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Out-of-Country Voting: The Predicament of the Recognised Refugee

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A. Introduction

The effective exercise of the right to vote ‘imposes an obligation upon the state not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised’. The State’s positive obligations include, inter alia, the promulgation of election laws that regulate candidacy and the formation of political parties, facilitate registration and voting processes, and enable access to information regarding the ballot and the candidates.

All states have non-citizen resident populations and, pertinent for this chapter, have non-resident citizens. States must first determine whether their non-resident citizens remain eligible voters; failing that, expatriates will have to exercise their (recognised) right to return to their state and reside there in order for their (dormant) voting rights to be re-established. However, if expatriates remain on the electoral roll, an effective exercise of their right to vote may depend on accessible out-of-country voting procedures (OCV).

The analytically distinct questions of eligibility and accessibility are often conflated.

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1 Richter v Minister for Home Affairs and Others, 2009 (3) SA 615 (CC) (12 March 2009)[53].


3 See R. Bauböck, ‘Towards a Political Theory of Migrant Transnationalism’ (2003) 37 International Migration Review 700, 714 (arguing that, since most states do not grant voting rights to non-citizen residents, the latter are deprived of any opportunity for democratic participation unless they can vote in elections of their states of citizenship).
Expatriates requiring access to OCV procedures may be (broadly) divided into three categories: first, voluntary migrants (migrant workers and their families); second, conflict forced migrants (persons displaced by conflict from their state of origin, whose access to OCV is appraised in this chapter in relation to transformative or post-conflict electoral processes taking place in their state of origin); third, recognised refugees (for the purposes of this chapter, persons recognised as refugees under the 1951 Convention Relating to the Status of Refugees and hold refugee status in a state of asylum whilst electoral processes are held in their state of origin). This chapter sheds light on the unique political predicament of recognised refugees qua expatriates.

Section B demonstrates that neither the International Covenant on Civil and Political Rights (ICCPR)\(^4\) nor regional treaties proscribe the imposition of residency requirements *in addition* to citizenship in order to determine voting eligibility. Nonetheless, most states consider their expatriates to be eligible voters. Whereas OCV procedures used to be rare,\(^6\) and eligible expatriates were expected to travel to the state to cast their ballot in person, today 115 States have in place OCV procedures.\(^7\) ‘Soft law’ instruments, most notably those of the Council of Europe, advocate an expansive approach both to eligibility and to accessibility, whereas judicial bodies are still reluctant to require Contracting States to include expatriates on their electoral rolls, or (when  


\(^{5}\) GA/Res/2200 (XXI), 16 December 1966, 999 UNTS 171, entered into force 23 March 1976.

\(^{6}\) P. Spiro, ‘Citizenship and Diaspora: A State Home for Transnational Politics?’ available at: <http://ssrn.com/abstract=1755231> (noting that, historically ‘the grant of political rights to those who have established residence outside the national territory is anomalous’).

\(^{7}\) Voting from Abroad: The International IDEA Handbook on External Voting (Institute for Democracy and Electoral Assistance 2007) 1-3 (posing that ‘external voting’ has two main purposes: ensuring the realisation of political rights for citizens living outside their state, and increasing political participation and thereby building trust and confidence in electoral processes and the democratic governments they produce).
they do so) to facilitate full access to OCV procedures. Notably, signatory States to the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families\(^8\) legally undertake to enable their expatriates to vote in their states of employment.

Section C addresses the accessibility of conflict forced migrants to OCV procedures. It is contended that such access is made available against the backdrop of either post-conflict transformation or peace-building. In such circumstances, elections often play a pivotal role in internationally sponsored agreements. Conflict forced migrants voting in these elections are seen either as being symbolically (re)admitted to the political community of their state of origin, or as actively participating in the (new) formation thereof. International organisations would offer their assistance and cooperation in order to secure the widest possible participation, and to enhance legitimacy and accountability. Indeed, the rationale underlying access of conflict forced migrants to OCV and facilitation of such procedures by states of asylum is an imminent or forthcoming repatriation of conflict forced migrants oftentimes, the two processes take place in parallel.

Section D considers the predicament of recognised refugees, noting that they may flee states that hold regular elections and have OCV procedures in place.\(^9\) It is contended that, among expatriates, recognised refugees have a strong normative claim to remain eligible voters and to have access to OCV procedures.\(^9\) It is a constitutive element of their status that recognised

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\(^8\) 18 December 1990, 2220 UNTS 3, entered into force 1 July 2003 (Migrant Workers Convention).


\(^9\) Conflict forced migrants may not necessarily satisfy the criteria set in the 1951 Convention, and their arrival en masse often results in states of asylum being unable (or unwilling) to conduct Refugee Status Determination procedures. They may be granted 'temporary protection' status or a form of 'subsidiary protection'.
refugees have left their State of origin involuntarily,\textsuperscript{11} and cannot or will not exercise their right to return and vote in person; hence, absent access to OCV, they are effectively disenfranchised. Importantly, recognised refugees are stakeholders in elections held in their state of origin; indeed, effective repatriation may depend on its results. Moreover, denying recognised refugees access to OCV procedures creates perverse incentives for regimes which may aim to achieve desirable political results by persecution or by failing to adequately offer recognised refugees protection from persecution by non-state actors.\textsuperscript{12}

Nevertheless, it is asserted that access of recognised refugees to OCV poses unavoidable impediments over and above those facing voluntary expatriates and conflict forced migrants in post-conflict circumstances. Recognised refugees suffer alienage from the political community of their state of origin as a direct result of their well-founded fear of persecution; unlike conflict forced migrants participating in post-conflict or transformative electoral processes, their repatriation is neither imminent nor forthcoming. While international organisations may conduct OCV operations in the context of post-conflict or peace-building transitional elections, they are highly unlikely to offer such assistance to recognised refugees.

Moreover, participation of recognised refugees in OCV processes requires formal engagement with authorities of their state of origin for the purposes of identification, registration and voting. If their well-founded fear of persecution results from actions of a persecutory regime, it

\textsuperscript{11} UNHCR, Excom, Conclusion No 62 (xli), \textit{Note on International Protection} (5 October 1990) (noting ‘...(iii) the difference between refugees and persons seeking to migrate for economic and related reasons, and the need for any refugee policy to respect fundamental distinctions between the two categories of people, and be fully consonant with the principles particular to, and essential for, the protection of refugees including...non refoulement’).

\textsuperscript{12} J. Grace, \textit{External and Absentee Voting in Challenging the Norms and Standards of Election Administration} (IFES 2007) 35 - 39
would be manifestly unreasonable to expect recognised refugees to be willing to make such contact. Indeed, persecutory regimes may view ‘deflectors’ as criminals and disenfranchise them; states of asylum may, for ideological reasons, refuse to facilitate political engagement of recognised refugees with their persecutory regime on their territory.\textsuperscript{13}

In contradistinction, where the recognised refugee’s fear of persecution stems from non-state actors, states of origin that are unable to provide their citizens with adequate protection from persecution may not necessarily be able to maintain functioning OCV processes. Furthermore, states of asylum may view political engagement between recognised refugees and officials of their state of origin as indicative of voluntary renunciation of that state’s protection, and initiate proceedings for cessation of refugee status; in turn, recognised refugees may be reluctant to engage with the diplomatic missions of their state of origin for fear of losing their status.

Hence, despite having a \textit{prima facie} strong normative claim to an effective right to vote from abroad, recognised refugees are likely to remain \textit{de facto} disenfranchised. Consequently, their forced alienage from the political community of their state of origin entails that they cannot take part in its elections through OCV procedures nor exercise their right to return to that state.

\textsuperscript{13} Importantly, OCV takes place on the territory of the state of asylum; thus, it requires the acquiescence of that state. For a recent example regarding OCV in Canada of French expatriates, see ‘Returning Officers’, \textit{The Economist Online}, 2 June 2012, available at: <http://www.economist.com/node/21556222>.
B. OCV of Voluntary Migrants

1. OCV and the International Covenant on Civil and Political Rights

Article 25 of the International Covenant on Civil and Political Rights (ICCPR) stipulates that ‘[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions...(2) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage.’ In tandem, Article 12(4) of the ICCPR pronounces that every person has a right to return ‘to his own country’\(^{14}\) and reside there.

The Human Rights Committee notes that ‘the right provided for by Article 25 is not an absolute right and that restrictions of this right are allowed as long as they are not discriminatory or unreasonable.’\(^{15}\) Residency is not one of the prohibited grounds in Article 2 of the ICCPR; hence, the question is whether residency may be considered a reasonable restriction on the exercise by an otherwise eligible citizen of her right to vote.\(^{16}\)

\(^{14}\) The provision clearly applies to citizens, and potentially to other persons who have a strong attachment to the state. In General Comment No 27: Freedom of movement (Article 12), CCPR/C/21, Rev 1, Add 9 (2 November 1999), the Human Rights Committee notes that ‘[t]he right of a person to enter his or her own country recognizes the special relationship of a person to that country’ and considers ‘that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.’ The Committee emphasises that ‘[t]he right to return is of the utmost importance for refugees seeking voluntary repatriation’.ibid [19] and [21].

\(^{15}\) Communication 500/1992 Joszef Debreczeny v the Netherlands, [9.2]. According to the Human Rights Committee, the factors which should determine whether a particular residency requirement is reasonable are the nature and purpose of the election, and the effect on the concerned population; see Communication 932/2000 Gllot v France, [14.2] (holding that the imposition of lengthy prior residency requirements which effectively disenfranchised French settlers in the context of a referendum on autonomy for the pacific territory of New Caledonia was reasonable).

\(^{16}\) Cf the American Convention on Human Rights, 22 November 1969, art 23(1): ‘[e]very citizen shall enjoy the following rights and opportunities: (b) to vote...in genuine periodic elections, which shall be by universal and equal suffrage...’; art 23(2): ‘[t]he law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings’ (my emphases). In contradistinction, art 13 of the African Charter on Human and Peoples’ Rights (1982) 21 ILM 58 pronounces that ‘[e]very citizen shall have the right to participate freely
State Parties undertake in Article 2(1) of the ICCPR to respect and to ensure to all individuals within their territories and subject to their jurisdiction the rights recognised in this convention. The Human Rights Committee opined that the ICCPR may apply extraterritorially to ‘anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.’ Indeed, it may be argued that a purposive interpretation of the ICCPR entails that, at least for the purposes of Article 25, expatriates are under effective control of their state. The Human Rights Committee notes that ‘[s]tates must take effective measures to ensure that all persons entitled to vote are able to exercise that right [to vote].’ Nevertheless, it implicitly acknowledges the legitimacy of residency requirements by maintaining that when residency requirements apply...they must be reasonable...and should not be imposed in such a way as to exclude the homeless from the right to vote’ (emphasis added). It is plausible that the global trajectory towards facilitating OCV will lead the Human Rights Committee in future proceedings to scrutinise residency requirements more robustly.

in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law’ without explicit qualifications( emphases added).

87 Human Rights Committee, General Comment No 32: The Nature of the General Legal Obligation imposed on States Parties to the Covenant, CCPR/C/21, Rev 1, Add 13 (29 March 2004) [10].


89 General Comment No 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to public service (Article 25), CCPR/C/21, Rev 1, Add 7 (12 July 1996) [3].

90 Ibid [11]. The latter point may be significant in the context of recognised refugees. See also Inter-Parliamentary Union, Declaration on Criteria for Free and Fair Elections adopted unanimously by the Inter-Parliamentary Council in its 154th session, Paris, 26 March 1994, art 2(1): ‘[e]very adult citizen has the right to vote in elections on a non-discriminatory basis’; art 2(3): ‘[n]o eligible citizen shall be denied the right to vote or disqualified from registration as a voter, otherwise than in accordance with objectively verifiable criteria prescribed by law, and provided that such measures are consistent with the State’s obligations under international law’; and art 2(5): ‘[e]very voter has the right to equal and effective access to a polling station in order to exercise his or her right to vote’.
2. OCV and the Council of Europe Institutions

Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR) proclaims that ‘[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which ensure the free expression of the opinion of the people in the choice of the legislature.’\textsuperscript{21} While the provision does not explicitly enunciate an individual right to vote, the European Commission on Human Rights held in \textit{Mathieu-Mohin}\textsuperscript{22} that the provision entails a subjective ‘right to vote’ based on the concept of ‘universal suffrage’.\textsuperscript{21} It further held that, while the right to vote is not absolute, its exercise should not be curtailed to such an extent as to impair its ‘very essence’ and deprive it of its effectiveness.\textsuperscript{24}

OCV features highly on the agenda of the Council of Europe. Its Committee of Ministers adopted a recommendation stipulating that the right to vote is an essential part of the democratic process, and that every European expatriate should be entitled to fully exercise it.\textsuperscript{25} The


\textsuperscript{22} App No 9267/81 \textit{Mathieu-Mohin and Clerfayt v Belgium} (2 March 1987) [54].

\textsuperscript{23} \textit{ibid} [51]. See also G.S. Goodwin-Gill, \textit{Free and Fair Elections} (Inter-Parliamentary Union 2006) 103-4. The ECHR has recently subjected eligibility-restricting measures to heightened scrutiny. See eg App No 33802/06 \textit{Kiss v Hungary} (Second Section Chamber) (20 May 2010) (holding that a provision in the Hungarian Constitution disenfranchising persons under the partial guardianship of another due to their mental incapacity is in contravention of Article 3 of Protocol I. The ECHR emphasised that, where a provision disenfranchises ‘a particularly vulnerable group in society’, the ‘margin of appreciation’ must be considered narrower and the state must offer very weighty reasons for its decisions). Note also recent case-law concerning prisoner voting: App No 126/05 \textit{Scoppola (No 3) v Italy} (GC) (22 May 2012); App No 2021/04 \textit{Frodl v Austria} (First Section Chamber) (8 April 2010); App No 74025/01 \textit{Hirst (No 2) v UK} (Fourth Section Chamber) (30 March 2004); (GC) (6 October 2005). For analysis of prisoner voting jurisprudence, see R. Ziegler, ‘Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives’ (2011) 29(2) Boston University International Law Journal 197, 222-34.

\textsuperscript{24} \textit{Mathieu-Mohin} (n 22) [54] and [56].

\textsuperscript{25} Recommendation R(86), \textit{The Exercise in the State of Residence by Nationals of other Member States of the Right to Vote in the Elections of the State of Origin} (21 March 1986). Notably, the Council of Europe is advocating OCV of non-resident
Parliamentary Assembly of the Council of Europe (PACE) adopted a series of ‘soft law’ instruments concerning access to OCV. Its 2004 recommendation entitled *Links between Europeans Living Abroad and their Countries of Origin* pronounced that expatriates should have ‘the right to vote...in embassies and consulates in the host states’ while maintaining their ‘right of return’, and called on signatories to ‘take account of their expatriates’ interest in policy making, in particular concerning questions of [.political rights, including voting rights.* The explanatory memorandum emphasised that ‘[t]he right to vote may be regarded as the principal attribute of citizenship and its exercise as the very basis of democracy’, and that ‘[m]ember States [should] allow their expatriates to vote by post, in person at their consulates, or by proxy’. In its 2005 resolution entitled *Abolition of Restrictions on the Right to Vote*, PACE urged states to ‘allow citizens living abroad to participate to the fullest extent possible in the electoral process, *inter alia*, by ‘grant[ing] electoral rights to all their citizens (nationals) without imposing residency requirements.*

As the analysis below demonstrates, the European Court of Human Rights (ECtHR) has been more cautious, generally refraining from proscribing residency eligibility requirements and (absent such requirements) from requiring states to ensure effective access to OCV procedures.

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26 Recommendation No 1650 (2004) §5.v.d.iv. [6] and [9.1.c] respectively. The Parliamentary Assembly notes that ‘it is in states’ interest that their nationals should continue to exercise their nationality consciously and actively’ and that ‘nations can play an important go-between role in host countries, working for better political, cultural, linguistic, economic, financial and commercial relations between their countries of origin and the countries where they live’. ibid [3].

27 Ibid, *Explanatory Memorandum* §4.3.1 [36].

In a case concerning *eligibility*, the Fourth Section Chamber rejected a challenge to Lichtenstein’s legislation stipulating that only Liechtenstein nationals who ordinarily reside *(ordentlicher Wohnsitz)* in Liechtenstein one month before the date of elections or referenda are entitled to vote therein.\(^{29}\) The judgment offered four rationales for justifying residency requirements: first, a non-resident citizen is less directly or less continually concerned with his state’s day-to-day problems and has less knowledge of them. Second, it is impracticable for parliamentary candidates to present electoral issues to citizens abroad; moreover, non-resident citizens have no influence on the selection of candidates or on the formulation of their electoral programmes. Third, there is a close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected. Fourth, the legislature may legitimately wish to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the state.\(^{30}\)

Critically, the judgment emphasised that Mr Hilbe (residing in Switzerland) retains an *unqualified right to return* to Lichtenstein; should he choose to exercise this right, his right to vote would be restored.\(^{31}\) An (effective) right of return was thus recognised as a justification for *ineligibility* of expatriates.

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\(^{30}\) *Hilbe* (n 29) (p3 of the English translation).

\(^{31}\) ibid.
In contradistinction, the Second Section Chamber upheld a challenge to a residency requirement for candidacy in the Ukraine, holding that, since Ukrainian law did not distinguish between ‘legal’ and ‘habitual’ residence, the fact that the applicant’s internal passport (Propsika) indicated that he retained legal residence satisfied the registration requirements.\(^{32}\) The ‘technical’ nature of the judgment was underscored by the Chamber’s reiteration that residency ‘was not an unreasonable or arbitrary requirement \textit{per se}’.\(^{33}\)

The Chamber emphasised that ‘stricter requirements may be imposed on the eligibility to stand for election to parliament as distinguished from voting eligibility’ as it would ‘enable [candidates] to acquire sufficient knowledge of the issues associated with the national parliament’s tasks’.\(^{34}\) However, the Chamber noted that ‘he [the applicant] was in a difficult position: if he had stayed in Ukraine, his personal safety or physical integrity might have been seriously endangered, rendering the exercise of any political rights impossible, whereas, in leaving the state, he was prevented from exercising such rights’.\(^{35}\) Hence, the fact that applicant has been granted \textit{refugee} status in the United States was instrumental: \textit{Melnychenko} may have been decided differently had the applicant been a voluntary migrant rather than a recognised refugee.

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\(^{32}\) App No 17707/02 \textit{Melnychenko v Ukraine} (Second Section Chamber) (30 March 2005) [61]. \textit{Cf} Judge Loucaides (dissenting), maintaining that reliance on the applicant’s ‘undisputed \textit{actual} residence rather than on the \textit{formal} registration of such residence...cannot be considered an arbitrary or even a wrong decision’ (emphases in original).

\(^{33}\) ibid.

\(^{34}\) ibid [56-7].

\(^{35}\) ibid [65]. See also the analysis in Section D infra.
In recent years, UK legislation disenfranchising non-resident citizens absent from the UK for more than fifteen years withstood two ECHR-based challenges.\(^{36}\) In 2007, the Fourth Section Chamber held in *Doyle* that 'over such a time period, the applicant may reasonably be regarded as having weakened the link between himself and the UK and he cannot argue that he is affected by the acts of political institutions to the same extent as resident citizens'.\(^{37}\) The Chamber emphasised that if 'he [the applicant] returns to live in the UK, his eligibility to vote as a British citizen will revive'.\(^{38}\)

In May 2013, the Fourth Section Chamber rejected in *Shindler*\(^{39}\) a further challenge to the legislation. The applicant, Mr. Shindler a Second World War veteran living in Italy with his Italian wife, argued that the rationales that were outlined in *Hilbe* (and cited approvingly in *Doyle*) are archaic: modern technology enables non-resident citizens to keep in contact with their state of origin, and it is entirely possible for a person living in Italy to be as informed as a person living in London on the day-to-day problems of the UK and to follow a general elections campaign.\(^{40}\) Mr. Shindler submitted that the fact that he is entitled to repatriate at any time indicates that his

\(^{36}\) Representation of the People Act 1985 s1, c.50 [UK].

\(^{37}\) App No 30158/06 Doyle v UK (Fourth Section Chamber) (6 February 2007).

\(^{38}\) Ibid. Cf the High Court judgment in *Preston v Wandsworth Borough Council* [2011] EWHC 3174 [39-42] (rejecting a claim that the UK legislation serves as a deterrent for British citizens *qua* EU nationals wishing to exercise their EU right to freedom of movement. The High Court held that, while the right to vote is a fundamental UK constitutional right and the claimant is aggrieved by its removal, the UK government was entitled to hold that there is a legitimate objective which the rule is designed to achieve, namely to remove the right to vote from those whose links with the UK have diminished and who are not, for the most part at least, directly affected by the laws passed in the UK. According to the judgment, there is no evidence to suggest that the rule creates a barrier of any kind to freedom of movement. The judgment was upheld by the Court of Appeal in *R (on the application of Preston) v Lord President of the Council*, [2012] EWCA Civ 1378.

\(^{39}\) App No 19480/09 Shindler v UK (7 May 2013).

\(^{40}\) pp 4-5 to the applicant's submission (draft with author).
interests are directly affected, *inter alia*, by National Health Service reforms, pensions, banking regulations, and taxation.

The court observed that only three member states of the Council of Europe disenfranchise most of their expatriates, with limited exceptions for diplomats, servicemen and the like; nine member states, including the UK, apply divergent tests to disqualify expatriates whose residence abroad is not deemed to be temporary; whereas in thirty-five member states, all expatriates retain their voting rights regardless of the length of their period of absence.\(^4\) Furthermore, the Chamber noted that ‘non-judicial bodies of the Council of Europe […] had demonstrated a growing awareness at European level of the problems posed by migration in terms of political participation in countries of origin and residence.’\(^5\) Nonetheless, the Chamber concluded that ‘the legislative trends are not sufficient to establish the existence of any common European approach concerning voting rights of non-residents’; hence, ‘the margin of appreciation enjoyed by the State […] still remains a wide one.’\(^6\) The claim that the *Hilbe* rationales are archaic was not fully addressed.

Council of Europe jurisprudence regarding restrictive access to OCV procedures of otherwise eligible voters dates back to 1979, when the European Commission on Human Rights rejected a challenge to UK legislation applicable at that time restricting access to OCV procedures to UK servicemen and diplomats. The Commission reasoned that servicemen and diplomats are distinguishable from other expatriates in that they ‘are not living abroad voluntarily but have been sent to a state other than their own by their government in the performance of services to be

\(^4\) *Shindler* (n 39) [73-5].

\(^5\) ibid [114].

\(^6\) ibid [115].
rendered their country. The Commission also noted that, regarding these populations, ‘there is [...] no risk of electoral fraud in their use of postal votes’.44

In 2010, the First Section Chamber upheld a legal challenge mounted by Council of Europe employees, Greek nationals residing in Strasbourg, who were denied access to OCV procedures.45 Article 51(4) of the 1975 Greek Constitution stipulates that ‘the conditions for the exercise of the right to vote by persons living outside the country may be specified by statute adopted by a majority of two thirds of the total number of Members of Parliament.’ The applicants argued that, absent legislative regulation setting up OCV procedures in Greek Embassies and Consulates, they were effectively unable to vote in Greek parliamentary elections.

The Chamber held (by a 5:2 majority, Judges Vajic and Flogaitis dissenting) that, whilst the applicants could have returned to Greece in order to vote, a de facto obligation to travel is expensive and disturbs professional and family life; hence, the lack of legislative implementation in respect of OCV constitutes unfair treatment of Greek citizens living abroad, particularly of ‘expatriates who, due to their financial circumstances or the fact that their place of residence is even further away, are de facto deprived of the opportunity to exercise their right to vote.’46 The Chamber emphasised, per Melnychenko, that restrictions on the exercise of voting rights should be subject to greater scrutiny than restrictions on the right to stand for election; hence, Contracting States should enjoy a narrower ‘margin of appreciation’. Drawing on Council of Europe resolutions and recommendations, as well as on legislative developments in other member states, the

44 App No 7730/76 X v UK (28 February 1979), European Commission of Human Rights Decisions and Reports 15, p 137.

45 App No 42202/07 Sitaropoulos v Greece (First Section Chamber) (8 July 2010).

46 ibid [43].
Chamber held that ‘Greece clearly falls short of the common denominator [...] as regards the effective exercise of voting rights by expatriates.\(^{47}\)

In March 2012, the Grand Chamber \textit{unanimously reversed}\(^{48}\) In line with its tendency to accord States a wide margin of appreciation in electoral matters, it maintained that ‘bright line’ rules are inevitable even if they may not do justice to particular applicants.\(^{49}\) According to the Grand Chamber, Contracting States are not under an obligation to enable citizens living abroad to exercise their right to vote, nor is there a European consensus of which Greece supposedly falls short.\(^{50}\) The court held that, while traveling to Greece in order to exercise one’s right to vote disrupts one’s financial, family and professional lives, such disruption is not ‘disproportionate to the point of impairing the very essence of the voting rights in question’?\(^{51}\)

This section demonstrated that the questions whether voluntary migrants should retain their right to vote in their state of nationality and, if so, whether they should have access to OCV procedures increasingly receive political and jurisprudential attention. It is contended that, while the jurisprudence is far from uniform, four assumptions underlie all judgments involving

\(^{47}\) ibid \[46]\.

\(^{48}\) App No 42202/07 \textit{Sitaropolous v Greece} (Grand Chamber) (15 March 2012).

\(^{49}\) ibid \[68-9]\.

\(^{50}\) ibid \[75]\.

\(^{51}\) ibid \[80]\. \textit{Cf} the South African Constitutional Court judgment in \textit{Richter} (n 1), quashing domestic legislation listing professions and post-holders that may enjoy access to OCV procedures, to the exclusion of others, including the applicant (a teacher working in the United States). The Court held that ‘a voter may not complain if the burden imposed does not prevent the voter from voting, as long as the voter takes reasonable steps to do so. ibid \[56]\]. However, while it is acceptable to ask voters to travel some distances from their homes to a polling station...it cannot be said...that requiring a voter to travel thousands of kilometres across the globe to be in their voting district on voting day is exacting reasonable compliance from a voter'. ibid \[68]\. The Court further observed that expatriate voting 'is an expression both of...continued commitment to...[the] country and...civic-mindedness from which...democracy will benefit. ibid \[69]\.
voluntary migrants: first, states of origin can establish effective OCV procedures if they so wish. Second, in order to vote from abroad, voluntary migrants are able to engage with diplomatic services of their states of origin if they so wish. Third, the states where voluntary migrants reside generally tolerate such political foreign engagements on their territory. Fourth, voluntary migrants can return to their state to vote in person, though it may cause disruption to their work and family life. It is asserted in Section D that none of these conditions are likely to be satisfied in the case of recognised refugees.

3. OCV and the Migrant Workers Convention: A Treaty Obligation

The Migrant Workers Convention concerns migrant workers and their families; refugees are explicitly excluded from its remit. The treaty imposes obligations both on states of employment (defined as states 'where the migrant worker is to be engaged, is engaged or has been engaged in a remunerated activity, as the case may be') and on sending states (defined as states 'of which the person concerned is a national'). Thus, the treaty aims to protect rights of migrants qua non-citizen residents as well as their rights qua expatriates of their sending states. By contrast, in view of the political predicament of recognised refugees, the 1951 Convention imposes obligations only on the state of asylum.

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52 Migrant Workers Convention, art 3(d). A ‘migrant worker’ is defined in art 2(1) as ‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.’ Notably, the Convention steers clear of questions of migration control (art 75: ‘Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families’).

53 ibid art 6.

54 Similarly to the 1951 Convention, the Migrant Workers Convention distinguishes between rights granted to all migrant workers and members of their families regardless of legal status (enumerated in part iii) and ‘[o]ther rights of migrant workers and members of their families who are documented or in a regular situation’ (enumerated in Part iv) which such persons shall enjoy in addition to the rights set forth in part iii.
The Migrant Workers Convention imposes obligations on sending states regarding voting rights of migrant workers and the families. According to Article 41(1), ‘[m]igrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote...at elections of that State, in accordance with its legislation’ (emphases added).

In order to regulate acts taking place outside the state's territory, the acquiescence of the territorial state is required; hence, OCV procedures are subject to limitations imposed by host states.\footnote{C. Navarro, ‘The Political Rights of Migrant Workers and External Voting’ in Voting from Abroad (n7) 178.} In recognition of this norm, Article 41(2) of the Migrant Workers Convention pronounces that states of employment ‘shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.’

Notably, alongside the obligations regarding voting rights of migrants in elections of their states of origin, Article 42(3) of the Migrant Workers Convention stipulates that ‘[m]igrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights’ (emphasis added). Hence, while the Migrant Workers Convention, like the Council of Europe, considers OCV of non-resident citizens and enfranchisement of non-citizen residents as conceptually compatible, it attaches a legal obligation only to the former.

The Committee on Migrant Workers (the treaty's monitoring body) receives reports concerning fulfilment of convention obligations.\footnote{The individual complaints mechanism requires ten accessions; so far, only two states have acceded to it.} The Committee has commended Mali, noting ‘with satisfaction that many expatriate Malians have the opportunity to participate in certain
countries.\textsuperscript{57} Similarly, it commended Mexico, which established OCV processes in 2005, as well as Azerbaijan, BiH, Colombia, Ecuador, The Philippines, and Senegal.\textsuperscript{58} By contrast, the Committee expressed concern that no arrangements were established by Albania, Algeria, Bolivia, Chile, Egypt, El Salvador, Guatemala, Paraguay, and Sri Lanka.\textsuperscript{59} Two states, Azerbaijan and Paraguay, indicated in their reports that they entitle non-citizen residents to vote in local elections, in accordance with the recommendation in Article 42(3).\textsuperscript{60}

Article 8(2) of the Migrant Workers Convention further affirms the state-citizen bond by enunciating the right of migrant workers and members of their families ‘at any time to enter and remain in their state of origin.’\textsuperscript{61} Hence, similarly to Article 12(4) of the ICCPR, the underlying assumption is that voluntary migrants retain their bond of citizenship with their state of origin whilst residing abroad, reflected in their right to return to that state at will, in the availability of protection abroad, and in the dual commitment on the part of the sending state and of the state of employment to facilitate access to OCV procedures.

\textsuperscript{57} CMW/C/MLI/CO/1 of 31 May 2006.

\textsuperscript{58} CMW/C/MEX/1 of 18 November 2005 (Mexico); CMW/C/AZE/CO/1 of 19 May 2009 (Azerbaijan); CMW/C/BIH/CO/1 of 3 June 2009 (BiH); CMW/C/COL/CO/1 of 22 May 2009 (Colombia); CMW/C/ECU/2 of 26 January 2010 (Ecuador); CMW/C/PHL/CO/1 of 22 May 2009 (The Philippines); CMW/C/SEN/1 of 4 January 2010 (Senegal).

\textsuperscript{59} CMW/C/ALB/CO/1 of 22 February 2010 (Albania); CMW/C/DZA/1 of 22 June 2008 (Algeria); CMW/C/BOL/CO/1 of 29 April 2008 (Bolivia); CMW/C/CHL/CO/1 of 19 October 2011 (Chile); CMW/C/EGY/CO/1 of 25 May 2007 (Egypt); CMW/C/SLV/CO/1 of 4 February 2009 (El Salvador); CMW/C/GTM/CO/1 of 18 October 2011 (Guatemala); CMW/C/PRY/1 of 23 February 2011 (Paraguay); CMW/C/LKA/CO/1 of 19 October 2009 (Sri Lanka).

\textsuperscript{60} CMW/C/AZE/CO/1 of 19 May 2009 (Azerbaijan); CMW/C/PRY/1 of 23 February 2011 (Paraguay).

\textsuperscript{61} Nonetheless, the Migrant Workers Convention has only 45 signatories. As most of the duties are imposed on states of employment, State Parties tend to be sending states such as Mexico and the Philippines, which consider the treaty as a vehicle to protect their citizens working abroad; states of employment are noticeably absent. Moreover, at present, the only European State Party is Bosnia and Herzegovina See S. Vucetic, ‘Democracies and International Human Rights: Why is there no Place for Migrant Workers?’ (2007) 1(4) International Journal of Human Rights 403, 418 (analysing the Travaux, Vucetic suggests that the Migrant Workers Convention was largely drafted by developing states for developing states).
C. OCV of Conflict Forced Migrants

Conflicts oftentimes cause displacement.\textsuperscript{62} Settlements of conflicts may include elections and, occasionally, the establishment of representative institutions as part of a transition to democracy as a key component of durable peace-building.\textsuperscript{63} Transitional elections in which conflict forced migrants are effectively disenfranchised may be considered deficient; by contrast, participation of conflict forced migrants enhances the legitimacy of the outcomes of negotiations and of election results, and increases the commitment of conflict forced migrants to the peace-building process. Elections may help reunite a conflict-torn society around common institutions.\textsuperscript{64}

The involvement of conflict forced migrants in post-conflict elections has arguably played an important role in the peace-building process in cases as diverse as Angola, Bosnia-Herzegovina, Cambodia, Guatemala, Mozambique, and Nagorno-Karabakh, by providing direct opportunity for conflict victims to participate in the selection of their post-conflict leadership.\textsuperscript{65} Indeed, diaspora members have participated in peace-building commissions and in other forms of post-conflict

\textsuperscript{62} Grace defines a ‘conflict forced migrant as any person displaced from their home community due to a deteriorating security or human rights situation generally as a consequence of violence; notably, this is a far broader definition than that of a recognised refugee. J. Grace, Enfranchising Conflict Forced Migrants (IOM 2003) 5.


\textsuperscript{65} J. Milner, Refugees and the Peace-Building Process (UNHCR 2011) 5-6.
political activity; for instance, the Iraqi diaspora has recently played a prominent role in post-invasion governance.\textsuperscript{66}

Recognition of a claim to effective citizenship, and consequent inclusion of conflict forced migrants in formal political activities such as elections or referenda, serve as powerful symbols of their (re)admission to the political community as equal citizens.\textsuperscript{67} The underlying assumptions behind electoral processes taking place in such circumstances are either that the conflict has ended or that it is likely to be resolved soon and, consequently, that repatriation is either imminent or forthcoming.

UNHCR notes that ‘conflict settlements often include the holding of national elections, and refugees [conflict forced migrants, in this chapter's analysis- the author] may be expected to repatriate according to a certain schedule in order to vote’.\textsuperscript{68} Repatriation arguably plays an important part in validating the post-conflict political order. When conflict forced migrants voluntarily go back to their homeland, they are quite literally ‘voting with their feet’ and expressing confidence in the future of their state; enabling conflict forced migrants to repatriate and express their political preference is arguably inherent in the concept of a free, fair and democratic election.\textsuperscript{69}


\textsuperscript{67} Long (n 66) 13.

\textsuperscript{68} Handbook on Voluntary Repatriation (UNHCR1996) 66.

The logic of repatriation and (re)enfranchisement guides the interpretation of Article 5(c) of the Convention on the Elimination of All Forms of Racial Discrimination. Signatories must guarantee the enjoyment of ‘political rights, in particular the right to participate in elections, to vote [...] on the basis of universal and equal suffrage’, while Article 5(d)(ii) guarantees everyone ‘[t]he right to leave any country, including one’s own, and to return to one’s country’ (emphases added). The Committee on the Elimination of Racial Discrimination emphasised that ‘(a) all such refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety’ and ‘[...] after the return to their homes of origin, the right to participate fully and equally in public affairs at all levels...’

Annex 7 of the Dayton agreement concerning the future of Bosnia and Herzegovina is illustrative of the approach to the significance of ensuring participation of conflict forced migrants in post-conflict electoral processes. The agreement stipulated that ‘[a]ll refugees and displaced persons have the right freely to return to their homes of origin' and that 'the parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries'. The agreement established that ‘the

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71 Ibid [2(a)] and [d] respectively.

72 General Framework Agreement for Peace in Bosnia and Herzegovina, Agreement on Refugees and Displaced Persons, signed on 14 December 1995.

73 Ibid [1].
parties shall ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution or discrimination.\textsuperscript{75}

Crucially, the Dayton agreement pronounced that ‘[t]he exercise of a refugee’s right to vote shall be interpreted as confirmation of his or her intention to return to Bosnia and Herzegovina’ and that ‘by Election Day, the return of refugees should already be underway, thus allowing many to participate in person in elections in Bosnia and Herzegovina’.\textsuperscript{76} Had they been excluded from the democratic processes, the legitimacy of these processes would have been strongly compromised.

There have been instances in which the linkage between elections and repatriation had arguably led states of asylum to withdraw their protection prematurely while effective repatriation was impeded by local resistance.\textsuperscript{77} Indeed, host states eager to see conflict forced migrants depart may attempt to bring asylum to an imminent end following participation in post-conflict elections.\textsuperscript{78} For instance, in the 1997 Liberian elections, Guinea refused re-entry to Liberians who had returned to Liberia to vote, even though international agencies argued that repatriation was unsafe.\textsuperscript{79}

\textsuperscript{75} ibid [2].

\textsuperscript{76} ibid, annex 3: Agreement on Elections, art iv (Eligibility) [1].


Furthermore, host states may prefer to see immediate repatriation of conflict forced migrants rather than allow OCV on their territory. They may be concerned about jeopardising their security, stability and sovereignty by allowing political party campaigning, voter education, and voter registration to take place on their soil. Thus, the international community may have to ‘persuade’ host states that participation of conflict forced migrants in elections will expedite their repatriation.

An Organisation for Security and Cooperation in Europe conference convened in 1999 resolved ‘to secure the full right of persons belonging to minorities to vote and to facilitate the right of refugees to participate in elections in their countries of origin.’ It may be argued that effective OCV of conflict forced migrants sometimes requires international support, inter alia, through provision of funding, administrative assistance in issuance of documentation, registration, distribution of election material, monitoring and verification. The International Organisation for Migration (IOM) has conducted several large-scale OCV operations in transitional elections. For conflict forced migrants involvement of the international community creates a secure and sustaining environment auspicious to electoral participation.


81 Istanbul Summit Declaration, 18-19 November 1999 [26].

82 The IOM led OCV processes in the 1999 elections in Bosnia and Herzegovina through the ‘Refugee Elections Steering Group’ set up following the signing of a Memorandum of Understanding between the IOM and the Organisation for Security and Cooperation in Europe. IOM offices in 17 States registered 630,000 voters of whom 394,000 cast their ballots. The IOM provided similar assistance following the 1999 East Timor tripartite agreement (Indonesia, Portugal, and the United Nations). In 2000-2001, the IOM operated the ‘Out of Kosovo Voting Programme’ registering nearly 300,000 Kosovars. The IOM was also responsible for OCV of 846,000 Afghani refugees residing in Pakistan and Iran in the 2004 elections in Afghanistan; a Memorandum of Understanding was signed with the respective governments. In 2005, the IOM assisted the Independent Electoral Commission of Iraq in registering and administering elections for
It may be concluded that, in contradistinction from voluntary expatriates, effective participation of conflict forced migrants in OCV is likely to occur in a post-conflict or transformative contexts, with international assistance, and with a view to forthcoming repatriation, notwithstanding the challenges relating to premature termination of protection.

D. OCV of Recognised Refugees

1. Introduction

The well-founded fear of persecution that the international community recognises as a basis for recognised refugee status is a symptom of a more fundamental political rupture between the refugee and her state of origin, leaving a recognised refugee without protection abroad and without access to a political forum.

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83 Cf A. Shacknove, ‘Who is a Refugee?’ (1985) 95 Ethics 274, 277 (arguing that persecution is a sufficient but not a necessary condition for the severing of the normal social bond; persecution is one manifestation of a broader phenomenon: the absence of protection of the citizen’s basic needs, which constitutes the full and complete negation of society and the basis of refugee-hood). Shacknove asserts that ‘under normal conditions, protection appends to the citizen following him into foreign jurisdictions. For the refugee, protection of basic needs is absent, even at home’ and suggests that ‘refugee status should only be granted to persons whose government fails to protect their basic needs, who have no remaining recourse other than to seek international restitution of these needs, and who are so situated that international assistance is possible’. bid 284.


85 Cf R. Ziegler, Voting Rights of Geneva Convention Refugees in their Countries of Asylum (draft with author).
Hathaway suggests that a recognised refugee is ‘by definition a person who no longer enjoys the assumed bond between citizens and the state’.\textsuperscript{86} Because recognised refugees receive a form of substitute protection, international refugee law excludes those who enjoy the basic entitlements of citizenship in a national community.\textsuperscript{87} Recognised refugees may be described as persons in respect of whom ‘the web of rights and obligations which links the citizen to her state has broken down’.\textsuperscript{88}

It is asserted that OCV procedures require a cumulative tri-partite effort on part of the recognised refugee, the state of origin, and the state of asylum. The unique predicament of recognised refugees dictates that, notwithstanding normative commonalities with conflict forced migrants, recognised refugees are unlikely to enjoy effective access to OCV.

The underlying assumption behind participation of conflict forced migrants in post-conflict or transformative electoral processes is that a fundamental change in circumstances in their state of origin has occurred, and that their repatriation thereto is imminent or forthcoming. In contradistinction, accessibility of recognised refugees to OCV processes is appraised absent such developments in their state of origin. Hence, it is presumed that their well-founded fear of persecution on a 1951 convention ground in their state of origin, which inhibits them from availing themselves of the protection of that state, has not subsided. This distinction has profound implications for the viability of recognised refugees’ access to OCV.

\textsuperscript{86} J.C. Hathaway, \emph{The Rights of Refugees under International Law} (Cambridge University Press 2005) 210.

\textsuperscript{87} J.C. Hathaway, \emph{The Law of Refugee Status} (Butterworth 1991) 135.

\textsuperscript{88} The State of the World’s Refugees (n 69) ch 1: Safeguarding Human Security.
2. Normative Commonalities between Recognised Refugees and Conflict Forced Migrants in Post-Conflict Elections Situations

Section B considered jurisprudence challenging preferential access to voting from abroad granted to non-resident citizens serving as military personnel and diplomats. The justification for these practices lies in the claim (and presumption) that, unlike voluntary migrants, they are sent abroad by their governments, render services to their state, and remain strongly attached thereto.

Recognised refugees, like conflict forced migrants, reside outside their state of origin involuntarily;\(^8^9\) in seeking asylum, they have not in any way manifested a wish to relinquish their citizenship.\(^9^9\) Indeed, an effective exclusion of recognised refugees from OCV processes may create perverse incentives for persecutory governments to use displacement as a means of securing and legitimising their rule.\(^9^9\) However, in terms of their relations with their state of origin, and their attachment thereto, it may be contended that recognised refugees are in a diametrically opposed position to that of servicemen and diplomats, discussed in Section B.

It has been suggested that OCV is pertinent when non-resident citizens are *stakeholders* in election results rather than merely affected by them. Mr. Shindler asserted before the ECtHR that his right to OCV as a non-resident British citizen stems, in part, from the fact that, should he choose to exercise his right to return to the UK, he would be subject to government policies

\(^{8^9}\) Long (n 66) 25.

\(^{9^9}\) Gallagher and Schowengerdt (n 80) 199. See also Venice Commission, *Report on Out-of-Country Voting* (24 June 2011), c.i.v (‘if persons, in exceptional cases, have been displaced against their will, they should, provisionally, have the possibility of being considered as resident at their former place of residence’).

\(^{9^9}\) Note, in this context, the decision in *Mlynchenko* (n 32).
decided in his (political) absence. For recognised refugees, election results may determine whether they are likely to be able to exercise their right to return; hence, their ‘stakes’ in such elections are particularly high.

Importantly, recognised recognised refugees are entitled to hold their status until one of an exhaustive list of cessation clauses in Article 1C of the 1951 Convention can be invoked by their state of asylum, in which case they would no longer require international protection and would no longer be able to refuse to avail themselves of the protection of their state of origin.52

Article 1C(5) is particularly noteworthy in this context, as it concerns changes in circumstances in the state of origin of the recognised refugee that have a ‘fundamental, stable and durable character’ and that result both in eradication of the refugee’s well-founded fear of being persecuted and in restoration of protection.54 UNHCR has issued formal declarations of general cessation of refugee status regarding changes in a particular territory.55 Post-conflict or peace-


54 UNHCR, ExCom, Conclusion No 65 (xliii) (1991), recalled in ExCom, Condusion No 69 (xlii) (1992) [b]. UNHCR advocates a waiting period of minimum 12-18 months before assessing developments in a country of origin. UNHCR, ExCom, Discussion Note, The Application of the Ceased Circumstances Clause in the 1951 Convention, UN Doc EC/SCP/1992/CRP.1 (20 December 1991) [12]. A similarly phrased cessation clause, art 1C(6), concerns refugees who are de jure stateless. The analysis in the chapter centres on the predicament of refugees who are citizens of their state of origin, and who would able to vote in its elections save for their persecution-induced involuntary non-residence. See also J. Fitzpatrick and R. Bonoan, ‘Cessation of Refugee Status’ in E. Feller, V. Türk, and F. Nicholson (eds), Refugee Protection in International Law (Cambridge University Press 2003) 491, 495.

55 UNHCR, Guidelines on International Protection: Cessation of Refugee Status under Articles 1C(5) and (6) of the convention (2003) (n 3) (references to UNHCR formal declarations of general cessation regarding the situations in Poland and Czechoslovakia, 15 November 1991; Chile, 28 March 1994; Malawi and Mozambique, 31 December 1996; Bulgaria and Romania, 1 October 1997; Ethiopia, 25 September 1999; Timor Leste, 20 December 2002).
building transitions are often perceived in such terms. The analysis below is premised on the assumption, built into the 1951 Convention framework, that absent such changes that would satisfy the requirements of Article 1C(5), recognised refugees are either unable or unwilling to repatriate. By contrast, as section C illustrated, post-conflict or transformative elections can be (and are) considered indicative of the feasibility of repatriation.

3. OCV of Recognised Refugees: Impediments

   a. Introduction

OCV ipso facto takes place outside the state’s territory. It requires recognition on the part of the state of origin of the need to give effect to the right to vote of its expatriates. As was noted above, in post-conflict or peace-building contexts, international assistance is oftentimes provided. By contrast, it seems highly improbable that international organisations will assist recognised refugees to exercise OCV in their states of asylum.

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56 See eg J.C. Hathaway, ‘The Rights of States to Repatriate Former Refugees’ (2005) 20 Ohio State Journal on Dispute Resolution 175 85 (suggesting that the paradigmatic change which the 1951 Convention drafters conceived of was the reversion of a totalitarian regime to democratic governance).

57 Cf UNHCR’s contention that the ‘compelling reasons’ clause in art 1C(5) (textually confined to pre-convention refugees) has come to reflect a general humanitarian principle that is applicable to art 1A(2) refugees: Guidelines on International Protection (n 95) [21]. See also J.R. Montgomery, ‘Components of Refugee Adaptation’ (1996) 30 International Migration Review 679 677-8 (arguing that refugees have a natural inclination to develop ties to the community within which they reside and a human need to build a new life following severe trauma); G. Noll, Rejected Asylum Seekers: The Problem of Return (UNHCR 1999) 6 (suggesting that refugees may resist repatriation ‘in order to preserve the value of their integrative effort’). See also J. Fitzpatrick and R. Bonoan, ‘Cessation (Article 1C)’ in E. Feller, V. Türk and F. Nicholson (eds), Refugee Protection in International Law (Cambridge University Press 2003) 492, 502 (enclosing a table of ‘ceased circumstances’ situations, ranging from Sudan in 1972 to Ethiopia in 1999).

58 Long (n 66) 7.
In a [draft] UNHCR policy paper, it is contended that the organisation should refrain from facilitating or promoting large-scale refugee OCV unless elections are likely to be ‘transformative’.

The paper sets four cumulative parameters for such engagement that are unlikely to be satisfied in a ‘regular’ recognised refugee context: first, elections have to take place in post-conflict situations, and the security situation has to be generally stable. Second, the overall political and social environment should be generally considered conducive to free and fair elections. Third, the exercise of the right to vote should foster durable solutions. Fourth, refugees must be able to participate voluntarily in national elections and not be subjected to misrepresentation, intimidation or manipulation.

In view of the above, international involvement in cases of recognised refugees is highly improbable. OCV requires, first, direct engagement of recognised refugees with officials of their state of origin, at least for registration and voting purposes. Second, their state of origin has to be both willing and able to conduct OCV in the respective state of asylum, and to permit their participation. Third, states of asylum must agree to facilitate or, at the very least, permit OCV on their territory as well as, arguably, election-related activities. When states of origin are persecutory, none of these cumulative conditions are likely to be fulfilled; when non-state actors are persecutory, it is highly improbable that all three conditions can be satisfied.

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[59] The Participation of Refugees in Elections of their Country of Nationality and the Role of UNHCR (UNHCR Geneva 2010) (draft with author) 2. For instance, in 2005, UNHCR was considering whether to assist OCV of Iraqi conflict forced migrants notwithstanding its assessment at the time that conditions in Iraq were not conducive to return, as the authorities were not yet able to protect citizens from violent attacks, and as basic services needed for a secure and stable existence could not be guaranteed. ‘Iraqi election enthusiasm reflected among refugee Diaspora’ (16 December 2005), available at: <http://www.unhcr.org/4392e5f4e.html>. In 2010, the Iraqi Election Commission requested assistance from UNHCR regarding OCV of Iraqis living in states neighbouring Iraq (Jordan, Lebanon, Syria and Egypt). The conflict forced migrants were divided on whether to participate, citing sectarian violence as the greatest threat if they return. W. Amr, ‘Refugees Watch Iraqi Elections with Doubts and Hopes’ (1 March 2010), available at: <http://www.unhcr.org/print/4b8bce536.html>.
b. Fear of Persecution by the Regime of the State of Origin

OCV may require expatriates to present themselves at embassies or consulates in order to register and vote. Recognised refugees whose well-founded fear of persecution stems from the actions of a predatory regime may wish to refrain from engaging with officials of their states of origin. Indeed, Article 25 of the 1951 Convention pronounces that the state of asylum must provide administrative assistance to recognised refugees that would normally be provided by their state of origin. A persecutory regime may not even necessarily have diplomatic relations with the state of asylum; however, even if OCV procedures are in place in the state of asylum and are used by other expatriates of the state of origin, a persecutory regime will not consider itself as such, and may not permit recognised refugees whom it may view under its domestic law as criminals to participate in such elections.

Article 2 of 1951 Convention requires that refugees in a state of asylum ‘conform to its laws and regulations as well as to measures taken for the maintenance of public order’. Hence, OCV of recognised refugees requires both de jure and de facto consent of the state of asylum. When a state grants asylum to recognised refugees based on their well-founded fear of persecution stemming from their state of origin, the state of asylum may object to official engagement between the

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101 Ad Hoc Committee on Refugees and Stateless Persons, *Draft Report of the Ad Hoc Committee on Statelessness and Related Problems* (15 February 1950) annex II.

102 Cf. Melnychenko (n 32) (regarding the treatment of the applicant by the Ukrainian authorities).

103 Voting from abroad (n 7) ch 1.
refugee and their persecutory regime, just as it would refuse to accept an attempt by the latter state to exercise protection abroad on behalf of its recognised refugee-national.\footnote{While art 28 of the 1951 Convention requires states of asylum to issue Convention Travel Documents to recognised refugees, they may limit their validity so that refugees are prohibited from travelling to their state of origin.}

c. Fear of Persecution by Non-state Actors in the State of Origin

It is widely acknowledged that well-founded fear of persecution may stem from the actions of non-state actors, where the state of origin fails to comply with its primary protection obligation to establish and operate a system of effective protection against persecution. In such circumstances, recognised refugees may not fear engagement \textit{as such} with officials of their state of origin; indeed, the authorities may be sympathetic to their cause. Nonetheless, UNHCR views engagement of recognised refugees with officials of their state of origin with suspicion, especially regarding the issuance of official documentation such as national passports.\footnote{For instance, UNHCR advises that, once recognised, a recognised refugee should not normally retain her national passport, and that if a refugee applies for and obtains a national passport or its renewal, it will (in the absence of evidence to the contrary) be presumed that she intends to avail herself of the protection of her state of nationality. UNHCR, \textit{Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees} (reissued 2011) [49-50]. Notably, however, it is ordinary practice for expatriates to identify themselves using their national passports when residing abroad. See also R. Da Costa, \textit{Rights of Refugees in the Context of Integration} (UNHCR 2006) ch 9, 131.}

Drawing on instances of application for national passports or renewal thereof as creating a presumption that re-availment of protection is intended, Goodwin-Gill and McAdam emphasise that, for the purposes of re-availment of protection, the recognised refugee must not only act voluntarily, but must also intend to and actually obtain protection so as to indicate the establishment of normal relations with the authorities of the state of origin.\footnote{G.S. Goodwin-Gill and J. McAdam, \textit{The Refugee in International Law} (3rd edn Oxford University Press 2007) 136.}
Recognised refugees may fear that their state of asylum will consider their (potentially continuous) *voluntary engagement* with officials of their state of origin concerning OCV *qua expatriates* to be indicative of their willingness to accept the protection of their state of origin and of the ability of that state to provide adequate protection. A state of asylum may then be inclined to invoke the Article 1C(1) cessation clause, which stipulates that if a recognised refugee has ‘voluntarily re-availed himself of the protection of the country of his nationality’ he no longer requires international protection. Hathaway contends that, once a state of asylum determines that protection in the state of origin is viable, it is entitled to withdraw recognised refugee status, as the 1951 Convention does not require that asylum be granted as *permanent* admission to a new political community.107

Grace and Mooney assert that ‘the act of refugees voting in their home state’s elections, whether in person or by absentee ballot should never be taken to signal that refugees and asylum-seekers no longer require international protection’.108 However, in practice, these acts are likely to be considered as such a signal by states of asylum. Moreover, a recognised refugee may be faced with having to rebut the assumption that, if her state of origin is able to conduct OCV procedures and to enable effective participation of recognised refugees therein, it is also able to provide adequate protection from persecution at the hands of non-state actors.

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108 Grace and Mooney (n 78) 114.
E. Concluding Remarks

Recent international developments in state practice and jurisprudence suggest that the majority of states consider their expatriates to be eligible voters, and that OCV is increasingly made available to voluntary migrants, notwithstanding the fact that they may be able to exercise the right to return to their state of nationality. In tandem, internationally-supported concerted efforts are often made to enhance participation of conflict forced migrants in post-conflict or transformative elections with a view to their imminent or forthcoming repatriation. By contrast, recognised refugees are both electorally excluded and unable due to their well-founded fear of persecution to exercise their internationally recognised right to return to their state.

This Chapter demonstrated that the strength of the normative claim of recognised refugees to access OCV processes is met with a political (and legal) reality in which their disenfranchisement is highly likely. Thus, recognised refugees are harmed in a manner which repudiates their claim to political membership.\(^{109}\) They are both effectively and symbolically, territorially and extraterritorially, shunned from the political community of their state of origin. Their unique vulnerability is heightened by the fact that the length of their stay in the state of asylum is indefinite, and their repatriation is thus neither imminent nor necessarily forthcoming. Their political predicament characterises recognised refugees as a special category of non-citizen residents.\(^{110}\)
