The Right of Aliens to Vote and to Carry Out Political Activities: A Critical Analysis of the Relevant International Obligations Incumbent on the State of Origin and on the Host State

*Andrea de Guttry**

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Abstract

Migration is a world-wide phenomenon which has always existed. Nonetheless, it is undeniable that in recent times the number of persons leaving their home country has increased significantly. This is due to various factors such as war, poverty, climate change, natural disasters, terrorism, serious and

* The author is Full Professor of Public International Law at the Scuola Superiore Sant'Anna, Pisa, Italy.

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systematic violations of human rights by governments. So far the legal status of foreigners (i.e. non-citizens) temporarily (or permanently) settled in a State other than their home country has received only limited attention.

The aim of the present paper is to investigate the regulation of foreigners' political activities and their right to vote and be elected, both in the home country and the hosting country, as they derive from international law and more specifically from human rights law. After a short introduction to present the different issues at stake and a few terminological definitions, the first part of this article will analyse which the obligations of the home State towards its diaspora are and, first of all, if the diaspora enjoys a right to vote and to be elected in their home country while abroad. The question will be examined from both a human rights and an international law perspective, always maintaining a necessary distinction between the rights of migrants, those of refugees and those of all the remaining citizens living abroad. The second part of this study will be devoted to analysing which the specific obligations regarding elections of the States hosting foreigners are: to what extent do these States have an obligation to allow the organisation of out of country elections in their territory or the political activities carried out by foreigners in connection with elections held in the home country of the foreigner or in national or local elections organised inside the hosting State? The last paragraph will be devoted to offering some concluding remarks that summarise the main findings of the analysis carried out in the present work.

I. Introduction

Individuals and groups have always moved across national boundaries. In recent times, however, this phenomenon has undergone significant changes both from a qualitative and a quantitative point of view. The number of persons who, voluntarily or forcibly, have left their homeland has significantly increased: according to recent estimates, in 2015 there were about 244 million migrants globally.[1] This means that there were three times more migrants in 2015 than in 1970.[2] According to the United Nations (UN), the number of persons affected by this phenomenon reached

> "244 million in 2015 for the world as a whole, a 41 per cent increase compared to 2000. This figure includes almost 20 million refugees".[3]

[1] MigFacts: International Migration, <https://gmdac.iom.int>.
[2] MigFacts (note 1).
[3] 244 million international migrants living abroad worldwide, new UN statistics reveal, <http://www.un.org>. Europe experienced a significant increase of migrants in recent years: a

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The reasons and motivation behind these movements have changed: beside the traditional causes which originated them, such as poor economy, war, famine, brutal violations of human rights, persecution based on ethnicity etc., new causes have surfaced such as climate change, natural disasters, terrorism and the phenomenon of States unable or even unwilling to protect the local population.[4]

In recent decades, public opinion has changed the attitude of many States hosting significant numbers of persons who have abandoned their home country for whatever reasons: in the sixties and in the seventies there was predominantly a solidarity approach towards the newcomers, partly on the assumption that their permanence would be limited in time.[5] In more recent times public opinion has changed again, in some instances dramatically, and in many States anti-immigration movements have flourished. They now play a significant political role and have influence at national level.[6] Very often, inaccurate reporting and information have added confusion and encouraged the development of anti-foreigner, and sometimes even racist, attitudes. This has favoured the expansion of political movements opposing immigration.

It is obvious that in coming years it will not be possible to stop migration notwithstanding all barriers and walls which have been and will be built, and the real challenge will be how to regulate these movements and how to find new and innovative ideas and models to better integrate the newcomers in the national community of the host State.

In the broader framework, the right to vote and the other political rights of foreigners attracted waves of interest of varying kinds.[7] At the beginning

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total of 4.7 million people immigrated to one of the EU-28 Member States during 2015. Among these 4.7 million immigrants during 2015, about 2.4 million persons were of non-member countries and 1.4 million were citizens of a different EU Member State. 35.1 million people from outside the EU-28 were living in an EU Member State on 1.1.2016. See more in EUROSTAT, Migration and Migrant Population Statistics, March 2017, <http://ec.europa.eu>.

[4] See more in *B. Ghosh*, Huddled Masses and Uncertain Shores: Insights Into Irregular Migration, 1998, 34 et seq.

[5] *S. Łodziński/D. Pudzianowska/M. Szaranowicz-Kust*, Voting Rights for Foreigners – For or Against? The Analysis of the Process of Granting Voting Rights to Third-Country Nationals – Selected Examples from Across the EU, 2014, 9.

[6] See for example, *W. Sommerville*, Assessing the Political Impact of Immigration as the United Kingdom Heads to the Polls, 2015 <https://www.migrationpolicy.org>.

[7] See for example the Communication from the Commission to the European Parliament and the Council "On A More Effective Return Policy In The European Union. A Renewed Action Plan", issued on 2.3.2017, COM (2017), 200 final. See as well *J. P. Cassarino*, Theorising Return Migration: The Conceptual Approach to Return Migrants Revisited, International Journal on Multicultural Societies 6 (2004), 253 et seq. and *S. Łodziński/D. Pudzianowska/M. Szaranowicz-Kust* (note 5), 10. See as well *A. C. Evans*, The Political Status of Aliens in International Law, Municipal Law and European Community Law, ICLQ 30 (1981), 20 et seq.;

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of the 1950s, when human rights started to become a topic for discussion, there was a clear trend to restrict these rights exclusively to citizens, and the notion of national sovereignty was still largely predominant in international relations and strongly defended by States. A clear example is provided by Art. 16 of the European Convention on Human Rights (ECHR), which allows States to impose restrictions on the political activity of aliens. 30 years later, around the 1980s, the mood had already changed and many commentators and politicians considered that the distinctions between citizens and foreigners had become anachronistic and obsolete and were, if they existed at all, restricted to the right to vote. More recently, in the face of the massive waves of immigration, the attitude has changed again, and many governments, under pressure from the public, are again leaning towards a more stringent interpretation of the political rights of aliens. The practice of allowing aliens to vote raises the question of whether including non-citizens in the "polity", meaning any form or process of civil government or constitution, undermines, or reinforces, democratic legitimacy.[8] The question of who has a formal voice in the polity is left partially to the political process, and this provides a necessary definitional flexibility in the democratic context, especially in times of heightened migration and transnational integration. Nonetheless, as stressed by *Rodríguez*, it is important to underscore that the decision not to extend alien suffrage does not mean that a society does not consider non-citizens to be part of the polity; at the same time the decision to grant non-citizens the opportunity to vote and be elected is not necessarily incompatible with an exclusive conception of the polity.[9]

On the basis of these premises, the present study aims to investigate if and to which extent, persons who have fled their home country or left it voluntarily enjoy political rights under existing international law rules, including the right to vote and to be elected in their country of origin. In fact, the exercise of this right might help to facilitate the return home, offering to the aliens the possibility of maintaining close relations with their own country. The focus of this investigation will be mainly on the existing international law rules and especially those aimed at protecting human rights. The present article does not intend to linger on the perennial academic debate on the (not yet consolidated) right to democracy, or to democratic governance, in in-

J. A. Frowein/T. Stein (eds.), Die Rechtsstellung von Ausländern nach staatlichem Recht und Völkerrecht, 2011.

[8] See *C. M. Rodríguez*, Noncitizen Voting and the Extraconstitutional Construction of the Polity, I.CON 8 (2010), 31 et seq.

[9] *C. M. Rodríguez* (note 8), 31.

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ternational law,[10] which is based on the claim that the legitimacy of governments is not just a matter of national arrangements, but of international law.[11] Nonetheless, it is worth recalling here that genuine and free elections, without promoting any specific form of government or a particular model or system for democracy, are essential to guarantee the right to participate in politics (which does not entail the existence of a right to democracy as such)[12] and all the fundamental human rights deriving from it, or in any case heavily influenced by it.

Thus, reference will be made, from time to time, to national legislation and rules, which, although not at the core of this study, will be useful and relevant in order to better understand and identify the content of international rules and to single out current trends in the attitude of the members of the international community. Second, this investigation aims at clarifying the specific obligations incumbent on the State hosting the foreigners, which are related to the exercise of their voting rights (and the other rights that cannot be separated from them), in their home country elections and even for the elections organised in the country where they have decided to settle. Although international rules do not differentiate among the typology of elections (e.g., local, national, presidential, referendum etc.), in a few countries there is a trend to vary the extent of electoral rights depending on the subject of the election and what emerges is that in the case of foreigners' right to vote in local elections the attitude of many States seems much more liberal. Therefore, it needs to be ascertained whether these different approaches to national or local elections are in conformity with international obligations incumbent on States. The specific and sensitive nature of the rights involved (to vote, to run for election/to stand as a candidate, to participate in electoral

[10] *Thomas Franck* initiated this discussion in his seminal work on the right to democratic governance. *T. M. Franck*, The Emerging Right to Democratic Governance, AJIL 86 (1992), 46 et seq. See *S. Marks*, What Has Become of the Emerging Right to Democratic Governance?, EJIL 22 (2011), 507 et seq.; *J. d'Aspremont*, The Rise and Fall of Democratic Government in International Law: A Reply to Susan Marks, EJIL 22 (2011), 549 et seq. Amongst the most relevant developments pointing to the existence of a strong connection between democracy and government's legitimacy it is worth mentioning that under the Lisbon Treaty, a State cannot become a member of the EU if it does not prove that it has a democratic regime. See Art. 49, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13.12.2007, 2007 O.J.(C 306).

[11] This claim, and the existence of a right to democracy, are opposed by several scholars, according to whom recognising the right to democracy is undesirable because such recognition would justify democratic States' intervention in non-democratic States, *M. J. Lister*, There Is No Human Right to Democracy: But May We Promote It Anyway?, Stanford J. Int'l L. 48 (2012), 257.

[12] *T. Wood*, Reinforcing Participatory Governance Through International Human Rights Obligations of Political Parties, Harvard Human Rights Journal 28 (2015), 152.

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campaigns etc.) in which legal and political considerations are very often closely linked together, require a very careful approach. This is especially true owing to the risk (real or merely perceived) that these political activities carried out by foreigners might represent an interference with the national sovereignty of other States.

II. Terminological Clarifications

In this paper, reference will be made to notions such as citizens, dual citizens, migrants, foreigners, aliens, refugees, asylum seekers, elections etc., which deserve some clarification and clear definitions, considering their pivotal role in the investigation. To start with, it should be restated that the question of attribution of citizenship is one of those which remain almost entirely in the discretionary power of the States, as it has been considered to be part of their sovereignty to choose whatever criteria they prefer. This has been confirmed by the jurisprudence of the International Court of Justice (ICJ) in the well-known 1955 *Nottebohm* case. In a famous passage of the judgement the ICJ stated that

> "[…] international law leaves it to each State to lay down the rules governing the grant of its own nationality. The reason for this is that the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations."[13]

The Human Rights Committee (HRC) expressed its agreement with this line of reasoning of the ICJ stating, in the 2008 case *Sipin* that

> "neither the Covenant nor international law in general spell out specific criteria for the granting of citizenship by naturalization".[14]

[13] *Nottebohm* case (second phase), I.C.J. Reports 1955, 23.

[14] *Gennadi Sipin v. Estonia*, CCPR/C/93/D/1423/2005, UN Human Rights Committee, 9.7.2008, para. 7.4. For the legal situation in Europe related to the attribution and withdrawal of citizenship see more in *M. P. Vink/G. R. de Groot*, Citizenship Attribution in Western Europe: International Framework and Domestic Trends, Journal of Ethnic and Migration Studies 36 (2010), 713 et. seq. The ECJ stated, in the well-known *Micheletti* case, ECJ, Case C-369/90 ECR 1992, I-04239, that Members States are free to choose their own rules for attribution of citizenship but they always have to respect the core values enshrined in the EU treaties: see more in *M. van den Brink*, The Origins and the Potential Federalising Effects of the Substance of Rights Test, in: D. Kochenov (ed.), EU Citizenship and Federalism, The Role of Rights, 2017, 85.

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In previous cases, i.e. *Borzov*[15] and *Tsarjov*,[16] the HRC had already clarified that considerations related to national security

> "may serve a legitimate aim in the exercise of a State party's sovereignty in the granting of its citizenship".

However, the ICJ added an important statement in the 1955 decision which must be taken into careful consideration:

> "On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States."[17]

This means that third States are not required to automatically recognise foreign citizenship, whenever this has been granted without a significant connection with the State of citizenship. In cases of persons having double or multiple citizenships, any State having granted its citizenship to such a person is perfectly entitled to consider him/her as his own citizen and not to consider as relevant any additional citizenship. More specifically, a potential action in diplomatic protection of a State towards one of its citizen who has several citizenships can be legally rejected by the other State if the person is also a citizen of that State.

Foreigners/aliens: Seen from the perspective of the hosting State, foreigners are persons present in a country who are not citizens of that country.[18] Normally, the terms foreigners and aliens are used as synonyms, and this usage will be maintained in the present article.[19] There are various typologies of foreigners, depending on the length of their stay: short term (mainly tourists, business persons or specialised workers), medium term (students or workers relocated in a given country for a longer period) or long term (retired persons or persons who have decided to choose that country as their final destination). Short-term foreigners usually keep their residency in their

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[15] *Vjatseslav Borzov v. Estonia*, CCPR/C/81/D/1136/2002, UN Human Rights Committee, 25.8.2004, para. 7.3.

[16] *Tsarjov v. Estonia*, CCPR/C/91/D/1223/2003, UN Human Rights Committee, 26.10.2007, para. 7.3.

[17] *Nottebohm* case (note 13), 23. See also *S. Forlati/A. Annoni* (eds.), The Changing Role of Nationality in International Law, 2013.

[18] According to Art. 1 of the UNGA Resolution 40/144 (1985) "Declaration on the human rights of individuals who are not nationals of the country in which they live" alien is "any individual who is not a national of the State in which he or she is present".

[19] Only in the title of this contribution the term "aliens" will be used to include both the foreigners and the diaspora.

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State of origin while medium and long-term foreigners may decide to move their residency and the centre of their interest to the new country. For the purpose of our investigation it will be assumed that all foreigners enjoy, obviously, all human rights (just as they belong to any individual),[20] while the length of their stay in a foreign country may have an impact on their political rights. In fact, a few rights (to vote and to be elected), are often granted only to those foreigners who have spent a longer period in the country and have chosen to be official residents in that country, thus creating some kind of effective relation and link with the hosting State.

Diaspora or *expatriates*: This term refers to the spreading of people from one original country to other countries irrespective of their motivation.[21] Therefore the terms diaspora or expatriate/s will be used when reference is made to the State they left.

Migrants: are a specific category of foreigners/diaspora: according to the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), the word migrant refers to a person

> "who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national".

Irregular Migrants: Although there is no clear and generally accepted definition of irregular migrants, according to the International Organization for Migration (IOM), from the perspective of destination countries this term refers to the

> "entry, stay or work in a country without the necessary authorisation or documents required under immigration regulations".[22]

From the perspective of the country of origin, IOM refers to persons crossing an international boundary without a valid passport or travel document or not fulfilling the administrative requirements for leaving the country.[23]

Refugees: are persons who have crossed an international border and are outside their State of origin and have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, and are unable or, owing to such fear, are unwilling to avail themselves of the protection of that country. In this article,

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[20] *B. Conforti*/*C. Focarelli*, The Law and Practice of the United Nations, 5th ed. 2016, 141 et seq.

[21] See more in *A. Chander*, Diaspora Bonds, N.Y.U. L. Rev. 76 (2001), 1005 et seq.

[22] IOM, Key Migration Terms, <https://www.iom.int>.

[23] IOM (note 22).

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when addressing the specific issue of refugees, we will make reference to those persons whose refugee status has been recognised, or is under consideration, by the competent national authorities of the State where they are resident, according to the 1951 Convention on the Status of Refugees (CSR) and the subsequent 1967 Protocol relating to the Status of Refugees. In this article this will be the definition used; however, it needs to be remembered that this is not the only definition of refugee. As an example, according to Art.1, para. 2 of the 1961 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa,

> "The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

According to the CSR, this special category of foreigners enjoys, social, economic and civil rights in their states of asylum although a few restrictions are permissible.

Home State: is the State of which the individuals are citizens and which they have left (voluntarily or forcibly) for whatever reason.

Foreign State or "*host State*": the State where the foreigners have decided to settle, for a limited or a longer period.

Elections: In this article reference will be made mostly to national elections, including, where applicable, those at local or at presidential level. Referendum and eElections for international institutions, such as the European Parliament (EP), will also be considered, the former whenever they are for the purpose of changing legislation or the Constitution. While the right to vote codified in Art. 25 the International Covenant on Civil and Political rights (ICCPR) (and in other regional instrument in America and in Africa) has been interpreted as referring to any elections (including local, regional and national),[24] Art. 3 of Protocol 1 to the ECHR limits this right to the elections to choose the legislature (and therefore mainly to national elections). The European Court of Human Rights (ECtHR) has clarified that this right does apply to Presidential elections (wherever the Head of State has the power to initiate or adopt legislation or has the power to censure the

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24 In the Human Rights Committee, General Comment No. 25, CCPR/C/21/Rev.1/Add.7, at para. 5 it is emphatically stated that the right to vote "covers all aspects of public administration, and the formulation and implementation of policy at *international, national, regional and local levels*". Emphasis added.

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legislative power)[25] and even to the elections for the European Parliament,[26] but not to local elections, be they municipal or regional, unless they concern regional legislative assemblies,[27] nor to referendums.[28]

Notably, the restrictions emerging from Art. 3 of Protocol 1 are almost unique in the panorama of relevant international conventions.[29]

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[25] *Boškoski v. the former Yugoslav Republic of Macedonia*, 2.9.2004, Report of Judgements and Decisions, ECtHR 2004-VI.

[26] *Matthews v. the United Kingdom*, 18.2.1999, Report of Judgements and Decisions, ECtHR 1999-I, paras. 45-54. See more in *R. C. A. White/C. Ovey*, The European Convention on Human Rights, 5th ed. 2010, 523 et seq.

[27] For the jurisprudence concerning the applicability of Art. 3 of Protocol 1 to regional legislative bodies, see more at note 85.

[28] *Malarde v. France*, 23.9.1998, Report of Judgements and Decisions, ECtHR 2006-IV and *Salleras Llinares v. Spain*, Report of Judgements and Decisions, ECtHR 2002-XII. In the case *Hilbe v. Liechtenstein*, ECtHR, Application No. 31981/96, Judgement of 7.9.1999, the Court stated that "the obligations imposed on the Contracting States by Article 3 of Protocol No. 1 are limited to parliamentary elections and do not apply to referendums". As underlined by *W. A. Schabas*, The European Convention on Human Rights, A Commentary, 2015, 1021, the rationale of this conclusion of the Court "seems rooted only in a literal reading of the text. After all, a referendum may certainly be legislative in the sense that it may change the laws of the country, and perhaps even the constitution. It does not seem reasonable to think that the drafters of the Convention actually meant to exclude such democratic manifestations from Article 3." However, the ECtHR confirmed even recently its position in a case presented by a British national against the 2012 agreement between the Scottish and United Kingdom Governments on a referendum on independence for Scotland. The main question the Court had to deal with, once more, was whether the independence referendum could be considered to fall within the scope of Art. 3 of Protocol No. 1. Although the Court admitted that, as observed domestically, in the independence referendum the people of Scotland were effectively voting to determine the type of legislature that they would have, the Court held that Art. 3 was limited to elections concerning the choice of legislature and did not apply to referendum. *Moohan and Gillon v. United Kingdom*, ECtHR, Applications No. 22962/15 and 23345/15, Decision of 13.6.2017. In a recent case of December 2017 a political party based in Ankara, making reference to Art. 3 of Protocol No. 1, argued in a case in front of ECtHR, that the Government had failed, *inter alia*, to ensure, in the April 2017 binding Constitutional Referendum, the free expression of the opinion of the people in the choice of legislature. The ECtHR rejected the case as the purpose of the Constitutional Referendum in Turkey had been, in substance, only to decide whether the President of Turkey should be accorded extensive powers within a new constitutional system of government. Accordingly, according to the Court, "the Referendum did not amount to an 'election' within the meaning of Article 3 of Protocol No. 1". *Cumhuriyet Halk Partisi (Republican People's Party) v. Turkey*, ECtHR, Application No. 48818/17, Decision of 21.11.2017.

[29] Within the CSCE/OSCE there are contradictory attitudes in this regard: in the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, <http://www.osce.org>, the preference seems to limit the right to vote to national elections. Para. 6 of the Copenhagen documents states that "The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government. The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes." In

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External voting (or "out-of-country voting") refers to the situation in which nationals[30] of a country cast their vote from outside the territory of the country where elections are held. It shall be kept separate from two other situations. Firstly, external voting does not refer to foreign citizens' right to participate in the elections of the host country: this specific problem will be further explored in the following para. IV. 1. Secondly, external voting implies that expatriates are entitled to take part in home country elections when staying abroad. The specific electoral laws regulating the modalities of voting and counting the votes of foreigners will not be addressed in this article as this is not its focus.

III. The Obligations of the Home State of the Diaspora

1. Is There an Obligation to Guarantee to the Diaspora the Right to Vote and to Be Elected? The Political Dimension of the Issue

The aim of this section is to ascertain whether the home country has a specific obligation under current international law, be it customary or treaty-based, to allow its citizens living temporarily or definitively abroad, to take part in national or local elections or in referendums. This could include allowing those citizens to participate in the electoral process either by returning to their country where their votes will be cast, or by allowing the so-called out-of-country vote. The modalities of the out-of-country vote can be manifold and each of them presents advantages and disadvantages: voting via postal service,[31] electronically,[32] proxy voting (designating someone in

the 1990 Charter of Paris for a New Europe, <https://www.osce.org>, adopted only a few months later than the Copenhagen document, the leaders of the OSCE participating States seem to have changed their opinion as they declared emphatically that "everyone also has the right: to participate in free and fair elections" without any limitations to the kind (local or national) of elections.

30 It should be noticed that there is a high degree of terminological confusion concerning the area of citizenship and nationality. It has correctly been noted that "[w]hile public international law uses the term nationality to refer to the legal bond between an individual and a sovereign state, several domestic laws use the term citizenship or its equivalent. In some states, a distinction is made between nationality as a status independent of residence and citizenship as a bundle of rights granted only to nationals residing in the territory". European Union Democracy Observatory on Citizenship, Citizenship or Nationality?, <http://eudo-citizenship.eu>. In this contribution the terms citizenship and nationality will be used as synonyms.

31 While the postal vote offers the significant advantage of reduced costs and of easing the participation of voters, it has been considered as well very susceptible to frauds, dependent on

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the country to vote for him/her), voting in person at polling stations organised, with the consent of the local State, in the embassy or in the consular premises, or in a*d hoc* polling stations made available in other locations in the territory of the foreign State.[33] The vote of the expatriates may then be added to the votes cast by the citizens who took part in the national elections. Sometimes a so-called "extraterritorial electoral constituency" is created, whereby nationals residing abroad elect their own representatives to their home State's legislative bodies.[34]

The issues at stake raise several controversial and politically sensitive issues.[35] The political arguments in favour of restrictions on expatriate voting rights have been summed up by the ECtHR in the 2012 *Sitaropoulos and Giakoumopoulos* case. The Grand Chamber stated that these restrictions might be justified by several factors:

> "[...] firstly, the presumption that non-resident citizens are less directly or less continually concerned with their country's day-to-day problems and have less knowledge of them; secondly, the fact that non-resident citizens have less influence on the selection of candidates or on the formulation of their electoral pro-

good postal infrastructures (which is not the case in many countries), and it is also potentially dangerous for women (anecdotal evidence suggests that in some settings, male household heads may insist on casting all of the votes within a family, effectively disenfranchising their wives and adult children). *K. Long*, Voting with Their Feet: A Review of Refugee Participation and the Role of UNHCR in Country of Origin Elections and Other Political Processes, 2010 <http://www.unhcr.org>, para. 172.

[32] According to Human Rights Advocates, The Right to Vote: A Basic Human Right in Need of Protection, 2010, 40, "Electronic voting machines used in the United States are often unreliable and insecure, and pose new challenges to conducting fair and transparent elections. There have been complaints that electronic voting systems have failed during U.S. elections by losing votes, registering votes for one candidate when the voter was trying to vote for another candidate, counting votes twice, failing to print 'zero tapes' as they are supposed to, reporting more votes than voters, or reporting significantly fewer votes than voters, etc." <http://www.humanrightsadvocates.org>. See as well *N. Kersting/H. Baldersheim* (eds.), Electronic Voting and Democracy: A Comparative Analysis, 2004.

[33] This option implies good political relations with the State hosting the diplomatic premises, a proper organisation of the diplomatic services and enough funding.

[34] *F. Mégret/R. Girard*, Diasporas, Extraterritorial Representation and the Right to Vote, Can. Yb. Int'l L. 52 (2015) 186. Dedicated "external districts" for the diaspora have been considered several times by the UN and by various States but have very often met with criticism (including in democratically stable countries such as Italy) due to the fact that the number of seats allocated to these "external districts" are very often considered unfair, sometimes subject to fraud and to the marginalisation of the diaspora: see more in *J. Grace/E. D. Mooney*, Peacebuilding Through the Electoral Participation of Displaced Populations, Refugee Survey Quarterly 28 (2009), 159.

[35] See the interesting reflections in this regard developed by *C. López-Guerra*, Should Expatriates Vote? Journal of Political Philosophy 13 (2005), 216 et seq. and in his recent book, Democracy and Disenfranchisement: The Morality of Electoral Exclusions, 2014.

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grammes; thirdly, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and, fourthly, the legitimate concern the legislature may have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country".[36]

This approach of the Grand Chamber, which rejected a previous decision of the first Section of the ECtHR,[37] confirms the existing uncertainty in the interpretation of the relevant rules and the lack of a consolidated approach.

According to *Griffith,* who commented on the situation in Canada, there are additional arguments supporting the denial of the voting right of the members of the diaspora: most of them pay taxes in the country they are living in and not in their home country, most national economic and social programs are tied to residency and, finally, the longer the time spent abroad, the looser the bond is with the home country as family, work and local connections become more meaningful.[38]

On the other hand, several arguments, all of a political and social character, have been used to demonstrate that the mere fact that a citizen decides to leave his/her country for a short or long period does not automatically imply the lack of interest in participating in national elections,[39] nor that he/she will be not be affected by the decisions taken by the elected bodies in his/her home country.[40] The arguments of those opposing the restrictions of non-residents' electoral rights were summarised in the *Shindler* case:

"Globalisation, modern technology and low-cost travel companies made it easier for citizens resident overseas to maintain contact with their country of origin both remotely and by frequent visits. Those who considered a residence

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[36] ECtHR, *Sitaropoulos and Giakoumopoulos v. Greece*, Application No. 42202/07, Judgement of 15.3.2012, para. 69.

[37] *Sitaropoulos and Others v. Greece*, Application No. 42202/07, decision of 8.7.2010.

[38] *A. Griffith*, What Should Expatriates' Voting Rights Be? 7.6.2016, <http://policyoptions.irpp.org>.

[39] See more in *C. Carter*, The Right to Vote for Non-Resident Citizens: Considered Through the Example of East Timor, Tex. Int'l L. J. 46 (2011), 659 et seq.

[40] Making specific reference to the situation in Canada, *A. Griffith* (note 38) concluded that the main substantive arguments which favour the recognition of electoral rights to the diaspora can be summarised as follows: "Canadians living abroad contribute to Canada and the world, and many retain an active connection with Canada, whether it is business, social, cultural, political, or academic. These Canadians' global connections should be valued as an asset; Patriotism and civic engagement are not tied to location; The internet and online communities make it easier for Canadians to remain in touch with Canada and Canadian issues; Canadians living abroad pay Canadian income tax on their Canadian income, and property tax on any real property they may own in Canada, and are subject to Canadian laws and foreign policy decisions."

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requirement to be justified failed to recognise the reality of many nationals living abroad in the exercise of their free movement rights guaranteed by EU law. Despite their residence abroad, journalists could continue to work for British newspapers, businessmen could be employed by British companies and lawyers could provide advice on English law. Notwithstanding long-term residence abroad, British nationals might still be considered domiciled in the United Kingdom, which had particular relevance to matters concerning tax and inheritance."[41]

In its 2011 report on Out of Country Voting, the European Commission for Democracy through Law (Venice Commission) underlined that the principle of "out of country voting" enables citizens living outside their country of origin

"to continue participating in the political life of their country on a 'remote' basis and guarantees equality between citizens living in the country and expatriates".[42]

In the academic community various additional arguments have been put forward based on the principle of inclusion,

"which calls for enfranchising individuals not only beyond the boundaries of citizenship but also beyond territorial boundaries".[43]

The real impact of diasporas on homeland politics has been examined by several authors,[44] who have reached different conclusions in this regard. As

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[41] *Shindler v. The United Kingdom*, 7.5.2013, Reports of Judgements and Decisions ECtHR, 2013, para. 88.

[42] CoE, Report on Out-of-Country Voting adopted by the Council for Democratic Elections at its 37th meeting (Venice, 16.6.2011) and by the Venice Commission at its 87th Plenary Session (Venice, 17.-18.6.2011), CDL-AD (2011) 022.

[43] *L. Beckman*, Citizenship and Voting Rights: Should Resident Aliens Vote?, 22.8.2006, <http://dx.doi.org/10.1080/13621020903309607>, 153 et seq. See also *G. M. Rosberg*, Aliens and Equal Protection: Why Not the Right to Vote?, Mich. L. Rev. 75 (1977), 1092 et seq.; *K. R. Tung*, Voting Rights for Alien Residents – Who Wants It?, The International Migration Review 19 (1985), 451 et seq.; *H. Lardy*, Citizenship and the Right to Vote, Oxford J. Legal Stud. 17 (1997), 75 et seq.; *M. I. del Toro Huerta/G. de Icaza Hernandez*, El voto migrante: la tendencia internacional y nacional del voto en el extranjero, in: D. Cienfuegos Salgado/M. de Jesus Esquivel Leyva/J. Morales Sanchez, Temas de Migraciòn y Derecho, 2008, 251 et seq.; *S. Song*, Democracy and Noncitizen Voting Rights, Citizenship Studies 13 (2009), 607 et seq.; *D. Owen*, Transnational Citizenship and the Democratic State: Modes of Membership and Voting Rights, Critical Review of International Social and Political Philosophy 14 (2011), 641 et seq.; *G. Fondevila/A. Mejía Reyes*, Restricciones al derecho de voto, Revista Justicia Electoral 1 (2011), 151 et seq. and *M. A. Perícola,* El derecho de sufragio de los extranjeros, Revista Pensar en Derecho 7 (2015), 190 et seq.

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highlighted by *Hirt*,[45] there are scholars who perceive the diaspora communities as agents of change and explore their possible contribution to development,[46] while others see them more as potential dangers for exacerbating conflicts.[47] According to *Hirt,* the existing literature

> "indicates that the role that diasporas can play is shaped by the type of government back home, the type of economic system (liberal or State-controlled), and the reasons why people within the diaspora left their country (to flee repression and conflict or to gain economic opportunities)".[48]

2. The Normative Aspects: Relevant Rules Emerging from Different Settings

a) Universal Agreements

It is useful now to take a closer look at the normative aspect of the issue at stake. The right to vote, the right to public participation in government and, arguably, the right to live under a democratic form of government,[49] have

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44 *T. Lyons/P. Mandaville* (eds.), Politics from Afar, Transnational Diasporas and Networks, 2011 and *R. Koslowski*, International Migration and the Globalization of Domestic Politics, 2005.

45 *N. Hirt*, The Eritrean Diaspora and Its Impact on Regime Stability: Responses to UN Sanctions, Afr. Aff. 114 (2015), 121.

46 One example is *G. Mohan*, Embedded Cosmopolitanism and the Politics of Obligation: The Ghanaian Diaspora and Development, Environment and Planning 38 (2006), 867 et seq. See as well *R. Rubio-Marín*, Introduction: Beyond the Citizens/Non-Citizens Divide: Modulating Concepts, in: R. Rubio-Marín (ed.), Human Rights and Immigration, 2014, 10 and the recent and interesting book of an Italian professor of Theoretical Philosophy, *D. Di Cesare*, Stranieri residenti. Per una filosofia della migrazione, 2017, who is advocating a new *jus migrandi*.

47 See, for example, *N. Kleist*, Mobilising "the diaspora": Somali Transnational Political Engagement, Journal of Ethnic and Migration Studies 34 (2008), 307 et seq.

48 *N. Hirt* (note 45). See more in *N. Al-Ali/K. Koser*, Transnationalism, International Migration and Home, in: N. Al-Ali/K. Koser (eds.), New Approaches to Migration? Transnational Communities and Transformation of Home, 2002, 1 et seq.

49 See *A. Rubinstein/Y. Roznai*, The Right to a Genuine Electoral Democracy, Minnesota Journal of International Law 27 (2018), 148. Even though, thanks to the wording of Art. 21, the right to live under a democratic form of government came into existence as an international legal right, as *Hannum* noted many doubts can be cast on whether Art. 21 actually reflects international law as practised: "[d]espite the arguments of some that a 'right to democracy" may be emerging as a norm of international customary law, it is apparent that many states have not accepted Article 21's guarantee of the right to participate in the political life of one's country". See *H. Hannum*, The Status of the Universal Declaration of Human Rights in National and International Law, Ga. J. Int'l & Comp. L. 25 (1996), 348.

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been codified in Art. 21 of the Universal Declaration of Human Rights (UDHR). It provides that:

> "(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."

Being a UN General Assembly (UNGA) Declaration, although adopted in a solemn manner in 1948, the UDHR is not a legally binding instrument. However, the ICJ,[50] several scholars,[51] practitioners,[52] and States[53] have repeatedly stated that nowadays this provision corresponds, to a significant

[50] In the case *United States v. Iran*, 1980 (I.C.J. Reports 1980), 42 the Court reached the conclusion that "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights".

[51] According to *L. Henkin* "With time, the Universal Declaration has itself acquired significant legal status. Some see it as having given content to the Charter pledges, partaking therefore of the binding character of the Charter as an international treaty. Others see both the Charter and the Declaration as contributing to the development of a customary law of human rights binding on all states." *L. Henkin*, The Age of Rights, 1990, 133. On the opinions of several authors about this issue, please refer to the detailed analysis carried out by *H. Hannum* (note 49), 287. See as well *E. Reginald,* The Right to Democracy: A Qualitative Inquiry, Brook J. Int'l L. 22 (1977), 508 and *L. Emeka Modeme*, Right to Political Participation in International Law: A Rebuttal of the Democratic Entitlement Claim, Yale J. Int'l L. 17 (1992), 540 et seq.

[52] In his 1987 report on the situation of Human Rights in Iran, *G. Pohl*, a Special Representative of the U.N. Commission on Human Rights, expressed his view that "The rights and freedoms set out in the Universal Declaration have become international customary law through State practice and opinio juris. Even if the strictest approach is adopted to the determination of the elements which form international customary law, that is, the classical doctrine of the convergence of extensive, continuous and reiterated practice and of opinio juris, the provisions contained in the Universal Declaration meet the stringent standards of that doctrine. The Universal Declaration, as a projection of the Charter of the United Nations, and particularly as international customary law, binds all States." U.N. Doc. E/CN.4/1987/23 (1987), 4 et seq.

[53] The International Conference on Human Rights meeting in Tehran in 1968 formally stated that the UDHR is "a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community": see the Proclamation of Tehran, Proclaimed by the International Conference on Human Rights at Tehran, on 13.5.1968, <http://www.ohchr.org>.

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extent, to customary international law.[54] One of the interesting aspects of the UDHR, for the purposes of this investigation, is the identification of the holder of the right, i.e. "everyone" as spelled out in Art. 21 para. 1. While in most of the subsequent treaties regulating electoral rights, reference is made only to citizens holding these rights, the approach of the UDHR needs to be highlighted. A second aspect that deserves to be mentioned is that the expression "the government of his country" has been, traditionally, interpreted as referring to the Government of the country of which the individual concerned is a citizen, most probably to counterbalance the potentially unlimited reach of the previous sentence. This traditional interpretation, which is undoubtedly relevant within this paragraph, might be challenged, considering the evolution of the migration phenomenon in the last decades, to include the country where the foreigners have settled. The legal consequences of this innovative interpretation will be examined later in the following paragraphs. Later, in 1966, Art. 25 of the ICCPR provided additional clarification of the precise extent of this right and who holds this right, solving, or at least trying to solve, a few interpretative issues raised by the wording of Art. 21 of the UDHR:

> "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."

As stressed by many commentators, the right to vote codified in Art. 25 of the ICCPR is "without doubt the most important political right" within the human rights law framework.[55] It is part of the broader right of political participation and it is the only right in the Covenant not guaranteed as a universal human right, but rather framed as a "citizen's right". In para. 1 of its General Comment No. 25 (1996) on "The right to participate in public affairs, voting rights and the right of equal access to public service" (Comment No. 25), the HRC stressed that Art. 25 "lies at the core of democratic

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[54] According to a few authors, Art. 21 of the UDHR, has not transformed into customary international law: see for example, *A. Kirshner*, The International Status of the Right to Vote, <http://archive.fairvote.org>, who states that "Article 21, however, has not been accepted as generally enforceable customary international law".

[55] *F. Mégret*/*R. Girard* (note 34), 187. See also *M. Nowak*, UN Covenant on Civil and Political Rights: CCPR Commentary, 2005, 574.

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government based on the consent of the people". The provision makes reference not only to the right to vote, but also to the "opportunity" to exercise such right: it is, therefore, possible to infer that the State of citizenship is also required to take positive measures to promote its realisation.[56] The scope and breadth of this positive obligation emerging in Art. 25 of the ICCPR have been set forth by the HRC in the General Comment No. 25 already mentioned,[57] where it is clearly affirmed that States have an obligation to take effective measures to ensure that all persons entitled to vote are able to exercise that right and that voter education and campaigns are, therefore, necessary to guarantee the effective exercise by an informed community of the rights embedded in Art. 25.[58] Furthermore the General Comment emphasises the importance of other rights, i.e. freedom of expression, assembly and association, as "essential preconditions for the effective exercise of the right to vote".

In contrast with other human rights and fundamental freedoms, which are assured to all individuals within the territory and subject to the jurisdiction of the State, most international and regional human rights treaties only recognise political rights for "citizens",[59] thus legitimising the reality that in virtually every democratic country voting rights in national elections are "the privilege of citizens".[60] This means that the right to vote is not automatically extended to everyone under a State's jurisdiction,[61] as States are entitled, although not obliged,[62] to restrict it to their own citizens.[63]

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[56] *R. Lappin,* The Right to Vote for Non-Resident Citizens in Europe, ICLQ 65 (2016), 861 et seq. See as well *R. Rubio-Marín,* Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants, N. Y. U. L. Rev. 81 (2006), 117 et seq.

[57] Human Rights Committee, General Comment No. 25 (note 24), para. 10.

[58] Human Rights Committee, General Comment No. 25 (note 24), para. 11.

[59] Human Rights Committee, General Comment No. 25 (note 24), para. 1.

[60] *L. Beckman* (note 43), 154.

[61] On the breadth and the development of the concept of jurisdiction see e.g. *A. Mills*, Rethinking Jurisdiction in International Law, BYIL 84 (2014), 187 and *M. Milanović*, From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties, HRLR 8 (2008), 411.

[62] In given cases expatriate citizens enjoy unlimited voting rights (France), while in other cases this right is recognised only for a given period after the departure from the home country (e.g. 15 years for the UK and 25 years for Germany). In a few cases (USA and other federal States) there might be a different rule for local (which could be decided by the local authorities) or national elections. Notwithstanding this, the issue of external voting and the duties attached to its implementation are still underdeveloped.

[63] The jurisprudence and scholars seem quite convinced that the beneficiaries of this right, due to its unique nature, have to be interpreted in a restrictive manner: this is the opinion, amongst others, of *H. Birkenkötter/A. von Notz,* Freiheit der (Auslands-)Wahl: Musste

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By directly linking the right to vote to citizenship, the ICCPR and the HRC General Comment implicitly affirm that the home State is the one that bears the primary responsibility to guarantee the fulfilment of the rights enshrined in Art. 25 of the ICCPR. This Article, however, raises an interpretative problem: Are the enshrined rights to be granted only to citizens living in the State or, additionally, to citizens who are temporarily or permanently living abroad (whatever the reasons for their absence may be)? The HRC has rarely had the opportunity to shed additional light on Art. 25 and has never addressed the specific issue under scrutiny here.[64] Nonetheless, the HRC expressed a clear view about the controversial issue of the extra-territorial applicability of the ICCPR, a question which is obviously very relevant in this specific framework. The main problem is related to the proper interpretation of Art. 2 of the ICCPR, according to which

> "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,"

this sentence being formulated in an ambiguous manner. The HRC, in its General Comment 31, however, clearly indicated that State parties are required, by Art. 2, para. 1:

> "[…] to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[65]

A careful analysis of the wording of Art. 25 does not permit the conclusion that it contains a positive obligation incumbent on States, at least at the present stage of development of international rules and treaties, to allow

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Deutschland der Türkei die Durchführung des Verfassungsreferendums gestatten?, Verfassungsblog, 30.3.2017, <http://verfassungsblog.de>.

[64] The HRC, during its Seventy-fourth session, 18.3.-5.4.2002, adopted the Communication No. 965/2000, in the case *Mr Mümtaz Karakurt v. Austria*, in which it addressed one specific issue related to Art. 25 concerning its applicability *ratione materiae*. The Committee observed in this regard that "the rights protected by that article are to participation in the public political life of the nation, and do not cover private employment matters such as the election of an employee to a private company's work-council".

[65] Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13, para. 10 (2004). See more as well in *C. Carter* (note 39), 659 et seq. For a different and more restrictive interpretation of Art. 2, see *R. Baubock*, Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting, Fordham L. Rev. 75 (2007), 2393.

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their diaspora to vote in national elections. Limitations to these rights of the diaspora have, therefore, to be analysed against the background of the first part of this article, which allows restrictions to the right to vote, provided that they are not unreasonable. The crucial issue, therefore, is to ascertain if, and under which conditions, restrictions to the vote of the diaspora can be considered "reasonable". In its 1996 General Comment No. 25,[66] the HRC offered a first line of interpretation. According to the HRC, considering the reference made in Art. 25 of the ICCPR to Art. 2 of the same Covenant, the reasonableness of a measure should be evaluated giving proper emphasis to the prohibition contained in this article, which categorically prohibits any distinction between citizens in the enjoyment of these rights

> "on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[67]

No reference is made, however, in Art. 2 of the ICCPR, to the residency of the individual as a ground for restrictions although, as appropriately emphasised by *Fox*, a proper analysis of the preparatory work of the Covenant allows the conclusion that the delegates included this reference to reasonable restrictions in order

> "to allow denial of suffrage to minors, convicts, the mentally ill, and those not meeting residency requirements".[68]

The HRC added additional clarifications which are essential for the purposes of this investigation. First of all, the Committee stated that

> "any conditions which apply to the exercise of the rights protected by article 25 should be based on *objective* and reasonable criteria,"[69]

and that States parties

> "should indicate and explain the legislative provisions which would deprive citizens of their right to vote".[70]

In para. 11 of the General Comment, the Committee, making reference to the registration phase, but with obvious and inevitable consequences on the exercise of the right to vote, confirms this interpretation stating that:

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66 Human Rights Committee, General Comment No. 25 (note 24).

67 Human Rights Committee, General Comment No. 25 (note 24), para. 3.

68 *G. H. Fox*, The Right to Political Participation In International Law, Yale J. Int'l L. 17 (1992), 554.

69 Human Rights Committee, General Comment No. 25 (note 24), para. 3. Emphasis added.

70 Human Rights Committee, General Comment No. 25 (note 24), para. 4.

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> "States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. *If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote*."[71]

These conclusions were upheld by the HRC in the *Gillot* case, where several French citizens residing in New Caledonia submitted a claim to the HRC due to the fact that they were not allowed to vote in the 1998 self-determination referendum, as they did not meet the ten-year residency requirement foreseen in the local law. The HRC rejected the request but clearly stated that it was, nevertheless, its task to decide whether the requirements

> "have the purpose or effect of restricting in a disproportionate manner, given the nature and purpose of the referendums in question, the participation of the 'concerned' population [...]".[72]

Summing up, the analysis of both the relevant articles contained in the ICCPR and of the work carried out by the HRC, confirm that Art. 25 does not provide a clear and formal obligation incumbent on States to allow their citizens who are abroad to vote in domestic elections or referendums and that States are allowed to introduce restrictions to the exercise of vote for the non-resident citizens territory, provided that these restrictions are based on objective and reasonable criteria, properly justified, not disproportionate and covered by legislation. Art. 25, however, does not prohibit States to have a more generous attitude towards their own diaspora, considering that as non-resident citizens, emigrants maintain a relationship with their country of origin that may be more important for them than their role as non-citizen residents.[73] In fact, several States have introduced specific norms allowing their diaspora to vote.[74] Should a State wish to use this opportunity, it will

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[71] Human Rights Committee, General Comment No. 25 (note 24), para. 11. Emphasis added.

[72] UN Human Rights Committee, *Gillot v. France* (Communication No. 932/2000), para. 14. On the concept of proportionality in the field of human rights see more in *M. Newton/L. May*, Proportionality in International Law, 2014, 163 et seq.

[73] See *M. Collyer*, A Geography of Extra-Territorial Citizenship: Explanations of External Voting, Migration Studies 2 (2014), 56.

[74] Sri Lanka, as an example, has very innovative legislation allowing expatriates to vote: see more in *C. Carter* (note 39), 659 et seq. Many other States have introduced similar rules: see more in A. *Blais/L. Massicotte/A. Oshinaka*, Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws, Electoral Studies 20 (2001), 41 et seq.; *L. Beckman*, Universal Suffrage for Real? A Global Index of Suffrage Restrictions and an Explanatory Framework, Statsvetenskaplig Tidskrift 112 (2010), 33; *D. C. Earnest*, Expanding the Electorate:

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have a discretionary power to decide which of the available tools for granting the voting rights of the diaspora should be used: voting in the country of citizenship, voting in the diplomatic premises abroad, postal vote, e-vote etc. In selecting the most appropriate tool, the countries are expected to take into consideration several aspects, such as the associated costs, the security of the mechanism, the diplomatic or organisational obstacles etc.[75] An analysis of the content of the other relevant conventions at universal level, dedicated to specific groups of persons, fully corroborates these conclusions.[76]

b) The Legal Framework of the Council of Europe

The problem under scrutiny here has also been addressed by relevant regional human rights agreements, which will be analysed in this sub-paragraph and in the following ones. The discussion starts with the framework of the Council of Europe (CoE). Art. 3 of Protocol 1 of the ECHR,[77] which has been ratified by all the Member States of the CoE, affirms that

> "[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

While Art. 1 of the ECHR extends treaty rights to everyone within the jurisdiction of the High Contracting Parties, Art. 3 of the Protocol, unlike

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Comparing the Noncitizen Voting Practices of 25 Democracies, Journal of International Migration and Integration 16 (2015), 1 et seq. *Earnest* concludes stating that although international factors might help to explain the timing of enfranchisement of noncitizens, domestic factors explain why the content of these rights vary considerably from State to State.

[75] ECtHR, *Riza et Autres c. Bulgarie*, Applications Nos. 48555/10 and 48377/10, judgement of 13.10.2015, para. 178: "La Cour ne perd pas de vue que l'organisation de nouvelles élections sur le territoire d'un autre pays souverain, fût-ce dans un nombre limité de bureaux de vote, est susceptible de se heurter à des obstacles diplomatiques ou opérationnels importants et d'entraîner des coûts supplémentaires."

[76] As an example, Art. 7 of the Convention on the Elimination of All Forms of Discrimination against Women merely states the prohibition of discrimination against women in the political and public life of the country and requests States, in particular, to

"ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country".

[77] Protocol 1 to the European Convention on Human Rights 1950.

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Art. 25 of the ICCPR, does not clarify whether the right to vote shall be regarded as an individual right. The Article instead refers only to the "State's obligation to organise elections".[78] However, considering the *travaux préparatoires* of Art. 3 of Protocol 1 and the interpretation of the provision in the context of the Convention as a whole, the ECtHR has held that it also implies individual rights, including the right to vote and the right to stand for elections.[79]

Art. 3 of the Protocol must be interpreted, in any case, considering the content of Art. 5, which states that

> "[a]s between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly".

This implies that the enjoyment of the rights and freedoms set forth in this Protocol shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Finally, while Art. 25 of the ICCPR admits restrictions to the right to vote provided that they are "reasonable", such a reference is missing in the ECHR, thus arguably suggesting that States Parties to the ECHR enjoy an even wider margin of appreciation.

Against this backdrop, the ECtHR[80] and the European Commission of Human Rights[81] have been requested several times to address the problem of the legality of restrictions to the diaspora's right to vote. The jurispru-

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[78] *R. Lappin* (note 56), 865. For a comprehensive comment to Art. 3 of Protocol 1, see *W. A. Schabas* (note 28), 1011 et seq.

[79] ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, Application No. 9267/81, judgement of 2.3.1987, para. 51. The Court ruled, the drafting Art. 3 of Protocol 1 was not intended at all to exclude the right of the individual to vote, but "to give greater solemnity to the commitment undertaken and in the fact that the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to 'hold' democratic elections". Furthermore, the ECtHR formally stated that Art. 25 of the ICCPR sets out the same rights as Art. 3 of Protocol 1: ECtHR, *Scoppola v. Italy*, Application No. 126/05, Judgement of 22.5.2012, para. 82.

[80] See for example: ECtHR, *Doyle v. the United Kingdom*, Application No. 30158/06, Judgement of 6.2.2007; *Sitaropoulos and Giakoumopoulos v. Greece* (note 36).

[81] The European HR Commission examined several cases, as from 1961, and declared almost all of them to be inadmissible as manifestly ill-founded: see *X. and Others v. Belgium*, Application No. 1065/61, Commission decision of 18.9.1961; *X. v. the United Kingdom*, Application No. 7566/76, Commission decision of 11.12.1976; *X. v. the United Kingdom*, Application No. 7730/76, Commission decision of 28.2.1979; *X. v. the United Kingdom*, Application No. 8873/80, Commission decision of 13.5.1982; *Polacco and Garofalo v. Italy*, Application No. 23450/94 and *Luksch v. Germany*, Application No. 35385/97, Commission decision of 21.5.1997.

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dence of the ECtHR offers interesting and relevant indications to draw some clear conclusions about the issue under scrutiny here. First of all, the Court stressed on several occasions that the right to vote and to be elected can only be determined by the legislator. The term "legislator" is not, however, limited to the national parliament, as the "[c]onstitutional structure of the State in question has to be examined"[82] in order to identify which body really has the legislative power.[83] As anticipated in the previous para. 2, the ECtHR has clarified that this right does apply to Presidential elections if the Head of State has the power to initiate or adopt legislation[84] and even to the elections of the European Parliament, but not to local elections, municipal or regional, unless they concern regional legislative assemblies,[85] nor to referendums.[86]

Secondly, the Court has carefully examined the relevant practice and activities of the CoE bodies, reaching the conclusion that there is a growing awareness at the European level of the problems posed by migration in terms of political participation in the countries of origin and residence. However, according to the Court, none of the material forms a basis for concluding that, as the law currently stands,

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[82] ECtHR, *Timke v. Germany*, Application No. 27311/95, Commission decision of 11.9.1995.

[83] In the case ECtHR, *Molka v. Poland*, Application No. 56550/00, Judgement of 11.4.2006, the Court has confirmed that the legislative power may, depending form the constitutional framework, should not be restricted to the national parliament alone. In several cases, the Court has expressed the view that the European Parliament form "part of the legislature" within the meaning of Art. 3 of Protocol 1: *Matthews v. the United Kingdom* (note 26), paras. 45-54.

[84] As far as the Presidential elections are concerned, see more in ECtHR, *Boškosky v. the former Yugoslav Republic of Macedonia*, Application No. 11676/04, Judgement of 2.9.2004, and ECtHR, *Brito da Silva Guerra and Sousa Magno v. Portugal*, Applications Nos. 26712/06 and 26720/06, Judgement of 17.6.2008. Art. 3 has been considered applicable to regional assemblies such as those of the German Laender, *Timke v. Germany* [note 82], Application No. 27311/95, decision of the Commission of 11.9.1995, the legislative assembly of the Autonomous Community of the Canary Islands, ECtHR, *Federacion Nacionalista Canaria v. Spain*, Application No. 56618/00, Judgement of 7.6.2001.

[85] ECtHR, *Etxeberria and others v. Spain,* Application No. 35579/03, decision of 30.6.2009. In this case the Court clearly stated that Art. 3 of Protocol 1 does not refer to the elections for municipalities and provinces as they do not participate in "the exercise of legislative power" within the meaning of the same Article: paras. 62-65. However, whenever the local/regional councils are competent to enact, within the territory of the region to which they belong, laws in a number of pivotal areas in a democratic society, such as administrative planning, local policy, public health, education, town planning and agriculture above. The Court concluded that "the competence and powers in the regional councils that are wide enough to make them a constituent part of the legislature in addition to the parliament" and therefore Art. 3 of Protocol 1 is applicable to them. ECTHR, *Vito Sante Santoro v. Italy*, Application No. 36681/97, decision of 1.7.2004, para. 53.

[86] See more at note 28.

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> "States are under an obligation to grant non-residents *unrestricted* access to the franchise".[87]

Furthermore, the Court restated that since there is no common approach as to the extent of States' obligations to enable non-residents to exercise the right to vote

> "[…] It therefore cannot be said that the laws and practices of member States have reached the stage where a common approach or consensus in favour of recognising an *unlimited* right to vote for non-residents can be identified."[88]

These conclusions of the Court, which were reiterated in subsequent cases,[89] deny the existence of an unconditional right of the diaspora to vote. Such a view is obviously extremely relevant in this connection. The provision codified in Art. 3 of Protocol 1 is, therefore, not absolute and there is

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[87] *Shindler v. The United Kingdom* (note 41), para. 114. Emphasis added. Only in one specific case against Greece, in which a constitutional provision granting the right to vote to its diaspora has never been enacted, did the Court conclude, in 2010, that "the absence for such a long period of regulations on the right of expatriates to vote from their place of residence, despite the rule laid down in Article 51 § 4 of the Constitution, is likely to constitute unfair treatment of Greek citizens living abroad in relation to those living in Greece" and that, therefore: the absence of the legislative implementation of the rules laid down in Article 51 § 4 of the Constitution for a period lasting more than three decades, combined with the development of the law of the Contracting States in this area, is sufficient to engage the liability of the respondent State under Article 3 of Protocol No. 1. *Sitaropoulos and Giakoumopoulos v. Greece* (note 37). This statement, however, must be read taking into account the very specific situation of the legal system in Greece, where the Constitution granted a right to vote abroad to the diaspora but this right was never implemented. This is not the case, in fact, in most other European countries. Furthermore, it has to be mentioned as well that, as already stated in the previous para. 3.1, on 22.11.2010 the case was referred to the Grand Chamber at the request of the Greek Government: the Grand Chamber rejected the decision of the Court. *Sitaropoulos and Others v. Greece* (note 36), para. 47.

[88] According to the investigations carried out by the Court, 44 States grant the right to vote to citizens resident abroad otherwise than on State service. Of these, 35 States do not remove this right once a citizen has resided abroad for a certain period of time. Nine States appear to limit the right by reference to the duration of the citizen's stay abroad. Emphasis added.

[89] See for example the recent case ECtHR, *Oran v. Turkey*, Application No. 1905/16, Judgement of 15.4.2015, in which the ECtHR stated that "The Court reiterates that national practices concerning voting rights for expatriates and the exercise of such rights are far from being uniform across the States Parties. Broadly speaking, Article 3 of Protocol No. 1 does not impose on States Parties any obligation to enable citizens resident abroad to exercise their right to vote. Furthermore, the work of the Venice Commission has shown that withholding or limiting the voting rights of expatriates does not amount to a restriction on the principle of universal suffrage.", para. 60.

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> "room for implied limitations, and the contracting State must be given a wide margin of appreciation"[90]

that allows them to restrict the voting rights of their diaspora provided that they respect a certain number of principles and values, which have been codified in the ECHR and partially developed by the practice and the jurisprudence of the Court itself.[91] The Court, if requested to do so, reserves the right to ascertain whether States denying the right to vote of their diaspora conform to these limits. In this regard the Court has developed an interesting case law. The Court stated that all restrictions have to be interpreted in a narrow manner, as the right to vote is not a privilege. The exclusion from the right to vote of any groups or categories of the general population

> "must be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 […]. Any general, automatic and indiscriminate departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates […]."[92]

As a consequence, according to the Court, for a restrictive measure to be deemed compatible with the right to vote it must not curtail the right to such

[90] Given that Art. 3 of Protocol 1 is not limited by a specific list of "legitimate aims" such as those enumerated in Arts. 8 to 11 of the ECHR, the Contracting States are therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the ECHR is proved in the particular circumstances of a given case. See Council of Europe/European Court of Human Rights, Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights. Right to Free Elections, 31.5.2016, <http://www.echr.coe.int>. On the judicial creativity of the ECtHR see generally *A. Mowbray*, The Creativity of the European Court of Human Rights, HRLR 5 (2005), 57 and *W. A. Schabas* (note 28), 1027. In the case of *Shindler v. The United Kingdom* (note 41), para. 103, the ECtHR confirmed that "the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere […]". The concept of "implied limitations" under Article 3 of Protocol No. 1 is of major importance for the determination of the relevance of the aims pursued by restrictions on the rights guaranteed by this provision and to be justifiable, a restriction has to be made by reference to any aim which is compatible with the principle of the rule of law and with the general objectives of the Convention.

[91] *Shindler v. The United Kingdom* (note 41). The Court found that the restrictions on the applicant's right to vote were proportionate to the legitimate aim pursued, the impugned legislation struck a fair balance between the interest of the applicant in participating in elections in his country of origin and the respondent State's interest in limiting parliamentary franchise to those who would be most directly affected by the laws. See *M. Saul*, The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments, HRLR 15 (2015), 761; *J. Gerards*, Pluralism, Deference and the Margin of Appreciation Doctrine, ELJ 17 (2011), 118 and *A. Legg*, The Margin of Appreciation in International Human Rights Law: Deference and Proportionality, 2011.

[92] *Shindler v. The United Kingdom* (note 41), para. 103.

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an extent as to impair its very essence and deprive it of its effectiveness. The principles to be respected by States when restricting the vote of their diaspora, to be legitimate and pass a possible test by the ECtHR are, therefore, manifold. First of all, they must be justified by legitimate aims. The contribution of the Court in this regard [has] proved to be essential as Art. 3 of Protocol 1, unlike Arts. 8 and 11 of the ECHR, does not contain a list of "legitimate aims". In examining the compliance with Art. 3,

> "the Court has focused mainly on two criteria: whether there has been arbitrariness or lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people".[93]

In doing so, the Court has, however, repeatedly underlined the need to examine and evaluate the national decision in light of the political and legislative evolution of the country concerned, which means, according to the Court itself, that "unacceptable features in one system may be justified in another".[94]

Secondly, the Court stated that the principle of proportionality has always to be taken into account.[95] More specifically, in two different cases in which the national legislation under scrutiny allowed the diaspora to vote at national elections but only for the first 15 years following their emigration, the

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[93] ECtHR, Guide on Article 3 of Protocol 1, 30.4.2017, para. 9. See more in *G. H. Fox*, (note 68), 562 et seq.

[94] *Mathieu-Mohin and Clerfayt v. Belgium* (note 79), para. 52.

[95] *Shindler v. The United Kingdom* (note 41), para. 102. According to the ECtHR "When reviewing the proportionality of the measure, it must be borne in mind that numerous ways of organising and running electoral systems exist. There is a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into its own democratic vision […]. This means that the proportionality of electoral legislation (and of any limitations on voting rights) must be assessed also in light of the socio-political realities of a given country. Furthermore, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond to any emerging consensus as to the standards to be achieved. In this regard, one of the relevant factors in determining the scope of the authorities' margin of appreciation may be the existence or non-existence of common ground between, or even trends in, the laws of the Contracting States. In the same judgement, at para. 102, the ECtHR has clarified that "the ease with which an applicant can acquire the citizenship of his State of residence, and thus exercise his right to vote in that country, may be relevant to the proportionality of a residence requirement in his State of origin. The possibility of acquiring a new citizenship is not, however, decisive given that the acquisition of such citizenship may have adverse consequences in other areas of one's life and that an applicant's interest in casting his vote in the State to which he feels most closely connected must also be given due weight."

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Court concluded that this kind of restriction to the vote of emigrants "was not disproportionate".[96]

In verifying the respect of the proportionality principle, the Court also considered specific situations in a given country: for example, when the proportion of citizens living out of the country is very significant and the diaspora may therefore have a decisive impact on the outcome of the election, restrictive measures might be justifiable and compatible with the proportionality principle.[97] In a more recent case an additional element has been taken into account. According to the Court, all the different interests involved

> "should be weighed up, including the State's choice to enable its expatriate citizens to exercise their voting rights, practical and security considerations relating to the exercise of this right, and the technical arrangements for implementing it".[98]

In a nutshell, on the one hand the ECtHR recognises that, since it enshrines a characteristic principle of democracy, Art. 3 of Protocol 1 is of prime importance in the Convention system;[99] on the other hand the Court does not resile in affirming that it is within the State's own scope of sovereignty to decide whether it wishes to grant the right to vote to its citizens residing abroad, and for the time being it is not possible to claim the existence of a right for all expatriate citizens to vote in the elections of the country of origin.[100] The sovereign decisions of the States must, in any case, be coherent and consistent with all the other general obligations stemming from the Protocol and the European Convention on Human Rights, including those prohibiting discrimination, and with the general principles elaborated by the European Court itself.

The above-mentioned conclusions have been criticised by various scholars, as they offer a doctrine

> "importing a very minimal supervision of state choices to limit the voting rights and opportunities of non-residents and lack the sort of robust scrutiny of the relevant principles and arguments that the issue merits".[101]

As anticipated, the extremely differentiated approach of the Member States of the CoE, as far as the right to vote of citizens abroad is concerned,

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96 *Shindler v. The United Kingdom* (note 41), para. 108.
97 *Shindler v. The United Kingdom* (note 41), para. 91.
98 *Oran v. Turkey* (note 89), para. 60.
99 *Mathieu-Mohin and Clerfayt v. Belgium* (note 79), para. 47.
100 *Shindler v. The United Kingdom* (note 41), para. 71.
101 *D. Harris/M. O'Boyle/C. Warbrick*, Law of the European Convention on Human Rights, 3rd ed. 2014, 928.

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testifies that there is no uniform practice and that in this connection there is no specific obligation incumbent on the States. Facing this situation, several initiatives have been undertaken at the political level within the Council of Europe to try to change the situation and to convince States to adopt a more favourable attitude towards the voting right of their diaspora. In this framework both the Parliamentary Assembly of the CoE and the Venice Commission have played a significant role, albeit with limited results so far. The Parliamentary Assembly stated very clearly its position in Resolution 1459 (2005) on the abolition of restrictions on the right to vote in which the member countries of the Council of Europe were invited to

> "grant electoral rights to all their citizens (nationals), without imposing residency requirements and to facilitate the exercise of expatriates' electoral rights by providing for absentee voting procedures".

The Parliamentary Assembly of the CoE adopted several other Resolutions with a set of specific recommendations which can be summarised as follows: a) to consider the possibility of harmonising Member States' laws in the interests of maintaining the voting rights of their nationals living in another member state;[102] b) to envisage, if appropriate, the drawing up of a protocol to the European Convention on Human Rights, whereby Member States would undertake to respect such voting rights for their nationals living in another member state and refrain from hindering the exercise thereof by any measure whatever;[103] c) to favour the right to vote of the diaspora *in loco*

[102] Recommendation 951 (1982) on voting rights of nationals of Council of Europe member states. Interesting to note, this Recommendation limits the request to grant the electoral rights to citizens living abroad but only in the case they live in a CoE member State. In Recommendation 1410 (1999) on links between Europeans living abroad and their countries of origin, the Assembly also recommended that the Committee of Ministers:

"iii. prepare a recommendation to the member states with the intention of fostering voluntary participation of expatriates in political, social and cultural life in their country of origin, by instituting and harmonizing arrangements for specific representation, such as the unrestricted right to vote or specific parliamentary and institutional representation through various consultative councils [...]".

[103] Recommendation 1410 (1999) on links between Europeans living abroad and their countries of origin" (note 102).

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in the country of origin [104] or in embassies and consulates in their host countries,[105] via postal service[106] or via Internet and/or distance voting.[107]

Beside the work carried out by the Parliamentary Assembly and its Committees, a significant role has also been played in these issues within CoE by the European Commission for Democracy through Law. In its Opinion No. 190/2002, Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, adopted in 2002, the Commission already stated that the right to vote and/or the right to stand for election may be subject to residence requirements.[108]

In its 2004 Report of the Abolition of Restrictions on the Right to Vote in General Elections, the Venice Commission, while emphasising that in Art. 3 Protocol No. 1 there is room for inherent limitations and that the States enjoy a large margin of appreciation under the control of the Court, stressed that, nonetheless, these limitations "must pursue a legitimate aim and not be

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[104] Recommendation 1410 (1999) on links between European living abroad and their countries of origin. This request has been further reiterated in Resolution 1696 (2009) on engaging European diasporas, in which the Assembly requested members States to "ease the acquisition or maintenance of voting rights by offering out-of-country voting at national elections".

[105] In Resolution 1459 (2005) on abolition of restrictions on the right to vote, the Assembly stressed at the outset the importance of the right to vote and stated that "given the importance of the right to vote in a democratic society, the member countries of the Council of Europe should enable their citizens living abroad to vote during national elections bearing in mind the complexity of different electoral systems. They should take appropriate measures to facilitate the exercise of such voting rights as much as possible […]." Similar requests of the Parliamentary Assembly were also formulated in its Recommendation 1650 (2004). In Resolution 1618 (2008) on measures to improve the democratic participation of migrants, the Assembly emphasised the importance of the participation of migrants in the political process of the host country but reiterated that democratic participation for migrants in their countries of origin was also important.

[106] In Resolution 1459 (2005), the Parliamentary Assembly of the CoE urged member States to adopt appropriate measures to facilitate the exercise of voting rights of their citizens living abroad, specially making an increased use of postal voting.

[107] In Resolution 1591 (2007) on distance voting the Parliamentary Assembly restated that the right to vote was an essential freedom in every democratic system and requested States to introduce distance voting. In Resolution 1897 (2012) on ensuring greater democracy in elections, the Parliamentary Assembly asked member States to foster citizen participation in the electoral process by, *inter alia*: "enabling all citizens to exercise their right to vote through proxy voting, postal voting or e-voting, on the condition that the secrecy and the security of the vote are guaranteed; facilitating the participation in the electoral process of citizens living abroad, subject to restrictions in accordance with the law, such as duration of residence abroad, whilst ensuring that, if polling stations are set up abroad, their establishment is based on transparent criteria".

[108] Venice Commission, Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report, Adopted by the Venice Commission at its 52nd session (Venice, 18.-19.10.2002), CDL-AD (2002) 23 rev.

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arbitrary or disproportionate".[109] In June 2011 the Venice Commission adopted a Report on Out of Country Voting in which, after having reiterated the importance of the diaspora's right to vote, it suggested, instead of excluding citizens residing abroad completely, setting a limit on the period for which they retain the right to vote after leaving the country.[110]According to the Venice Commission, therefore, the denial of the right to vote to citizens living abroad or the placing of limits on the exercise of such right constitutes a restriction of the principle of universal suffrage. This restriction is, however, not incompatible with the obligations imposed on States by the ECHR, considering that the principles of the European electoral heritage did not yet require

> "the introduction of […] a right for all expatriate citizens to vote in their State of nationality which was subject to no residence qualification".[111]

c) The Legal Framework of the European Union

Having examined the Council of Europe's activities related to the diaspora's right to vote, it is worth recalling the relevant activities carried out in this connection by the institutions of the European Union (EU). According to a recent study,[112] significant differences continue to exist in the national

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[109] Venice Commission, Report of the Abolition of Restrictions on the Right to Vote in General Elections, by Mrs *M. Lazarova Trajkovska*, endorsed by the Venice Commission at its 61st Plenary Session (Venice, 3.-4.12.2004).

[110] CoE, Report on Out-of-Country Voting (note 42), para. 73.

[111] Study No. 580/2010 CDL-AD (2011)022. European Commission for Democracy Through Law (Venice Commission), Report on Out-of-Country Voting, Adopted by the Council for Democratic Elections at its 37th meeting (Venice, 16.6.2011) and by the Venice Commission at its 87th plenary session (Venice, 17.-18.6.2011), paras. 98 and 99. On the wider impact of the Venice Commission on the issue here under scrutiny please refer to *A. Ubeda de Torres*, Between Soft and Hard Law Standards: The Contribution of the Venice Commission in the Electoral Field, in: H. Hardman/B. Dickson (eds.), Electoral Rights in Europe: Advances and Challenges, 2017, 50 et seq.

[112] The European Parliament Electoral procedures, <http://www.europarl.europa.eu>. According to this study, "In the United Kingdom the right to vote of citizens resident abroad is confined to certain categories. Belgium and Greece grant the right to vote only to those of their non-resident nationals who are living in another Member State, while Denmark and Italy restrict the right to vote of non-resident nationals living in a third country to specific categories. Germany grants the right to vote in elections to the European Parliament to citizens who have lived in another country, provided that they are enrolled on the German electoral register. In Bulgaria, Ireland and Slovakia the right to vote is confined to EU citizens domiciled on their national territory."

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legislations of EU Member States concerning the right to vote of citizens resident abroad.

Whilst under the existing EU Treaties, Member States are competent to determine who can benefit from the right to vote in national elections, disenfranchisement practices can negatively affect EU free movement rights and are also at odds with the founding premise of EU citizenship, which is not intended to deprive citizens of rights, but rather to provide them with additional ones. In fact, in the EU Citizenship Report of 2013,[113] the Commission had already announced its willingness to propose constructive ways to enable EU citizens living in another EU country to fully participate in the democratic life of the EU by maintaining their right to vote in national elections in their country of origin.[114] While important indications and commitments emerge from this Recommendation, one cannot disregard the fact that these are mostly fine words and noble intentions, with very limited impact, for the time being, on the right to vote for the home country elections of the diaspora. It is interesting to note, in this connection that the EU has achieved concrete results in expanding and protecting the voting rights of EU citizens residing in another EU country in local elections and in European Parliament elections. The differences in priority given by the EU, which favours the voting rights of the diaspora for the above-mentioned elections in the country of settlement, are perfectly in line with the political commitment to reinforce and speed up the integration process of EU citizens in the country where they are temporarily residing. This is to be perceived, without any doubt, as a positive step. In the meantime, however, if a similar engagement with equivalent results is not also shown for the affirmation of the diaspora's right to vote in the home country, the consequences would be unbalanced, as there would be an effort to favour the integration of foreigners in a new State and at the same time a risk of losing their relationship with the home State. The need for a shift in the EU attitude, with the goal of promoting the voting rights of expatriates not only in the place of residency, but also in their home country, seems important and urgent.

113 COM/2013/269.

114 In the recent Recommendation C/2014/391, the European Commission stated that whenever Member States decide to limit the right to vote in national elections only to citizens resident in the territory, they should enable their nationals who make use of their right to free movement and residence in the Union "to demonstrate a continuing interest in the political life in the Member State of which they are nationals, including through an application to remain registered on the electoral roll, and by doing so, to retain their right to vote".

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d) Other Regional Treaties

After focusing on the situation in the European continent, attention will now be shifted to other regions, where three different and contradicting situations emerge: a) no specific indication about the rights of the diaspora; b) rules which allow the discrimination based on the residency principle; and, c) rules which recognise the right of the diaspora to vote in national elections. In a few cases the predominating attitude seems to be the one emerging from Art. 25, i.e. only citizens have the right to vote and there are no specific indications about the rights of the citizens living abroad. For example, the Association of Southeast Asian States (ASEAN) Human Rights Declaration adopted during the Phnom Penh meeting of the Association contains a provision (Art. 25) on the right to participation and on the right to vote which (although it is not legally binding and is not explicitly connected to the mandate of the ASEAN Human Rights Commission) states that

> "1. Every person who is a citizen of his or her country has the right to participate in the government of his or her country, either directly or through democratically elected representatives, in accordance with national law.
> 2. Every citizen has the right to vote in periodic and genuine elections, which should be held by universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electors, in accordance with national law."

The content of this article and of other similar rules codified in regional instruments do not really introduce any significant innovation, as they merely mirror Art. 25 of the ICCPR.[115] In a few other regional treaties, on the other hand, the possibility to restrict this right on the basis of residency is clearly foreseen, and therefore allowed. For example, Art. 23, comma 2, of the American Convention on Human Rights (ACHR) states that

> "The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, *residence*, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings."[116]

While in the ICCPR reference was made exclusively to the generic prohibition of unreasonable restrictions to the right to vote, which inevitably

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[115] See for example Art. 29 of the Convention of the Commonwealth of Independent States on Human Rights and Fundamental Freedoms (1995) entered into force in 1998, the 2012 Commonwealth Charter, the Document of the Second Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, Copenhagen, 1990 (note 29) and the Convention on the Rights of Persons with Disabilities.

[116] Emphasis added.

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requested the contribution of the relevant Courts to better define the extent of the legitimate restrictions, the Inter-American Convention seems much clearer on this point, allowing States to introduce derogations and restrictions to the right to vote of their citizens based on the place of their residency at the time of the vote. The conclusions reached previously about the consistency of residency restrictions with Art. 25 of the ICCPR confirm that Art. 23 of the ACHR does not contradict the ICCPR itself, provided that certain requisites are respected. This conclusion was also confirmed in 2003 by the Inter-American Commission on Human Rights (IACHR) in the *Statehood Solidarity Committee* case. The Commission confirmed that the restrictive interpretation of Art. 23 of the American Convention is in line with the approach of other universal and regional systems of human rights protection:

> "[...] Like the European Court and this Commission, the UN Human Rights Committee has recognized that the rights protected under Article 25 of the ICCPR are not absolute, but that any conditions that apply to the right to political participation protected by Article 25 should be based on 'objective and reasonable criteria'. The Committee has also found that in light of the fundamental principle of proportionality, greater restrictions on political rights require a specific justification."[117]

Following in the ECtHR's footsteps, the IACHR made reference once more to the "objective and reasonable criteria" which must characterise any restrictions on political rights. Very much in line with the attitude of its European counterpart, the IACHR, while legitimising in principle these restrictions, imposed on the State the obligation to offer specific justification for its behaviour to allow, at a later time, the Commission to confirm if the bases for the restrictive measures adopted were really objective and reasonable, should there be a request to do so.

In other cases, the regional *fora* depart significantly from the universal trend. An interesting case is represented by the Convention on standards of democratic elections, the voting rights and freedoms in the State Parties of the Commonwealth of Independent States (CIS)[118] of 7.10.2002. Art. 2 of

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[117] *Statehood Solidarity Committee v. United States,* Inter-American Commission on Human Rights, Case 11.204, Report No. 98/03, OEA/Ser./L/V/II.114, Doc. 70 rev. 1, 725 (2003), 29.12.2003, para. 93. See more in *R. Glickhouse/M. Keller*, Explainer: Expatriate Voting Laws in Latin America <http://www.as-coa.org>.

[118] The Commonwealth of Independent States (CIS) was formed in December 1991 by the leaders of the Republic of Belarus, the Russian Federation and the Ukraine. At present the following States are members of the CIS: Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine.

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this Convention is a very important and innovative provision, which, at para. c, states that

> "every citizen living or staying in the period of conducting of the national elections beyond the boundaries of their state has the voting rights equal to those pertaining to other citizens of their state. Diplomatic representations and consulate facilities of the state, and their officials support citizens in execution of their voting rights and freedoms".[119]

The rule is very clear and recognises, at least on paper, that citizens of the countries belonging to the CIS have a right to vote in the national elections even if they are abroad temporarily or for a long period. The rule seems to expect not only that member States must provide this right for their diaspora, but also that they should do their utmost to allow an out-of-country vote in order to facilitate the effective participation in the electoral process to those citizens who have left, for whatever reasons, their country of origin. As this is an innovative rule in the international legal framework it might be important to underline a few additional aspects: First of all, Art. 29 of the CIS Human Rights and Fundamental Freedoms Convention states that the right to vote has to be exercised according to the national law, leaving significant power to the member States. Art. 2c of the 2002 Convention does not include this limitation, thus imposing stricter obligations on the States and eliminating any discretionary power. Moreover, according to Art. 19 of the same Convention:

> "1. The States party to the Convention commit themselves to undertake legislative and other steps in order to consolidate the guarantees of voting rights and freedoms with the purpose to prepare and conduct democratic elections, to execute the provisions of the Convention. The standards of democratic elections, the citizen's voting rights and freedoms proclaimed above may be assured by way of their inclusion in the constitutions, legislative acts."

This article confirms that within the regional area of the CIS, the approach to the right of citizens to vote in elections in their country of origin is significantly different from the traditional approach and presents an interesting innovative element, which reinforces the electoral rights of the diaspora. With the exception of CIS countries, it can be affirmed that at the regional level none of the existing treaties (or corresponding jurisprudence) require States to facilitate voting for citizens abroad. The exception, then, can be traced back to the promotion of strong economic, cultural and social inte-

119 Text in English, not an official translation, is available at <http://www.venice.coe.int>.

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gration pursued by CIS countries, and especially by Russia, which also emerges in relation to the diaspora's voting rights.[120]

e) The Activities Promoted by the UN

Finally, it is worth mentioning that sometimes the request to favour the participation of the diaspora to take part to national elections has originated from the United Nations. Both the Security Council and the UN Secretary-General (directly or through his representatives) have on several occasions promoted the participation of the diaspora in national or local elections. A few examples will corroborate this interest of the UN institutions which needs, however, to be put in context. In fact, all the cases which will be mentioned below refer to post-war situations in which the main goal of the special voting rules was to facilitate the return and reintegration of the diaspora as a tool to promote post-war settlement, reconciliation and nation (re)building.

Para. c of the 1999 Agreement regarding the Modalities for the Popular Consultation of the East Timorese through a Direct Ballot, between the Governments of Indonesia, Portugal and the Secretary-General of the United Nations, formally included in the list of persons entitled to take part in the consultation: all persons, aged 17 years or above, born in East Timor; persons born outside East Timor but with at least one parent having been born in East Timor; and those whose spouses fall under either of the two categories above. As the Agreement did not restrict the right to vote to those residing in East Timor, it was generally understood that the right was to be recognised for the whole East Timorese diaspora. One year later, *Bernard Kouchner*, in his capacity as Special Representative of the Secretary General for Kosovo, adopted the United Nations Mission in Kosovo (UNMIK) Regulation No. 2000/21, on the Establishment of the Central Election Commissions[121] whose Section 7 (Voter Eligibility for the First Municipal Elections) stated that

> "7.2 A person who is residing outside Kosovo and who left Kosovo on or after 1 January 1998, may register to vote on a separate voters' register, provided that he or she meets the criteria in UNMIK Regulation No. 2000/13 of 17 March 2000 on the Central Civil Registry for being a habitual resident of Kosovo and the voter eligibility requirements as established by administrative direction. Such a person

[120] *F. Splidsboel Hansen*, Integration in the Post-Soviet Space, International Area Studies Review 16 (2013), 142 et seq.

[121] The Regulation is available at <http://www.unmikonline.org>.

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shall be eligible to vote for the municipality where he or she resided on 1 January 1998."

In this case, thanks to the leading role played by the UN, the Kosovar diaspora was granted the right to vote in the elections which took place in October 2000.

This precedent inspired the High Representative for Bosnia and Herzegovina, who in 2001 issued the Election Law of Bosnia and Herzegovina.[122] Art. 1.5 of this law states that

> "A citizen of Bosnia and Herzegovina who temporarily resides abroad and has the right to vote, shall have the right to register and to vote in person or by mail, for the municipality where the person had a permanent place of residence prior to his or her departure abroad, provided he or she is registered as a permanent resident in that municipality at the moment of his or her application for registration. The proof of residence shall rest upon the applicant. If the proof of residence is not attached to the application, this application will be rejected."

More recently, in United Nations Security Council (UNSC) Resolution 2254/2015 concerning the situation in Syria, the Council took note of the Statement of the International Syria Support Group (ISSG) of 14.11.2015[123] and expressed its support

> "[…] for free and fair elections, pursuant to the new constitution, to be held within 18 months and administered under supervision of the United Nations, to the satisfaction of the governance and to the highest international standards of transparency and accountability, *with all Syrians, including members of the diaspora, eligible to participate*."[124]

The real impact of the UNSC Resolution on the electoral rights of the Syrian diaspora will only be measurable in the future, once the political situation allows the holding of national elections.

The cases mentioned above prove that in general term States, unless bound by a specific treaty or by a UNSC Resolution, do not have a specific obligation to allow non-resident citizens to vote in elections held in their home country. The repeated interest shown by the United Nations in the involvement of the diaspora in post-war elections deserves the full credit as it represents a wise and far-sighted approach to the question.

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122 The Law is published in the Official Gazette of Bosnia and Herzegovina, 23/01: <www.ohr.int>.

123 <http://www.rbs0.com/Wien20151030.html>.

124 UNSC Resolution 2254/2015, para. 4. Emphasis added.

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IV. Specific Obligations Regarding the Right to Vote of Migrants and Citizens Who Have Acquired the Status of Refugee in Another Country

The paragraph above reached the conclusion that, unless otherwise regulated in specific regional human rights agreements, States are not (yet?) obliged to guarantee the right to vote to their citizens living abroad, and should they wish to deny this right, they have to act in compliance with several principles identified by international jurisprudence. This paragraph aims to verify if these conclusions also apply to specific cases of diaspora, namely refugees and migrants, who are entitled to special treatment provided for in several international treaties.

The active political role played by refugees in their country of origin is complicated, as refuges have lost their residence in their home country. Nevertheless, it has proven to assist in reconstruction activities[125] and to prevent the so-called phenomenon of the "spoiler refugee groups" whose failure to engage in reconstruction may undermine a post-conflict settlement.[126] Furthermore, according to *Gallagher* and *Schowengerdt*, they should be given "[…] a right to participate in the electoral process of their country"[127] considering that refugees have not in any way relinquished their citizenship by seeking asylum, but were compelled to leave their country of origin because current conditions therein posed a threat to either their lives or livelihood,

However, as far as refugees are concerned, a proper analysis of the specific rules concerning their political rights and duties codified in the 1951 Refugee Convention and protocols does not allow the view that there is a "clear obligation on the part of their State to ensure that they can vote in national elections".[128] Considering the very specific problems of refugees there is, according to a recent UNHCR study, an

[125] *K. Long* (note 31), 6.

[126] *J. Milner*, Refugees and the Regional Dynamics of Peacebuilding, Refugee Survey Quarterly 28 (2009), 17.

[127] *D. Gallagher/A. Schowengerdt*, Participation of refugees in post-conflict elections, in: K. Kumar (ed.), Post-Conflict Elections, Democratization, and International Assistance, 1998, 199. The same argument is also used by *R. Ziegler*, Voting Rights of Refugees, 2017, 68.

[128] *J. Grace/E. D. Mooney* (note 34), 100. A similar opinion is expressed by *J. Grace*, Challenging the Norms and Standards of Election Administration: External and Absentee Voting, 2007. The few Resolutions of the UNSC (mainly dealing with Afghanistan) in which the UN body encouraged the local authorities "to enable an electoral process that provides for voter participation that is representative of the national demographics including women and refugees and calls upon all eligible Afghans to fully participate in the registration and electoral

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> "increasing awareness of the special situation of refugees and the need to take into account their interest in participating in elections in their country of origin. This appears to be an area where the law is developing."[129]

In any case, it might be worth remembering that States are not prevented from conferring electoral rights to refugees settled in their territory: The political debate on this option has been warming up during recent electoral campaigns.[130] At regional level there are already the first attempts to introduce a specific obligation: Art. 8 of the 2007 African Charter on Democracy, Elections and Governance,[131] for example, states that

> "State Parties shall adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, *migrants,* people with disabilities, *refugees* and displaced persons and other marginalized and vulnerable social groups".[132]

Although the phrasing of this article raises the issue about which State (the State of origin? the hosting State? both?) is required to implement this obligation, it seems largely accepted[133] that this Article requests, at least, the State of origin of the refugee (and of the migrants), to allow them to exercise their right to vote and, to this end, enact national legislation which allows them to take part in national elections. In Art. 44 of the same Charter the State Parties declare their commitment to initiate appropriate measures including legislative, executive and administrative actions to bring the respective national laws and regulations into conformity with the Charter. After the African Charter comes into force, the rights of refugees (and of migrants) to vote in elections held in their home country will therefore be strongly boosted, at least in theory. In fact, the issue of the capacity of election administrators to conduct elections in multiple countries and the question of the significant associated costs remain unresolved problems which might prevent the full implementation of this right.

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processes" (such as UNSC Resolution 1536 [2004]), do not impair the previous conclusion as the SC did not oblige, but merely "encouraged" the local authorities to allow the participation of refugees in the national electoral process.

129 *R. Mandal*, Political Rights of Refugees, UNHCR, PPLA/2003/04, 2003, 13.

130 In Germany, during the recent political elections of September 2017, the issue of conferring electoral rights to those who have received refugee status in Germany has been, from time to time, at the centre of the political debate. The Social Democrats and the Green Party favoured this option while the CDU and the CSU opposed it: see more at <https://www.welt.de>.

131 The African Charter has not yet entered into force. So far only ten States have ratified it while 28 have signed it but not yet ratified it.

132 Emphasis added.

133 *A. Mbata Mangu*, African Civil Society and the Promotion of the African Charter on Democracy, Elections and Governance, African Human Rights Journal 12 (2012), 348 et seq.

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Another innovative attitude, this time only related to the category of refugees, has been developed within the Organization for Security and Co-operation in Europe (OSCE,) which has devoted much attention in recent decades to the issue under scrutiny here. In 2006 the OSCE created an Informal Working Group on Migration and Refugee Flows, tasked with exploring more coherent and strategic approaches which could be adopted by the Organization to address the challenges posed by refugees exercising their voting rights.[134] Already in the 1999 OSCE Istanbul Summit Declaration, the OSCE Participating States declared their full commitment

> "to facilitate the right of refugees to participate in elections held in their countries of origin".[135]

Although the phrasing of the OSCE document is peculiar and consistent with the entire OSCE machinery[136] and with the legal and political nature of this Organization, it clearly reflects an engagement of all Participating States. The formulation of this article concerns both the country of citizenship of the refugee (the country which has to adapt the national legislation to ensure the full implementation of this right of its citizens which have obtained the refugee status abroad) and the country which has granted the refugee status and where the refugee is temporarily located, as will be discussed in more detail in the paras. IV. 1 and IV. 3 below. The country where the refugee settles (temporarily?) should facilitate the exercise of this right, for example by offering, upon request of the country of origin, the use of the embassy, consular premises or other places as polling stations.

The picture emerging from the analysis of State practice concerning the out-of-country vote (OCV) by refugees indicates a low level of consistency and sometimes even some contradictory approaches. Raising awareness of the current situation should stimulate a more coordinated approach and the development of

> "clear and consistent guidelines for financial and logistical engagement in OCV processes".[137]

Furthermore, notwithstanding the high priority given, in various instances, by the international community to promote out-of-country voting

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[134] The OSCE Informal Working Group on Migration and Refugee Flows was created after the OSCE Security Days on Migration in Rome in March 2016.

[135] <http://www.osce.org>.

[136] The OSCE operates through a political process that creates politically binding norms and principles: OSCE commitments are not legally binding but they are political promises to comply with these standards.

[137] *K. Long* (note 31), para. 72.

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for refugees and asylum seekers who left the country due to war, the real impact of this policy raises many doubts. Considering that OCV programs for displaced populations, which are inevitably very expensive[138] and depend almost entirely on the financial support of interested States, and considering that this support does materialise frequently, it is difficult to anticipate a significant development in this policy in the foreseeable future. This is an unfortunate outcome, considering the potential role to be played by refugees for the stabilisation and reconstruction of their home countries, especially in the aftermath of a conflict.

Finally, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW), has to be mentioned in this context as it contains very important rules concerning the voting rights of this category of the diaspora. Art. 41 para. 1 of the ICMW affirms that

> "[m]igrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation".[139]

Art. 41 para. 2 of the ICMW stipulates that

> "the States concerned shall, as appropriate and in accordance with their legislation, *facilitate the exercise of these rights*". (Emphasis added)

Whilst para. 1 of Art. 41 provides immigrants with the right to participate in the political life of their home country and to vote, the phrasing of para. 2 of the same Article requests the States of the migrants to facilitate the exercise of the electoral rights "as considered appropriate and in accordance with the national legislation". The regulatory framework dictated by the ICMW undoubtedly introduces a new set of rights for migrants and new obligations for the States of origin. As there is now a specific obligation incumbent on the home States to recognise migrants' right to vote, at least for those States which ratified the ICMW (51 on February 2018), the limitations to this right, which remain possible according to the wording of the Convention itself, have to be applied and interpreted in a restrictive manner. Otherwise the specific goals and objectives of the Convention risk being frustrated.

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[138] According to the study of *K. Long* (note 31), para. 71, "While OCV in Bosnia in 1996 cost just US$ 2 million, as did the 1999 East Timorese Popular Consultation, IOM (2003), voting in the 2005 Iraqi elections cost US$ 72 million (with an initial budget of US$ 92 million), or US$ 270 per external voter, a questionable use of international financial resources."

[139] Art. 41 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990.

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The innovation introduced by the ICMW is significant and noteworthy, as it incorporates two considerations: First, the general principle of favouring the individual with rights when there is a discrepancy between two or more rules granting human rights; second, most of the universal and regional treaties examined above do not explicitly foresee migrants' right to vote in their home country.[140] The fact that several States which have ratified the ICMW do not comply with this obligation deserves to be condemned and brought to the attention of the relevant monitoring bodies. This negative attitude of the States is part of a widespread tendency in the international community characterised by a very cautious approach when dealing with the political rights of migrants and refugees. This trend is also clearly reflected in the recent New York Declaration for Refugees and Migrants, adopted by the UN General Assembly on 3.10.2016.[141] In this landmark Declaration, although there are several commitments to ensure full respect and protection for the human rights of migrants and of refugees,[142] there is no reference at all to their political rights.

V. The Obligations of the States Where the Foreigner Has Settled

1. Is There an Obligation to Allow Foreigners to Vote in National or Local Elections?

As has emerged from the paragraphs above, the right to vote is not guaranteed as a universal human right, but rather considered as a "citizen's right". This means that, unless there are specific agreements or national laws[143]

[140] See more in *J. Fitzpatrick*, The Human Rights of Migrants, in: A. Aleinikoff/V. Chetail (eds.), Migration and International Legal Norms, 2003; *A. Pécoudand/P. de Guchteneire*, Migration, Human Rights and the United Nations: An Investigation of the Obstacles to the UN Convention on Migrant Workers Rights, Global Migration Perspectives 3 (2004) and *J. Yau*, Promise and Prospects of the UN's Convention on Migrant Workers, in Migration Information Source, March 2005.

[141] A/Res/71/1.

[142] A/Res/71/1, para. 22.

[143] See more in the comprehensive, although not recent, study of *J. Raskin*, Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage, U. Pa. L. Rev. 141 (1993), 1391 et seq. and the one of *V. Harper-Ho*, Noncitizen Voting Rights: The History, the Law and Current Prospects for Change, Law & Inequality 18 (2000), 271 et seq. For a specific overview of the relevant rules codified in the Constitution of The Netherlands, see more in *H. U. Jessurun d'Oliveira*, Electoral Rights for Non-Nationals, NILR 31 (1984), 59 et seq.

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regulating the issue in a different manner, the right to vote is not automatically extended to everyone under a State's jurisdiction,[144] as States are entitled, but not obliged, to restrict it to their citizens.[145] Several "political" arguments have been used to support the denial of the rights of foreigners to vote in national or local elections in the host State: for example, it has been noticed that a stay in the foreign territory, especially if it is a short one, does not allow a person to get sufficiently acquainted with the political institutions, actors and topics in the respective territory[146] and that a temporary stay means that a foreigner will not be subject to the consequences of his/her choice.[147] *Waldrauch*, however, expressed his firm belief that should a foreigner have spent a long period in the host country,

> "not citizenship should be the relevant criterion for deciding who is granted electoral rights but residence in the respective territory";

and the basic rule in this respect is "the longer one stays, the stronger one's moral claims".[148] Other arguments used to favour the extension of the right to vote to non-citizens are based on

> "the relation between the contribution of non-citizens to a country's prosperity on the one hand and the possibilities of non-citizens to influence the political decisions in the country concerned on the other hand. In a democracy, all groups of the population ought to have equal opportunities"[149]

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144 On the breadth and the development of the concept of jurisdiction see e.g. *A. Mills* (note 61), 187 and *M. Milanović* (note 61), 411.

145 The jurisprudence and scholars seem quite convinced that the beneficiaries of this right, due to its unique nature, have to be interpreted in a restrictive manner: this is the opinion of *H. Birkenkötter/A. von Notz* (note 63). States can further restrict this right excluding, among their citizens, for example, those under a given age or those who have been found guilty for having committed a serious crime, related or not to the exercise of this right.

146 For an opposing view see *J. Wisecup*, Resident Alien Voting Rights in a Postmodern World, Chicano-Latino Law Review 27 (2008), 172 et seq.

147 *H. Waldrauch*, Electoral Rights for Foreign Nationals: A Comparative Overview of Regulations in 36 Countries, 2003, <https://openresearch-repository.anu.edu.au> 3.

148 *H. Waldrauch* (note 147). See as well *G. Rosberg* (note 43), 1092 et seq.; *J. B. Raskin* (note 143), 1391 et seq.; *J. H. Carens*, Citizenship and Civil Society: What Rights for Residents?, in: H. Randall/P. Weil (eds.), Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe, 2002, 100 et seq.; *E. Brozovich*, Prospects for Democratic Change: Non-Citizen Suffrage in America, Hamline Journal of Public Law & Policy 23 (2002), 403 et seq.; *S. Benhabib*, The Rights of Others: Aliens, Residents, and Citizens, 2004, who strongly argues for more moral universalism and cosmopolitan federalism, and *D. C. Earnest*, Neither Citizen Nor Stranger: Why States Enfranchise Resident Aliens, Wld. Pol. 58 (2006), 242 et seq.

149 Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Demography, Report by Mr *C. Luís,* on "Participation of Immigrants and Foreign Residents in Political Life in the Council of Europe Member States", 22.12.2000, Doc. 8916. See as well, the interesting and similar conclusions reached in his study on South Korea, by *K. Kalicki*, Elec-

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or on the urgent need to address the widening gap between popular and territorial sovereignty.[150] Recent studies have examined the potential impacts, both positive and negative, of allowing foreigners to vote in national or local elections.[151]

As already anticipated, several regional human rights treaties are drafted in a similar manner to Art. 25 of the ICCPR, allowing States to restrict the right to vote and to be elected to their "citizens" alone.[152] All these rules do not prohibit States to allow the participation of foreigners in their national elections. Such a decision, not impossible, but infrequent till now, especially at the regional level,[153] would, however, be based on a discretionary and autonomous decision of the local State. This conclusion is confirmed by the content of several national Constitutions[154] and also by national jurisprudence. For example, in the case *X et al. v. the State of Japan et al.*, involving a Korean national who had been residing for a long period in Japan and who

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toral Rights Beyond Territory and Beyond Citizenship? The Case of South Korea, Japanese Journal of Political Science 10 (2009), 289 et seq.

150 *M. W. Varsanyi*, The Rise and Fall (and Rise?) of Non-Citizen Voting: Immigration and the Shifting Scales of Citizenship and Suffrage in the United States, Space and Polity 9 (2005), 113 et seq. See as well *V. Harper-Ho* (note 143), 271 et seq.

151 In a recent study by *S. Fox/R. Johnston/D. Manley*, If Immigrants Could Vote in the UK: A Thought Experiment with Data from the 2015 General Election, The Political Quarterly 87 (2016), 500 et seq., it was estimated that 95 parliamentary seats could have been won by a different party in the 2015 general elections in the UK. According to the authors of this research, enfranchising all immigrants would require re-drawing UK constituency boundaries and this would increase the relative power of urban constituencies and would incentivise some political entrepreneurs and parties to temper anti-immigration rhetoric. See also the interesting conclusions reached in the study by *E. R. Bolaños Salazar*, La participación política desde el extranjero: el impacto del voto emigrante en la democracia latinoamericana y la importancia de su protección en el sistema interamericano de derechos humano, Revista Costarricense de Derecho Internacional I (2014), 60 et seq. In another study the risk of manipulation of the vote of aliens has been highlighted making specific reference to the situation in Zimbabwe: see more in *D. Anusa*, ZANU (PF)'s Manipulation of the "Alien" Vote in Zimbabwean Elections: 1980-2013, South African Historical Journal 68 (2015), 1 et seq.

152 See for example, the Convention of the Commonwealth of Independent States on Human Rights and Fundamental Freedoms (1995), the American Declaration on the Rights and Duties of Man (1948), the African Charter on Human and Peoples' Rights (1981), the CIS Human Rights and Fundamental Freedoms Convention (1995), the Inter-American Democratic Charter (2001) and the ASEAN Human Rights Declaration (2012).

153 For the specific, and sometimes very innovative approaches in the Central American countries see more *P. Santolaya Machetti/M. Díaz Crego*, El sufragio de los extranjeros: un estudio de derecho comparado, 2008.

154 As an example, Art. 100 of the 1991 Constitution of Colombia affirms that "the law may grant to aliens resident in Colombia the right to vote in elections and in popular consultations at the municipal or district level". See more on these questions *A. Kirshner* (note 54), 7 et seq.

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asked to be entitled to vote in the national elections in Japan, the Fukui District Court clearly stated in 1994, that the term "every citizen" as used in Art. 25 of the ICCPR

> "cannot be interpreted as including foreign nationals permanently residing in the country concerned".[155]

The Court, taking into consideration the practice of other States allowing foreigners to vote for the local assemblies, concluded that States can always decide to allow foreigners to vote as it is

> "a matter of legislative policy whether to grant such a right to foreign nationals".[156]

Although the approach adopted by most States is, at least nowadays, to restrict the right to vote to their own citizens, there are a few exceptions, which deserve to be mentioned in this connection. The UDHR is a good example: Unlike most of the subsequent international legally binding instruments which identify only the "citizens" as the right-holder, the Declaration states that "everyone has the right to take part in the government of his country". A few scholars have, therefore, drawn the conclusion that the UDHR should be interpreted in such a manner as to allow foreigners, or at least those settled for the long term, to vote in the country of their residence.[157] A number of regional organisations have introduced specific obligations according to which the local State must allow foreigners, or at least those having resided in the country for a long period, to actively take part in national or local elections. An interesting case in this connection is offered by the Commonwealth, an intergovernmental organisation of 53 States, many of which are former British colonies, dependencies and territories. In the December 2012 "Commonwealth Charter" the members of this organisation pledged to

> "[...] recognise the inalienable right of individuals to participate in democratic processes, in particular through free and fair elections in shaping the society in which they live".

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[155] Fukui District Court, 5.10.1994 reproduced in AsYIL VI (1996), 223.

[156] Fukui District Court (note 155), 223.

[157] According to *A. Rosas*, the UDHR defines the right to vote "more on the basis of residence than nationality or citizenship": *A. Rosas*, Article 21, in: S. Guðmundur/A. E. Alfreðsson (eds.), The Universal Declaration of Human Rights: A Common Standard of Achievement, 1999, 451. In fact, considering the specific situation of the foreigners, especially those settled for a long period in a third country, it might well be argued that the government of their country is the one they are living in and therefore those foreigners who have resided abroad for a long period, should enjoy the right to vote in the country they are living in.

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The clearly innovative part of this Declaration is that the right to participate in democratic processes, mainly through elections, is bestowed on individuals, and not on citizens (as in all the previous international texts examined so far) and relates to elections taking place in the country in which an individual lives. The innovation is even more significant considering that in the previous 1991 Harare Commonwealth Declaration this right was conferred only on citizens (and not to all individuals).[158] Other interesting cases of expansion of the right of foreigners to vote in the country they are living in is offered by the 1990 Charter of Paris for a New Europe, adopted during the Meeting of the Heads of State or Government of the participating States of the Conference on Security and Co-operation in Europe (CSCE)[159] and by the CoE 1992 Convention on the Participation of Foreigners in Public Life at Local Level, (which entered into force in 1997 but has so far been ratified by only 9 member States). Art. 6 paras. 1 and 2 of this Convention state that:

> "[…] each Party undertakes, subject to the provisions of Article 9, paragraph 1, to grant to every foreign resident the right to vote and to stand for election in local authority elections, provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections.
>
> However, a Contracting State may declare, when depositing its instrument of ratification, acceptance, approval or accession, that it intends to confine the application of paragraph 1 to the right to vote only."

In this specific case the right to vote and to be elected is, however, restricted *ratione materiae* only to local elections and *ratione personae* only to foreigners who have been lawful and habitual residents in the State concerned for the five years preceding the elections. Notwithstanding these limitations, this Convention constitutes another fissure in a legal framework

158 Art. 4 of the 1991 Harare Commonwealth Declaration states that: "We believe in [...] equal rights for all citizens regardless of gender, race, colour, creed or political belief, and in the individual's inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives."

159 In this Charter it is stated "*everyone* also has the right […] to participate in free and fair elections". Emphasis added. It is interesting to note that this statement contradicts the Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (note 29), adopted just a few months before, according to which "The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government. The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes [...]."

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which used to be very compact and consolidated and seems recently, although very slowly, to have lost its granitic configuration. The Parliamentary Assembly of the CoE is another major actor promoting this trend, as it has traditionally requested the expansion of the political rights of foreigners in general and of migrants in particular. In its recent Resolution No. 2006, adopted in 2014, the Parliamentary Assembly requested CoE Member States to

> "ensure that migrants have a say in the democratic process by granting them, in particular, the right to vote at local level".[160]

The Parliamentary Assembly of the CoE also addressed the question under scrutiny here in several studies and reports. In the 2005 Report on Abolition of restrictions on the right to vote, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, considering that in many States there is a trend to let residency prevail over nationality as a precondition for the right to vote, suggested that CoE Member States

> "follow this approach at least for local elections, and under the condition of a certain minimum period of residence. With regard to the right to be elected, the same approach could be applicable with a requirement of a longer period of minimum residence."[161]

Additional ruptures to the traditional approach have been introduced in the European Union. Art. 22(2) of the Treaty on the Functioning of the European Union (TFEU), grants to

> "every citizen of the Union residing in a Member State of which he is not a national [...] the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides".[162]

The EU Charter of Fundamental Rights, at Arts. 39 and 40, restates the electoral rights of non-national Union citizens in municipal and European parliamentary elections in their country of residence.[163] In order to take part

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[160] CoE Parliamentary Assembly, Resolution 2006 (2014) 1, final version, Integration of Migrants in Europe: The Need for a Proactive, Long-Term and Global Policy.

[161] CoE Parliamentary Assembly, Doc. 10553, 18.5.2005. Abolition of Restrictions on the Right to Vote Report. Committee on Legal Affairs and Human Rights.

[162] The arrangements for implementing this right were adopted under Council Directive 93/109/EC as amended by Council Directive 2013/1/EU.

[163] The right to vote and to stand as candidate in municipal elections of citizens of the Union residing in a Member State of which they are not nationals, has been implemented through the Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections of citizens of the Union residing in a Member State of which they are not nationals: Official Journal of the EU, L 368, 31.12.1994, 38 et seq.

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in elections, EU citizens must apply to be on the electoral roll of the country of residence, providing the same supporting documents as national voters. In countries where voting is compulsory, they will also be covered by this obligation. These rights have been regulated in a detailed manner in the Directive 93/109/EC of 6.12.1993 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, and in the Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections. This is undoubtedly one of the most advanced pieces of international legislation allowing the active participation in the national election process of foreigners who comply with specific requisites.

Although the trend of expanding, under specific conditions, the right to vote of foreigners seems to be slowly increasing, it has to be emphasised that the above-mentioned treaties and regulations represent an exception to the general rule and, as such, have to be interpreted in a narrow manner. This approach, which in any case is strongly opposed by many other stakeholders,[164] could, however, receive an additional boost in other regional areas. Currently

> "65 countries, on 6 continents, have provisions granting the exercise of some voting rights to foreigners and/or for certain categories of foreign residents".[165]

This fact proves that there is a growing awareness of this issue, to the point where it could be seen as a powerful tool to expedite the integration process of the foreigners into the national and local communities through the recognition of their political rights.

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[164] The political rights of the migrants in the country where they are settled received scant attention in the 2011 EU Commission Staff Working Paper, EU Initiatives Supporting the Integration of Third-Country Nationals (SEC [2011] 957 final, 20.7.2011) as well as in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on the Integration of Third-Country Nationals (COM [2016] 377 final, 7.6.2016), On February 2013, the Greek Council of the State issued its decision 460/2013 on, among others, the right of third-country nationals to participate in municipal elections in Greece. The Council of State declared that third-country nationals are not entitled to vote or to be elected in municipal elections: see more on this in *D. Christopoulos*, What Next for Greek Nationality Law? European Union Democracy Observatory on Citizenship, 18.2.2013, <http://eudo-citizenship.eu>.

[165] Countries that Grant Some Voting Rights to Foreign Residents (65 of 193 Member States of the United Nations), <http://www.ivotenyc.org>.

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2. Is There an Obligation to Support Third States in the Organisation of Their Out-of-Country Elections?

This paragraph examines the specific obligations incumbent on States hosting foreigners. These obligations centre around co-operation with foreign States in the organisation of out-of-country activities such as those to be organised in the embassies, consulates, other locations, correspondence vote, e-vote, creation of an electoral district and so forth. In the following paragraph we will examine if and to what extent foreigners are entitled to exercise other political rights which are closely linked to this right, such as political campaigning, fundraising, organisation of public events etc. As the issues at stake are many, it may be convenient to address them separately, although there are evident interconnections. First of all, we will analyse whether the local State has any obligation at all.

As already anticipated in para. III. 2. above, participation in national elections by voters currently in a foreign country can be organised using different tools, e.g. e-vote, postal vote, in presence vote etc., each of them having a diversified impact on the sovereignty of the hosting State. E-vote and postal vote, for example, do not represent any significant interference with the exclusive rights of the local State to exercise its sovereign powers on its territory. In similar cases, it must be assumed that the exercise of foreigners' voting rights in elections held in another country must be permitted by the local State, as there is no significant intrusion or interference in the sovereign activities pertaining exclusively to the local State.[166] On the other hand, should the modality of the organisation of the vote imply the opening of polling stations on the territory of a foreign country, be it in the embassies or consular premises of the foreign State or in other locations, the legal framework is quite different, as this modality of conducting elections might well represent an interference in the national sovereignty. In such a case it has been noted that

> "[t]here are no consistent policies, practices or standards to guide host governments on the question of foreign electoral activities being conducted on their soil, much less the responsibilities of host governments".[167]

As a result of this normative vacuum, some countries do not allow any kind of foreign electoral activity on their soil.[168] Other States, however, have

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[166] See, for example, *H. Birkenkötter/A. von Notz* (note 63).

[167] *B. Lacy,* Host Country Issues, in: A. Ellis/C. Navarro/I. Morales/M. Gratschew/N. Braun (eds.), Voting from Abroad: The International IDEA Handbook, 2007, 137.

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refused on an *ad hoc* basis specific requests, for reasons ranging from sovereignty to security and to political considerations, whereas fewer States have had a more liberal attitude allowing, in principle, the holding of foreign elections in the diplomatic premises of the respective country, subject to prior notification to the competent national authorities.[169]

These uncertainties and differentiated (and sometimes, even contradictory) approaches in international practice require a more detailed legal analysis which will focus both on general international law and on the 1961 Vienna Convention on Diplomatic Relations, as well as on the 1963 Vienna Convention on Consular Relations. Art. 3 of the 1961 Convention and Art. 5 of the 1963 Convention list, respectively, all the diplomatic and all the consular functions: nowhere are the organisation or holding/hosting of national elections expressly mentioned as tasks to be performed by the diplomatic or consular offices. However, in the last paragraph of Art. 5 there is a final clause stating that consular functions include

> "[...] performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State".

It is precisely this final clause which usually provides the regulatory framework for issues related to the organisation of elections in a foreign State. A closer look at the precise wording of this provision, however, allows clarification of an important aspect: The legality of organising elections in the diplomatic premises located in the hosting country depends on national enabling legislation or on specific rules codified in a valid treaty or on the absence of any objection by the receiving State. It seems quite clear, therefore, that, according to Art. 5, a foreign State does not have any right to organise on the soil of another State polling stations for its diaspora living in that country unless this is permitted by the national law of the hosting State,

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168 For instance, Canada strictly prohibits foreign electoral campaigns on its soil on the grounds that "[f]oreign electoral campaigns in Canada have the potential to focus on domestic Canadian political issues or bilateral disputes, and to undermine social cohesion, inclusiveness and identity". See *F. Mégret/R. Girard* (note 34), 193.

169 See for example the position of Germany: considering the tensions raised by the Turkish Constitutional Referendum to be held in April 2017, the German Minister for State Affairs, *Peter Altmaier*, answering to a parliamentary question on 12.3.2007, confirmed that the embassies and consulates of foreign States accredited in Germany are allowed to organise national elections and to implement them, if the voting system foresees the voting by mail or internet. The answer of Minister *Altmaier* to the parliamentary question is available at: <https://dipbt.bundestag.de>.

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by specific agreements or by the hosting State tolerating these activities. Such a conclusion is based on solid and consistent international practice.[170]

The position of the German government concerning the recent Turkish referendums of 16.4.2017 is very instructive in this connection. Germany allowed Turkish citizens (including those having dual German and Turkish citizenship) to vote in the Turkish Embassy and consulates in Germany at the Presidential Referendum. Answering a parliamentary question on 12.3.2017, the Minister for State Affairs, Mr *Peter Altmaier*, confirmed that, according to a well-established practice, personal vote for foreign elections is allowed in Germany, usually only in diplomatic and consular premises, if a special authorisation, to be requested by the diplomatic representative, has been granted by the Federal Ministry of Foreign Affairs (MOFA). On an extraordinary basis, the MOFA can also allow the use of additional premises. For example, for the French presidential elections, which occurred in April and May 2017, France requested and obtained the authorisation to organise polling stations not only in its diplomatic and consular premises but also on the premises of the Institut Français. According to Minister *Altmaier* the German Government can deny or withdraw at any moment the authorisation to conduct foreign elections or referendums on German soil.[171]

In certain cases, the local Government is virtually compelled to deny the authorisation. This occurs when the referendum concerns topics which would contradict basic national and common values. A few weeks after the Referendum of April 2017, the Turkish President *Erdoğan* announced the possibility of launching a new Referendum in order to reintroduce capital punishment in Turkey. *Steffen Seibert*, the spokesperson of the Government, immediately reacted, stating officially that

> " it is politically not to be imagined that we will allow this kind of referendum in Germany on a topic which clearly contradicts our Constitution and European values".[172]

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[170] In the press Conference of 15.3.2017, the spokesperson of the German MOFA stated that "international law gives a fully discretionary power to the State to decide whether to allow, and, if the case, under which conditions and within which limits, the exercise on its territory of sovereign acts by another State. The organisation of elections in another country is a sovereign act and therefore it needs, according to international law, the authorisation of the hosting State. This rule is applicable not only in Germany but worldwide." Translation provided by the author: the official document in German is available at <https://www.bundesregierung.de>.

[171] The answer of Minister *Altmaier* to the parliamentary question is available at: <https://dipbt.bundestag.de>.

[172] Unofficial translation into English by the author. The Statement is reproduced on the official website of the German National television ZDF: <http://www.heute.de>.

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This statement, which received full backing from most of the opposition parties,[173] is supported by an interesting report from the Research Centre of the German Bundestag issued on 21.4.2017.[174] After careful legal analysis of all the relevant facts and issues, the report concludes that the Government has discretionary power to allow the holding of elections for foreign countries on German soil, unless the voting or the referendum relates to issues which would conflict with the basic Constitutional rules and relevant international norms.[175]

Another interesting example is offered by Italian legislation: Art. 55 of the recently updated Consular Law of 2011[176] states that the consular offices of Italy worldwide are tasked to carry out all necessary activities requested by national law including specifically those necessary to enable all Italian citizens living abroad to take part in national elections. Although the wording of this article could lead to the conclusion that the Italian consular staff might be allowed to organise elections abroad without limitations, it is the opinion of the present author that this would be an erroneous interpretation as a prior authorisation by the local State is needed to carry out electoral activities inside the consular premises. This interpretation is based on the content of Art. 3 of the same Consular Law of 2011, according to which the head of the consular office shall carry out its task in conformity with international rules and practice.[177] The position of Canada is slightly different, as the Canadian authorities have clarified that

> "[f]oreign missions carrying out voting activities for foreign elections, within their premises or elsewhere in Canada, must obtain Canada's consent prior to proceeding".

Therefore, if foreign voting activity is arranged by a foreign mission but is not authorised by Canada, "this would be incompatible with the exercise of consular functions".[178]

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173 *Martin Schulz*, at that time main opposition candidate who has been appointed by the Social Democratic Party to run for the position of Chancellor, confirmed to the press that such a Referendum among the Turkish citizens living in Germany cannot take place: <http://www.heute.de>.

174 <https://www.bundestag.de>.

175 Unofficial translation provided by the author.

176 Decreto Legislativo 3.2.2011, No. 71, Ordinamento e funzioni degli uffici consolari, ai sensi dell'articolo 14, comma 18, della legge 28.11.2005, No. 246, published in the Gazzetta ufficiale, Serie Generale No. 110 of 13.5.2011.

177 Art. 3 of the 2011 Law states that "the tasks of the consular office are fulfilled by the head of the office according to relevant international conventions and customs" (un-official translation provided by the author).

178 <http://www.international.gc.ca>.

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Summing up, it is possible to affirm that States have no specific obligation to offer to foreign countries the use of their own territories, nor to allow the use of diplomatic and consular premises, for the organisation of foreign elections. Obviously the outcomes would be different if the local State consented (on a case-by-case basis or in a generic manner or as codified in specific international agreements). In this regard, an interesting and relevant rule is codified in Art. 8 of the 1967 European Convention on Consular Functions, according to which

> "A consular officer shall be entitled to […] send individual notifications to nationals of the sending State in connection with referendums and elections, national and local, and to receive ballot papers of his nationals qualified to participate in the said referendums and elections."[179]

It is worth stressing that the 1967 Convention has not yet come into force. Notably, in para. 56 of the Explanatory Report to the Convention, Art. 8 is defined as "innovative" because, in relation to those States that have ratified this Convention, it can be assumed that on the basis of this article there will be no need to ask and to obtain prior authorisation from the hosting State to receive ballot papers in the consular premises. The precise extent of this right, however, is controversial, as it is not clear if it implies only the collection via postal services of the ballot papers or also permits the setting up of polling stations inside the consular premises. In any case, until the Convention comes into force, the host State will still be entitled to make a final decision regarding the holding of foreign elections in its territory. The precise content of the innovative rules codified in the 1967 Convention will, most probably, be clarified on the basis of the States' practice after its entry into force, which, considering the slow ratification process, might never happen.

In the 1999 Agreement regarding the Modalities for the Popular Consultation of the East Timorese through a Direct Ballot, between the Governments of Indonesia, Portugal and the Secretary-General of the United Nations, which has already been analysed in para. III., much emphasis has been placed on facilitating the participation in the consultation of all those who had left the country. In this framework, the agreement provided for the opening of 200 voter registration centres in East Timor and of special registration centres in Jakarta, Yogyakarta, Surabaya, Denpasar, Ujung Pandang, Sydney, Darwin, Perth, Melbourne, Lisbon, Maputo, Macau, and New York.

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[179] Furthermore, Art. 44 of the same Convention states that "A consular officer shall be entitled, in addition to the consular functions for which provision is made in the present Convention, to exercise any other consular functions entrusted to him by the sending State which are not prohibited by the law of the receiving State or to which no objection is taken by that State."

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It was foreseen by the treaty that the same centres, opened for the registration of voters, would later be used as polling stations.

The decision to open registration and voting centres in countries which were not parties to the agreement sponsored by the UN (such as Australia, Macau, the USA and Mozambique), is almost unique. As anticipated earlier in this paragraph, these States should have been formally requested in advance to permit the opening of these centres in their respective territories. However, it can be assumed, on the basis of the follow-up and the effective implementation of this agreement, that there was an implicit consent of these States to allow these activities to be implemented on their territories. On the other hand, Portugal and Indonesia were explicitly obliged to allow the consultation to take place on their territories, as they were parties to the 1999 international agreement.

The post-Taliban elections in Afghanistan were addressed in similar way. In view of the fact that over one million Afghans were living in Pakistan and Iran at the time of the Afghan Presidential elections scheduled to take place on 9.10.2004, two Memoranda of Understanding were signed between the Government of Afghanistan, United Nations Assistance Mission in Afghanistan (UNAMA) and the Governments of Iran and Pakistan. According to these memoranda, IOM was appointed as the administrator for the elections and the two host governments were requested to provide widespread support for the out-of-country registration and voting program, including security of registration and polling centres as well as escorts for the transport of election material.[180]

As anticipated in para. III. 6. above, the UNSC, in its Resolution 2254/2015 concerning the situation in Syria, requested that all Syrians, including those abroad, be allowed to vote. This request of the UNSC targeted not only the Syrian authorities but, additionally, all those States hosting the Syrian diaspora, to facilitate Syrians' active participation in the elections. This implies that these States should allow the hosting of election-related activities on their territories. The careful wording used by the UNSC, however, seems to indicate that States are invited, but not obliged, to facilitate these out-of-country elections.

A second point to be examined in this paragraph is whether the same conclusion is applicable to the host State in the presence of special categories of foreigners, such as refugees or migrants. This issue is sometimes dealt with

[180] IOM, UNAMA and IEC, Background Information, Afghanistan Out of Country Registration and Voting (OCRV) program for Afghan refugees in Pakistan and Iran, 25.9.2000, <https://aceproject.org>.

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in specific soft law instruments: For example, the OSCE participating States have stated, in the 1999 Istanbul Summit Declaration, their commitment to

> "secure the full right of persons belonging to minorities to vote and to facilitate the right of refugees to participate in elections held in their countries of origin".[181]

This sentence reflects the willingness of all the OSCE participating States not only to ensure that refugees are allowed to participate in the elections held in their countries of origin, but to facilitate the exercise of this right by, for example, offering, upon request of the country of origin, the possibility to use the embassies and the consular premises or even other places as out-of-country polling stations.

The importance of refugees being involved in the electoral process in their home country was emphasised in his speech to the UNSC on 8.1.2009 by the then UN High Commissioner for Refugees, who stressed that their active participation

> "can provide critical perspectives on the causes of conflict and contribute to a sense of shared ownership in peacemaking and peacebuilding".[182]

However, the 2006 UNHCR Manual "Voluntary Repatriation: International Protection" clearly indicates that the possibility for refugees to vote abroad in the country of temporary settlement depends on agreements between the interested States. Therefore, unless there are specific treaties, the State hosting the refugee has no obligation to allow the organisation in its territory of any elections/referendums being held in another country.[183]

One may conclude by saying that the host State has no specific and clear-cut obligation to support foreign elections involving voters present in the country. However, voting procedures for the elections in a third State implying merely e-voting procedures or a vote via postal services, must be, generally speaking, tolerated by the State hosting voters, considering that they do not represent any significant interference with the exclusive right of the local State to exercise its sovereignty,[184] unless the topic of the vote or referendum is of such a nature to contradict fundamental values of the local State and of the wider international community (such as, for example, a referendum on the reintroduction of the death penalty). These conclusions are valid unless there are specific treaties, or a UNSC Resolution, regulating the issue in a different manner and creating specific obligations incumbent on the

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181 OSCE Istanbul 1999 Summit Declaration, para 26, <https://www.osce.org>.

182 Statement by Mr *António Guterres*, United Nations High Commissioner for Refugees, to the United Nations Security Council, New York, 8.1.2009, <http://www.unhcr.org>.

183 UNHCR, Handbook Voluntary Repatriation: International Protection, 1996, 66.

184 See the authors quoted at note 63.

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State hosting foreigners: in such a case, it is obvious that the specific treaty rules, or, when applicable, the obligations stemming from a UNSC Resolution, will prevail. In any case, the precise wording of the UNSC Resolution will be of pivotal importance, as the UN body very often merely recommends that States support out-of-country elections.

3. Do Foreign Citizens Enjoy Other Political Rights Such as Freedom of Opinion, Peaceful Assembly and Freedom of Association, in the Country Where They Are Living?

a) The Universal and the Regional Regulatory Framework

In this paragraph we will examine if, and under which conditions, foreigners enjoy political rights in the host State. These rights are usually considered to include the right to assembly, to vote and to be elected, to hold opinions without interference, etc. These rights might be enjoyed on the occasion of elections or other political activities organised in the State of origin or in relation to activities associated with the political situation in the host State. As most of the relevant treaties do not provide for any distinction between the nature of political activities carried out by foreigners, i.e. activities related to the State of origin or those related to the host State, we will not differentiate among these activities, unless the treaties allow us to do so. In fact, to separate the political activities carried out in the host State on the basis of the specific goal of those activities is often almost impossible due to the narrow borderlines between the two typologies of activities.

In general terms, as already stated, it is the opinion of the present author that whenever the local State has authorised the exercise of their right to vote, it should allow the foreigners to exercise all the associated rights, unless there are specific rules allowing the local State to restrict the political activities of foreigners in its territory.[185] However it cannot be denied, that, at least in the case of elections occurring in a foreign country, there are potentially con-

[185] According to *G. S. Goodwin Gill*, International Law and the Movement of Persons Between States, 1978, 255, an alien indulging in "undesirable" political activities is liable to expulsion. *A. Verdross*, Les règles internationales concernant le traitement des étrangers, Collected Courses of the Hague Academy of International Law 37 (1931), states clearly that foreigners do not enjoy political rights. *C. Tiburcio*, The Human Rights of Aliens Under International and Comparative Law, 2001, 184, after a detailed examination of the opinions of the scholars on the specific issue, concludes stating that the "Legal commentators acknowledge the existence of a general prohibition established by international law as regards political activities of aliens". See as well *G. H. Fox* (note 68), 539 et seq.

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flicting interests in this area, between the right of the individuals belonging to the diaspora to actively participate in the political life of their home country, and, on the other hand, the compelling need of the host State to avoid being accused of interfering in the internal affairs of another country in which an electoral campaign and elections are taking place. At the same time, the host State has to make sure that the political activities of the foreigners do not represent a danger to national security, public safety and public order: in such a case the ICCPR offers to the potentially affected State the possibility to introduce restrictions, which in any case must be proportional, necessary and not unreasonable, and are of course subject to the international control envisaged in international human rights treaties.

General Comment No. 25 explains that States have an obligation to take effective measures to ensure that all those entitled to vote are able to exercise that right, and that voter education campaigns are a necessary tool to guarantee the effective exercise by an informed community of the rights enshrined in Art. 25.[186] Furthermore, the General Comment stresses the importance of other rights, e.g. freedom of expression, assembly and association, as "essential preconditions for the effective exercise of the right to vote".[187] The General Comment does not differentiate between the political rights of citizens and foreigners: it seems therefore that, if allowed to vote in a foreign State for their home country elections, the foreigners should also be granted the other political rights closely connected with the right to vote. The relevant articles are Art. 19 (Right to Hold Opinions without Interference, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice), Art. 21 (Right of Peaceful Assembly) and Art. 22 (Freedom of Association with Others). The wording of these articles does not allow any discrimination between citizens and non-citizens as these rights are to be recognised to "everyone". All these provisions do not differentiate between political activities related to events in the home country or in the host country. In examining the problems under scrutiny here, proper attention has to be given to the role played nowadays by social media, which have proved to have a significant role in shaping voters' opinions.

Restrictions to these rights are possible, according to the same articles, only if provided by law, and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public

[186] Human Rights Committee, General Comment No. 25 (note 24).

[187] *C. Binder*, Two Decades of International Electoral Support: Challenges and Added Value, Max Planck UNYB 12 (2009), 219.

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order (*ordre public*), or of public health or morals (Art. 19) or if imposed in conformity with the law and are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others (Arts. 21 and 22). Furthermore, it is interesting to note that General Comment 15 (Art. 2, ICCPR – Right of Aliens) solemnly states that

> "the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens".

The only admissible forms of discrimination based on citizenship are those codified in Art. 25 of the ICCPR and those based on Art. 12, which allows States to restrict the liberty of movement and the freedom to choose the place of residence only to persons "lawfully within the territory" (by implication permitting restrictions on undocumented migrants). This conclusion reflects the position expressed by the UNGA in its 1985 Resolution adopting the "Declaration on the Human Rights of Individuals Who Are not Nationals of the Country in which They Live".[188] According to this Declaration, aliens are entitled to fully enjoy the right to freedom of expression and the right to peaceful assembly, subject to such restrictions

> "as are prescribed by law and which are necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others".[189]

In times of public emergency threatening the life of the nation, States can always use Art. 4 of the ICCPR to take measures derogating from their obligations under the Covenant.[190] A short examination of the relevant international practice of States, including those who have ratified the ICCPR,

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188 A/RES/40/144. See also, Office of the UN High Commissioner for Human Rights, The Rights of Non-Citizens, 2006, 10 et seq.

189 Art. 5.2 of the Declaration. A good example of an internal rule adopted by a State implementing these international obligations is offered by Art. 100 of the 1991 Constitution of Colombia where it is stated that "Aliens in Colombia will enjoy the same civil rights as Colombian citizens. Nevertheless, for reasons of public order, the law may impose special conditions on or nullify the exercise of specific civil rights by aliens. Similarly, aliens will enjoy, in the territory of the Republic, guarantees granted to citizens, except for the limitations established by the Constitution or the law." See more in *C. Escobar*, Immigrant Enfranchisement in Latin America: From Strongmen to Universal Citizenship, Democratization 22 (2015), 927 et seq.

190 See more on this in *E. Sommario*, Stati d'emergenza e trattati a tutela dei diritti umani, 2018.

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leads to surprising and contradictory results. While a few States seem more liberal,[191] several do not permit foreigners to carry out political activities in the country where they are living.[192] These Restrictions have sometimes been justified by making reference to specific clauses codified in regional treaties, such as Art. 16 of the ECHR,[193] Art. XXXVIII of the American Declaration of the Rights and Duties of Man[194] and Art. 30 of the Convention of the Commonwealth of Independent States on Human Rights and

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[191] See for example, Section 20 of the 1994 Constitution of Argentina, which states that "Foreigners enjoy within the territory of the Nation all the civil rights of citizens".

[192] For a comprehensive picture and data on external voting practices from around the world, see "The Voting from Abroad Database", managed by International IDEA <https://www.idea.int>.

[193] The relevant articles of the ECHR have been at the centre of several cases in front of the ECtHR: among the most significant and the most recent cases see: ECtHR, *Women On Waves and Others v. Portugal*, Application No. 31276/05, Judgement of 3.2.2009; ECtHR, *Kudrevičius and Others v. Lithuania*, Application No. 37553/05, Judgement of 15.10.2015; ECtHR, *Perinncek v. Switzerland*, Application No. 27510/08, Judgement of 15.10.2015; ECtHR, *Merabishvili v. Georgia*, Application No. 72508/13, Judgement of 28.11.2017. See more on these issues in *H. Lambert*, The Position of Aliens in Relation to the European Convention on Human Rights, Council of Europe Human Rights Files No. 8, 2007, 25, *J. F. Durán Alba*, Restrictions on the Political Activity of Aliens under Article 16 ECHR, in: J. García Roca/P. Santolaya, Europe of Rights: A Compendium on the European Convention of Human Rights, 2012, 497 et seq., *A. Yutaka*, Restrictions on the Political Activity of Aliens (Article 16), in: P. van Dijk/F. van Hoof/A. van Rijn/L. Zwaak (eds.), Theory and Practice of the European Convention on Human Rights, 2015, 1077 et seq., *M. B. Dembour*, When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint, 2015, 37 and *A. de Guttry/F. Capone*, An Analysis of the Diplomatic Crisis Between Turkey and the Netherlands in Light of the Existing International Legal Framework Governing Diplomatic and Consular Relations, European Journal of Legal Studies 10 (2017), 61 et seq. It is worth noticing that the topic of the political rights of foreigners has been addressed in an innovative manner in Art. 3 of the 1992 Convention on the Participation of Foreigners in Public Life at Local Level, in which each Party undertakes to guarantee to foreign residents, on the same terms as to its own nationals several "political" rights such as the right to freedom of expression and the right to freedom of peaceful assembly and to freedom of association with others. The Convention did not prove to be well received on the European continent as it entered into force five years after its signature and so far has been ratified only by nine States (Albania, Czech Republic, Denmark, Finland, Iceland, Italy, The Netherlands and Sweden).

[194] Art. XXXVIII of the 1948 American Declaration states that it is up to every person "to refrain from taking part in political activities that, according to law, are reserved exclusively to the citizens of the state in which he is an alien". Conversely, in Art. 8 of the 2002 Andean Charter for the Promotion and Protection of Human Rights, the parties declare "that every person, whether a national or a foreigner, found within the territory of the Andean Community Member States is entitled to all human rights and fundamental freedoms set forth in International Law on Human Rights and in pertinent national legislation".

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Fundamental Freedoms (1995).[195] This practice, which is widespread across the international community and does not recognise the rights to freedom of expression and to peaceful assembly of aliens, seems to be at odds with the relevant rules of the ICCPR. In most instances, States adopting discriminatory rules restricting the political activities of foreigners did not respect the limits and the procedures provided for in Arts. 19, 21 and 22 of the ICCPR, nor those foreseen in Art. 4, which allows, in time of public emergency which threatens the life of the nation, derogations from most of the obligations under the Covenant. However, this issue has never been properly addressed by the international human rights monitoring bodies, probably owing to its highly sensitive nature. A more assertive attitude of these bodies would contribute to guaranteeing to a higher degree the respect for these specific rights of aliens.

b) *Ad hoc* Rules Governing the Rights of Refugees and Migrants

Rules concerning the political rights of specific categories of foreigners, such as refugees and migrants, are codified in *ad hoc* treaties. As far as refugees are concerned, it has been stated above that allowing political participation by refugees in elections taking place in their country of origin is the best way of increasing their chances of being able to return to their home country, should they wish to do so. As a consequence, allowing the full enjoyment of freedom of expression and of freedom of assembly to those persons who have acquired the status of refugee, seems to be the best means available for the host State to contribute to reconciliation in the affected countries and to potentially create the minimum conditions for a possible safe return of the refugees to their State of origin. Considering that the option of return to their home country is not realistic, at least in the short and medium term, and taking into consideration that refugees are without national protection and without access to a political environment,[196] it seems obvious that the facilitation of

> "political participation of displaced peoples should be recognized and protected by the international community".[197]

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195 According to this Article "[n]othing in Articles 11, 12 and 20 shall be regarded as preventing the Contracting Parties from imposing restrictions on the political activity of alien citizens and stateless persons".

196 *A. Shacknove*, Who Is a Refugee?, Ethics 95 (1985), 280.

197 *K. Long* (note 31), 5.

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In this frame, Art. 15 (Right of Association) of the 1951 Convention on the Status of Refugees states that

> "[a]s regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances".

Generally speaking, one might argue that the fact that the CSR does not adequately regulate the political rights of the refugees implies that these political rights will be governed by other human rights treaties, such as the ICCPR, to the extent to which they are applicable to refugees.[198] This would also be consistent with the preamble of the 1951 Convention in which the High Contracting Parties emphasised that

> "the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination"

and that the United Nations has, on various occasions, manifested its

> "profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms".

This approach is consistent also with Art. 5 of the CSR, that confirms how

> "[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention".

In order to better understand the breadth and scope of Art. 15, two short additional comments are needed. Firstly, arguing *a contrario,* while States hosting refugees are allowed to restrict their rights to form societies, clubs, and other groups of people with a political aim, they are not obliged to do so. In other words, every State, provided that it acts without any discrimination as to race, religion or country of origin, is free to decide if and to which extent it wants to restrict or to extend the political rights of the refugees. Secondly, it has to be taken into account that the CSR is dated 1951 and that the ICCPR was adopted about 15 years later. Making reference to the relevant rules codified in the 1969 Vienna Convention on the Law of Treaties concerning the application of successive treaties relating to the same subject matter, one might conclude that para. 3 of Art. 30 of the Vienna Convention becomes applicable and therefore that

198 *R. Mandal* (note 129).

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"[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".[199]

In light of the analysis undertaken so far, it is possible to conclude that the ICCPR prevails, in this specific regard, over the 1951 CSR. This conclusion, however, significantly changes the situation, considering that the ICCPR recognises political rights of foreigners and, therefore, of refugees.

More restrictive approaches are those codified in the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa[200] and by the EU Council Directive 2003/109/EC of 25.11.2003 concerning the status of third-country nationals who are long-term residents.

As far as the American continent is concerned, the Cartagena Declaration on Refugees[201] contains a specific recommendation to all States party to the 1969 American Convention on Human Rights

"to apply this instrument in dealing with asilados and refugees who are in their territories".

Although this Declaration is not a Treaty and therefore it does not impose a binding obligation on the States of the American continent,[202] it is of great

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[199] Para. 4 of Art. 30 of the Vienna Convention further clarifies that:

"When the parties to the later treaty do not include all the parties to the earlier one

[…] (a) As between States parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

Art. 31, para. 3, c) of the same Vienna Convention furthermore states that in the interpretation of a Treaty, there shall be taken into account, together with the context: "[…] c) any relevant rules of international law applicable in the relations between the parties".

[200] The Convention has been adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session in September 1969, and entered into force on 20.6.1974. Art. III of the Convention states that 1. Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.

[201] The Declaration was adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19.-22.11.1984.

[202] It is interesting to note that in the 2015 Inter-American Commission on Human Rights report on "Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System", there is no specific paragraph or consideration devoted to the specific political rights of the immigrants and of the refugees. OEA/Ser. L/V/II Doc. 46/15, 31.12.2015, <http://www.oas.org>.

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"political" importance *de jure condendo* as it reflects the opinion of a wider community of relevant stakeholders.

Relevant international rules regulate the political rights of another specific category of foreigners, namely migrants.[203] Art. 40 of the ICMW recognises that

> "[m]igrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests",

while Art. 13 states that:

> "1. Migrant workers and members of their families shall have the right to hold opinions without interference.
>
> 2. Migrant workers and members of their families shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of their choice."

These two relevant provisions, as well as a few others codified in the ICMW,[204] are drafted in such a manner as to clearly confer on migrants specific rights closely linked with the exercise of their political rights. In this case the exercise of these rights is unconditional and States may restrict them only if all the conditions set forth in Art. 13, para. 3 are fully respected.[205] These conclusions are coherent and consistent with those reached in para. IV. 1. in which the right of migrants to vote in their home country elections has been laid down in the provisions of the ICMW. The right to vote regulated in

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[203] See also *J. Rath*, Voting Rights, in: H. Zig Layton (ed.), The Political Rights of Migrant Workers in Western Europe, 1990, 127 et seq.

[204] Art. 12 of the Convention adds that: "1. Migrant workers and members of their families shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of their choice and freedom either individually or in community with others and in public or private to manifest their religion or belief in worship, observance, practice and teaching."

[205] Art. 13.3, of the ICMW, states that:

"The exercise of the right provided for in paragraph 2 of the present article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputation of others;

(b) For the protection of the national security of the States concerned or of public order (ordre public) or of public health or morals;

(c) For the purpose of preventing any propaganda for war;

(d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."

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Art. 41 of the ICMW would otherwise be deprived of any meaning if not associated with the right to carry out political activities.

In sum, the political rights of foreigners have undergone significant changes under the close scrutiny of States and of public opinion in recent decades. While at the beginning of the human rights codification process a cautious attitude prevailed, offering States the possibility of severely restricting foreigners' rights, in a subsequent period the mood changed and, especially at regional level, various rules were introduced to offer wider opportunities to foreigners to conduct their political activities in the country where they are temporarily living. This happens in relation to elections both in the home country and in the hosting country. More recently, in reaction to the great waves of irregular migration from the Middle East and from Sub-Saharan Africa, attempts have been made in various national parliaments to endorse a more rigid interpretation of the political rights of foreigners. What emerges from the description of the relevant rules of the various international conventions dealing with the political rights of the different categories of foreigners, is that rights and treatments differ significantly and that there are categories better protected and categories which have received, so far, a lower level of protection of their political rights to be exercised in the foreign State they are living in. Notwithstanding all the limitations highlighted above, the category of migrants is the most protected, at least in those countries that have ratified the specific conventions. The disparity in the treatment of the different categories of foreigners, especially those who have decided, or who have been *de facto* obliged, to remain for a longer period in a specific country, is not conducive to reinforce their integration in civil society and reflects political approaches and priorities of the last century which nowadays appear obsolete and ripe for radical reconsideration.

VI. Concluding Remarks

The right of aliens to vote and to exercise associated civil and political rights has always represented a sensitive issue owing to its political and social implications. The position of States and that of relevant international and national stakeholders differs significantly, both from a geographical and a historical perspective. Arguments supporting and opposing the exercise of such rights by foreigners change continuously due to the fact that the phenomenon of international migration and movements of persons is taking on new characteristics and is growing at an unprecedented rate. The evolving and changing mood of public opinion in the countries of origin and destina-

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tion also changed and inevitably has produced an impact on the attitude of the governments faced with the management of the situation.

The legal framework presented in this article, clearly reflects a certain degree of ambiguity and leaves a significant amount of discretionary power to the States in regulating the issues at stake. The content of the various relevant treaties differs, sometimes significantly, confirming divergences in the approach to the rights analysed in this work.

Differences have emerged in this investigation at both the universal and the regional level, depending on the typologies of aliens, some of whom are more protected and benefit from better guarantees of their electoral rights, and the place where the elections are being held, i.e. in the home country or in the host country.[206]

The jurisprudence of the international tribunals that have been tasked with solving a good number of disputes arising from the unclear legal framework, reflects the existing uncertainties very well. The cautious approach of the jurisprudence to cases related to the foreigners' right to vote and to conduct political activities, especially if compared with the much more innovative interpretation given in other cases, well reflects the complexity of the situation. The reference of the judges to the doctrine of the "margin of appreciation" offers an important indication about the discretionary power of States, which can be exercised within the limits fixed by the same jurisprudence in order to avoid abuses.

In this situation of flux the goal to define the electoral rights of aliens and the respective obligations incumbent on the home countries and on the States hosting them has proved to be quite complex and fragmented as the tension between opposing interests continually surfaces and needs to be addressed. The rules which can be referred to have often been drafted in an ambiguous manner and in significantly different political, historical and economic situations.

Within this framework the specific case of the EU is worth mentioning, as it represents an attempt to balance the various (and often contradictory) interests at stake and to offer pragmatic solutions. The EU has made great efforts with concrete results in the expansion and protection of the voting rights of the European diaspora in the country where they are residing, in local elections and in those of the European Parliament. Without any doubt

206 In this regard the experience of Mexico seems interesting: according to Art. 9 of the Mexican Constitution of the right to assemble or associate peacefully for lawful purposes cannot be restricted although "only citizens of the Republic may do so to take part in the political affairs of the country". This is an attempt to find a compromise between the rights of foreigners to carry out political activities and of the State to avoid external interferences in issues related to domestic affairs.

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this is to be perceived as a positive step. The solution found by the EU could inspire other regional organisations or even future universal codifications.

Having said this, it must be observed that the approach of the EU raises at least two questions. First of all, if a similar engagement with equivalent results is not also shown for the affirmation of the right to vote of the diaspora in the home country, the consequences would be unbalanced, as there would be a risk of favouring the integration of the foreigner in the new State and the loosening of his relationship with the home State. Such a situation could also create tension and suspicion among Members States, as they could perceive the generosity of other States in allowing the foreigners to take part in national elections as a form of interference with national sovereignty.

The second concern is related to the fact that the European model favours discrimination between different categories of aliens, as only those coming from EU Member States can take advantage of these rights. Although in many cases such a discrimination might be justified by the different degree of relations between the foreigner and the host State, it is not difficult to forecast that the issue of discrimination based on citizenship might be brought to the attention of the international tribunal which will have to evaluate if this restriction is compatible with the rule defined in the jurisprudence, such as whether there has been arbitrariness or a lack of proportionality,[207] that they are imposed in pursuit of a legitimate aim and that the means employed are not disproportionate[208] and that any such conditions do not run counter to the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage.[209]

As far as the right to vote is concerned, another possible solution to accommodate the diverging concerns would be to allow aliens, or at least those who have a certain level of relations and interests in the two States, to vote in the host country or in their home country and to let them freely choose where to exercise their electoral rights, taking into consideration his/her interest, priorities and future perspectives. This would be, *de jure condendo*, a possible solution based on a human rights perspective: this kind of solution would, inevitably, imply that the chosen State, whichever of the two it will be, will have to allow the individual to fully enjoy all the political rights

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[207] See ECtHR, *Yumak and Sadak*, Application No. 10226/03, Judgement of 8.7.2008, para. 109.

[208] See ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium* (note 79), para. 52.

[209] See *Hilbe v. Liechtenstein* (note 28); and ECtHR, *Melnychenko v. Ukraine* (No. 17707/02, Judgement of 19.10.2004, para. 56.

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which are closely linked to the right to vote. This solution currently seems not to be under consideration.

Another possible option could be to reduce the complication and time involved in acquiring the citizenship of the new country, to allow them to fully enjoy all the political rights belonging to the citizens of that State. Considering that in most countries double or multiple citizenship is no longer discouraged, this option would not hamper the existing rights of the individuals but would increase them. So far, however, the political conditions to allow such a move do not seem to exist in most countries.[210]

What seems more feasible, especially in the short-medium term, and assuming that there is a willingness to promote a more inclusive policy to favour the integration of the aliens into the new community where they have settled, is to differentiate between the foreigners on the basis of the varying degree and intensity of their relations with the local State. Rules based on the European experience, allowing foreigners the right to vote, at least in local elections, if they have settled for a given period of time, would represent a significant advance. They would be in line with a few existing regional treaties, and with the jurisprudence which has already stated that rules of this kind are in keeping with the obligations incumbent on States and deriving from universal and regional human rights agreements. Obviously the right to vote should be granted hand-in-hand with the other political rights closely linked to this specific right.

Beginning at the local level and eventually moving to the regional and national level could represent a sound strategy to promote new policies in this field more consistent with the general aim to protect and promote the human rights of everyone. Certainly, this trend would not affect in any way the already existing, although limited, electoral and political rights of special categories of foreigners, such as migrants, on the basis of the specific conventions analysed in the previous paragraphs.

Finally, as far as far as the other political rights (such as the right to freedom of opinion and to assembly) closely connected with the right to vote are concerned, the overall picture is marked by light and shadow. Although universal treaties and many regional treaties do not allow any discrimination based on citizenship (unless the States adopt legal restrictions or derogations which must be consistent with the prescriptions dictated by the consistent jurisprudence of the ECtHR) the practice and the attitude of most of the

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[210] In Italy, as an example, after a long debate in the Parliament on a draft law which would have granted Italian citizenship to about 800.000 foreigners with close ties to Italy, the decision has been taken to postpone the discussion considering the upcoming elections and the perceived unfavourable attitude of the public opinion.

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States, as analysed in the previous paragraph, are in clear contradiction with this obligation. This situation causes worry for at least two reasons. The right to vote presupposes the right to freedom of opinion, association and assembly: Restrictions to these rights do not allow the full exercise of the right to vote, even in the limited cases in which aliens are allowed to exercise it. Furthermore, the violations of those rights pertaining to aliens are, with a few exceptions,[211] not properly addressed, neither by the international human rights monitoring bodies nor in the Universal Periodic Review (UPR).[212] In the framework of the UPR, 57, 686 recommendations from sessions 1 to 26 have been made so far (two UPR cycles): of them about 100 were devoted to issues related to foreigners and twelve to those related to aliens.[213] While these recommendations were referring mostly to the fight against racism, xenophobia or social discrimination, or to specific problems such as family reunion, rights of minors, and access to justice, almost no recommendation was devoted to the political rights of foreigners,[214] including the right to hold opinions, to assembly and to set up associations.[215] The reasons behind this weak interest in the political rights of aliens can be explained both by their sensitive nature and by the limited capacity (and interest?) of aliens to lobby for respect of their political rights. Another explanation might well be that States have no interest in raising the issue vis-à-vis another State in the framework of the UPR as they might fear that similar recommendations might be directed against them whenever it will be their turn to undergo the UPR. In these cases, unfortunately, silence and non-interference seems the prevailing rule in inter State relations. Notwithstanding this, the increased presence of foreigners in the territory of so many States requires new policies and new approaches to properly deal with the

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[211] Dutch NGOs' contribution to the second Universal Periodic Review of the Netherlands by the UN Human Rights Council, 2011 <https://njcm.nl>.

[212] The universal periodic review is a new human rights mechanism. It has been established by General Assembly Resolution 60/251. On the basis of this mechanism, the Human Rights Council reviews, on a regular basis, the fulfilment by each of the United Nations Member States of their human rights obligations and commitments.

[213] The statistics mentioned in the text are drawn from <https://www.upr-info.org>.

[214] The very few exceptions are recommendations, drafted in a very generic manner, to a few States such as Luxemburg (recommendation made by Tunisia), and Slovenia (recommendation made by Cote d'Ivoire), in which these States were merely invited to take the necessary measures to accelerate implementation of the law on the reception and the integration of foreigners. No recommendation was made, however, to those States who have adopted national legislations prohibiting or severely restricting the right of aliens to hold opinion, to assembly and to create associations even when these national laws were formulated in a manner not respecting the limits foreseen in the ICCPR.

[215] < https://www.upr-info.org>.

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emerging challenges presented in this article.[216] In line with the conclusions drawn from this analysis, greater attention must inevitably be paid to the full enjoyment by aliens of the political rights that are already recognised in the relevant international human rights conventions. This would itself be a significant step in the right direction. If the current political situation is not favourable to promoting new and more advanced regulations concerning the status of foreigners and their rights, the integral respect of those already existing would already be a good beginning.

[216] See the interesting analysis by *A. K. Modrzejewski*, Political Participation of Foreigners as an Instrument of Integration in the Republic of Poland, the Federal Republic of Germany and the United Kingdom, 2012, 67 et seq.

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