overburdened by EU citizens. Social assistance is one of the most politically volatile issues within a society, with those who are deemed underserving often demonised as scroungers, who have no right to access such assistance. This anger is particularly peaked when ‘immigrants’ are able to access it. In this sense, the acceptance of a host population of those non-citizens who can access social assistance, is an acceptance into the social community. It indicates the belonging of the non-citizen. This may be a reason why an EU citizen is required to legally reside within a host country for five years before obtaining the right to reside permanently, as they will be considered to ‘belong’ to the host society, and as such can no longer be seen as a burden to social assistance, but a rightful beneficiary of it.

Recent cases from the ECJ have been raised in connection with this Directive and the issue of states refusing either a right of residency or access to social assistance to non-citizens from other EU states. The first is the *Brey*³⁹⁶ case in 2013, which ruled that some EU migrants who were inactive in the labour market may be entitled to social assistance. In this case it was a means-tested benefit, access to which could not automatically mean a lack of self-sufficiency, an assessment must be carried out before any decision is made. The *Dano*³⁹⁷ case added greater specificity to *Brey* by concluding that states can refuse social assistance to those who had entered the country without any intention to work and who continued to have no intention to work.³⁹⁸ In such a case, no assessment is required to be carried out.³⁹⁹ Finally, the court in *Alimanovic*⁴⁰⁰ considered the case of two family members who had worked for 11 months, became involuntarily unemployed and required social assistance. They had a right of residence as a result of their ‘work seeker’ status under article 14(4). This meant that they had access to social assistance until expiry of this status after six months. However, the court followed the letter of the law and deemed it was correct for the German authorities to stop providing social assistance after their work seeker status expired six months after becoming unemployed. Although one claim would not be burdensome to the system, multiple family claims would be. These cases indicate the acceptance of EU citizens who – once obtaining a right of residence – can live in a territory but have

³⁹⁵ Recitals 10, 16

³⁹⁶ *Pensionsversicherungsanstalt v Peter Brey*, ECJ Case C-140/12, 19 September 2013

³⁹⁷ *Elisabeta Dana & Florin Dano v Jobcenter Leipzig*, ECJ (Grand Chamber), 11

November 2014

³⁹⁸ Paras 81-83

³⁹⁹ Para 80

⁴⁰⁰ *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others*, ECJ (Grand Chamber) C-67/14, 15 September 2015

no right to access benefits that would help them subsist.⁴⁰¹ Social assistance would have been provided to citizens of these states in the same situation, showing the distinction between citizenship is still important within the EU.

This challenges the view that the EU is moving towards postnationalism, especially given the recent dates of the judgments, as it still allows states to make distinctions between its own citizens and other EU citizens. Further, it is only as an individual who causes no burden to a state that a person initially gains a right of residence, meaning only those with sufficient funds to resettle, or are employable are able to take advantage of EU rules. It is free movement for some EU citizens, not for all. This is something that goes against the whole ethos of the EU, as well as the idea that the EU is becoming postnational. Distinctions between EU citizens should be lessening rather than increasing.

Given these countervailing trends against postnationalism, showing states retaining control of their territorial borders in respect of both non-EU and EU citizens, Peo Hansen asks “since when have intellectuals been able to rest assured that ‘Europe’ harbours a progressive cosmopolitan⁴⁰² and democratic teleology?”⁴⁰³ By this he means that ‘contempt for the nation-state’ leads some academics to dismiss democratic movements within that community, in order to push for something more on a grander scale.⁴⁰⁴ Further, those advocating for a teleology of postnationalism point to trends that aid their cause whilst dismissing those that do not. It may be that a postnational Europe emerges but it is unclear how this would look democratically. There is no move to increase the democratic accountability of the EU, and there is no sign of voting rights emerging within individual nation-states. Postnational theorists fail to address these issues, advocating for a concept of a larger sense of belonging before all the pieces are in place. These difficulties are the same for the idea that a right to democratic governance, where the whole population of a territory is represented and their will expressed, will soon emerge.

The democratic entitlement, as it works in Europe, and as it can reasonably be assessed to work in the near future, is therefore only applicable to citizens. Further, there is no clear evidence that non-citizens will soon obtain the right to vote. This inability to vote is, as stated above, symbolic of not belonging and being unequal politically in law. It is still the case that it is the granting of citizenship that represents belonging and inclusion.⁴⁰⁵ It is still the case that citizenship grants a right to vote, and therefore a right to take part in free and fair elections. Given the large number of non-citizens

⁴⁰¹ These cases are more complex than this summary but it is the effect of them that I wished to make clear: that states do not have an automatic obligation to accept anyone within the EU and that states will refuse access to those who are not their citizens.

⁴⁰² Cosmopolitanism is a concept similar to postnationalism, in which individuals feel more related and attached to a variety of different centres comprising a single community with universal ideals.

⁴⁰³ *Supra* note 382, p. 35

⁴⁰⁴ *Supra* note 382, p. 35

⁴⁰⁵ *Supra* note 243, p. 11

that reside in different states, and the large number that are being forced to flee their home, is the democratic entitlement fit for a world where populations are not static? In short, in reinforcing the institutionalisation of static sovereignty, does it match the democratic ideals that Franck hails, namely the free expression of the will of the people, government's representing the whole of the population on a territory and individual self-determination? The answer must be no. Will the democratic entitlement reach these goals in the near future? There is no clear indication of this. With citizenship still thought of as a privilege to those who belong, migrants lack the ability to express their will and enact individual self-determination. As migration increases, this will be the reality for an increasing number of people. An increasing number of people will be without direct democratic participation and will only be able to rely on their freedom of expression to influence their political sphere. A reduction in democracy leaves open to potential for human rights abuses. This is something that Franck's formulation cannot address, formed as it is on citizen, rather than human rights. It is therefore deficient, needing another piece in order for it to be useful for the migrant, and therefore for it to become a human right. That piece is a human right to vote (or human right to citizenship with voting rights attached). Without it, the democratic entitlement is alienable from the persona and particular to that person's location. Without it, it will become increasingly problematic as an ideal to strive for in an age where an increasing number of individuals can be considered migrants. Without it, the will of the people in a democratic society is in reality the will of *some* people.

The final chapter will sum up these thoughts but first I will assess the answers to the research questions posed.

5 The utility of the democratic entitlement in a mobile world

This thesis set out to investigate whether the emerging right to democratic governance as conceptualised by Franck is of any use to migrants within Europe. In order to determine this, it asked the following questions:

1. What are the principles of democracy that can be drawn from the three generations of rights that Franck invokes as forming his right to democratic governance?
2. Is there a human right to vote?
3. If not, is there a human right to obtain or change citizenship that includes voting rights?
4. Can Franck's democratic governance be considered a human right?

The principles of democracy found in the three generations of rights were uncovered in Chapter 3. Section 3.1 demonstrated that self-determination requires that it is for the people within a territory to shape their own collective political destiny, determined freely through free, fair and open participation in the democratic process. It is a process that belongs to the whole population of the state. Section 3.2 demonstrated that the ability to express oneself freely is integral to ensuring that the democratic process remains free and fair. Section 3.3 demonstrated that free and fair elections must be periodic, incorporate a multi-party system, be free of discrimination, have secret ballots and ensure universal suffrage. In sum, democratic governance requires that the whole population within the territory of a state has the opportunity to vote, subject to reasonable limitations such as age and mental capacity. It requires the consent of those who are governed, as sovereignty has shifted to the people,⁴⁰⁶ and it is the 'will of the people' that is the basis for the 'authority of government.'⁴⁰⁷ Without this, and with a significant amount of the population denied suffrage, a government cannot be said to be democratic.

If it could not be said to be universal, it could not be a human right in its current form. Whether it was a human right or not was investigated in section 3.5 and chapter 4, through the right to vote and the right to obtain or change citizenship, both of which were found not to be human rights. As such, a crucial component of the right to democratic governance – the right to vote – is missing. In its current conception, the entitlement cannot be said to be a human right through the lens of universality. This is because it is only available when an individual is in a specific location and it leaves the individual when she leaves that location. Section 4.4 put forward reasons against wishfully believing that the democratic entitlement would necessarily emerge in the near future as something that would confer voting

⁴⁰⁶ *Supra* note 26, p. 336

⁴⁰⁷ UDHR Article 21

rights on non-citizens, and therefore become a human right. To be considered as a fully functioning human right, it must therefore be reconceived to also include the human right to vote or a human right to obtain or change citizenship. The section showed that passively hoping for the emergence of such a reconceptualization based on current trends may not be the most effective way of ensuring that it becomes a human right. Without this, the emerging right to democratic governance, as well as the form of democratic governance within Europe, is of no help and of no use to the migrant. Without the ability to vote and there participate in democratic governance, migrants will continue to be under threat of being ruled by decree. With citizenship still seen as a privilege to those who belong, migrants will continue to live in a place where their opinions are not significant and their actions are not effective. They will have no individual self-determination and belong to no political community that is of any use to them. It is in such conditions that human rights abuses can arise, as a significant proportion of those who are governed are not required to consent to being governed. This is why something more is needed.

5.1 Concluding remarks

At the start of his article, *Human Rights and the Age of Inequality*,⁴⁰⁸ Moyn asks the reader to imagine a world where one man owns everything, in order to demonstrate that human rights can be protected in conditions of inequality. I will copy this method and ask the reader to imagine a world in which no one moved country. A world where citizens of every nation-state have no desire to live in new surroundings, no desire to explore different cultures, meet different people or experience different climates. It is a world where no wars cause people to be displaced, where no political agendas cause people to flee persecution. Everyone is happy where they are. Everyone belongs where they are and it is the only place that they will ever be. This is the world that Franck's emerging right to democratic governance envisages. It is also a world that has never existed.

The reality is quite different. The movement of people is a fact of human existence, happening seemingly from the dawn of humanity. In modern times, large-scale movements of people have happened, usually during and after war. This is still the case today. On top of this, advances in modern technology, and a change in the modern mind-set has coupled the large-scale movement of people fleeing war and persecution with a large number of 'individuals' choosing to move independently of any great catalytic force. The EU, under rules of free movement, has facilitated this movement within Europe. Within the UK, it is estimated that there are currently about 2.15

⁴⁰⁸ S. Moyn, 'Human Rights and the Age of Inequality' In *Can Human Rights Bring Social Justice?: Twelve Essays*, edited by Doutje Lettinga and Lars van Troost. Amsterdam: Amnesty International Netherlands, 2015.

million EU migrants.⁴⁰⁹ Globalisation is leading to individuals feeling as if they belong in more than one place, the internet brings people closer together, dispelling ideas of difference, whilst economic consensus has led to the rise of individualism, at the expense of collectivism, presenting a challenge to the traditional political community of the nation. Franck's teleology has meant that the democratic entitlement, as conceived by him, is unable to address these new trends. It has based itself in history to predict the future, passively accepting already developed norms in the assumption that the world existed in stasis. This passivity inhibited the emerging right to question the assumption the right is based on, namely the assumption of static populations and static sovereignty.

As the world becomes smaller, it seems like we are moving towards a time of greater mobility, in which fluidity and detachment are the signifiers of the age.⁴¹⁰ There is increased virtuality, increased movement, and a reduction of collective institutions in an age of neoliberalism. It is unlikely that, at least, increased virtuality and increased movement will stop. Travel is cheap, companies are transnational, meaning they require a transnational workforce, and communities are being formed outside the bonds of the nation, especially online. Increased movement is something that European states will also have to encourage if they wish to grow economically. It is estimated that by 2050, Europe will require 50 million migrants to continue growth,⁴¹¹ with the age of the population of work age estimated to decrease by about 52 million people within the same timeframe. In the short term, by 2020, net migration of 25 million would be needed to keep the working-age population at current levels.⁴¹² The internet, travel, technology, and market forces will dictate increased movement as well as increased detachment to just one community. This is what the current trends point to, at least. It is possible that this will not happen, that states will shut out immigrants, that the neoliberal logic is supplanted by another, more sedentary logic, that the internet breaks. That, at the moment, seems unlikely. Further, Peo Hansen has pointed out that since the 1980s, the 'fortification' of Europe, in which the EU tried to implement zero labour immigration, resulted in an equal and steady growth of illegal or irregular immigration,⁴¹³ showing that the closing of borders does not decrease migration, it only increases illegal migration. This is, of course, only true of countries that offer the opportunity for money to be made by the migrant. In short, populations will remain mobile, and sovereignty as the will of a static population will need to address this in order to remain functional within democracies containing significant numbers of non-citizens. To remain legitimate, they must ensure that all those who are governed are able to consent to such governance.

⁴⁰⁹ *The Guardian*, 'Number of EU migrants working in UK rises to record level', 18 May 2016, available at: <http://www.theguardian.com/world/2016/may/18/number-of-eu-migrants-working-in-uk-rises-to-record-level>

⁴¹⁰ R. Lee, 'On the margins of belonging: Confronting cosmopolitanism in the late modern age', *Journal of Sociology* vol 46(2): 169-186 (2010), p. 175

⁴¹¹ P. Mason, *Postcapitalism: a guide to our future*, Allen Lane (2015) p. 28

⁴¹² *Supra* note 18, p. 2

⁴¹³ *Supra* note 369, pp. 89, 93

Whether or not these trends will continue, the case now is that there are roughly 60 million displaced persons in the world, large numbers of EU citizens within other member state countries, large numbers of illegal immigrants and large numbers of legal immigrants. The UN estimated that in 2015 there were 244 million migrants in the world (up from 173 million in 2000), with 76 million in Europe.⁴¹⁴ If estimates are correct, and states act to continue growth, that would mean there would be 126 million migrants within Europe in 2050. This is an eye-wateringly large number, larger than the individual populations of member-states within the EU. Such a large number of people would have no right to citizenship. They would have no right to vote. Yet, they would (presumably) be living in democratic societies, which hold free and fair elections periodically, with free expression, and representatives who are formed from the free will of the electorate, an electorate that does not have to be comprised of the large number of migrants. How many non-citizens within a nation-state who have no vote would be enough to deprive a democratic government of its legitimacy? This is the only question that can be asked on Franck's formulation of the democratic entitlement. It is only when a tipping point arises and a large number of people are deprived and are seen to be deprived of their direct political rights, which manifests in negative outcomes for those who are deprived, that the international community may take note, and question the legitimacy of the government. Is this good enough for a human right?

A human right cannot be contingent on a threshold number of people being deprived of it before their claims are legitimised. A human right, and in this case the right to democratic governance, must be claimable from the moment one person is unable to participate in the formation process of democratic governance. It cannot be contingent on the person's location and cannot be taken away when that person changes location. This may be unpalatable to nation-states, and is probably unworkable politically. But it is the point at which an assessment of a democratic entitlement must start from; the fact that one person is involved in being ruled but not the ruling should lead to questions, if such a democratic entitlement is considered a human right. Without questioning the democratic entitlement at this level, the door remains shut to non-citizens participating in political decisions affecting them. Without questioning, it remains a citizen right, and remains acceptable as a citizen right.

Framed as a human right based on universality, it only remains useful if individuals do not cross borders. If it was not formed as a human right, it may not suffer from this fact, it could be reframed as a requirement for membership to the international community, for instance. However, it is framed as a human right and its efficacy as a human right is the basis of this thesis. As a human right it is lacking. It lacks a human right to vote.

⁴¹⁴ UN Department of Economic and Social Affairs, 'International Migration Report 2015', ST/ESA/SER.A/375, available at: http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015_Highlights.pdf

With a large section of a nation-state not having a say in its collective political destiny, a government cannot be said to represent the whole people belonging to a territory, as they are denied participation in the democratic process. In this sense, migrants are not experiencing individual self-determination. And here questions are raised about the meaning of 'belonging to a territory' and 'people'. However, internal self-determination, which is what the right to democratic governance appears to take its lead from 'belongs to the whole population of the state'. Non-citizens can be considered a population apparent within a state, on a simple definition of population. If they cannot partake in the democratic process they are not fulfilling their right to self-determination. Instead, they are subjected by the electorate. This is why Walzer has suggested that everyone residing, and even present, within a state should have democratic rights, which will release them from subjugation. Owen Fiss has argued that large numbers of non-citizens without voting rights damages the legitimacy of democratic societies, as denying non-citizens the vote, reduces claims of being a society of equals. Miller believes that all individuals who build their lives in a country should be granted citizenship and Iris Young believes that 'a democratic decision is legitimate only if all those affected by it are included in the process of discussion and decision-making'.⁴¹⁵

These theorists have come to this conclusion as they see no legitimacy in democratic governance that contains a large 'occluded inside'.⁴¹⁶ Within Franck's formulation, when non-citizens are left without voting rights, the legitimacy of a democratic government is not lost. However, when considering the principles of democracy that Franck's three generations of rights reveal, when non-citizens are unable to vote, democracy is not fulfilled. It can be said at this point the legitimacy of the government is lost. There is a gap between Franck's formulation and Franck's purpose (if his purpose is to ensure democratic societies based on the free will of the people, where sovereignty resides in the people and individual self-determination is assured). This is something that must be remedied within law, rather than through a reliance on states to naturalise individuals, for democratic governance to be considered a human right and be useful in a time of migration. What is needed are new understandings of belonging and attachment to meet the challenges of a mobile world. Democratic states must be willing to let those who are affected by their decisions have a say in those decisions. Without this, the emerging right will stagnate as a citizen right, only realisable through the overthrow of a dictator, or through external pressure or intervention. It will resemble Lyotard's rights of others as interpreted by Rancière,⁴¹⁷ where states justify interference within the domestic sphere of other states through declarations that they are bringing human rights and democracy to these states. It is a right that does not locate

⁴¹⁵ M. J. Gibney, 'Rights of non-citizens to membership', pp. 61-62

⁴¹⁶ W. Brown, 'We're all democrats now', *Kettering Review*, vol. 29 no. 1, 2011, p. 49

⁴¹⁷ What Rancière as the "right to humanitarian interference" in J. Rancière, 'Who is the subject of the rights of man?', *The South Atlantic Quarterly*, Volume 103, Number 2/3, Spring/Summer (2004), pp. 297-310

in the individual, rather one that locates in the international community as a right of interference.

The right has emerged passively, which is why it is only a citizen right. It is a teleological result of what has gone on before, and what will happen, without any need for further input, without questioning the terms of democratic governance. If the right has fully emerged in Europe, it means two things. The first is that it is a right that excludes non-citizens from democracy. The second is that the expression of the will of the people, as the whole population within a territory, through elections in which only citizens can participate, becomes less clear with each new migrant that arrives. Without the will of the people being expressed, a government loses legitimacy as it is no longer considered democratic. The words of the participant in the HRC seminar, quoted earlier, should be remembered:

“[D]emocracy without human rights and the rule of law was oppression, human rights without democracy and rule of law was anarchy, and rule of law without democracy and human rights was tyranny.”⁴¹⁸

Democracy is a crucial ingredient in ensuring human rights, and it is for this reason that democracy is promoted by the international community and scholars alike. If non-citizens cannot participate in it, they remain vulnerable to oppression and human rights abuses. This is why it is important that the emerging right to democratic governance includes the right of non-citizens to participate in the democratic governance that affects them. If sovereignty has shifted to the people, it must be mobilised. Without this, it is a citizen right. As a citizen right, in countries without democracy, it can turn into a right of intervention for the international community. In democratic countries, it is a right for those who already have the right. For migrants, it is useless.

⁴¹⁸ *Supra* note 23, p. 6

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