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Investment Citizenship and Democracy in a Global Age

Towards a Democratic Interpretation of International Nationality Law

Samantha Besson*

Introduction

The commodification of democracy (even only potentially¹) induced by selling State² citizenship³ to individuals⁴ and especially by the development of domestic programs of “investment citizenship”⁵ (IC) has long been criticized from a normative perspective, and rightly so.

Unlike other normative arguments previously advanced against IC in political theory,⁶ and more general critiques of commodification of public goods and individual rights,⁷ the present chapter argues from

* Professor of Public International Law and European Law, University of Fribourg, Switzerland. Many thanks to Yvonne Donders and the audience of the *Law and Justice across Borders* Seminar at the University of Amsterdam on 24 May 2018, and to Adrien Folly for his research and editorial assistance.

¹ See D Kochenov, ‘Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price’ in A Shachar and R Bauböck (eds), *Should Citizenship be for Sale?* (European University Institute – RSCAS 2014).

² I am only considering *State* citizenship in this chapter, and not EU citizenship (see S Besson and A Utzinger, ‘Future Challenges of European Citizenship. Facing a Wide-open Pandora’s Box’ (2007) 13 *European Law Journal* 573) or other potential forms of transnational or supranational citizenship that cannot be equated with State citizenship. As will become clear in the course of the argument about what makes a group of people a political community, there are egalitarian and hence democratic difficulties in conceiving of (democratic) citizenship entirely outside of territorial entities like States: see T Christiano, ‘A Democratic Theory of Territory and Some Puzzles about Global Democracy’ (2006) 37 *Journal of Social Philosophy* 81, 100-5; S Besson, ‘Why and What (State) Jurisdiction: Legal Plurality, Individual Equality and Territorial Legitimacy’ in J Klabbers and G Palombella (eds), *Interlegality* (CUP 2019). See also PJ Spiro, ‘A New International Law of Citizenship’ (2011) 105 *AJIL* 694, 739.

³ I am only focusing on the acquisition of *citizenship* in this chapter, and not on the access to the national territory and immigration policies in general. While both may be related (eg R Plender, ‘Nationality Law and Immigration Law’ in R Plender (ed), *Issues in International Migration Law* (Brill Nijhoff 2015); G Matias, *Citizenship as Human Right: The Fundamental Right to a Specific Citizenship* (MacMillan 2016), 153ff) and although both discussions are often conflated in the literature (eg A Shachar and R Hirschl, ‘On Citizenship, States and Markets’ (2014) 22 *The Journal of Political Philosophy* 231; A Shachar, ‘Selecting By Merit: The Brave New World of Stratified Mobility’ in S Fine and L Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (OUP 2016)), the monetization of citizenship, and hence of political rights, raises normative issues that are distinct from those that arise from the granting of mere residence or work permits on monetary grounds. See also PJ Spiro, ‘The End of Olympic Nationality’ in F Jenkins, M Nolan, and K Rubenstein (eds), *Allegiance and Identity in a Globalised World* (CUP 2014), 491-2. Importantly, I am not looking at IC programs that would not grant full citizenship rights either (eg limited citizenship without political rights).

⁴ I am only considering the citizenship of *individuals* or natural persons in this chapter, and not of legal persons or other entities.

⁵ For a detailed descriptive survey of those programs, see K Surak, ‘Global Citizenship 2.0 – The Growth of Citizenship by Investment Programs’ (2016) 3 *Investment Migration Working Paper* <<https://investmentmigration.org/download/global-citizenship-2-0-growth-citizenship-investment-programs/>> accessed 9 June 2019. I am excluding other related programs of naturalization and acquisition of citizenship such as “olympic citizenship” that, like IC, do not require a connection, but, unlike IC, are based on *talent* or merit, i.e. another kind of capital (see Shachar, ‘Selecting By Merit’ (n 3); Shachar and Hirschl (n 3); PJ Spiro, ‘Cash-for-passports and the end of citizenship’ in A Shachar and R Bauböck (eds), *Should Citizenship be for Sale?* (European University Institute – RSCAS 2014)).

⁶ See eg A Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard UP 2009) 54-61; A Shachar, ‘Dangerous Liaisons: Money and Citizenship’ in A Shachar and R Bauböck (eds), *Should Citizenship be for Sale?* (European University Institute – RSCAS 2014); R Bauböck, ‘What is wrong with selling citizenship? It corrupts democracy!’ in A Shachar and R Bauböck (eds), *Should Citizenship be for Sale?* (European University Institute – RSCAS 2014); Shachar and Hirschl (n 3) 248-50; A Tanasoca, ‘Citizenship for Sale: Neomedieval, not Just Neoliberal?’ (2016) 57 *European Journal of Sociology* 169; Shachar, ‘Selecting by Merits’; A Shachar, ‘Citizenship for Sale’ in A Shachar, R Bauböck, I Bloemraad, and M Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017). Contra: J Hidalgo, ‘Selling Citizenship: A Defense’ (2016) 33 *Journal of Applied Philosophy* 223; S Borna and JM Stearns, ‘The Ethics and Efficacy of Selling National Citizenship’ (2002) 37 *Journal of Business Ethics* 193.

⁷ See eg M Sandel, *What Money Can’t Buy: The Moral Limits of Markets* (Farrar, Straus, and Giroux 2012) 61-5.

within the legal practice itself: it proposes its normative critique as the best interpretation of citizenship or nationality⁸ law. In contrast to other existing legal critiques of IC, however, it does not focus on domestic or European Union (EU) law,⁹ but on *international* law: it develops a new interpretation of international nationality law (INL) that prohibits granting nationality on monetary grounds only¹⁰.

Such an interpretation may at first sound surprising given the very few limits traditionally set by (customary) INL on States' sovereignty when devising the bases for the acquisition of nationality.¹¹ Since the 19th Century, indeed, INL has developed as the regime of international law that frames the conditions for the acquisition of State nationality, but only very minimally and in order to secure the mutual opposability of domestically defined and attributed nationality. This has been the case in particular to address the problems the diversity of domestic nationality law regimes raises in the contexts of statelessness, dual nationality or diplomatic protection. Gradually, however, and since the mid-twentieth century, a few additional requirements constraining domestic law on the acquisition of nationality have been made by INL treaties including the prohibition of discrimination and of non-consensual naturalization.¹² Nowadays, as a result, INL prevents domestic nationality law not only from over-reaching, as it has been the case since the 19th Century, but also from under-reaching and excluding certain people from the domestic political community.¹³

To that extent, one may consider that contemporary INL does no longer only protect other States' (and their peoples') interests, but also those of the concerned State itself and of its people. What I would like to argue in this chapter is that, so-doing, INL actually guarantees certain minima about what holds people together in a State and, in turn, makes States' existence not only justifiable in the first place, but also

⁸ Because this chapter focuses on international law and not on domestic law, it does not distinguish between *nationality* and *citizenship*. See also Spiro, 'A New International Law of Citizenship' (n 2) 695-6; A Shachar, 'Earned Citizenship: Property lessons for Immigration Reform' (2013) 23 *Yale Journal of Law & the Humanities* 110, 129; Matias (n 3) 41ff. Accordingly, I will assume, as it is the case in contemporary international law, that all nationals are also to be citizens (and hence holders of all citizenship rights, including political rights; see eg Art. 25 of the International Covenant on Civil and Political Rights). It is important to emphasize, however, that there is clearly no historical and no conceptual identity between nationality and citizenship *qua* political membership (see eg Besson and Utzinger (n 2)). It is the progressive expansion of the political franchise in the course of the history of the democratic State that led to a practical overlap between nationality and citizenship, one that is actually protected under IHRL through the political rights to participation and representation of all nationals. Of course, domestic authorities benefit from a broad margin of appreciation under international law and may extend citizens' (political) rights to non-nationals, based for instance on residence or integration or any other criteria of connection to other citizens (see eg R Bauböck, 'Expansive Citizenship: Voting Beyond Territory and Membership' (2005) 38 *Political Science and Politics* 683). In those cases, the personal scope of citizenship may become greater than that of nationality. The reverse expansion of the scope of nationals without corresponding political rights is not allowed under IHRL, however. I will revert to this central question of the relationship between nationality and citizenship in section 3.

⁹ See A Shachar and R Bauböck (eds), *Should Citizenship be for Sale?* (European University Institute – RSCAS 2014). See also J Džankić, *The pros and cons of ius pecuniae: investor citizenship in comparative perspective* (European University Institute – RSCAS 2012).

¹⁰ The present chapter does not address IC programs that are *hybrid* and rely on some additional criteria of connection to other citizens such as residence or integration (see Surak (n 5) 11ff). By doing so, indeed, those programs confirm this chapter's point.

¹¹ See *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921* (Advisory Opinion) [1923] PCIJ Rep Series B No 4, p 24. See eg I Brownlie, 'The Relations of Nationality in Public International Law' (1963) 39 *The British Yearbook of International Law* 284; O Dörr, 'Nationality', *Max Planck Encyclopaedia of Public International Law* (2006); K Hailbronner, 'Nationality in Public International Law and European Law' in R Bauböck and others (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European States* (vol I, Amsterdam UP 2006); J Crawford, *Brownlie's Principles of International Law* (8th edn, OUP 2012) 509ff.

¹² See eg Spiro, 'A New International Law of Citizenship' (n 2) 697-716; G-R de Groot and OW Vonk, *International Standards on Nationality: Texts, Cases and Materials* (Wolf Legal Publishers 2016).

¹³ See also Crawford, *Brownlie's Principles* (n 11) 518; Hailbronner (n 11) 35.

sustainable in the long run. On this contemporary reading, INL entrenches minimal criteria for the personal component of States' internal structure, i.e. what constitutes its people, albeit from the outside. Those minimal international law standards may be resorted to in order to support the State in case of erosion of those features, be it under internal or external pressure such as increased labour mobility and global migration. This constitutional role of INL accounts for the legal duality of nationality that, just like that of the State and its other constitutive elements such as territorial jurisdiction, is constituted and regulated under both domestic and international law at the same time, on the one hand, and with respect to the domestic as much as the international normative implications of that status, on the other.¹⁴

Usually, accounts of the thickening of the requirements of INL such as this one are made by reference to international human rights law (IHRL). It is under the latter's influence, indeed, that INL has developed some of the new requirements bearing on domestic nationality laws in the last thirty years or so, mostly to prohibit discrimination in the acquisition of nationality on suspect grounds such as gender, religion, disability or race.¹⁵ I am leaving IHRL outside the scope of the chapter, however, and for two reasons. The first one is to avoid inflationary and circular arguments about whether there is, and should be, an international human right to domestic citizenship¹⁶ or, more broadly, to democracy¹⁷. The second, and most important reason, is that the proposed argument does not only focus on individual interests, but also pertains to the protection of the conditions of public equality in the State and hence of the latter's political and especially democratic legitimacy. Indeed, IHRL constraints on the domestic regulation of the acquisition of nationality have rightly been criticized for contributing to the erosion of citizenship as an exclusive collective status that may not be reduced to a set of individual rights.¹⁸ The time has come, therefore, to complement and hence counterbalance individualizing IHRL-based interpretations of INL with more collective democratic ones.

Such a democratic interpretation of INL could be based, I shall argue, on another principle of international law that emerged around 1945 together with, and as a companion¹⁹ to IHRL: the international principle of democracy (IPD)²⁰. Like IHRL,²¹ the IPD protects the public or political dimension of the basic principle of individual equality, itself an international law principle under existing

¹⁴ See Brownlie (n 11) 364; Crawford, *Brownlie's Principles* (n 11) 510-11, 518, and 526.

¹⁵ Ibid 715-7.

¹⁶ For evidence pointing against an international human right to nationality or citizenship, see eg *Kuric and others v. Slovenia* App no 26828/06 (ECtHR, 13 July 2010) para 353; *Case of the girls Yean and Bosico v. Dominican Republic* (IACtHR, 8 September 2005) para 137. Contra: Matias (n 3) 197ff.

¹⁷ For an argument against such a human right to democracy, see S Besson, 'The *Human Right* to Democracy in International Law – Coming to Moral Terms with an Equivocal Legal Practice' in M Susi, K Odendahl, and A von Arnould (eds), *New Human Rights* (CUP 2020) (forthcoming).

¹⁸ See also Spiro, 'A New International Law of Citizenship' (n 2) 696 and 720.

¹⁹ See S Besson, 'Human Rights and Democracy in a Global Context – Decoupling and Recoupling' (2011) 4 *Ethics and Global Politics* 19.

²⁰ See C Pippin, 'Democracy as a Global Norm: Has it Finally Emerged?' in M Happold (ed), *International Law in a Multipolar World* (Routledge 2012); Besson, 'The Human Right to Democracy in International Law' (n 17). See also F Ehm and C Walter (eds), *International Democracy Documents – A Compilation of Treaties and Other Instruments* (Brill 2015).

²¹ See S Besson, 'The Egalitarian Dimension of Human Rights' (2013) 136 *Archiv für Sozial- und Rechtsphilosophie Beiheft* 19.

customary international law.²² Whereas IHRL protects individual equality as a public status (*qua* equal individual rights that constitute it), the IPD protects it as a public process (*qua* equal and inclusive decision-making process in circumstances of reasonable disagreement). What the IPD also guarantees, I will argue, are the basic conditions for individual public or political equality, and hence for the justification of democracy. Those basic conditions amount, as I will explain, to the sharing of equal and interdependent stakes.²³ It is only when people's shared interests spread over a sufficiently broad range of issues and in a sufficiently equal way, indeed, that their political equality matters and that democracy can be justified.

This understanding of the conditions of democratic citizenship protected under the IPD is, the chapter argues, the best contemporary interpretation of INL. As the practice of States with respect to the acquisition of nationality confirms, various shorthands may be used in domestic nationality law to capture the connection between people, such as residence or descent. All of them have in common, I will argue, to ascertain (and some better than others) the existence of equal and interdependent stakes between future citizens and existing ones, and hence to secure the conditions of public equality and democracy. A mere monetary connection of the kind required by IC, by contrast, does not guarantee that the concerned people share stakes with other members of the relevant political community that are sufficiently equal and interdependent for that community to remain a State and a democratically legitimate one in particular. If I am right, therefore, this should not only prevent IC from being opposable to other States, but also from being regarded as legally valid under INL.

The proposed argument unfolds in three steps. In a first section, the chapter develops a democratic interpretation of INL and, more specifically, proposes an egalitarian interpretation of the connection requirement one can find in States' domestic practice regarding the conditions for the acquisition of nationality (1.). A second section draws some implications for the lack of validity of IC under international law and what may be done against commodification in future interpretations of INL (2.). Finally, in a third section, the chapter replies to critiques to the relevance of democracy in contemporary international law (3.).

1. A Democratic Interpretation of International Nationality Law

This section proposes a democratic interpretation of INL in the light of the IPD. Its argument is three-pronged. It claims, first, and from the vantage point of democratic theory, that the factual conditions of public equality and hence for the justification of democracy are the sharing of equal and interdependent stakes and that it is a requirement of democratic citizenship that those conditions are preserved (1.1.). This is best done, it argues in a second step, by interpreting INL in the light of the IPD that is a principle of

²² See J Crawford, 'Chance, Order, Change: The Course of International Law', *Collected Courses of The Hague Academy of International Law* (2013) vol 365, 272ff, by reference to *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, (Second Phase) [1970] ICJ Rep 3, para 41.

²³ See Christiano, 'A Democratic Theory' (n 2) 85-7; T Christiano, 'Democratic Legitimacy and International Institutions' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (OUP 2010), 130-3.

international law that protects the conditions for democratic citizenship, just as INL has been interpreted in the light of IHRL in the last twenty years or so (1.2.). The upshot of the proposed argument is discussed in a third step: it consists in interpreting the “genuine connection” requirement, as it has been protected by INL, and the various shorthands used in domestic nationality law to capture that connection between members of the political community as a test for the sharing of equal and interdependent stakes (1.3.).

1.1. *The Factual Conditions of the Justification of Democracy*

It is common among democratic theorists to ground democracy in the principle of public or political equality, i.e. a political derivation of the principle of individual equality in circumstances of collective decision-making.²⁴ In the most minimal understanding, indeed, democracy amounts to the collective decision-making process that includes equally all those subjected to a decision and hence best protects their public equality in circumstances of reasonable disagreement about that decision.

The justification of democracy in public equality, however, requires that certain factual conditions for public equality are fulfilled. Those conditions include, among others, first of all, that many important issues must arise for the whole community at the same time and, second, that there must be a rough equality of stakes among persons in the community concerning the whole package of issues.²⁵

The first condition has been referred to by Christiano as the “interdependence of stakes”, while the second has been coined the “equality of stakes”. Individual stakes refer to the susceptibility of a person’s interests to be advanced or not by the collective organization of a group.²⁶ The interdependence of those stakes matters for public equality to arise as a concern and, in turn, for public equality to justify democracy because of the inherent relationships between democracy and majority rule. For majority rule to be justified on an egalitarian basis, indeed, it is important that there be many issues decided over so that all can take turn in being either in the majority or the minority and that people can trade votes between issues depending on how important they are to them (e.g. education v. security). For democratic purposes, however, the interdependence of stakes also needs to be complemented by their equality. Equal say over certain issues can only be justified if all participants have stakes in those issues that are equal. Of course, that equality of stakes does not need to pertain to every issue –and it is most likely that it cannot due to the distinctness of individual interests and circumstances. It should, however, at least exist in the overall package of interdependent issues to be decided over collectively.²⁷ The equality and interdependence of stakes have also been coined as the sharing of a “common world”.²⁸

Importantly, first of all, sharing equal and interdependent stakes with others need not be conflated with sharing a culture or identity. It is compatible with multicultural, multinational or multiethnic political

²⁴ See Christiano, ‘Democratic Legitimacy’ (n 23) 121-2; Christiano, ‘A Democratic Theory’ (n 2) 87-9. See also Besson, ‘The Egalitarian Dimension’ (n 21).

²⁵ See Christiano, ‘Democratic Legitimacy’ (n 23) 130.

²⁶ Ibid 131.

²⁷ Ibid 130-1.

²⁸ See Christiano, ‘A Democratic Theory’ (n 2) 85-7.

communities. It is often precisely because people differ in their culture or other identity aspects that their sharing equal and interdependent stakes enables them to constitute a political community and to overcome cultural, nationalist or ethnic conflicts.²⁹ An obvious example in this respect is the Swiss political community.

True, some of the stakes shared equally and interdependently by the members of a political community may also be shared with members of other political communities. The fact is that those transnational stakes will not usually be shared in a sufficiently equal or interdependent fashion, however. For instance, one may consider that people in two political communities (e.g. France and Switzerland) with a shared natural border (e.g. a lake), but a different natural environment may share some stakes in security (e.g. around that lake), but not all of them (e.g. maritime security for France only). Moreover, the stakes they share may not even be equal overall due to their limited scope and hence to their lack of interdependence with other stakes the members of each community have (e.g. energy or industry). When the shared stakes across two or more political communities are interdependent and equal, however, one may consider the possibility of enlarging the political community so as to encompass those new members, without necessarily diluting the smaller ones into a larger one, as would be the case in a federal State or in the European Union. As a matter of fact, considering the sharing of equal and interdependent stakes with others as a factual condition of public equality, and hence of democracy, does not exclude the possibility of doing so in more than one political community at a time. Some people live or have lived in more than one community, or are closely related to another community in other ways, whether those political communities are neighbours or not.

Nor, secondly, should the considering of sharing equal and interdependent stakes as a condition of political equality and democracy be conflated with the “all-affected” principle in democratic theory. That principle requires that all those affected be included in the democratic process, and hence within the citizenry. Sharing equal and interdependent stakes goes further, however, than mere affectedness.³⁰ It covers a broader range of interests over a longer period of time and is necessarily collective.

As a matter of fact, a question frequently raised in the context of discussions of the democratic legitimacy of international law is whether all people in the world do not already share stakes that are sufficiently interdependent and equal for the factual conditions of global democracy to be given and for a global democratic people to be constituted.³¹ Even if it is not (yet) the case for all our interests as such, certain global stakes (e.g. clean water or cybersecurity) may already be said to be shared in a sufficiently interdependent fashion, albeit not necessarily in an equal way (especially because they are still so few that equality over the whole package of issues is more difficult to establish), while others (e.g. education or social security) can only be considered such among people living within more limited territorial boundaries such as those of States. Importantly, however, the existence of such transnational or global stakes and the

²⁹ Ibid 86-7 and 98.

³⁰ See Christiano, ‘A Democratic Theory’ (n 2) 97-8.

³¹ See Christiano, ‘Democratic Legitimacy’ (n 23) 132-4.

fact that they may be considered as interdependent and equal does not make it the case that more localized stakes or stakes that are not shared in an interdependent and equal fashion are irrelevant from a democratic theory perspective and that domestic democratic communities cannot co-exist with regional or even global ones. Nor can we conclude from the former that anyone in the world sharing some stakes with us should be allowed to be part of our democratic community when we make decisions pertaining to other stakes we do not share equally and interdependently with them, but decisions that affect them all the same. Indeed, the set of stakes that are the factual conditions for domestic public equality, and hence for domestic democracy in this case, is unique to us. Treating them as equal members of our democratic community when they have a lesser stake would treat all the others who share a higher stake unequally. Democratic membership *qua* right to participate in a collective decision-making process founded in the fundamental relational status of equality simply cannot be reduced to a loose and variable constellation of individual memberships depending on how each individual's interests are affected at any given time. There are other epistemic correctives currently explored to make sure other people's interests that are affected (albeit not interdependently and equally) are duly considered in our democratic deliberations even if those people are not members of the democratic community and, to that extent, cannot participate or be represented therein.³²

Of course, finally, because sharing equal and interdependent stakes is a factual condition for the justification of democracy, democracy cannot be invoked to assess the origins of that fact and, in particular, the egalitarian and democratic credentials of the common world people share. This matters because, in the course of human history, those origins (e.g. our living together in a specific territory) have most of the time been arbitrary and, to some extent, non-democratic.³³ This limitation weighing on the scope of democratic arguments should not come as a surprise, however. It is sometimes referred to as the "boundary-paradox" in democratic theory due to the inherent limitations this creates for any democratic argument.³⁴ Providing such a normative assessment of the origins of democratic citizenship is not the point of the proposed argument, however. Rather, what matters in this chapter, and provided sharing equal and interdependent stakes can be said to be a factual condition of the justification of democracy, is that that factual condition is preserved against future erosion. And that argument can readily be made from a democratic point of view.

If this first prong of the argument is correct, democratic States are required under the principle of democracy to protect the conditions for democracy to remain justified.³⁵ This implies making sure the acquisition of democratic citizenship is done not only so as not to exclude those who share equal and interdependent stakes (and not to under-reach –by excluding long-term residents, for instance), on the one

³² See eg the on-line debate between Joachim Blatter, Rainer Bauböck and others under <<http://globalcit.eu/let-me-vote-in-your-country-and-ill-let-you-vote-in-mine-a-proposal-for-transnational-democracy/>> accessed 9 June 2019.

³³ See Christiano, 'Democratic Legitimacy' (n 23) 87 and 98.

³⁴ See FG Whelan, 'Democratic theory and the boundary problem' in JR Pennock and JW Chapman (eds), *Liberal Democracy* (New York UP 1983). See also R Bauböck, 'Political Membership and Democratic Boundaries' in A Shachar, R Bauböck, I Bloemraad and M Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017), 61-4.

³⁵ See also Christiano, 'A Democratic Theory' (n 2) 98; Besson, 'The Human Right to Democracy in International Law' (n 17).

hand, but also to only include those who do (and not to over-reach either –by including people who have no connection whatsoever to existing members of the political community, for instance), on the other.

1.2. Reading International Nationality Law in the Light of the International Principle of Democracy

It is through the international law principle of democracy, the IPD, that States arguably protect democracy together and from the outside of their respective democratic polities. So-doing, the IPD entrenches domestic democracy by constraining domestic law in case democracy is under threat. Together with IHRL, it amounts to a form of constitutional pre-commitment on the part of democratic States that have resorted to international law to protect their democratic regimes against themselves.³⁶

Like its post-1945 companion IHRL, the IPD protects the public or political dimension of the basic principle of individual equality, itself an international law principle under existing customary international law.³⁷ The IPD itself has only been codified a few times.³⁸ For the rest, it may be considered a general principle of international law.³⁹ It is, for instance, regularly referred to as a complementary principle of international law in IHRL. Besides mentioning the IPD in their preambles (e.g. the Preamble to the European Convention on Human Rights), IHRL treaties protect it by guaranteeing political rights to equal participation and representation (e.g. Art. 25 of the International Covenant on Civil and Political Rights [ICCPR]). IHRL courts and bodies have also recognized a general positive duty for States adopt a democratic regime and hence to resort to democratic procedures when specifying and restricting their human rights' duties.⁴⁰

Of course, that international democratic pre-commitment through the IPD can only last as long as the most entrenched norms of international law can. Importantly, however, international law norms have the ability to last longer than domestic ones. They are indeed more difficult to amend, whether they are customary or treaty-based, due to the generality (of State practice or consent) requirement. Its international law dimension is what makes the current legal regime of democracy, and especially of democratic citizenship, different from what prevailed in previous ages, and especially in the Athenian or Roman context. It is actually what will slow down the erosion of that regime by comparison to what occurred previously in human history, and especially at the end of the Roman Republic.⁴¹ Relapses into

³⁶ See A Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54:2 International Organization 217.

³⁷ See J Crawford, 'Chance, Order, Change: The Course of International Law', *Collected Courses of The Hague Academy of International Law* (2013) vol 365, 272ff by reference to *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, (Second Phase) [1970] ICJ Rep 3, para 41.

³⁸ See eg F Ehm and C Walter (eds), *International Democracy Documents – A Compilation of Treaties and Other Instruments* (Brill 2015).

³⁹ See Pippan (n 20). The most critical authors of the contemporary protection of democracy by international law recognize the existence of the IPD *qua* general principle of international law: eg J d'Aspremont, 'The Rise and Fall of Democratic Governance in International Law: A Reply to Susan Marks' (2011) 22 European Journal of International Law 549, 553-554 and 564; A Magen, 'The Democratic Entitlement in an Era of Democratic Recession' (2015) 4:2 Cambridge Journal of International and Comparative Law 368.

⁴⁰ See Besson, 'The Human Right to Democracy in International Law' (n 17), by reference to *Zdanoka v. Latvia* App no 58278/00 (ECtHR, 16 March 2006), para 98; *Navalnyy v. Russia* App 29580/12 (ECtHR, 15 November 2018), paras 174-5.

⁴¹ For an interesting discussion of the erosion of public equality in the past and the return of individuals to a solitary status, see G Vico, *The New Science* (from the 1744 third edition, Cornell University Press 1948), par. 1101-2 and 1106.

what some have described as neo-Medieval conceptions of citizenship⁴², for instance, have been made structurally and legally more difficult by international law. I will revert to the critique of the relevance of democracy in contemporary international law in light of the alleged democratic “deconsolidation” or “backsliding” in the third section.

To the extent that the IPD protects democracy, it also implicitly requires that the factual conditions for the justification of democracy, and hence for public equality, be secured. When the IPD protects the conditions for the justification of democracy, more specifically, it constrains the conditions for the acquisition of domestic citizenship by making sure they include the sharing of equal and interdependent stakes. This is where the IPD overlaps with INL.

True, INL has been a regime of international law for much longer than the IPD. Like IHRL, the IPD emerged in 1945, but even more clearly so since the 1990s.⁴³ It is clear, as a result, that the minimal framing by international law of the conditions for the acquisition of domestic nationality since the 19th Century were not originally related to a concern for public equality and democracy. Nor were they actually particularly concerned with individual rights, more generally.⁴⁴ With the development of IHRL, however, INL has gradually come to be interpreted so as to protect human rights, including against discrimination in the acquisition of nationality.⁴⁵ Curiously, however, the corresponding interpretation in the light of the IPD has not occurred yet. The time has come to fill this gap. After all, as I explained before, IHRL and the IPD protect two complementary facets of political equality: human rights and democracy. Focusing only on the human rights side of political equality when interpreting INL, therefore, may be detrimental to the protection of political equality and democratic citizenship in the long run. As a matter of fact, human rights-based interpretations of INL have progressively eroded the exclusive character of citizenship: they expanded its personal scope so as to decrease the gap between citizens and human rights-holders in each State.⁴⁶

It is urgent therefore to counterbalance the influence of IHRL in INL by drawing more on the IPD and to provide a more balanced approach to public equality in a democracy. Both principles of systemic or integrative and evolutive interpretation of INL, as required by international treaty law (Art. 31(3)(c) and (b) of the Vienna Convention on the Law of Treaties), confirm that one may take the IPD into account in this context.

1.3. From Genuine Connection to Sharing Equal and Interdependent Stakes

Since the 19th Century, INL has worked as the regime of international law that frames the minimal conditions for the acquisition of State nationality, but only minimally so and in order to secure the mutual opposability of domestically defined and attributed nationality. This has been the case in particular of the

⁴² See eg Surak (n 5) 34; Tanasoca (n 6).

⁴³ For a chronological survey of the practice of the IPD in 20th Century’s international law, see Besson, ‘The Human Right to Democracy in International Law’ (n 17).

⁴⁴ See Spiro, ‘A New International Law of Citizenship’ (n 2) 697ff.

⁴⁵ Ibid. 703ff.

⁴⁶ Ibid. 696 and 720.

requirement pertaining to the conditions for the acquisition of domestic nationality identified from States' practice by the International Court of Justice (ICJ) in the *Nottebohm* case, i.e. the "genuine connection" test.⁴⁷

Interpreting INL in the light of the IPD implies interpreting its minimal framing of the domestic conditions for the acquisition of nationality by reference to the conditions identified in the previous sections for the justification of democratic citizenship, i.e. the sharing of equal and interdependent stakes. As a matter of fact, the "genuine connection" requirement is best interpreted in contemporary circumstances as a test for the sharing of equal and interdependent stakes. Not only does the proposed democratic interpretation fit that test really well, but it provides a justification for it that is in line not only with the IPD, but also with IHRL whose concern for equality it shares.⁴⁸

In short, the *Nottebohm* test of "genuine connection" requires that nationality reflects and is based on a social fact of attachment that makes nationality "real and effective".⁴⁹ As the practice of States regarding the acquisition of nationality has confirmed since then, various shorthands⁵⁰ may be used to capture that genuine connection between people, whether at birth or at a later stage of naturalization: it may be birthplace [and the corresponding *jus soli*], descent [and the corresponding *jus sanguinis*], marriage, legitimation, adoption, permanent residence [and the corresponding *jus domicili*], or other forms of integration.⁵¹ Most of them assess the connection between people by reference to territory,⁵² albeit not necessarily so. All of them, however, may be interpreted as ways to ascertain the existence of equal and interdependent stakes between future citizens and existing ones, and hence to secure the conditions of public equality and democracy. Accordingly, that genuine connection required by INL works as much positively as a ground for inclusion (protecting against nationality under-reach, and reflecting IHRL requirements) as negatively as a ground for exclusion (protecting against nationality over-reach, and reflecting the IPD requirements).⁵³

⁴⁷ See *Nottebohm Case (Liechtenstein v. Guatemala)* (Second Phase) [1955] ICJ Rep 4, p 23.

⁴⁸ For an analogous conception of *Nottebohm* as "inverse conceptual guide for the future of international law of citizenship", see Spiro, 'A New International Law of Citizenship' (n 2) 723. See also Shachar, *The Birthright Lottery* (n 6) 27-33; Shachar, 'Earned Citizenship' (n 8) 128ff.

⁴⁹ *Nottebohm* (n 47) p 23-4: '[...] nationality is a legal bond having as its basis a *social fact of attachment*, a *genuine connection* of existence, interests and sentiments, together with the existence of reciprocal rights and duties. [...] The Court must ascertain [...] whether the factual connection [...] appears to be sufficiently close [...] that it is possible to regard the nationality conferred as *real and effective*, as the exact juridical expression of a social fact of a connection which existed previously [...]. [...] Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves [...] his establishment of a *new bond of allegiance*. It may have far reaching consequences and involve profound changes in the destiny of the individual who obtains it.'

⁵⁰ Importantly, those are only shorthands (and there may actually be others) for the "connection" between people and between people (and, by extension, their State), and they should not be conflated with the connection itself. To that extent, it is wrong to refer to a *jus nexi* as such (eg Shachar, *The Birthright Lottery* (n 6) 27-33; Shachar, 'Earned Citizenship' (n 8) 128ff): all shorthands pertain to a connection between people, and none epitomizes that connection more than others.

⁵¹ The link between those shorthands in domestic nationality law and the "genuine connection" requirement is confirmed, albeit indirectly, by P.J. Spiro, '*Nottebohm* and "Genuine Link": Anatomy of a Jurisprudential Illusion' (2019) Investment Migration Working Paper <<https://investmentmigration.org/download/nottebohm-genuine-link-anatomy-jurisprudential-illusion-imcrp-2019-1/>> accessed 9 June 2019, 19-20.

⁵² See on the importance of the territorial dimension of the connection between members of a political community for the justification of democracy: Christiano, 'A Democratic Theory' (n 2) 100-5; Christiano, 'Democratic Legitimacy' (n 23). See also Besson, 'Why and What (State) Jurisdiction' (n 2). See also N Walker, 'The Place of Territory in Citizenship' in A Shachar, R Bauböck, I Bloemraad and M Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017).

⁵³ See Spiro, 'A New International Law of Citizenship' (n 2) 718.

Of course, the *Nottebohm* test has been very controversial ever since the ICJ's judgment was issued.⁵⁴ While some have rejected it outright, others have rightly limited its material scope to issues of dual nationality and/or diplomatic protection.⁵⁵ Yet others have re-interpreted it as amounting, at the most, to an “abuse of rights” test in that context.⁵⁶ Finally, some have distinguished the “effectivity” of the connection required in the diplomatic-protection context from its “appropriateness”, and suggested that only the latter may be generalized.⁵⁷ There is no evidence in the *Nottebohm* case, however, for the latter distinction. Moreover, such a distinction would be just as indeterminate as what makes for the factual connection itself.⁵⁸ It would not be very helpful, as a result.

Scope precludes entering further into the future-of-*Nottebohm* controversy here. It is true, of course, that the context of the *Nottebohm* case was very specific –besides being a clear case of IC at the same time. To that extent, one may consider that the “abuse of rights” reading of the case and its applicability to dual nationality and/or diplomatic protection context is convincing. For the purposes of the present argument, however, it suffices to observe how resilient the “genuine connection” test *per se* has been, both in the domestic and in the international practice of States with respect to the identification of the shorthands for the connection between citizens and hence to the criteria used for the acquisition of nationality in domestic law. To that extent at least, it should remain a relevant part of contemporary discussions of INL.⁵⁹

Moreover, reading the “genuine connection” test in the light of the proposed democratic argument about the conditions of the justification of democracy makes it fit the post-war constitutional regime of the democratic State as it is entrenched in IHRL and in the IPD. To that extent, the proposed interpretation may help addressing the concerns usually raised against the test's alleged old-fashioned or “romantic” flavour by more inclusive and progressive understandings of citizenship acquisition in contemporary global circumstances of mobility.⁶⁰ As a matter of fact, and by reference to what I argued before, reinforcing the IPD interpretations in INL could contribute to counterbalancing some of the individualizing influence of IHRL in INL,⁶¹ and help thereby reinvigorating the democratic dimension of the protection of individual equality in international law.

⁵⁴ See on the ICJ's reasoning, eg Brownlie (n 11) 349-64; Hailbronner (n 11) 60; Dörr (n 11) paras 18ff; O Dörr, 'Nottebohm Case', *Max Planck Encyclopaedia of Public International Law* (2007). For a descriptive and normative critique of the “genuine connection” requirement in INL, see JL Kunz, 'The Nottebohm Judgment (Second Phase)' (1960) 54 AJIL 536; RD Sloane, 'Breaking the Genuine Link: the Contemporary International Legal Regulation of Nationality' (2009) 50 Harvard International Law Journal 1, 37-9; A Macklin, 'Is It Time to Retire *Nottebohm*?' (2018) 111 AJIL Unbound 492; Spiro, '*Nottebohm* and “Genuine Link”' (n 51).

⁵⁵ See Sloane (n 54) 3-4, 12, 18-19, and 29. See also A Peters, 'Passportization: Risks for International Law and Stability. Part II', (2019) EJIL Talk! <<https://www.ejiltalk.org/passportisation-risks-for-international-law-and-stability-part-two/>> accessed 9 June 2019.

⁵⁶ See eg ILC, 'Draft Articles on Diplomatic Protection with commentaries' (2006) UN Doc A/61/10 General Assembly Official Records 22, Arts 4 and 32-3.

⁵⁷ See A Peters, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction' (2010) 53 Germany Yearbook of International Law 623, 686-7.

⁵⁸ See Brownlie (n 11) 356ff.

⁵⁹ See also Peters (n 55).

⁶⁰ See Spiro, '*Nottebohm* and “Genuine Link”' (n 51) 17ff.

⁶¹ See Spiro, 'A New International Law of Citizenship' (n 2) 696 and 720.

2. The International Illegality of Investment Citizenship

If the proposed argument for a democratic interpretation of INL is correct, a mere monetary connection of the kind required by IC does not guarantee that the concerned people share stakes with other members of the relevant political community that are sufficiently equal and interdependent for that community to remain a State and a democratically legitimate one in particular. It is clear indeed that, absent an additional reference to the other usual criteria or shorthands for the existence of a connection between people such as sharing residence over the same territory or a common history, money in itself cannot secure that the candidates for IC share interdependent and equal stakes with the other citizens in that State.

Of course, being able to contribute financially to the life of the State may be regarded as a way of connecting future investment citizens' interests to those of other members of the population (including in a way that may, in the long run, contribute to democratic life itself). To that extent, they definitely share a stake in the economic future of the political community. However, that connection between future investment citizens and existing ones does not make their stakes sufficiently interdependent or, at least, enough of their stakes interdependent. Nor, certainly, does it make those stakes equal. Wealth, at least in the circumstances that give rise to the granting of IC, is unequally distributed. To that extent, even if there are stakes that future investment citizens share with existing ones and that may be considered interdependent, they cannot be equal.

These facts about the lack of interdependent and equal stakes of investment citizens actually echo what distinguishes the "common world" of political communities from more partial associations such as economic enterprises or commercial ventures.⁶² The interests participants in those economic endeavours share with others are not only limited by comparison to those at stake in a political community like the State (i.e. restricted to the financial investment), but also extremely diverse within that limited range of interdependence (i.e. by reference to the amount of the investment in each case).

Some authors have objected that wealth is not more "arbitrary" than birthplace, descent or even residence as a criterion for the acquisition of nationality and hence as shorthands for the sharing of equal and interdependent stakes.⁶³

While this is correct, this objection does not cut any ice. Generally speaking, indeed, citizenship is always exclusive and hence non-egalitarian in a certain respect. Moreover, one cannot simply argue for an arbitrary criterion for the acquisition of nationality by relying on the alleged arbitrariness of others. Finally, and most importantly, the problem with IC in this argument is not the arbitrariness of wealth itself as a criterion, but its inability to track the sharing of equal and interdependent stakes and hence the connection between a future citizen and others. Being born or residing in the same place, or having ancestors who did or a spouse who does, makes it likely in most cases that people do share those stakes in a way that enables them to claim public equality and in turn democratic citizenship. Of course, those other criteria may not

⁶² See Christiano, 'A Democratic Theory' (n 2) 86.

⁶³ See eg Kochenov (n 1) 27.

always be effective, and may even be abused. For instance, one may consider that descent, unless it is qualified by an additional minimal residence requirement, may no longer be able to track a connection to other people in a given political community in situations where there has been massive emigration without return to the homeland over a few generations. This may actually explain why some States whose nationality is acquired on grounds of descent have started limiting the political rights of their nationals abroad and have accordingly devised different tiers among types of nationality. The fact is, however, that, most of the time, shorthands like residence or marriage can be used to track a genuine connection between people and one that is characterized by their sharing equal and interdependent stakes. By contrast, it is difficult to see how wealth or financial investment could ever do so. In other words, it is not only a matter of imperfection or abuse of a generally performant criterion.

Additionally, some critiques of IC consider that resorting to wealth as a basis for the acquisition of nationality, whereas the criteria usually resorted to are criteria of connection, is actually in breach of the principle of equal treatment between citizens of the same political community. It treats future investment citizens better than other poorer future citizens who have to comply with residence or other integration requirements to be naturalized.⁶⁴ The problem is that this form of unequal treatment does not fall under the principle of non-discrimination in IHRL for lack of use of a prohibited ground, unless, of course, wealth is used as a neutral ground for covert or indirect discrimination on another prohibited ground such as race or origin.⁶⁵ Barring this, the egalitarian argument may be made on grounds of the moral principle of public equality itself. Indeed, what is at stake is the protection of the factual conditions for that principle even to apply. As I explained before, equality may be invoked from within the democratic community itself in order to preserve the egalitarian conditions of democracy.

As a matter of fact, making sure their population shares equal and interdependent stakes is also a condition for States to be able to represent their people democratically in international law-making. It is a condition, for instance, for their international treaties to bind them (and their people) legitimately to other States (and their people).⁶⁶ To that extent, the democratic stakes of securing the conditions of political equality and hence of protecting democratic legitimacy domestically through a connection-sensitive acquisition of citizenship are not only domestic, but global. It is not just a matter of protecting domestic democracy against itself, but also of securing the democratic legitimacy of international law that still ensues, under current international law-making, through the consent of (democratic) States.⁶⁷

⁶⁴ See eg Shachar, 'Selecting By Merit' (n 3) 186-9; Shachar and Hirschl (n 3) 250; Bauböck, 'What is wrong' (n 6) 21; Shachar, 'Earned Citizenship' (n 8) 132-7.

⁶⁵ See also Hidalgo (n 6) 234-6.

⁶⁶ See S Besson and JL Martí, 'The Legitimate Actors of International Law-Making – Towards a Democratic Theory of International Representation' (2018) 9:3 Jurisprudence 504.

⁶⁷ See T Christiano, 'Climate Change and State Consent' in J Moss (ed), *Climate Change and Justice* (CUP 2015); T Christiano, 'Replies to David Álvarez, David Lefkowitz, and Michael Blake' (2016) 4 Law, Ethics and Philosophy 221; S Besson, 'State Consent and Disagreement in International Law-Making – Dissolving the Paradox' (2016) 29 Leiden Journal of International Law 289.

If the proposed argument is correct, IC should not be regarded as legally valid under INL.⁶⁸ This is true in international law, but also with each domestic nationality regime depending on the status and rank of international law in that domestic legal order.

The question then becomes not only one of international non-opposability to other States (and their people), but also potentially of international responsibility of the concerned State itself for breach of international law. Duties to cease the violation and prevent repetition are owed to all States in the international community of States and may also be claimed by all of them to the extent that duties arising under INL are owed to all other States and protects their collective interests, and not only the interests of the concerned State's people. The issue turns, in other words, into a matter of enforcement of international law.⁶⁹ This raises all sorts of procedural difficulties in the absence of a centralized international law-enforcer and the variations in *locus standi* before international courts depending on the States at stake and of the people concerned, but also on the regime of international law whose violation is claimed.⁷⁰

3. Replies to Critiques of the Relevance of Democracy in Contemporary International Law

There are at least three critiques that have been, or could be, articulated against the proposed democratic reading of INL and of its requirement of a connection-based acquisition of nationality. All three rely on the lack of or, at least, decrease in relevance of democracy and democratic citizenship in international law.

First of all, the lack of relationship between domestic citizenship and international law. According to this critique, the nationality-related rights investment citizens are interested in, and actually use the most in practice, are rights acquired under international law rather than domestic law. Those are rights invoked towards other States than the State of citizenship and other individuals than their fellow citizens in that State.⁷¹ They arise, for instance, by virtue of that State's regional institutional integration (e.g. free movement rights in the EU) or other international treaties (e.g. tax or investment treaties). To that extent, the domestic legal rights arising from nationality, and for instance political rights, i.e. the rights most affected by the sharing of equal and interdependent stakes, are rarely used by investment citizens, thereby making the absence of effective connection between investment citizens and other citizens in the political community less of a concern.

This critique fails to convince, however. Given the duality of nationality under domestic and international law,⁷² indeed, INL requirements affect the normative consequences of citizenship both on the domestic and international planes and without distinction between the citizenship rights arising from domestic or international law. To that extent, the fact that most of their newly acquired citizenship rights, such as free

⁶⁸ See also, albeit indirectly, Mixed Claims Commission, (*United States and Germany*) constituted under the Agreement of August 10th 1922, Reports of International Arbitration Awards, vol 7, 1-391.

⁶⁹ See eg Peters (n 57) 709ff.

⁷⁰ See eg S Trevisanut, 'Nationality Cases before International Courts and Tribunals', *Max Planck Encyclopaedia of Public International Law* (2011).

⁷¹ See Surak (n 5) 34 and 38.

⁷² See Brownlie (n 11) 364; Crawford, *Brownlie's Principles* (n 11) 510-11, 518, and 526.

movement rights, investment or taxation privileges, are exercised abroad in practice, and are not used (mainly) to affect domestic politics, does not detract from the proposed argument. Empirical evidence for this may be identified in practice, as there have been signs of backlash and resistance on the part of other States objecting to the “legitimacy” of IC.⁷³

At this stage, someone may reply that certain IC programs actually separate political rights from other rights deriving from nationality and submit the former to additional requirements of residence or other forms of connection to other citizens. By doing so, they limit the impact of IC on democratic citizenship and place investment citizens among the group of nationals that is already excluded from democratic participation and representation. The latter are citizens who lack the capacities to hold those political rights like children or severely demented people.

In reply to this objection, one should start by emphasizing that its gist confirms the argument made in this chapter and thereby supports the importance of connection for democratic citizenship. Unlike hybrid IC programs that add a connection requirement (e.g. residence) to the financial contribution before even granting nationality to investment citizens and which are not discussed in this chapter, however, the programs referred to in this objection may be criticized for contributing to the fragmentation of nationality rights and, arguably, to the gradual dilution of nationality into a disconnected set of individual rights. What holds nationality rights together, indeed, is their collective dimension *qua* rights of membership, hence the centrality of political rights among them. Severing an entire group of citizens’ political rights intentionally from other nationality rights threatens to separate nationality from citizenship and to revert to previous eras in which the political franchise was incomplete.⁷⁴ This is precisely the disconnection that post-war INL aims at protecting nationals against, however, in particular through IHRL’s protection of their rights to equal political participation and representation (e.g. under Art. 25 ICCPR). Of course, States may expand the scope of citizens’ political rights to non-nationals on grounds of connection to other citizens like residence, but they may not deliberately exempt nationals from the personal scope of the very same rights. In other words, the personal ambit of “citizenship” *qua* political membership may become broader than “nationality”’s (e.g. by granting political rights to foreign residents), but not the other way around.

True, as I mentioned in the previous section, States that rely on descent as shorthand for connection sometimes divide their nationals among different groups, some of which have no political rights barring a minimal residence-duration in the country. It is difficult to see therefore why the same could not apply to investment citizens. What this rejoinder fails to see, however, is that, unlike nationality based on descent, IC does not rely on a shorthand that can ever capture the sharing of equal and interdependent stakes between citizens of a political community in the first place. To that extent, the point of IC is not to correct the political consequences of a shorthand that no longer captures that connection so well anymore due to the greater mobility of citizens, and hence to introduce exceptions into a rule, but, on the contrary,

⁷³ See eg Surak (n 5) 30; Shachar, ‘Citizenship for Sale?’ (n 6) 811-2.

⁷⁴ On such constellations, see eg Surak (n 5) 34.

to allow the naturalization of people whose criterion for naturalization can never capture any connection to other citizens that is sufficiently equal: IC simply turns an exception into a rule.

Second, the limited number of democratic States in the world. According to that critique, the argument proposed in this chapter only applies to democratic States. As a result, extending it to the interpretation of INL whose scope is universal and also applies to non-democratic States is not justified.

This critique does not cut any ice, however. First of all, the IPD is a general principle of international law.⁷⁵ It binds all States, as a result, just as IHRL binds all States even though they do not necessarily effectively protect human rights in practice. No international lawyer would seriously consider that international human rights may no longer be considered as principles of international law merely because they are not yet respected everywhere.⁷⁶ As a result, non-democratic States are bound by the IPD and the proposed interpretation of INL as much as democratic ones. Secondly, it is actually the right of other States under IHRL to require that non-democratic States comply with their *erga omnes* duties, including duties related to democracy. As a matter of fact, those other States also incur, arguably, a responsibility to assist non-democratic States to become democratic and abide by their relevant duties under both IHRL and the IPD.⁷⁷

At this point, some authors may object that the IPD and, by extension, its democratic citizenship-related requirements, contradict the allegedly competing principle of self-determination in international law.⁷⁸ A non-democratic State may, indeed, invoke the principle of self-determination to oppose the proposed democratic reading of INL.

One may reply, however, following Christiano, that the principle of self-determination is actually best understood as derived from the international principle of democracy itself⁷⁹ –rather than the other way around. In order to protect individual equality in public decision-making processes, the latter should be democratic, and, for this to be the case, political communities should be able to determine themselves autonomously. Of course, just as any moral right includes the right not to be used or to be misused, self-determination may either not be used or be used non-democratically even though it derives from the protection of democracy itself. One of the moral limits to its not being used or misused, as with any human right, is the protection of equality itself.⁸⁰ This is confirmed in the practice of IHRL in particular where absolute human rights or human rights' duties, i.e. rights and duties that may not be justifiably

⁷⁵ See Pippin (n 20); Besson, 'The Human Right to Democracy in International Law' (n 17).

⁷⁶ See B Simma and P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 Australian Yearbook of International Law 82.

⁷⁷ See S Besson, 'The Bearers of Human Rights Duties and Responsibilities for Human Rights – A Quiet (R)Evolution' (2015) 32 Social Philosophy & Policy 244.

⁷⁸ See DA Reidy, 'On the Human Right to Democracy: Searching for Sense without Stilts' (2012) 43 Journal of Social Philosophy 177.

⁷⁹ T Christiano, 'Self-Determination and the Human Right to Democracy' in R Cruft, SM Liao, and M Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015), 476-9.

⁸⁰ See Besson, 'The Human Right to Democracy in International Law' (n 17).

restricted, pertain to equality and the protection against discrimination.⁸¹ This interpretation of the international principle of self-determination actually accounts well for the practice of the IPD where fascism and apartheid belong to the political regimes absolutely prohibited by international law, precisely because they threaten public equality.⁸² As a result, that egalitarian limit on self-determination accounts well for the democratic interpretation of the minimal genuine-connection requirement in INL as a condition for the acquisition of citizenship that may not be dispensed with democratically or in the name of democratic self-determination.

Finally, the growing irrelevance of democratic citizenship even within so-called democratic States. To the extent that the democratic principle amounts to a general principle of international law, the third critique of the proposed argument pertains to the impact of the erosion of the democratic practice of States worldwide on the IPD. The evidence authors usually put forward is the rise of authoritarian governments,⁸³ but also of non-democratic forms of populism and of global individualism, and the corresponding disaffection of domestic, including democratic, politics.⁸⁴

The critique does not bite, however. Of course, nationality may be approached as being both a descriptive and a normative concept at the same time, i.e. one that both relies on descriptive criteria and protects one or many moral values in drawing rights and obligations. The ICJ's understanding of nationality in *Nottebohm* actually also entails both descriptive and normative elements.⁸⁵ As a result, and to the extent that INL is eminently customary in its source, the generality and coherence of the practice of democratic citizenship on the ground, or lack thereof, matters normatively as well. Importantly, however, the present chapter's purpose is not to either empirically reject or confirm the growing social significance of monetary status in a globalized world.⁸⁶ Neo-liberal conceptions of social life clearly imbue analogies between the nationality of physical persons and that of corporations these days. So-called "functional" and hence consequentialist readings of what nationality is for abound and, with them, the further individualization of citizenship independently of any political community and the related utilitarian atomization of the corresponding rights and duties according to functions.⁸⁷ As a result, nothing prevents democratic citizenship from eroding and even disappearing for a time or even for good domestically, and, with it and in due course, all its related features in international law such as not only democracy, but also the modern

⁸¹ See S Besson, 'Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights?' (2016) 61 *American Journal of Jurisprudence* 69.

⁸² See eg International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Art 3. See d'Aspremont, 'The Rise and Fall of Democratic Governance' (n 39) 557.

⁸³ See d'Aspremont, 'The Rise and Fall of Democratic Governance' (n 39) 554 and 564; Magen, 'The Democratic Entitlement' (n 39). See also Spiro, 'A New International Law of Citizenship' (n 2) 741-5; Spiro, 'Cash-for-passports' (n 5) 10.

⁸⁴ See Spiro, 'A New International Law of Citizenship' (n 2) 745.

⁸⁵ See *Nottebohm* (n 47), p 23.

⁸⁶ See Kochenov (n 1). See also Spiro, 'A New International Law of Citizenship' (n 2) 697; Surak (n 5) 34 and 39.

⁸⁷ See Sloane (n 54) 34-5 and 59; R Gulati, 'The Relevance of Nationality in the Age of Google, Skype and Facebook' in F Jenkins, M Nolan, and K Rubenstein (eds), *Allegiance and Identity in a Globalised World* (CUP 2014), 563-6.

State itself. After all, just like democratic citizenship, the State is a historical creation and its trajectory has not been linear.⁸⁸

Nevertheless, the State consent or practice required to amend those international law norms would have to be sufficiently general. And this is clearly not yet the case with respect to the non-democratic or even anti-democratic practice of States worldwide. What the chapter has been interested in, indeed, is what matters here and now and with contemporary INL still in place, and before the complete and worldwide erosion of the State structure occurs in practice and the corresponding international law norms become irrelevant, if this is ever to happen. As I argued before, indeed, IHRL and the IPD may be approached as forms of external constitutional pre-commitment aimed precisely at protecting democracies against themselves when facing hard times.

One sometimes reads that arguments against IC, including arguments relying on the “genuine connection” requirement in INL, rely on a “romantic”, “nostalgic” and even “illusionary” understanding of the political community and the State.⁸⁹ Law is not about what people do, however, but about what they should be doing. Citizenship may well have become a commodity (like labour, money and land before it), and States may have progressively turned into hotels, but it does not mean that they should, be it from the perspective of democratic theory or from that of international law.

Conclusion

Unlike previous normative critiques of IC, this chapter’s argument was developed not only from a democratic theory perspective, but also from within the practice of international law itself.

In short, its argument has been that contemporary INL is best interpreted in the light of the IPD, and the international principle of individual equality, as a form of international pre-commitment of democratic citizenship. What this requires, I argued, is that the factual conditions for the justification of democracy protected under the IPD, be also protected under INL. This implies that the domestic conditions for the acquisition of nationality encompass the sharing of equal and interdependent stakes, both positively so as to include those who share such stakes and negatively so as not to include those who do not. This explains in turn how the genuine-connection test in *Nottebohm* is best interpreted, under a reading of INL that takes not only IHRL, but also the IPD seriously, as a test for the sharing of equal and interdependent stakes. The consequence for IC is its lack of opposability, but also of validity under INL.

The process of commodification of democratic citizenship that is currently at work needs to be addressed urgently. One way this can be done is through stronger democracy-oriented interpretations of INL. It is essential, so-doing, to counterbalance the individuation of citizenship that has been caused by an overemphasis on human rights and IHRL in the last twenty years. What is at stake is nothing less than the

⁸⁸ On the changes in the meaning of citizenship as a result of “changes in the character of human society and the [corresponding] developments in international organization”, see also Harvard Law School, ‘The Law of Nationality’ (1929) 23(S5) AJIL 21.

⁸⁹ See eg Spiro, ‘*Nottebohm* and “Genuine Link”’ (n 51) 17 and 21-22.

future of political equality domestically, but also, by extension, of the democratic legitimacy of international law itself.

Keywords: democratic theory; international nationality law; domestic citizenship; *Nottebohm* case; genuine-connection test; international principle of democracy; conditions for the justification of democratic citizenship; sharing of equal and interdependent stakes.

Abstract: The process of commodification of democratic citizenship through the current proliferation of “investment citizenship” (IC) programs, i.e. the various state-led programs that offer the acquisition of domestic citizenship through financial contribution only, needs to be addressed urgently, and, so the chapter argues, through stronger democracy-oriented interpretations of international nationality law (INL). Unlike other arguments against IC advanced in political theory, the present chapter argues from within the legal practice itself: it proposes its normative critique as the best interpretation of nationality law. In contrast to other existing legal critiques of IC, however, it does not focus on domestic or European Union law, but on international law: it develops a new interpretation of INL that excludes granting nationality on monetary grounds only. In short, the chapter argues that contemporary INL is best interpreted in the light of the international principle of democracy (the IPD), and the customary international law principle of individual equality, as a form of international pre-commitment of democratic citizenship. What this means is that the factual conditions for the justification of democracy need to be protected not only under the IPD, but also under INL. In turn, this implies that the conditions of naturalization encompass the sharing of equal and interdependent stakes, both positively so as to include those who share such stakes and negatively so as not to include those who do not. The matching of those conditions under the IPD and INL explains in turn how the genuine-connection test in *Nottebohm* is best interpreted, under contemporary circumstances, as a test for the sharing of equal and interdependent stakes. The consequence, the chapter argues, is not only the lack of opposability, but also of validity of IC under INL.