

# THE RIGHT TO VOTE FOR NON-RESIDENT CITIZENS IN EUROPE

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**Abstract** The right to vote is the most important political right in international human rights law. Framed within the broader right of political participation, it is the only right in the International Covenant on Civil and Political Rights not guaranteed as a universal human right but rather as a citizen's right. While limitations on the right to vote are permissible in respect of citizenship and age, residency-based restrictions are not explicitly provided. However, recent judgments of the European Court of Human Rights endorse a view that voting rights may be conditioned on residency on the grounds of an individual's bond to their country-of-origin and the extent to which laws passed by that government would affect them. This article questions this proposition and explores whether disenfranchisement based solely on residency constitutes an unreasonable and discriminatory restriction to the essence of the right.

**Keywords:** citizenship, democracy, European Court of Human Rights, human rights, voting.

## I. INTRODUCTION

On 7 May 2013, the European Court of Human Rights (ECtHR) delivered its judgment on a complaint against the UK by a British citizen who was disenfranchised as a result of living outside of the UK for more than 15 years (*Shindler*).<sup>1</sup> The applicant contended that he retained very strong ties with the UK as a retired British Army serviceman receiving a State pension paid into a British bank account on which he paid tax, as well as having family members in the UK. He argued that the 15-year time limit had the effect of disenfranchising him completely and that it was not a proportionate limitation of the right. The ECtHR, building on existing jurisprudence, held that there had been no violation of the right, emphasizing that the State maintains a significant margin of appreciation in providing voting rights to non-resident citizens. Although the Court noted that there was a growing awareness at the European level of the problems posed by migration in terms of political

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<sup>1</sup> *Shindler v UK* App No 19840/09 (ECtHR, 7 May 2013).

participation in countries of origin and residence, it was satisfied that the UK had pursued ‘the legitimate aim of confining the parliamentary franchise to those citizens with a close connection with the UK and who would therefore be most directly affected by its laws’. The Court added that the 15-year limit was proportionate to that aim and that this ‘blanket’ measure ‘serves to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing interests on a case-by-case basis’.<sup>2</sup>

The right to vote is ‘without doubt the most important political right’ in international human rights law (IHRL).<sup>3</sup> Framed within the broader right of political participation, it is the only right in the 1966 International Covenant on Civil and Political Rights (ICCPR) not guaranteed as a universal human right but rather as a citizen’s right. While IHRL recognizes that the right to vote is not absolute and that limitations are permissible in respect of citizenship and age, residency-based restrictions are not explicitly provided. In recent years, a number of European States have reassessed the relationship between residency and political participation in light of increased immigration, generally extending voting rights to resident non-citizens for local (but not national) elections. However, there has been limited attention to the contrary trend, emigration, and a State’s obligation to protect and facilitate non-resident citizen’s voting rights. While the merits of conditioning voting rights on residency may be debatable from a political or moral standpoint, the denial of voting rights for non-resident citizens challenges our understanding of a core treaty-based human right.

In this context, the *Shindler* judgment is important as it appears to endorse a view that voting rights at the national level may be conditioned on residency on the grounds of a citizen’s normative bond to their country-of-origin and the extent to which laws passed by that government would affect them. This article questions this proposition and explores whether any *de jure* disenfranchisement based on residency constitutes an unreasonable and discriminatory restriction to the essence of the right. In doing so, the article considers principles of equal citizenship, compatibility with EU freedom of movement and labour mobility laws, and the likelihood of State derogation from the right given the fact that citizens residing abroad are unlikely to be able to vote anywhere if they cannot vote in their country-of-origin.

The article begins in section I with a review of the right to vote for non-resident citizens in international and European human rights law. The article draws upon the ICCPR and other universal treaties as well as comments and conclusions from treaty bodies, the 1950 European Convention on Human Rights (ECHR) and jurisprudence of the ECtHR, other regional treaties and jurisprudence, Council of Europe statements and other European soft law, as

<sup>2</sup> *ibid*, paras 116–118.

<sup>3</sup> M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 574.

well as European State practice. Section II assesses whether the restrictions proposed in recent ECtHR judgments are reasonable according to the ECtHR's own test that any limitation must not impair the essence and effectiveness of the right, be in pursuit of a legitimate aim, and be proportionate. Section III explores the modalities available to States to facilitate external voting, with consideration given to the tension between electoral integrity and universal suffrage. The article concludes by considering whether European States have a human rights obligation to provide the right to vote to all its citizens irrespective of residence and, if so, what discretion may be exercised in providing modalities for the effective realization of that right.

## II. NON-RESIDENT CITIZEN VOTING RIGHTS AND INTERNATIONAL HUMAN RIGHTS LAW

This section outlines the right to vote at the international and European level, focussing on what limitations may be permissible to non-resident citizens.

### *A. Treaties*

#### *1. Universal*

##### a) International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is the primary codification of political rights in IHRL and currently has 168 parties, including all Council of Europe States. Article 25 establishes the right to vote as part of the broader right to participate in political and public life:

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

Unlike all other ICCPR rights, the right to vote is exclusively guaranteed to citizens rather than all persons under a State's jurisdiction. The distinctions referred to in Article 2 include 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.<sup>4</sup> These distinctions are examples through which prohibited discrimination can be identified, but the list is not exhaustive. There is no explicit reference to residency as a permissible ground for limiting rights but residency may be considered to fall under the residual clause of 'other status'. Moreover, reference to 'every citizen' and 'universal suffrage' underpins the inclusive

<sup>4</sup> Art 26 reaffirms non-discrimination, providing equality before the law and equal protection of the law.

and non-discriminatory nature of the right to vote, while affirmation of not only the 'right' but also the 'opportunity' establishes that it should not only be guaranteed as a *de jure* right but that the State is also required to take positive measures to realize the right.<sup>5</sup>

The Human Rights Committee (CCPR) has provided authoritative interpretation of the ICCPR. In its 1996 'General Comment 25: Participation in Public Affairs and the Right to Vote', residency is not mentioned as a permissible restriction in the examples provided in paragraphs 4, 10 and 14 (age, mental incapacity, conviction),<sup>6</sup> with paragraph 4 underlining that rights 'may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable'. Moreover, paragraph 15 explicitly states that residency is an unreasonable restriction when it comes to the right to stand for election (alongside education, descent and political affiliation). It would be inconsistent if such conditions were considered permissible for voting rights but not candidacy, as well as contrary to standards that allow for stricter candidacy rights as compared to voting rights.<sup>7</sup>

Paragraph 11 of the General Comment refers to residency in respect of the registration of voters (not of the right), stating that 'it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable.' It also places positive obligations on States to 'take effective measures to ensure that all persons entitled to vote are able to exercise that right', underscoring that enfranchisement alone is insufficient and that steps are needed to facilitate voting. It adds that 'voter education and registration campaigns are necessary'. Notably, like most election-related IHRL, General Comment 25 is silent as to whether residency should be considered as 'official' or 'habitual' residence, although the ECtHR has noted that national law should be clear in this respect.<sup>8</sup>

In respect of specific cases, the CCPR has seldom considered non-resident citizen voting rights. However, for self-determination referenda, it has held that a 10-year residency requirement was not disproportionate in light of the 'the nature and purpose of the referenda in question [and] the participation of the "concerned" population'.<sup>9</sup> Importantly, the CCPR added that

<sup>5</sup> Art 2.2 requires States to 'adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present covenant'. This is replicated in other international treaties.

<sup>6</sup> CCPR, 'General Comment No 25: Participation in Public Affairs and the Right to Vote' (1996) CCPR/C/21/Rev.1/Add.7. See also art 2 of the 1994 Inter-Parliamentary Union Declaration on Criteria for Free and Fair Elections.

<sup>7</sup> See, for example, *Melnychenko v Ukraine* App No 17707/02 (ECtHR, 19 October 2004) paras 57–58.

<sup>8</sup> *ibid*, para 62, where the Court noted that Ukrainian law did not draw a distinction between 'official residence' (eg residence indicated in a passport) and a person's 'habitual place of residence'.

<sup>9</sup> CCPR, 'Gillot v France' Com No 932/2000 (26 July 2002) A/57/40, para 14.2.

proportionality was preserved by limiting this restriction to local elections and referenda and not extending it to national-level elections.

Separately, the CCPR has held that any blanket restriction of political rights, without distinction, fundamentally challenges the principle of proportionality.<sup>10</sup> Additionally, General Comments 28 and 31 affirm the State's obligation to perform both its negative duty to refrain from discrimination and its positive duty to prevent it.<sup>11</sup> In addition, UN Special Rapporteurs have encouraged the facilitation of the right for non-resident citizens to vote. This has included recommendations to 'guarantee in law and practice the right of ... citizens abroad to participate in national public life and to vote',<sup>12</sup> and to 'make it possible for [citizens] living abroad to exercise their voting rights, at least in the countries where it has diplomatic representation, as done by many countries'.<sup>13</sup>

Freedom of movement provisions are also instructive in understanding permissible restrictions on non-resident voting rights. Article 12.1 of the ICCPR states that everyone has 'the right to liberty of movement and freedom to choose his residence', while Articles 12.2 and 12.4 provide that everyone has the right to leave and return to their own country. This allows citizens to return to their country-of-origin to cast their vote in person.

Lastly, it should be underscored that Article 4 of the ICCPR stipulates that States may derogate from treaty rights only 'in time of public emergency which threatens the life of the nation'. This provision is replicated in other universal and European treaties.<sup>14</sup> The 2001 CCPR General Comment 29 clarifies that 'the right to non-discrimination ... cannot be derogated from in any circumstances'.<sup>15</sup>

#### b) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW)

The 1990 ICMW guarantees voting rights in their country of origin for those outside of it. The ICMW has been ratified by 47 States to date, including 8 Council of Europe States. Article 41.1 provides:

<sup>10</sup> CCPR, 'Silva v Uruguay' Com No R.8/34 (8 April 1981) A/36/40, para 8.2.

<sup>11</sup> CCPR, 'General Comment No 28: The Equality of Rights between Men and Women' (2000) CCPR/C/21/Rev.1/Add.10, para 21; CCPR 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties' (2004) CCPR/C/21/Rev.1/Add.13, para 6.

<sup>12</sup> HRC, 'Report of the Special Rapporteur on the Human Rights of Migrants: Mission to Albania' (10 April 2012) A/HRC/20/24/Add.1, para 72.

<sup>13</sup> HRC, 'Report of the Special Rapporteur on the Situation of Human Rights in Cambodia' (16 July 2012) A/HRC/21/63, para 81.

<sup>14</sup> See, for example, art 4 of International Convention on the Elimination of all Forms of Racial Discrimination; art 4 of the Convention on the Rights of Persons with Disabilities; and art 15 of the ECHR.

<sup>15</sup> CCPR, 'General Comment No 29: Derogations during a State of Emergency' (2001) CCPR/C/21/Rev.1/Add.11, para 8.

Migrant 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.

Importantly, Article 41.2 further stipulates that ‘the States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights’. No State has made any declaration or reservation in regard of Article 41.

The Committee on Migrant Workers (CMW), established in 2004, has examined voting rights in concluding observations on four States, unequivocally calling for rights to be extended to citizens abroad.<sup>16</sup> It has further held that additional requirements placed on non-residents, such as signing an affidavit of intent to return to their country-of-origin, are unreasonable.<sup>17</sup>

### c) Other universal treaties

In line with the ICCPR, other universal treaties reaffirm the right to vote without discrimination or residency limitations. This includes Article 5 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 7 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and Article 29 of the 2006 Convention on the Rights of Persons with Disabilities (CRPD).

The corresponding treaty bodies have underscored that voting rights should not be subject to conditions that have a disproportionate impact on women, national minorities, or persons with disabilities.<sup>18</sup> This is particularly pertinent where migration has a gender or ethnic pattern. The Committee on Economic, Social and Cultural Rights (CESCR) lends support, holding that ‘rights should not be conditional on, or determined by, a person’s current or former place of residence’.<sup>19</sup> Treaty bodies have additionally called for resident non-citizens to be allowed to vote in local elections in their host country.<sup>20</sup>

<sup>16</sup> CMW, ‘Concluding Observations on Azerbaijan’ (27 May 2013) CMW/C/AZE/CO/2, para 35; CMW, ‘Concluding Observations on Philippines’ (1 May 2009) CMW/C/PHL/CO/1, para 35; CMW, ‘Concluding Observations on Mexico’ (20 December 2006) CMW/C/MEX/CO/1, para 10; CMW, ‘Concluding Observations on Bosnia and Herzegovina’ (26 September 2012) CMW/C/BIH/CO/2, para 40.

<sup>17</sup> CMW, ‘Concluding Observations on Philippines’ para 38.

<sup>18</sup> Respectively, CEDAW, ‘General Recommendation No 23: Political and Public Life’ (1997) A/52/38, para 23; CCPR, ‘Concluding Observations on the USA’ (18 December 2006) CCPR/C/USA/CO/3/Rev.1, para 35; CRPD, ‘Concluding Observations on Hungary’ (22 October 2012) CRPD/C/HUN/Q/1, para 46.

<sup>19</sup> CESCR, ‘General Comment No 20: Non-discrimination in economic, social and cultural rights’ (2009) E/C.12/GC/20, para 34.

<sup>20</sup> CCPR, ‘General Comment No 25’ (n 6) para 3; CMW, ‘Concluding Observations on Colombia’ (22 May 2009) CMW/C/COL/CO/1, para 6; CERD, ‘Concluding Observations on Italy’ (4 April 2012) CERD/C/ITA/CO/16-18, para 24.

With the right to vote being founded on citizenship, it is also necessary to consider international standards concerning citizenship. While the link between citizenship and the right to vote is made explicit in the ICCPR, the legal attributes of citizenship are not addressed in detail in international treaties. Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws states that 'it is for each state to determine under its own law who are its nationals'. Article 1.3 of ICERD prohibits States from discriminating against any particular nationality in determining citizenship, while Article 9.1 of CEDAW adds that citizenship rules should not discriminate against women. Paragraph 3 of CCPR General Comment 25 adds that distinctions between those who attain citizenship by birth and those by naturalization may be discriminatory. The 1961 Convention on the Reduction of Statelessness provides measures to avoid statelessness, and the vulnerability it entails, when issues arise between States. The ICJ, in considering international law criteria for acquiring citizenship, has held that a 'genuine link' must exist between the individual and State that may be demonstrated by prolonged residence, interests, and business activities, but not necessarily payment of taxes.<sup>21</sup>

## 2. *European*

### a) ECHR

Article 3 of Protocol 1 of the ECHR has been ratified by all Council of Europe members. It states:

The 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 Article 1 of the ECHR extends treaty rights to everyone within the jurisdiction of the State, Article 3 of Protocol 1 does not specifically address whether the right to vote is an individual right, instead speaking only of a State obligation to organize elections. However, having regard to the *travaux préparatoires*, the ECtHR has held that the article was not intended to exclude the individual right,<sup>22</sup> although limiting its scope to legislative elections.<sup>23</sup> No restriction of rights based on residency is made in the ECHR, with Article 14 providing that rights should be secured 'without discrimination on any ground'. The ECtHR has held that residence falls under this provision and can be engaged in cases of alleged discrimination.<sup>24</sup>

<sup>21</sup> *Nottebohm Case (Liechtenstein v Guatemala) Judgment* (ICJ, 6 April 1955) 24–26.

<sup>22</sup> *Mathieu-Mohin and Clerfayt v Belgium* App No 9267/81 (ECtHR, 2 March 1987) para 51.

<sup>23</sup> *Bader v Austria* App No 26633/95 (ECtHR, 15 March 1996) unpublished.

<sup>24</sup> *Carson and Others v UK* App No 42184/05 (ECtHR, 16 March 2010) paras 70–71.

The ECtHR has consistently ruled that voting rights are not absolute but subject to 'implied limitations', which States enjoy a wide margin of appreciation in determining.<sup>25</sup> The Court's role, rather, is to guarantee that limitations 'do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate'.<sup>26</sup> In particular, 'conditions must not thwart the free expression of the opinion of the people in the choice of the legislature',<sup>27</sup> while 'the presumption in a democratic state must be in favour of inclusion'.<sup>28</sup> However, as Article 3 of Protocol 1 does not enumerate a list of 'legitimate aims', restrictions may be justified by any aim that is compatible with the principle of the rule of law and the general objectives of the treaty.<sup>29</sup> Moreover, the Court has acknowledged that there are numerous ways of organizing elections and that legislation 'must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another'.<sup>30</sup>

The Court has long held that restrictions on voting rights may be applicable in terms of citizenship, minimum age, and residence.<sup>31</sup> In respect of non-resident citizens, the ECtHR has held that residency is not *per se* an arbitrary or unreasonable restriction and may be justifiable on four grounds:

firstly, the assumption that a non-resident citizen is less directly or continuously interested in his country's day-to-day problems and has less knowledge of them; secondly, the fact that it is impracticable for the parliamentary candidates to present the different electoral issues to citizens abroad and that non-resident citizens have no influence on the selection of candidates or on the formulation of their electoral programmes; thirdly, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of 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.<sup>32</sup>

The Court has also cited the link between taxation and representation as a reasonable basis for imposing residency limitations on the right to vote.<sup>33</sup>

<sup>25</sup> *Sevinger v The Netherlands* App No 17173/07 (ECtHR, 13 April 2007) 7.

<sup>26</sup> *Ganchev v Bulgaria* App No 28858/95 (ECtHR, 25 November 1996) 6; *Tanase v Moldova* App No 7/08 (ECtHR, 27 April 2010) para 162.

<sup>27</sup> *Podkolzina v Latvia* App No 46726/99 (ECtHR, 9 July 2002) para 33.

<sup>28</sup> *Hirst v UK* App No 74025/01 (ECtHR, 6 October 2005) para 59.

<sup>29</sup> *Zdanoka v Latvia* App No 58278/00 (ECtHR, 16 March 2006) para 115.

<sup>30</sup> *Shindler* (n 1) para 102. <sup>31</sup> *Lukusch v Germany* App No 35385/97 (ECtHR, 21 May 1997) 2.

<sup>32</sup> *Hilbe v Liechtenstein* App No 31981/96 (ECtHR, 7 September 1999) 3–4.

<sup>33</sup> *X. v UK*, Decision App No 7215/75 (ECtHR, 11 December 1976) 2.



On these grounds, the Court has ruled that blanket 4-, 10-, and 15-year residency requirements were ‘somewhat lengthy’ but justifiable.<sup>34</sup> It has held that residence requirements may be necessary to take account of specific contexts, such as independence or emergence from civil war,<sup>35</sup> or to protect national minorities.<sup>36</sup> It has ruled that the essence of the right is not curtailed should an individual be able to ‘revive’ their voting rights if they return to their country-of-origin or apply for citizenship in their host country.<sup>37</sup> However, the Court recently acknowledged that the possibility of acquiring a new citizenship should not be ‘decisive’, given that it ‘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 be given due weight’.<sup>38</sup>

The Court has further held that Article 3 of Protocol 1 does not impose a positive obligation on States to facilitate voting rights for expatriates, although when a State includes a constitutional provision to that effect it cannot be deferred indefinitely.<sup>39</sup> In this respect, it has noted difficulties with the integrity of postal voting as well as that some countries consider it incompatible with national sovereignty to permit foreign residents on their territory to exercise the political rights they enjoy at home.<sup>40</sup> It has also held that the disruption to financial, family, and professional life caused by returning to the country-of-origin to cast a vote does not impair the essence of the right.<sup>41</sup>

The Court has ruled that exceptions from residency requirements for diplomats and servicemen representing their State abroad are reasonable as they ‘are not living abroad voluntarily’ and they ‘remain closely linked to their country and under control of their government’.<sup>42</sup> It has also ruled against individualized decisions for non-residents, holding that the law ‘must lay down a general rule’, even when an individual has not necessarily severed ties with their country-of-origin,<sup>43</sup> as this ‘serves to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing interests on a case-by-case basis’.<sup>44</sup>

#### b) Other European treaties

The 1992 European Convention on the Participation of Foreigners in Public Life at Local Level (CPFPL) adopted by the Council of Europe does not

<sup>34</sup> Respectively, *Polacco and Garofalo v Italy* App No 23450/94 (ECtHR, 15 September 1997) 6; *Py v France* App No 66289/01 (ECtHR, 11 January 2005) para 52; *Shindler* (n 1) para 118.

<sup>35</sup> *Py* (n 34) para 62. <sup>36</sup> *Polacco and Garofalo* (n 34) 5.

<sup>37</sup> *Doyle v UK* App No 30158/06 (ECtHR, 6 February 2007) 3. <sup>38</sup> *Shindler* (n 1) para 106.

<sup>39</sup> *Sitaropoulos and Giakoumopoulos v Greece* App No 42202/07 (ECtHR, 15 March 2012) paras 47–49. <sup>40</sup> *X. and Association Y. v Italy* App No 8987/80 (ECtHR, 6 May 1981) 6.

<sup>41</sup> *Sitaropoulos and Giakoumopoulos* (n 39) para 80. <sup>42</sup> *X.* (n 40) 3.

<sup>43</sup> *Shindler* (n 1) para 105. <sup>44</sup> *ibid.*, para 116.

detail non-resident citizen voting rights, but Article 6 does grant foreign residents the right to vote in local elections after five years.<sup>45</sup> Within the EU, Articles 39 and 40 of the 2000 Charter on Fundamental Rights of the EU (CFREU), confirm the right of EU citizens to vote in European Parliament and local elections according to their EU residence, but not national parliamentary elections.

Freedom of movement is guaranteed in the 2007 Treaty on the Functioning of the EU (TFEU). Article 20.2.a provides all EU citizens with ‘the right to move and reside freely’ within the Union. Articles 45 and 46 secure ‘freedom of movement for workers’ and prohibit ‘qualifying periods’ to exercise such rights.

In terms of citizenship, Article 3 of the 1997 European Convention on Nationality (ECN) reaffirms State competence in determining who are its nationals, subject to non-discrimination clauses. Article 7.1.f, however, provides that a State may remove an individual’s nationality if there is no ‘genuine link between the State party and a national habitually residing abroad’; echoing the ICJ ruling in *Nottebohm*.<sup>46</sup>

Outside of the Council of Europe and EU, treaties of the Commonwealth of Independent States (CIS) are also relevant, with 4 of 9 CIS States being Council of Europe members and 2 applications pending.<sup>47</sup> The 1995 CIS Convention on Human Rights and Fundamental Freedoms enshrines the right to vote as an element of the right to participate in government, while Article 2 of the 2002 CIS Convention on Standards of Democratic Elections (CISCSD) explicitly includes voting rights for non-resident citizens.

### c) Other regional treaties

The right to vote is enshrined in all major regional human rights treaties. This includes Article 23 of the 1969 American Convention on Human Rights (ACHR), Article 13 of the 1981 African Charter on Human and Peoples Rights, and Article 24 of the 2004 Arab Charter on Human Rights.<sup>48</sup> All of these include non-discrimination clauses consistent with the ICCPR and ECHR. Only the ACHR (Article 23.2) provides residency as a grounds for limiting the right; although this comes alongside limitations based on language and education that are widely deemed as discriminatory.<sup>49</sup>

<sup>45</sup> The CPFPL entered into force in 1997. Currently, nine States have ratified the treaty.

<sup>46</sup> *Nottebohm* (n 21).

<sup>47</sup> Armenia, Azerbaijan, Moldova, and the Russian Federation are Council of Europe members and the applications of Belarus and Kazakhstan are pending. The CIS conventions are legally binding on all CIS States.

<sup>48</sup> See also, art 25.2 of the 2012 Association of Southeast Asian Nations (ASEAN) Human Rights Declaration. Also, art 9.2.I of the 2009 AU Kampala Convention further requires States to ensure that IDPs ‘can enjoy their civic and political rights, particularly ... the right to vote and to be elected’.

<sup>49</sup> CCPR, ‘General Comment No 25’ (n 6) para 10.

The jurisprudence of the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights acknowledge that the right to vote is not absolute, but that restrictions must be based on 'objective and reasonable grounds'.<sup>50</sup> None of these treaties or corresponding jurisprudence require States to facilitate voting for citizens abroad.

### *B. Customary International Law*

Customary international law in respect of non-resident citizen voting is yet to fully crystallize. Nonetheless, it is at least arguable that the other international instruments in this field do not indicate that residency may be a permissible restriction on the right to vote. Article 21 of the 1948 Universal Declaration of Human Rights (UDHR), which marked the beginning of the development of participation as a human right, provides for 'periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote'. Unlike the ICCPR, there is no distinction between individuals on the basis of citizenship. Given that the ICCPR clarified the right as conditioned only on citizenship, this indicates that residence was not foreseen as a permissible limitation. This position is clearly affirmed in subsequent UN General Assembly resolutions that note 'the right to participate in a political system based on common and equal citizenship and universal franchise'.<sup>51</sup> In respect of citizenship, Article 15 of the UDHR provides that 'everyone has the right to a nationality' and that no one should be deprived of their nationality arbitrarily.

In addition, Article 13 of the UDHR provides for free movement within, to, and from one's country and, while there is no universal treaty regulating voting rights for refugees, principle 22 of the 1998 UN General Assembly's Guiding Principles on Internal Displacement recommends that individuals 'shall not be discriminated against as a result of their displacement in the enjoyment of ... the right to vote ... including ... the means necessary to exercise the right'.<sup>52</sup>

At the European level, sources that may indicate the emergence of customary international law are scarcer. However, the Council of Europe's Committee of Ministers (CoM) has acknowledged the need to take 'measures to facilitate the exercise of voting rights of citizens living abroad'.<sup>53</sup>

<sup>50</sup> *Statehood Solidarity Committee v US* App No 11.204 (IACHR, 29 December 2003) para 93; *Purohit and Moore v The Gambia* App No 241/01 (ACHPR, 29 May 2003) para 76.

<sup>51</sup> UN General Assembly Resolution on Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections (1991) A/RES/46/137, para 6.

<sup>52</sup> UN General Assembly Guiding Principles on Internal Displacement (1998) E/CN.4/1998/53/Add.2.

<sup>53</sup> CoM, 'Reply to PACE Recommendation 1650' (2004) para 1; CoM, 'Reply to PACE Recommendation 1714' (2005) para 7.

## C. State Practice

The ECtHR has made reference to State practice when deciding on the reasonableness of restrictions on voting rights, stating that ‘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, or even trends in, the laws of Contracting States’.<sup>54</sup>

External voting rights for non-residents were first granted by Australia in 1902, but only a few States initially followed suit, with the right usually limited to members of the military or government stationed abroad.<sup>55</sup> The practice became more commonplace in the 1980s and expanded significantly in the 1990s.<sup>56</sup> In many cases, the expansion of external voting rights occurred in the aftermath of international wars or internal transitions to democracy.<sup>57</sup> In 2013, it was estimated that, globally, 129 countries permitted some form of external voting.<sup>58</sup> Within the Council of Europe, there is a clear trend in favour of voting rights for non-resident citizens.<sup>59</sup> As of 2013, of the 47 Council of Europe States, only 3 prohibit non-resident voting or limit it to those on official service.<sup>60</sup> The overwhelming majority, 44, grant the right to non-resident citizens irrespective of the reason of their absence. Of these, 35 do not limit that right on the basis of the duration of the citizen’s stay abroad. Nine States impose temporal restrictions, including seven who limit the right to those ‘temporarily’ abroad; although in three of those, ‘temporary’ is not defined and no conditions are imposed on citizens to demonstrate that their absence is temporary.<sup>61</sup> The remaining two States impose a temporal limitation on the right, with Germany removing the right after an absence of 25 years and the UK after 15 years. In 1989, the Austrian Constitutional Court struck down a law that required residence as a condition for voting in national elections.<sup>62</sup>

In the 44 States that permit non-resident voting, modalities to exercise that right vary considerably, including one, or a combination, of voting by post, at embassies, electronically, by proxy, or in person on national territory.<sup>63</sup> The Venice Commission of the Council of Europe has identified wide variations

<sup>54</sup> *Shindler* (n 1) para 102; *Hirst* (n 28) paras 78–79; *Alajos Kiss v Hungary* App No 38832/06 (ECtHR, 20 May 2010) para 41.

<sup>55</sup> E Sensenig-Dabbous, *Absentee Voting Survey* (LERC, Notre Dame University 2005) 6.

<sup>56</sup> L Brand, ‘Arab Uprisings and the Changing Frontiers of Transnational Citizenship’ (2014) 41 *Political Geography* 54, 55.

<sup>57</sup> J Itzigsohn and D Villacrés, ‘Migrant Political Transnationalism and the Practice of Democracy’ (2008) 31 *Ethnic and Racial Studies* 664, 665.

<sup>58</sup> M Collyer, ‘A Geography of Extra-Territorial Citizenship’ (2014) 2 *Migration Studies* 295.

<sup>59</sup> *Shindler* (n 1) paras 74–75; GS Goodwin-Gill, *Free and Fair Elections* (Inter-Parliamentary Union 2006) 126.

<sup>60</sup> *Shindler* (n 1) paras 74–75. Exceptions are Armenia, Ireland, and Malta.

<sup>61</sup> Bosnia and Herzegovina, Denmark, Hungary, Liechtenstein, the former Yugoslav Republic of Macedonia, Montenegro, and Serbia.

<sup>62</sup> *Voting Rights and Residency Case* 323/97 (Austrian Constitutional Court, 16 March 1989).

<sup>63</sup> *Sitaropoulos and Giakoumopoulos* (n 39) paras 32–45. See App 1.

in State practice in terms of modalities for registering for out-of-country voting, which may be 'justified for administrative reasons relating to voting arrangements'.<sup>64</sup>

Outside of the Council of Europe, there are few examples of States imposing temporal limitations on the right to vote for non-residents. Australia imposes a 6-year rule that may then be extended indefinitely on an annual basis.<sup>65</sup> New Zealand imposes a 3-year rule, which is reset when a citizen returns to the country for a visit.<sup>66</sup> Canada previously imposed a 5-year rule, but in 2014 it was overturned on the basis that the constitution does not provide grounds for restricting the right on residency and that the time limit imposed was arbitrary.<sup>67</sup>

#### *D. Soft Law*

At the European level, a number of soft law documents by international organizations have advocated for non-resident citizen voting, particularly from Council of Europe institutions. As early as 1982, the Parliamentary Assembly of the Council of Europe (PACE) recommended that the CoM consider establishing a European legal guarantee of the right, especially by post or at embassies.<sup>68</sup> In 1999, it recommended that States consider non-residents' interests in policymaking, including 'an unrestricted right to vote' in person in their country-of-origin or at embassies. It further recommended the right of expatriates to vote in local elections in their host country.<sup>69</sup> In 2005, PACE called on States to 'grant electoral rights to all their citizens, without imposing residency requirements' and to facilitate voting by post, at embassies, or by electronic means.<sup>70</sup> It also recommended States to assess the need for a European treaty on the matter.<sup>71</sup> Since then, PACE has consistently expressed regret at the failure of States to harmonize laws on non-resident voting rights, called for enhanced out-of-country voting, and the granting of voting rights to foreigners for local elections.<sup>72</sup> In 2012, however, PACE

<sup>64</sup> Venice Commission of the Council of Europe, 'Report on Out-of-Country Voting' (2011) CDL-AD(2011)022, para 38.

<sup>65</sup> Art 94.1.c of the 1918 Commonwealth Electoral Act (Australia).

<sup>66</sup> Art 80.1.a of the 1993 Electoral Act (New Zealand).

<sup>67</sup> *Frank et al. v Canada* 12-453976 (Ontario Superior Court of Justice, 2 May 2014) para 95, 129.

<sup>68</sup> PACE, 'Recommendation 951: Voting Rights of National of Council of Europe Member States' (1982) para 10.

<sup>69</sup> PACE, 'Recommendation 1410: Links between Europeans Living Abroad and their Countries of Origin' (1999) paras 5.3–5.5.

<sup>70</sup> PACE, 'Resolution 1459: Abolition of Restrictions on the Right to Vote' (2005) para 11.b–d.

<sup>71</sup> PACE, 'Recommendation 1714: Abolition of Restrictions on the Right to Vote' (2005) para 1.

<sup>72</sup> PACE, 'Resolution 1591: Distance Voting' (2007) para 1, 8; PACE, 'Resolution 1696: Engaging European Diasporas' (2009) para 9.1.3, 10.2; PACE, 'Recommendation 1890: Engaging European Diasporas' (2009).

indicated, for the first time, that external voting rights may be restricted according to 'duration of residence abroad'.<sup>73</sup>

The Council of Europe's Venice Commission has also pronounced on the matter. The 2002 Code of Good Practice in Electoral Matters recognizes residency as a permissible restriction for local (but not national) elections and for a period not exceeding six months.<sup>74</sup> It adds that forcibly displaced persons should 'have the possibility of being considered as resident at their former residence'. In 2004, the Venice Commission opined that States should find a formula to include voters who reside abroad but cannot return on election day; 'it is up to the citizen to decide whether or not he/she wishes to exercise this right'.<sup>75</sup> In 2005, the Venice Commission found restrictions on non-resident citizens to be 'problematic from a human rights perspective'.<sup>76</sup> In 2007, the Venice Commission stressed that 'elections abroad should generally meet the same standards for democratic elections as in-country procedures'.<sup>77</sup> In 2008, the Venice Commission said that 'countries considering arrangements for external voting will have to balance universal suffrage against transparency and security during elections. It is also a matter of costs to what extent large groups can be accommodated'.<sup>78</sup> In 2011, the Venice Commission concluded that a specific treaty for non-resident voting was not yet required, but, in view of European mobility, States should adopt a positive approach to guaranteeing the right.<sup>79</sup>

All Council of Europe members are participating States of the Organization for Security and Co-operation in Europe (OSCE) and paragraph 7.3 of the 1990 OSCE Copenhagen Document commits States to guarantee 'universal and equal suffrage to adult citizens'.<sup>80</sup> No restriction on the basis of residency is provided. The freedom to leave and return to one's country is recognized, with the 1989 Vienna Document committing States to 'allow all refugees who so desire to return in safety to their homes'.<sup>81</sup>

<sup>73</sup> PACE, 'Resolution 1897: Ensuring Greater Democracy in Elections (2012) para 8.1.7, 8.1.12.

<sup>74</sup> Venice Commission of the Council of Europe, 'Code of Good Practice in Electoral Matters' (2002) CDL-AD(2002)23rev, section I.1.1.c.

<sup>75</sup> Venice Commission of the Council of Europe, 'Report on Abolition of Restrictions on the Right to Vote in General Elections' (2005) CDL-AD(2005)011/012, para 31.

<sup>76</sup> Venice Commission of the Council of Europe, 'Opinion on PACE Recommendation 1714' (2005) CDL-EL(2005)032, para 4.

<sup>77</sup> Venice Commission of the Council of Europe and OSCE/ODIHR, 'Joint Opinion on the Draft Election Code of the former Yugoslav Republic of Macedonia' (2007) CDL-AD(2007)012, para 5.

<sup>78</sup> Venice Commission of the Council of Europe and OSCE/ODIHR, 'Joint Opinion on the Election Code of the Republic of Armenia' (2008) CDL-AD (2008)023, paras 10–13.

<sup>79</sup> Venice Commission of the Council of Europe, 'Report on Out-of-Country Voting' (2011) CDL-AD(2011)022, paras 98–99.

<sup>80</sup> OSCE, Copenhagen Document (1990) para 7.3.

<sup>81</sup> OSCE, Vienna Document (1989) para 22.

*E. Summary*

This section has demonstrated ambiguity in regard of non-resident citizen voting rights. No treaty explicitly provides for residence as a permissible restriction on the right to vote while reference to ‘every citizen’ and ‘universal suffrage’ underpin the inclusive and non-discriminatory nature of the right. This is supported by treaty bodies and European State practice, which overwhelmingly endorses the right to vote for non-resident citizens. While there is a trend to granting local voting rights by residency, the right to vote at national elections remains exclusively bound to citizenship and a number of instruments safeguard the principle of equal citizenship and protect against statelessness. Treaty bodies have held that blanket restrictions of rights challenge proportionality and that a derogation of rights may only occur at times of public emergencies and cannot be discriminatory.

However, ECtHR jurisprudence provides a contrary view, ruling that the right can be conditioned on residency on the grounds, *inter alia*, of an individual’s bond to their country-of-origin and the extent to which laws passed by the legislature would affect them. For non-resident citizens, it has also held that blanket restrictions are permissible in ensuring legal certainty. Such rulings challenge not only the existing body of IHRL but also the ECtHR’s own test as to what constitutes a reasonable restriction on voting rights.

Lastly, it should be underlined that States are not only required to establish the right to vote but to take positive measures to realize that right. Indeed, the ICMW and CISCDE, as well as treaty bodies and numerous institutions, explicitly call on States to facilitate non-resident citizen voting. While the ECtHR has questioned the integrity of some external voting methods, freedom of movement rights ensure that an eligible voter may always return to their country-of-origin to vote in person.

III. ASSESSING ECTHR JURISPRUDENCE ON NON-RESIDENT CITIZEN VOTING RIGHTS

The previous section established that the ECtHR is something of an outlier in its acceptance that national-level voting rights can be conditioned on residency. This section assesses whether the restrictions proposed by the ECtHR are reasonable according to its own test that any limitation must not impair the essence and effectiveness of the right, be in pursuit of a legitimate aim, and be proportionate.

*A. Essence and Effectiveness*

No universal or European treaty provides for residence as a permissible restriction on the right to vote, with the ICMW, CISCDE, treaty bodies and a large volume of State practice contributing to customary international law

calling on States to protect the essence of the right in respect of non-resident citizens. State practice further demonstrates that the right is commonly upheld across Europe. Collectively, this shows that voting rights have been interpreted in a way that gives full effect to the treaty's object and purpose; to maximize inclusion on the basis of citizenship. The essence of the right, therefore, is at clear risk of being violated when external citizens are denied the same voting rights as resident citizens.

This is in line with democracy's historical expansion of suffrage rights to marginalized groups, including those without property or paying taxes, the illiterate, national minorities, women, 18-year olds, prisoners, and persons with disabilities.<sup>82</sup> There are some characteristics specific to non-residents, but a 'similar political logic' is at play; that is to say that the 'demand for ever-increasing inclusiveness seems to be almost an inherent feature of competitive regimes'.<sup>83</sup>

The ECtHR has traditionally exercised restraint when ruling on the essence of voting rights, reflecting the broad discretion afforded to States given the sensitivity of decisions about national elections.<sup>84</sup> However, on occasion, it has found a violation. For example, the Court has held that while States enjoy latitude in establishing electoral rules, this should not exclude persons from participating in political life and, 'in particular, the choice of legislature'.<sup>85</sup> This represents an 'an ultimate red line around the inner core of the right to free elections which must never be transgressed'.<sup>86</sup>

It is surprising that the Court has not applied this 'red line' to non-resident voting rights, particularly considering the high risk of State derogation. Indeed, given that voting rights for national elections are not typically extended to foreigners, citizens residing abroad are unlikely to be able to vote anywhere if they do not have the right in their country-of-origin, representing a *de facto* derogation from the right.<sup>87</sup> As Barry explains, suffrage becomes 'effectively suspended for the duration of the migration'.<sup>88</sup> As such, sending States 'have a human rights-based obligation to provide expatriates with such rights'.<sup>89</sup> Irrespective of where a person feels more connected, this may be their

<sup>82</sup> JB Raskin, 'Legal Aliens, Local Citizens' (1993) 141 UPaLRev 1391, 1393.

<sup>83</sup> S Rhodes and A Harutyunyan, 'Extending Citizenship to Emigrants' (2010) 31 International Political Science Review 470, 471.

<sup>84</sup> D Harris *et al.*, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014), 921.

<sup>85</sup> *Aziz v Cyprus* App No 69949/01 (ECtHR, 22 June 2004) para 28.

<sup>86</sup> C Binder, 'Diversity and Political Rights in the Jurisprudence of the ECtHR' in A von Bogdandy *et al.* (eds), *Direitos Humanos, Democracia e Integração Jurídica* (Elsevier 2012) 518.

<sup>87</sup> Venice Commission of the Council of Europe, 'Report on Out-of-Country Voting' (n 79) paras 63–71.

<sup>88</sup> K Barry, 'Home and Away' (2006) 23 New York University Public Law and Legal Theory Working Papers 1, 51.

<sup>89</sup> R Baubock, 'Stakeholder Citizenship and Transnational Political Participation' (2007) 75 FordhamLRev 2393, 2410.



only opportunity to exercise voting rights in at least one national election.<sup>90</sup> It should be recalled that States may derogate from voting rights only during a public emergency, which has not been the case in any of the ECtHR cases.

The likelihood of derogation is particularly significant in the EU, given its free movement and labour mobility rights. Although retaining local and European voting rights, EU citizens are forced to relinquish national political representation in order to exercise free movement.<sup>91</sup> Instead of benefiting from both rights, citizens face ‘an impossible choice’. As Kochenov explains, ‘ironically, the more successful the functioning of free movement, the fewer the political rights’.<sup>92</sup> In this sense, the ECtHR’s ruling that the essence of the right is not curtailed if a person can return to their country-of-origin to revive their voting right is at fundamental odds with other EU rights.

The essence of the right becomes more salient when considered alongside concepts of citizenship. The right to vote is ‘very closely associated with citizenship both in popular understandings and in political theory’.<sup>93</sup> Political theorists from Aristotle to Rousseau to Walzer have understood citizenship to essentially reflect the status of full membership in a self-governing polity. Thus, citizens are those who participate in self-government either through voting or standing for public office.<sup>94</sup> Indeed, while most civil and social rights have gradually been extended to all residents irrespective of nationality, voting rights remain attached to formal citizenship status.<sup>95</sup> In this sense, voting has been described as an ‘inherent citizenship right’<sup>96</sup> and ‘a core right of citizenship’.<sup>97</sup> Citizenship without voting rights, therefore, would be ‘an alarming construct, calling into question the legitimacy of the use of the notion of citizenship itself’.<sup>98</sup>

Moreover, denial of the vote not only denies a human right but also status as a citizen, challenging an individual’s identity as a member of the national community.<sup>99</sup> For Shklar, the ‘ballot has always been a certificate of full membership in society, and its value depends primarily on its capacity to confer a minimum of social dignity’.<sup>100</sup> Martin Luther King Jr famously reflected that ‘the denial of the vote not only deprives the Negro of his constitutional rights – but what is even worse – it degrades him as a

<sup>90</sup> F Fabbrini, ‘Voting Rights for Non-Citizens’ (2011) 7 *EuConst* 392, 403–4.

<sup>91</sup> Venice Commission of the Council of Europe, ‘Report on Out-of-Country Voting’ (n 79) para 7.

<sup>92</sup> D Kochenov, ‘Free Movement and Participation’ (2009) 16 *Maastricht Journal of European and Comparative Law* 197, 213.

<sup>93</sup> L Bosniak, ‘Constitutional Citizenship through the Prism of Alienage’ (2002) 63 *OhioStLJ* 1285, 1307.

<sup>94</sup> R Baubock, ‘Expansive Citizenship’ (2005) 38 *Political Science and Politics* 683, 683.

<sup>95</sup> PJ Spiro, ‘Perfecting Political Diaspora’ (2006) 81 *NYULRev* 207.

<sup>96</sup> Rhodes and Harutyunyan (n 83) 474.

<sup>97</sup> S Song, ‘Democracy and Noncitizen Voting Rights’ (2009) 13 *Citizenship Studies* 607, 607.

<sup>98</sup> Kochenov (n 92) 197.

<sup>99</sup> D Owen, ‘Transnational Citizenship and the Democratic State’ (2011) 14 *Critical Review of International Social and Political Philosophy* 641, 659.

<sup>100</sup> JN Shklar, *American Citizenship* (Harvard University Press 1991) 2.

human'.<sup>101</sup> Fishkin asserts that denial of political rights sends 'a powerful message of exclusion and second-class citizenship'.<sup>102</sup>

The denial of citizenship has implications for the protection of other rights. Arendt has observed that citizenship is 'a right to have rights',<sup>103</sup> while Walzer notes that 'the denial of citizenship is always the first of a long train of abuses'.<sup>104</sup> Chief Justice Warren of the US Supreme Court opined that 'citizenship *is* man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person'.<sup>105</sup> This recognizes the extreme vulnerability of statelessness,<sup>106</sup> as well as the centrality of the State in implementing of IHRL.<sup>107</sup>

It is estimated that most States recognize dual citizenship.<sup>108</sup> For some, this distorts the essence of citizenship and voting rights as dual citizens may enjoy an unfair privilege of double voting.<sup>109</sup> However, there is a difference between having two votes in a single election and having votes in two different elections. Moreover, if it is possible to have connections in two countries, 'it may be reasonable to have a political voice in both these contexts'.<sup>110</sup>

The ECtHR originally held that the essence of voting rights is not curtailed if an individual can apply for citizenship in their host State. However, the Court later acknowledged that this should not be 'decisive', given an individual's interest in voting 'in the state to which he feels most closely connected'.<sup>111</sup> The Court, and others, have also recognized that changing one's citizenship may additionally lead to socio-economic disadvantages, including in relation to inheritance rights, property ownership, pensions and other entitlements.<sup>112</sup> Moreover, 'since avoiding statelessness and the vulnerability that it entails should be a priority, sending countries should not ask expatriates to give up their nationality'.<sup>113</sup> It also imposes a burden that other citizens do not have to bear and may 'engender forms of resentment and damage social cohesion'.<sup>114</sup>

Some theorists have suggested that voting rights be disaggregated from citizenship. With migrants representing 5–10 per cent of the global population<sup>115</sup> it has been observed that 'migration decouples citizenship and

<sup>101</sup> ML King Jr, 'Speech before the Youth March for Integrated Schools' in *A Testament of Hope* (James Melvin 1986, first published 1959) 21–2.

<sup>102</sup> J Fishkin, 'Equal Citizenship' (2011) 86 *IndLJ* 1289, 1337.

<sup>103</sup> H Arendt, *The Origins of Totalitarianism* (Harcourt, Brace and Jovanovich 1951) 294.

<sup>104</sup> Walzer, *Spheres of Justice* (Basic Books 1983) 62.

<sup>105</sup> *Perez v Brownell*, 356 US 44 (US Supreme Court, 31 March 1958) section 64.

<sup>106</sup> Arendt (n 103).<sup>107</sup> Song (n 97) 612.

<sup>108</sup> AT Aleinkoff, 'Citizenship Policies for an Age of Migration' in T Faist (ed), *Dual Citizenship in Europe* (Carnegie Endowment for International Peace 2002).

<sup>109</sup> DA Martin, 'New Rules on Dual Nationality for a Democratizing Globe' (1999) 14 *Georgia Immigration Law Journal* 1, 26 30.

<sup>110</sup> I Honohan, 'Should Irish Emigrants have Votes?' (2011) 26 *Irish Political Studies* 545, 551.  
<sup>111</sup> *Shindler* (n 1) para 106.

<sup>112</sup> JA Garcia, 'Immigrants and Suffrage' (2011–12) 24 *Harvard Journal of Hispanic Policy* 21, 32.

<sup>113</sup> R Rubio Marin, 'Transnational Politics and the Democratic Nation-State' (2006) 81 *NYULRev* 117, 142.<sup>114</sup> *ibid*, 138.

<sup>115</sup> OECD, 'International Migration Database' (2012) <<http://stats.oecd.org>>.

residence, disrupting tidy conceptions of nation-states as bounded territorial entities with fixed populations of citizens'.<sup>116</sup> It has been argued that the lack of political rights for non-residents undermines democratic legitimacy and encourages exclusion.<sup>117</sup> As Beckman observes, 'perversely, citizenship itself has become the source of unequal rights among people living in the same country'.<sup>118</sup>

To support disaggregation, some have argued for a post-national protection of rights, claiming that universal personhood has replaced nationality-based rights.<sup>119</sup> Advocates cite the European trend of granting local voting rights to non-citizens,<sup>120</sup> as supported by the CFREU, CPFPL, and Council of Europe. However, this trend focuses on local voting rights and, in fact, may rather support the nexus between citizenship and national voting rights. In this sense, local voting rights are conditioned on residency and are automatically transferred according to the municipality an individual resides; within their country or elsewhere. In contrast, national voting rights are solely grounded in citizenship, which does not automatically change should a person emigrate.<sup>121</sup>

As such, the disaggregation of voting rights 'would entail devaluation of citizenship itself'.<sup>122</sup> Even those open to disconnecting citizenship from associated rights accept that electoral rights, as opposed to economic and social rights, should remain limited to citizens.<sup>123</sup> Indeed, one of the challenges with disaggregation is that it appears to deal with an effect (voting rights) rather than the cause (citizenship). Rather than amend voting rights, the focus should instead be on examining the criteria for citizenship. In line with this, Walzer advocates extending citizenship to all resident non-citizens: 'men and women are either subject to the state's authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what the authority does'.<sup>124</sup> Walzer, as well as Rubio Marin and Carens,<sup>125</sup> argue for mandatory naturalization, which may be 'subject to certain constraints of time and qualification, [but] never to the ultimate constraint of closure'.<sup>126</sup> By expanding citizenship opportunities, it preserves the value of citizenship and existing State obligations to implement IHRL.<sup>127</sup> Alternatively, others argue that citizenship be revoked for those who have never lived in the country or have no intention to. Baubock, for example, suggests that citizenship should

<sup>116</sup> Barry (n 88) 17–18.

<sup>117</sup> Walzer (n 104) 61.

<sup>118</sup> L Beckman, 'Citizenship and Voting Rights' (2006) 10 *Citizenship Studies* 153, 155.

<sup>119</sup> Y Soysal, *Limits of Citizenship* (University of Chicago Press 1994) 142.

<sup>120</sup> S Day and J Shaw, 'European Union Electoral Rights and the Political Participation of Migrants in Host Countries' (2002) 8 *International Journal of Population Geography* 183.

<sup>121</sup> Baubock (n 89) 2430.

<sup>122</sup> Song (n 97) 615.

<sup>123</sup> JH Carens, 'On Belonging' (2005) *Boston Review*.

<sup>124</sup> Walzer (n 104) 60–1.

<sup>125</sup> R Rubio Marin, *Immigration as a Democratic Challenge* (Cambridge University Press 2000); JH Carens, 'The Integration of Immigrants' (2005) 2 *Journal of Moral Philosophy* 29.

<sup>126</sup> Walzer (n 104) 60–1.

<sup>127</sup> D Jacobsen, *Rights Across Borders* (Johns Hopkins University Press 1996) 112.

‘not be automatically transmitted beyond the first generation born abroad’.<sup>128</sup>

### *B. Legitimate Aim*

As outlined in Section I, the ECtHR has established four legitimate aims for restricting non-resident’s right to vote, namely: being less informed on country issues, less able to influence electoral platforms, not directly affected by decisions of the elected body, and having an undue influence on results. The Court has also held that an economic contribution in the form of taxes may provide justification. Additional aims referenced in the literature include the situation of conflict-forced migrants and the home-State political discourse. The legitimacy of these seven aims is assessed below.

#### *1. Less informed on country issues*

The Court has held that it is legitimate to restrict voting rights on ‘the assumption that a non-resident citizen is less directly or continuously interested in his country’s day-to-day problems and has less knowledge of them’. This assumption is untenable in contemporary global society, where high-speed modes of communication and transportation have minimized the effects of physical absence.<sup>129</sup> Emigrants can keep abreast of political news through satellite television, the internet, cheaper telephone calls, and more accessible air travel.<sup>130</sup> As Barry notes, ‘emigrants can be present in their home states, in absentia’.<sup>131</sup>

In addition, the usually more arduous steps necessary to vote externally are indicators of the interest of non-resident citizens in political issues, demonstrating ‘a deeply held desire to participate in the affairs of a country they still feel is their own’.<sup>132</sup> As with resident citizens, those who are less informed are less likely to participate.

#### *2. Less able to influence electoral platforms*

Using the same means, States can reach out to their external citizens more readily. It is now commonplace for non-resident communities to be visited by parties and candidates campaigning for their political, financial, and logistical support.<sup>133</sup> Moreover, expatriates can play a role in candidate selection and the framing of campaign issues. They can participate in online or postal primary elections to select candidates, make donations to parties and candidates, and mobilize voters within their host country. In several instances, the

<sup>128</sup> Baubock (n 89) 2426.

<sup>129</sup> Rubio Marin (n 125) 128.

<sup>130</sup> Baubock (n 94) 683.

<sup>131</sup> Barry (n 88) 26–7.

<sup>132</sup> *ibid* 58.

<sup>133</sup> P Levitt, ‘Transnational Migration’ (2001) 1 *Global Networks* 195.

introduction of external voting has been a direct result of lobbying by expatriates.<sup>134</sup>

The Court's reasoning is further diminished by the fact that several States have purposefully extended voting rights as a means to use their citizens abroad to lobby on their behalf.<sup>135</sup> This can be a means to promote foreign policy interests in bilateral relations, spread the national language and culture, and promote a democratic and modern image to the global community.<sup>136</sup> Collectively, this renders the Court's second legitimate aim for limiting expatriate voting as obsolete, as candidates can campaign abroad and non-resident citizens can influence candidate selection and campaign platforms.

### 3. *Not directly affected by parliamentary decisions*

The third legitimate aim offered by the Court is that expatriates would not be directly affected by the acts of the bodies they would elect. This argument is grounded on the so-called 'all-affected principle', which states that 'everyone who is affected by the decisions of a government should have the right to participate in that government'.<sup>137</sup> This causally-based principle tells us that anyone 'whose fate [is] inextricably bound up with the functioning of the country's institutions' should be recognized as a political equal.<sup>138</sup> However, external citizens, it is argued, 'do not share in the politically determined life of the country; they are not subject to its working conditions and practices, they do not in general pay taxes, their children are not brought up in its education system, and so on'.<sup>139</sup> Even if they are affected by some decisions, such as those concerning nationality, military service, and diplomatic protection, they are not subject to State authority in the same direct and comprehensive way.<sup>140</sup>

The principle, however, lacks specificity and the degree to which a person is 'affected' by the State may be interpreted in radically distinct ways.<sup>141</sup> As Goodin explains, 'notice first that whose interests are "affected" by any actual decision depends on what the decision actually turns out to be. Notice second that what the decision actually turns out to be depends, in turn, upon who actually makes the decision'.<sup>142</sup> The principle may thus encourage a view

<sup>134</sup> Itzigsohn and Villacrés (n 57) 671.

<sup>135</sup> L Vardarajan, *The Domestic Abroad* (Oxford University Press 2010).

<sup>136</sup> M Collyer and Z Vathi, 'Patterns of Extra-territorial Voting' (2007) T22 Working Paper – Sussex Centre for Migration Research, 8.

<sup>137</sup> RA Dahl, *After the Revolution?* (Yale University Press 1990) 64. See also ECN and *Nottebohm* (n 21).

<sup>138</sup> B Barry, *Culture and Equality* (Cambridge University Press 2000) 77; S Benhabib, *The Rights of Others* (Cambridge University Press 2004) 217.

<sup>139</sup> R Rubio Marin, 'National Limits to Democratic Citizenship' (1998) 11 *Ratio Juris* 51, 53.

<sup>140</sup> A Weale, *Democracy* (St Martin's Press 1999), 158. <sup>141</sup> Owen (n 99) 642.

<sup>142</sup> R Goodin, 'Enfranchising all Affected Interests and its Alternatives' (2007) 39 *Philosophy and Public Affairs* 40, 52; Dahl (n 137) 49.

that resident non-citizens be included in national elections,<sup>143</sup> or, even, that non-resident non-citizens be included when government decisions have a profound international impact.<sup>144</sup> In this sense, the principle requires ‘defining the demos decision by decision rather than people by people’.<sup>145</sup> However, elections are not a vote on a single issue but are rather exercises in determining who will enjoy law-making and enforcement powers on a wide range of issues. A principle of affected interests can therefore not overcome the need to define the limits of the voting population and, as such, represents an effort to recast political theory in the language and structures of IHRL.

A variant of the all-affected principle is the ‘all-coerced principle’. According to Song, the coercion principle differs insofar that ‘a right of participation is owed not simply in virtue of state laws having causal effects on people’s basic interests, but rather on the more restricted basis of being subject to state coercion’.<sup>146</sup> For external citizens, this may imply being subject to the political authority of the State but not its coercive authority to enforce compliance with the law, for example, in respect of taxes or military service. This provides a more defined criterion for limiting external voting rights. However, it raises the controversial argument that a person must contribute in order to be a full citizen (see point 5 below). It also seems unfair that a citizen should be punished for the State’s failure to ensure compliance with laws.

It is also clear that non-resident citizens may be affected by decisions despite not being a current resident, as they may maintain property, operate businesses, pay commercial or indirect taxes, or hold investments in the country. Moreover, many non-residents return to their country-of-origin and therefore have a valid interest in their future government.<sup>147</sup>

#### 4. *Undue influence on decision-making*

The fourth legitimate aim outlined by the Court is a country’s desire to limit the influence of citizens living abroad in the making of decisions that do not primarily affect them. As non-residents do not live with the consequence of their vote, it is argued that they will not exercise it with the same care as resident voters who vote responsibly out of self-interest. By allowing such participation, expatriates ‘are evading all the costs of their choices’,<sup>148</sup> which are instead paid by the residents exposed to the laws of the resultant government.<sup>149</sup>

Concerns have been raised that this may lead to votes for extreme policies. Baubock notes that expatriates ‘often preserve an image of the national culture

<sup>143</sup> C Lopez-Guerra, ‘Should Expatriates Vote?’ (2005) 13 *Journal of Political Philosophy* 216, 217.  
<sup>144</sup> Beckman (n 118) 160.

<sup>145</sup> I Shapiro, *The Moral Foundations of Politics* (Yale University Press 2003) 222.

<sup>146</sup> Song (n 97) 611.

<sup>147</sup> C Hirschman *et al.*, *The Handbook of International Migration* (Russell Sage Foundation 1999).  
<sup>148</sup> Beckman (n 118) 162.  
<sup>149</sup> Lopez-Guerra (n 143) 227.

that is frozen in time' and that they can 'be mobilised in support of radical ethno-nationalists who reject the accommodation of national minorities and the resolution of violent conflicts between domestic factions or neighbouring states'.<sup>150</sup> Yet this not a universal truth and expatriates have often supported democratic transitions in their home States, notably in South America. Moreover, 'being knowledgeable, informed or moderate are not required or guaranteed among resident citizens',<sup>151</sup> and it would be unfair to apply such reasoning to non-resident citizens.

This argument also draws on concerns that external voters lack the information necessary to make a considered decision, the basis of which has already been dismissed. Other arguments highlight controversial cases when emigrant votes were perceived to decide the election results.<sup>152</sup> However, in such cases the impact of the external vote is modest and, in fact, loses relevance when analysed next to other variables such as political affiliation.

### 5. *Economic contribution*

Separately, the Court has historically held that the link between taxation and representation is a reasonable ground for limiting the right to vote for non-residents. The connection between economic contribution and voting rights has also been cited as a reason to extend external voting rights.<sup>153</sup> Indeed, many expatriates send large remittances to their homelands, invest significantly in businesses, establish commercial links, and, at times, pay social benefits.<sup>154</sup> Recognizing this, and wishing to encourage further contributions, several States have expanded voting rights to non-resident citizens.<sup>155</sup>

However, remittances are voluntary and do not contribute directly to the State. As such, 'they are not equivalent to the payment of taxes any more than charitable donations are'.<sup>156</sup> The transfer of remittances is also unequal; 'some emigrants choose to participate regularly and intimately, a few choose to leave without looking back, and most fall somewhere between these two extremes'.<sup>157</sup> This variety in practice does not present a solid and predictable basis for expanding external voting rights.

Moreover, tying political rights to economic contributions is controversial and undermines the principle that all citizens have the same obligations and rights regardless of social status.<sup>158</sup> This 'contributivist' approach implies

<sup>150</sup> Baubock (n 89) 2416; T Lyons, 'Diasporas and Homeland Conflict' in M Kahler and others (eds), *Globalization, Territoriality, and Conflict* (Cambridge University Press 2006).

<sup>151</sup> Honohan (n 109) 550.

<sup>152</sup> B Mascitelli and S Battiston, 'The Challenges to Democracy and Citizenship' (2008) 13 *Modern Italy* 261; F Ragazzi and I Stiks, *Country Report Croatia* (EURO 2010).

<sup>153</sup> P Levitt and R De la Dehesa, 'Transnational Migration and the Redefinition of the State' (2003) 26 *Ethnic and Racial Studies* 587.

<sup>154</sup> Vardarajan (n 134).

<sup>155</sup> M Lisi *et al.*, 'Out of Sight, Out of Mind?' (2014) *South European Society and Politics* 1, 8.

<sup>156</sup> Honohan (n 110) 548.

<sup>157</sup> Barry (n 88) 32.

<sup>158</sup> S Pogonyia, 'Four Patterns of Non-resident Voting Rights' (2013) 13 *Ethnopolitics* 122, 127.

that ‘only when your taxes are paid do you have a real stake in political affairs’.<sup>159</sup> This echoes previous discriminatory limitations on voting rights and raises concerns about those who cannot contribute, such as the poor, disabled or elderly.<sup>160</sup> The linkage between taxes and citizenship has also been rejected by the ICJ in *Nottebohm*.

### 6. *Conflict-forced migration*

The ECtHR has not ruled on the connection between conflict-forced migration and external voting but there is emerging consensus that any restriction would lack legitimacy, as outlined by UN, Council of Europe and OSCE recommendations. The exclusion of refugees would effectively give legitimacy to those who violently forced their migration. Moreover, their absence from the electorate would distort electoral results and lead to political configurations unlikely to promote their return or address their concerns.<sup>161</sup> Disenfranchisement would also heighten their marginalization and impede reintegration into society. As such, external voting rights for conflict-forced migrants can be seen as a means to protect their political rights when they are unable or unwilling to return, to make amends for past human rights abuses, and to promote post-conflict reconciliation.<sup>162</sup> South Africa, Iraq and Kosovo all included voting rights for non-residents in elections that determined independence or established post-conflict government. Although questions remain as to how long such rights should remain in place, the extent of conflict necessary for such rights to be triggered, as well as the payment for such modalities, there is consensus that ‘justifying voting rights for forced exiles can be seen as a special case that is not more widely generalisable’.<sup>163</sup>

### 7. *Home state politics*

A further aim of external voting may be to gain an electoral advantage or advance an ethno-nationalist ideology. While both aims may be disregarded as illegitimate, it is worth noting the reasoning.

According to some studies, the initiation of external voting in one-third of countries was based on a desire to gain an electoral advantage.<sup>164</sup> In this sense, a party advocates for external voting only if ‘it expects to win relatively more votes from abroad than its competitors’.<sup>165</sup> In authoritarian contexts, it has been posited that external voting is ‘aimed at increasing sovereignty over expatriates with resources to be tapped or at reinforcing

<sup>159</sup> Beckman (n 118) 159.

<sup>160</sup> *ibid* 159.

<sup>161</sup> J Grace, ‘External and Absentee Voting’ in IFES (ed), *Challenging the Norms and Standards of Election Administration* (IFES 2007) 39. <sup>162</sup> Baubock (n 89) 2436. <sup>163</sup> Honohan (n 110) 549.

<sup>164</sup> Rhodes and Harutyunyan (n 83) 473.

<sup>165</sup> Baubock (n 89) 2412.



security through a different means of monitoring communities abroad'.<sup>166</sup> Neither of these scenarios provides a genuine attempt at expanding political rights, even if the language of citizenship is appropriated.<sup>167</sup>

In other contexts, external voting has been introduced as a means to support ethno-nationalist conceptions of the State, which conceives citizens not as members of the territorial State but as an ethnic group dispersed over several States.<sup>168</sup> Pogonyia notes that 'the enfranchisement of non-resident ethnic kin serves ethnic engineering aims and leads to the establishment of an ethnocracy' that benefits nationalist parties.<sup>169</sup> Baubock notes that emotional attachments or nationalist sentiments do not suffice for qualifying as a voting citizen, which depend on objective criteria.<sup>170</sup>

### *C. Proportionality*

The proportionality test provides a basis for determining the validity of restrictions imposed by a State when implementing human rights law. Where such restrictions are made, paragraph 6 of CCPR General Comment 31 provides that States 'must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims'. In doing so, the ECtHR has held that the principle allows for a balance between individual and public interests, while guarding against arbitrariness by requesting States to explain why limitations have been introduced.<sup>171</sup> In this sense, proportionality can provide a means to accommodate the historical, legal and political diversity of a State while ensuring that States do not overstep their margin of appreciation in deciding how to implement rights.<sup>172</sup>

European State practice is clear, with 44 Council of Europe States granting voting rights to non-resident citizens. The right, as such, does not fall exclusively under a State's margin of appreciation and any departure from the norm clearly risks being disproportionate. This is a position exemplified by constitutional court decisions in Austria and Canada that struck down residency-based restrictions for being discriminatory and disproportionate.

Defined temporal limitations on the right are imposed in two European States, with Germany removing the right after 25 years and the UK after 15. While this is not an unsubstantial period, the imposition of any time limit lacks proportionality insofar that it does not account for the myriad reasons that may explain absence. Although the UK legislature considered different options as to when a non-resident should lose the right,<sup>173</sup> this does not necessarily mean that the resultant decision was proportionate and represents a fair balance between competing interests. Moreover, the length of time

<sup>166</sup> L Brand, 'Authoritarian States and Voting from Abroad' (2010) 43 *Comparative Politics* 81, 97.

<sup>167</sup> Brand (n 56) 55. <sup>168</sup> C Joppke, *Selecting by Origin* (Harvard University Press 2005).

<sup>169</sup> Pogonyia (n 158) 136. <sup>170</sup> Baubock (n 89) 2421.

<sup>171</sup> *Podkolzina* (n 27); *Soering v UK* App No14038/88 (ECtHR, 7 July 1989) para 89.

<sup>172</sup> *Binder* (n 85) 511. <sup>173</sup> *Shindler* (n 1) para 21.

abroad does not necessarily correlate to a subjective loss of connection to the home State.<sup>174</sup> It is also at odds with the TFEU, which prohibits ‘qualifying periods’ in terms of labour mobility rights.

Nonetheless, the Court held that blanket restrictions on non-resident citizen voting are reasonable due to the burden imposed if a State had to make individual assessments. The Court added that this blanket approach would promote legal certainty and avoid problems of arbitrariness inherent to case-by-case assessments.<sup>175</sup> Yet, this contradicts the CCPR’s stance that blanket restrictions lack proportionality. Moreover, the lack of an individual assessment is contrary to the ECtHR’s own rulings on restrictions of voting rights of other groups, such as prisoners or persons with disabilities, which discarded blanket restrictions in favour of individual court decisions. In these cases, the Court held that any automatic and indiscriminate restriction on voting rights lacks proportionality and risks undermining the democratic validity of the legislature thus elected.<sup>176</sup> The lack of an individual test to ascertain a person’s connection to their country, therefore, is not only disproportionate but is inconsistent with other relevant ECtHR rulings. Although the formulation and implementation of such testing may indeed be burdensome on the State (as it has proven in the cases of prisoners and persons with disabilities), it is appropriate that any deprivation of a core human right be accompanied with the most rigorous of processes.

Separately, in terms of restricting voting rights by the *type* of election, it is of note that only 20 Council of Europe States permit external voting for referenda and only 7 for local elections.<sup>177</sup> This is in line with the CCPR’s conclusions in *Gillot*, which argued that it is proportionate to limit the right according to the nature and purpose of elections. It also reflects the trend towards granting local voting rights according to residency and national voting rights to citizenship.<sup>178</sup> It may therefore be proportionate to limit external voting rights in local elections.

#### *D. Summary*

It ought to be acknowledged that the Court works in a politically sensitive environment and that it had previously been criticized by some for what was seen as an overly intrusive approach in its decisions on prisoner voting rights, particularly in the UK.<sup>179</sup> While it can be speculated that the Court sought to avoid making a further contentious ruling on voting rights in *Shindler*, this section nonetheless has highlighted how ECtHR jurisprudence fails its own

<sup>174</sup> C Carter, ‘The Right to Vote for Non-Resident Citizens’ (2011) 66 *Texas IntlLJ* 655, 671.

<sup>175</sup> *Shindler* (n 1) para 116. <sup>176</sup> Respectively, *Hirst* (n 28) para 62; *Kiss* (n 54) para 44.

<sup>177</sup> App 2. <sup>178</sup> *Gillot* (n 9) para 14.2.

<sup>179</sup> T Zwart, ‘More Human Rights than Court: Why the Legitimacy of the European Court of Human Rights Is in Need of Repair and How It Can Be Done’ in S Flogaitis *et al.* (eds), *The European Court of Human Rights and Its Discontents* (Edward Elgar 2013), 79.

test. The essence and effectiveness of non-resident citizen voting rights is impaired insofar that restrictions lack any explicit basis in IHRL and exclude a group of citizens in a discriminatory manner, similar to how women and minorities were historically disenfranchised. Denial of voting rights also devalues citizenship, sending a powerful signal of exclusion and placing other human rights at risk. Moreover, as citizens residing abroad are unlikely to be able to vote anywhere if they cannot vote in their country-of-origin, there is a manifest risk of State derogation from the right to vote. In the EU context, there is stark inconsistency insofar that individuals are forced to relinquish national political rights in order to exercise free movement rights.

Furthermore, the justifications offered by the Court to impose such restrictions are flimsy, obsolete, and easily discredited, while the proportionality test is critically undermined by the imposition of blanket measures that have been renounced by the Court in cases concerning voting rights for prisoners and persons with disabilities.

#### IV. FACILITATION OF NON-RESIDENT CITIZEN VOTING RIGHTS

If we accept that States are obliged to provide all citizens with the right to vote irrespective of residence, attention should duly shift to the practical implication of making the right effective and the extent to which a State ought to facilitate the right. Indeed, Article 25 of the ICCPR affirms not only the ‘right’ but also the ‘opportunity’ to vote for all citizens. In line with CCPR General Comment 25, this implies that the State should take positive measures to facilitate the right, which may include effective voter registration and the provision of alternative voting methods. In addition, the ICMW, CISCDE, treaty bodies and a large volume of State practice relevant to customary international law explicitly call on States to facilitate voting rights for non-resident citizens.

Yet, at the same time, States have a legitimate interest in guaranteeing the integrity of the electoral process. Voting in uncontrolled environments—where there is no supervision comparable to that of a polling station—may lead to breaches of important principles such as the security and secrecy of the vote, as well as ensuring that all votes are received and counted as intended.<sup>180</sup> There is, as such, a tension between the principle of universal suffrage and measures of effective electoral management aimed at the elimination of electoral fraud.<sup>181</sup>

The costs of external voting should also be considered. The ICMW conditions external voting on the grounds that it is ‘appropriate and in accordance with [state] legislation’. Other treaties that call for facilitation of voting, such as the CRPD, note that this should not impose ‘a disproportionate or undue burden’ on the State. External voting can be

<sup>180</sup> Venice Commission of the Council of Europe, ‘Code of Good Practice in Electoral Matters’ (2002) CDL-AD(2002)23rev, section I.3.2.

<sup>181</sup> Fishkin (n 102) 1289.

cumbersome and costly, for voters and governments,<sup>182</sup> particularly when non-residents are sparsely distributed across several countries and voter participation is limited.<sup>183</sup> The Venice Commission has recognized the financial difficulties in organizing external voting, while the ECtHR—in light of divergent European State practice—has held that the cost of returning to a country to vote does not impair the essence of the right.<sup>184</sup> Thus, external voting may be justified on a joint consideration of universality, integrity, and costs.

The following section explores the practical modalities available to States to facilitate non-resident citizen voting. The section also briefly notes important legal framework issues that effect facilitation, including voter registration and electoral districting.

### *A. External Voting Methods*

A review of European State practice shows that arrangements for exercising expatriate voting rights are not uniform. States offer one or multiple modalities, all of which hold strengths and weaknesses, including in-person voting on national territory, in-person voting at embassies, postal voting, electronic voting, and proxy voting.

The right to vote if one returns home is universal, except in those cases where temporal restrictions are imposed. Where this is the only method available, some have argued that it imposes an undue burden on citizens in terms of time and money to travel home to vote, which unfairly excludes certain groups.<sup>185</sup> It may also lead to political parties paying for trips for citizens to return and vote, amounting to a form of vote-buying.

The most common method of voting from abroad is in person at embassies or consulates. Its principal advantage is that it provides the same voting method for all voters, within a controlled environment where challenges of secrecy of voting and voter identification are minimized. However, it may limit accessibility insofar that it can require extensive travel times and costs for those not living near an embassy.<sup>186</sup> This is a particular issue in large countries such as Russia or France. Additionally, voters may not trust the embassy staff if they are perceived as representing the government rather than being independent. The method also relies on compliance by the host country to allow foreign elections to be exercised on their territory; although this concern is generally abating.<sup>187</sup>

The second most popular method is postal voting. It has the advantage of being easy to organize and relatively inexpensive. It also removes concerns of governments having foreign political activities take place on their territory.

<sup>182</sup> Barry (n 88) 27.

<sup>184</sup> *Sitaropoulos and Giakoumopoulos* (n 39) para 80.

<sup>186</sup> P Boccagni, 'Reminiscences, Patriotism, Participation' (2011) 49 *International Migration* 76.

<sup>187</sup> Baubock (n 89) 2401.

<sup>183</sup> Lisi *et al.* (n 155) 5.

<sup>185</sup> Kochenov (n 92) 219.

However, the lack of a controlled environment for voting means that the integrity of the vote cannot be guaranteed as it cannot ensure that the voter is correctly identified or that they cast their ballot free of pressure. Another disadvantage is that it can demand a long time frame and may be ineffective in countries with unreliable postal services. Due to the need to cast their vote in advance, voters will also not be informed of late campaign developments that may have influenced their choice.

Electronic voting is used in three Council of Europe States for external voting. It has the advantage of promoting greater accessibility (a voter need not travel to an embassy), minimizing time and logistical challenges (votes may be cast on election day from home), and it may minimize administration costs. However, concerns about voting in an uncontrolled environment remain and there are also risks of system failure and data protection.<sup>188</sup>

Lastly, several States provide proxy voting as a modality for external voters. Proxy voting means that a elector can appoint someone to vote on their behalf at their polling station. This is an easy and inexpensive method. However, as each voter needs to tell their proxy whom to vote for, it cannot ensure secrecy. There is also no guarantee that the proxy will vote as instructed, potentially violating the principle of one-person-one-vote.<sup>189</sup>

### *B. Voter Registration and Districting*

IHRL clearly establishes that States enjoy a wide margin of appreciation in their choice of electoral system.<sup>190</sup> This has implications on important aspects of non-resident voting. First, almost all European States require citizens to actively register for external voting, even if passive voter registration is provided in-country. For some, advance active registration is construed as an undue burden on external citizens that limits participation.<sup>191</sup> However, IHRL provides for both active and passive voter registration and the only requirement is that States take steps to facilitate registration.<sup>192</sup> For external citizens this implies effective voter information and procedures that are not unduly difficult to comply with, particularly when absent from the country-of-origin.<sup>193</sup>

In terms of districting, there are two possibilities to accommodate external voters. Most often, votes are counted within national districts according to the last place of residence of the migrant or in the capital.<sup>194</sup> An alternative,

<sup>188</sup> CoM, 'Recommendation 11: Legal, Operational and Technical Standards for E-voting' (2004).

<sup>189</sup> Lafleur J-M, *Transnational Politics and the State: The External Voting Rights of Diasporas* (Routledge 2013), 22. <sup>190</sup> *Shindler* (n 1) para 102.

<sup>191</sup> A Lijphart, 'Unequal Participation' (1997) 91 *American Political Science Review*.

<sup>192</sup> CCPR, 'General Comment No 25' (n 6) para 11.

<sup>193</sup> P Boccagni and J Ramirez, 'Building Democracy or Reproducing "Ecuadoreanness"?' (2013) 45 *Journal of Latin American Studies* 721, 727. <sup>194</sup> Collyer and Vathi (n 136).

used by six Council of Europe States, is to establish special districts for citizens abroad, whereby their votes and representation is made distinct from the national system. Such an approach can ensure that specific interests of non-residents are recognized.<sup>195</sup> It can also make electoral administration easier,<sup>196</sup> as well as provide predictability and reduce fears that external votes could decisively influence the results of national districts.<sup>197</sup> However, the system detracts from the idea of equal citizenship and equal voting rights. As Baubock explains, ‘insofar as they have a right to be recognized as voting members, they share with domestic citizens the same interests in the future of the polity. For this reason, they should be seen as voting for legislators who will represent the general citizenry’.<sup>198</sup> While existing national districts may be preferable to support the concept of equal citizenship, States may opt for special districts should there be concerns of a decisive impact on the national results.

### *C. Summary*

The facilitation of voting rights for external citizens is in line with IHRL provisions to provide the right and opportunity to vote for all citizens. No treaty, however, explicitly requires a specific modality be adopted and States are afforded a wide margin of appreciation in their choice of electoral system. This is supported by additional latitude given to States to ensure the integrity of the electoral process and to not pursue methods that incur an unreasonable cost. As such, provided that States permit citizens to return to their home country to vote, make citizens aware of relevant procedures, and do not place undue burdens in respect of registration, then no violation is committed. Rather it is the choice of a State to balance the principle of universal suffrage on the one hand against the need for security of the ballot and considerations of a practical nature on the other.

### V. CONCLUSION

The *Shindler* judgment represents a milestone for non-resident citizen voting rights. It endorses a view that voting rights may be conditioned on residency on the grounds of an individual’s normative bond to their country-of-origin and the extent to which laws passed by that government would affect them. Yet, as this article has shown, the ECtHR judgment has no credible grounding in other aspects of IHRL. No universal or European treaty provides for residence as a permissible restriction on the right, while treaty bodies and European State practice overwhelmingly endorse the right to vote for non-resident citizens. Despite changes in local voting rights, the right to

<sup>195</sup> Spiro (n 95) 226.

<sup>196</sup> Lafleur (n 189).

<sup>197</sup> Lisi *et al.* (n 155) 4.

<sup>198</sup> Baubock (n 89) 2433.

vote at national elections remains exclusively bound to citizenship and a number of instruments safeguard the principle of equal citizenship. Treaty bodies have further held that blanket restrictions of rights challenge proportionality and are discriminatory.

Moreover, the ECtHR's judgment fails its own test that any limitation must not impair the essence and effectiveness of the right, be in pursuit of a legitimate aim, and be proportionate. The presumption in any democratic State must be in favour of inclusion, citizenship should have a unitary value, and States cannot be permitted to derogate from the most central of political rights. In the EU, the removal of non-resident citizen voting rights is also fundamentally at odds with free movement rights within the Union. Furthermore, the ECtHR's endorsement of blanket restrictions lacks proportionality, contradicts its decisions on voting rights for prisoners and persons with disabilities, and is contrary to broader IHRL.

However, while States are obligated to uphold their human rights obligation to provide all citizens with the right and opportunity to vote irrespective of residence, they may exercise discretion in the voting modalities offered to non-resident citizens. Divergent State practice, as well as the need to ensure electoral integrity and the right to not pursue methods that incur an unreasonable cost, means that States are currently not compelled to introduce voting at embassies, by post, or electronically. While practice should always favour inclusion, it remains the State's prerogative to balance universal suffrage on the one hand against the need for security of the ballot and considerations of a practical nature on the other. In all cases, however, the citizen's right to return to their country-of-origin to cast a vote cannot be violated.

## 1. The Right and Opportunity to Vote of Non-Resident Citizens

Country	Right to Vote			Facilitation of Right					Representation	
	No Restrictions	Restricted to those temporarily abroad	Restricted to a fixed temporal term	In person; on national territory	In person; at embassies abroad	Post	Electronic	Proxy	Dedicated Districts	Existing Districts
Albania	•			•						•
Andorra	•			•						•
Armenia										
Austria	•			•		•				•
Azerbaijan	•			•						•
Belgium	•			•	•	•		•		•
Bosnia and Herzegovina	•	•		•	•	•				•
Bulgaria	•			•	•					•
Croatia	•			•	•				•	
Cyprus	•			•						•
Czech Republic	•			•	•					•
Denmark	•	•		•	•					•
Estonia	•			•	•	•	•			•
Finland	•			•	•					•
France	•			•	•			•	•	
Georgia	•			•	•					•
Germany	•		•	•		•				•



Greece	•		•				•
Hungary	•	•	•	•			•
Iceland	•		•	•			•
Ireland					•		
Italy	•		•		•		•
Latvia	•		•	•	•		•
Liechtenstein	•	•	•		•		•
Lithuania	•		•	•	•		•
Luxembourg	•		•		•		•
Malta							
Moldova	•		•	•			•
Monaco	•		•			•	•
Montenegro	•	•	•				•
Netherlands	•		•		•	•	•
Norway	•		•	•			•
Poland	•		•	•			•
Portugal	•		•	•	•		•
Romania	•		•	•			•
Russian Federation	•		•	•			•
San Marino	•		•				•
Serbia	•	•	•	•			•
Slovakia	•		•		•		•
Slovenia	•		•	•	•		•
Spain	•		•	•	•		•

*Continued*

<sup>199</sup> Data in appendices from *Sitaropoulos and Giakoumopoulos* (n 39) and *Shindler* (n 1), with updates provided from the author's own research, as of 2015.

Continued

Country	Right to Vote			Facilitation of Right					Representation	
	No Restrictions	Restricted to those temporarily abroad	Restricted to a fixed temporal term	In person; on national territory	In person; at embassies abroad	Post	Electronic	Proxy	Dedicated Districts	Existing Districts
Sweden	•			•	•	•				•
Switzerland	•			•		•	•	•		•
The former Yugoslav Republic of Macedonia	•	•		•	•				•	
Turkey	•			•						•
Ukraine	•			•	•					•
United Kingdom	•		•	•		•		•		•

2. The Right to Vote of Non-Resident Citizens By Election Type

Country	Election Type				
	Presidential	Parliamentary	Referenda	European	Local
Albania					
Andorra					
Armenia					
Austria					
Azerbaijan	•		•		
Belgium		•		•	
Bosnia and Herzegovina					
Bulgaria	•	•			
Croatia	•	•	•	•	
Cyprus					
Czech Republic		•			
Denmark					
Estonia		•	•		
Finland	•	•			•
France	•	•	•	•	
Georgia	•	•			
Germany		•		•	
Greece					
Hungary		•	•	•	
Iceland					
Ireland					
Italy		•	•		
Latvia		•	•		
Liechtenstein		•	•		•
Lithuania		•	•	•	•
Luxembourg		•	•	•	
Malta					
Moldova	•	•	•		
Monaco		•			•
Montenegro					
Netherlands		•		•	
Norway					
Poland	•	•	•		
Portugal	•	•	•	•	
Romania	•	•	•	•	
Russian Federation	•	•	•		
San Marino					
Serbia	•	•			

Continued

Continued

Country	Election Type				
	Presidential	Parliamentary	Referenda	European	Local
Slovakia		•			
Slovenia	•	•	•		
Spain		•	•		•
Sweden		•	•	•	•
Switzerland		•	•		•
The former Yugoslav Republic of Macedonia	•	•			
Turkey					
Ukraine	•	•	•		
United Kingdom		•		•	