Migration in the global village: Cultural rights, citizenship and self-determination

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1 Introduction

One of the consequences of the continuing process of globalisation is the ever increasing free movement of people all over the world. In this respect the world has indeed become a global village and some commentators even refer to global citizenship in order to explain this phenomenon.

It must be emphasised at the outset that different categories of people take part in the migration process for a variety of reasons. The first group that comes to mind is the people who emigrate to another country with the idea of making it their permanent home. The second group is those who only migrate temporarily to another state for purposes of, for example, work, study, or even extended vacation. And then there are the refugees who flee to another country for fear of political persecution so as to obtain asylum and later permanent residence.[1] In between these groups, are those persons who, for a variety of reasons such as environmental change, state fragility, and livelihood failure,

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[1]The most recent estimate by the International Organisation for Migration in the foreword of its 'World Migration Report 2010' at xix is that there are currently approximately 214 million migrants worldwide. It is further estimated that the number could rise to 405 million by 2050. Report to be found at http://www.migration4development.org/sites/m4d.emakina-eu.net/files /wmr_2010_english.pdf (accessed 8 August 2012). Bauman *Culture in a liquid modern world* (2011) 34-36 briefly discusses the three separate phases that constitutes the history of modern migration, of which the third phase 'currently in full flow and gathering momentum … introduces the age of diasporas' (35). Weedon *Identity and culture: Narratives of difference and belonging* (2009) 104 describes the formation of diasporic communities of people of African and South and East Asian descent as 'one of the main legacies of Western colonialism'.

are forced to migrate outside of the formally prescribed channels.[2] They can be described as irregular migrants, and their position is particularly precarious despite the fact that they are, in theory at least, protected by international human rights norms. Although migration is a world phenomenon, it is particularly prevalent in Africa. According to Adepoju,[3] migration in Africa specifically, displays the following trends: First, whereas migrants in Africa were traditionally men (men being the breadwinners who moved around in search of employment, women staying at home to tend to domestic tasks such as the raising of children), women are now increasingly becoming involved in migration for their own benefit. Feminisation, as Adepoju refers to this phenomenon, places great pressure on the traditional gender roles in the African family. Secondly, in the past the typical African would migrate in order to sell his or her (mostly unskilled) labour. This has changed insofar as people nowadays increasingly migrate to other states as self-employed entrepreneurs in primarily the informal sector. Adepoyu refers in this regard to the commercialisation of migration. Thirdly, the destinations of migrants were formerly located principally within the particular region itself, but economic realities have forced migration from Africa to expand to countries in other parts of the world with which the migrants very often have no cultural, religious, or linguistic ties. The potential for conflict created by situations such as this is obvious. Fourthly, migration in Africa is no longer limited to unskilled workers, but increasingly includes highly qualified professionals, often to the detriment of social upliftment and development in African states. Fifthly, migrants in and from Africa are often accused of spreading HIV/AIDS, and being involved in human trafficking. Migrants in and from Africa are, therefore, often viewed with suspicion which at times may even result in xenophobic attacks on foreigners. Migration specifically between African states, must be seen against the background of the declared objective of Africa as a region, as well as, for example, SADC as a sub-region, to promote and work towards integration.[4]

Whatever the reason for leaving one's country for another, the problems

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[2]Betts 'Soft law and the protection of vulnerable migrants' (2010) *Georgetown Immigration LJ* at 533.

[3]Adepoju 'Changing configurations of migration in Africa' dated September 2004 in Migration Information source to be found at http://www.migrationinformation.org/feature/display.cfm ?ID=251 (accessed 18 October 2012).

[4]See art 3 of the Constitutive Act of the African Union (2000) which determines, *inter alia,* in sub-article (a) that it is the objective of the Union to 'achieve greater unity and solidarity between the African countries and the peoples of Africa'. See also art 5(1)(a) of the Treaty of the Southern African Development Community (1992) in terms of which regional integration is explicitly stated as one of its aims. It is also interesting to note that the Constitution of the Republic of South Africa, 1996 in its preamble declares that '[w]e, the people of South Africa, … believe that South Africa belongs to all who live in it, united in our diversity'.

associated with the treatment of foreigners are as old as the phenomenon of migration itself. Even in biblical times a duty was placed upon Israel to recognise the human dignity of any stranger. Exodus 22 verse 21 expressly states that 'you shall neither mistreat a stranger nor oppress him, for you were strangers in the land of Egypt'. This command is repeated in Exodus 23 verse 9 which declares in the same vein that 'also you should not oppress a stranger, for you know the heart of a stranger, because you were strangers in the land of Egypt'.[5] In the 21st century, however, certain member states of the European Union refuse to allow migrant Muslims to build places of worship, or Muslim women to wear their traditional religious attire. In certain Muslim states, migrant Christians are not allowed to consume alcohol or practice their religion. Even without migration playing any role, violent clashes between Christians and Muslims in Egypt and Nigeria are a regular occurrence. In South Africa, xenophobia flares up from time to time when the local population attacks foreigners, accusing them, *inter alia,* of participation in criminal activities and keeping South Africans out of jobs. The difficulties experienced by the receiving state as a result of the migratory process are very aptly described as follows by Martiniello:[6]

> Migration is … perceived as a cause of insecurity inside states. The presence of immigrant populations is often presented as a threat to 'native' economic well-being. Immigrants and their offspring are often accused of taking jobs from nationals or of taking unfair or fraudulent advantage of rich countries' social security systems. Immigrant populations are also presented as a threat to law and order, so that immigration is associated with the rise in trans-frontier organized crime (drugs, prostitution, arms-dealing, and human-trafficking, mafias etc). Immigrants, particularly the second generation, are associated with the rise in urban criminality affecting many towns and suburban areas of Europe. Consequently, since the presence of migrants is presumed to encourage feelings of insecurities in the native population, it is sometimes used simplistically as the main reason for the rise of extreme-right parties. In this way, immigration finally appears as a threat to democracy and immigrants as 'internal enemies' who put in jeopardy our social benefits, our relative economic well-being, and even our cultural and national identity. Islam and Muslims thus become our bogey men. According to this view, Europe is suffering from galloping Islamization, threatening European cultures and values, including democracy and human rights.

From the preceding introductory remarks, it should be clear that the developments referred to have a direct bearing on certain basic concepts and the relation between them in both domestic and public international law. These

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[5] *The Holy Bible*, New King James Version (1982).
[6] Martiniello 'The new migratory Europe: Towards a proactive immigration policy?' in Parsons and Smeeding (eds) *Immigration and the transformation of Europe* (2006) at 299.

concepts include citizenship and self-determination, and their relation with human rights and specifically cultural rights. In the exposition that follows these issues will be discussed in greater detail.

2 The contemporary concept of citizenship

Linda Bosniak[7] observes as follows regarding the contemporary interest in the concept of citizenship:

> The past two decades have seen a huge outpouring of scholarly interest in the subject of citizenship. Probably no subject commands more persistent attention across the disciplines: the idea of citizenship figures centrally in constitutional theory, in political philosophy, in social theory, in cultural studies, and in legal studies. Nor does any other concept better satisfy so many kinds of normative appetites at once. Citizenship is championed by civic republicans, participatory democrats, cultural radicals, communitarians, egalitarian liberals and sometimes social conservatives, all of whom have claimed it as fulfillment of their particular moral vision.

It is suggested that this renewed interest in the concept of citizenship can be ascribed, at least partially, to the ongoing process of globalisation and the consequent ever increasing free movement (migration) of people across state borders. The emergence of a global community with a global or cosmopolitan citizenship,[8] seems to be an increasing reality.[9]

Bosniak[10] very aptly describes the influence of globalisation on the concept of citizenship as follows:

> In the past several years … the national assumption in the citizenship literature has come under increasing challenge. A growing number of scholars across the

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[7]Bosniak *The citizen and the alien: Dilemmas of contemporary membership* (2006) at 17.

[8]The idea of a universal community and cosmopolitanism is not entirely new and was already proposed by Immanuel Kant when he stated that: 'The peoples of the earth have entered in varying degrees into a universal community, and has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*. The idea of a cosmopolitan right is not fantastic and overstrained; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal right of humanity'. See Immanuel Kant *Kant: Political writings* (edited by Reiss and translated by Nisbet) (1991) (2ed) at 107-108 as quoted in Harvey 'Cosmopolitanism and the banality of geographical evils' (2000) 12 *Public Culture* at 532. See further Ochoa 'Towards a cosmopolitan vision of international law: Identifying and defining CIL post *Sosa v Alvarez-Machain*' (2005) 74 *University of Cincinnati Review* at 127.

[9]Jasentuliyana and Kiran 'Space features and human security' (1997) *Space Policy* at 261 make the interesting observation that space technology, mainly in the form of satellite broadcasting, has played a positive role in providing people in different countries with a 'window to the world'. According to them '[t]his has the potential of promoting better understanding and creating "global citizens" with a truly international, humanistic world view'.

[10]Bosniak n 7 above at 24.

> disciplines have begun to press for updated understandings of citizenship's location. They have coined new phrases – 'transnational citizenship', 'global citizenship', 'postnational citizenship' – and have revived the classic notion of 'cosmopolitan citizenship'. For some, these terms represent empirical claims about the changing nature of citizenship in practice: citizenship, they maintain, is becoming increasingly decoupled from the nation-state as a matter of fact. Others contend that citizenship *ought* to be conceived in ways that are divorced or distanced from state-belonging. The particulars of each of these arguments vary, but the common theme is that exclusively state-centered conceptions of citizenship are unduly narrow or parochial in this age of intensive globalization. Citizenship is described as increasingly denationalized, with new forms of citizenship (both above and below the state) either actually or ideally displacing the old.[11]

In contrast to Perrez,[12] who is of the opinion that globalisation typically involves a process of denationalisation, Ochoa[13] submits that the emergence of a global or cosmopolitan citizenship has not resulted in the individual becoming denationalised. The emergence of a global citizenship does, however, according to her, require a rethink of the role of citizen participation in government and governance. Seita[14] argues that the convergence of fundamental values through globalisation increases the possibility that a new perspective will develop that views membership of the human race as the most important societal relationship, aside from nationality. He also accepts that it is unlikely that nationality will be replaced as the most significant societal relationship, but is nevertheless of the opinion that globalisation and the convergence of values may in future convince people in different countries that the second most important social group is the human race, rather than a person's racial, religious or ethnic group. In some instances, nationality may

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[11]See also Venter *Global features of constitutional law* (2010) at 119-130. Citizenship is not necessarily a guarantee for equality. In fact, in many instances tribal membership is a far better guarantee for equality than citizenship of a state. In this regard Joireman 'Entrapment or freedom: Enforcing customary property rights regimes in common-law Africa' in Fenrich, Galizzi and Higgins (eds) *The future of African customary law* (2011) at 300 observes as follows: 'Customary law differs … between ethnic groups in the same country. Thus, conceptions of citizenship that bring with them ideas of equality across national space and territory are often at odds with customary law. Take, for example, the pernicious problem of land rights for migrants. Although virtually every constitution in Sub-Saharan Africa enshrines notions of citizenship that transcend ethnicity and region, migrants within a country who seek to settle in rural areas still face tremendous difficulties in either purchasing or renting land to farm, and on which to build housing. As citizens of a country, migrants should have the same rights to property all over the country. Yet, they do not, as customary land tenure systems by their nature exclude those who are not autochthones, or "sons of the soil"'.

[12]Perrez *Cooperative sovereignty from independence to interdependence in the structure of international environmental law* (2000) at 119.

[13]Ochoa 'The individual and customary international law formation' (2007) 48 *Virginia JIL* at 167.

[14]Seita 'Globalization and the convergence of values' (1997) 30 *Cornell ILJ* at 431.

be included in a regional identification. For example, the identification of being a European will replace that of the individual nationalities of the European Union.[15]

When discussing citizenship, especially in the context of migration, one has to keep in mind that, as Rainer Bauböck explains in the preface to the book by Parolin,[16] the concept of citizenship is today often used as a synonym for nationality. Whereas citizenship denotes an international dimension that can be described as the democratic participation by individuals as subjects of a sovereign political authority, nationality reflects an external dimension that empowers states to protect their nationals abroad, and entails a duty to readmit them into their territories.

States receiving migrants as one of the consequences of globalisation have to manage the cultural, religious and political differences between the various sections of the population (for example, a predominantly Christian population and a large number of Muslim migrants),[17] in order to prevent the potential for conflict between the groups from becoming a reality. Fears among the local population of being 'overrun' by foreign cultural, religious and linguistic groups, at times result in a back-lash from the locals in an attempt to protect their own positions. In this regard acquiring citizenship of their new homeland is no guarantee whatsoever that foreigners will be immune to attacks of this nature.

The influence of religion on citizenship in the Arab world has resulted in it being described by Western scholars as illiberal. Globalisation necessitates that the divide between a liberal democratic and an Islamic concept of citizenship, receive the attention of commentators in order to bridge, or at least

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[15] *Id* at 462 n 106. In this regard Hirch Ballin in an article on Turkey's possible accession to the European Union, argues that the borders of Europe are determined more by norms than by fences. He is of the opinion that in the framework of the European Union, identity is not lost, but that the walls erected over the course of history are torn down: 'Through accession to the EU, national character will be transformed into an element of diversity within unity that is inherent in the Union. ... The borders of Europe are shifting, as they have always shifted: these shifts are determined not by mountain ranges, rivers or fences, but by universal values and European norms. If these values and norms are allowed to prevail, it can be said that Turkey is part of Europe, because it is one of Turkey's characteristics to be European. For this reason, the apparent reversed prioritizing of law and economics in the enlargement of the European Union, can be understood only on the basis of values that underpin both law *and* economics.' See Hirch Ballin 'EU enlargement with reversed priorities: Law, economics and basic values in the process of Turkish accession to the European Union' (2006) 13 *Tilburg Foreign Law Review* at 41-42.
[16] Parolin *Citizenship in the Arab world: Kin, religion and the nation-state* (2009) at 9.
[17] Laurence 'Managing transnational Islam: Muslims and the state in Western Europe' in Parsons and Smeeding n 6 above at 251-273.

narrow, this divide.[18] It is suggested that this would only be possible if some common ground could be found between these two divergent concepts of citizenship – and it would seem that this common ground could be universal human rights. According to the ideology of universality of human rights, it is argued that human rights, such as the rights to equality, physical integrity, free speech, and freedom of religion and association, display a universal character, at least with regard to their general content.[19] Human rights are regarded as universal because these rights are inherent in every individual. Therefore, these rights must be applied equally and similarly, regardless of cultural differences between people.[20] In this regard Perrez[21] is even of the opinion that a comprehensive world-society-system with a common world-culture is evolving.[22] Such a common world-culture will, however, become a practical reality only if the concept of universality of human rights is accepted by states.

Held[23] is one of the proponents of the idea of a global citizenship and states that it is 'built on the fundamental rights and duties of all human beings…'.[24] If acceptance of the global nature of citizenship is not (yet) entirely a reality on a global scale, it certainly is real at the regional level in, for example, the European Union where the legal position requires individuals to accept dual citizenship of their particular member states and the Union,[25] although the Union is not a state but rather a (supranational) organisation. Since the

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[18]Parolin n 16 above at 10-11.

[19]Steiner, Alston and Goodman *International human rights in context: Law, politics, morals* (2008) (3ed) at 517.

[20]Robbins 'Powerful states, customary international law and the erosion of human rights through regional enforcement' (2005) 35 *California Western ILJ* at 277. In contrast, the proponents of cultural relativism argue that human rights are relative insofar as they are embedded in and dependent on a specific cultural context. See Steiner, Alston and Goodman n 19 above at 517. See further Ferreira and Ferreira-Snyman 'The impact of treaty reservations on the establishment of an international human rights regime' (2005) 38 *CILSA* at 171-177 for a discussion of the competing ideologies of universalism and cultural relativism.

[21]Perrez n 12 above at 114 and 117.

[22]Seita n 14 above at 462 identifies three types of commonalities essential for the formation of a society, namely shared *fundamental values* by the prospective members, the fact that prospective members *identify* themselves as belonging to the same community and the *universality of rights* by which members expect that they all are entitled to the same rights and have the same responsibilities. Also see Simma and Paulus 'The "international community": Facing the challenge of globalization' (1998) 9 *European JIL* at 266-277.

[23]Held *Global covenant: The social democratic alternative to the Washington Consensus* (2004) 115.

[24]Chidester *Global citizenship, cultural citizenship and world religions in religious education* (2002) at 12 states that '[g]lobal citizenship ... is formed on the basis of universal rights and transnational loyalties ...'.

[25]See in this regard Kostakopoulou *The future governance of citizenship* (2008) at 35-44. On European and global citizenship see Thomas *Immigration, Islam, and the politics of belonging in France: A comparative framework* (2012) at 245-260.

adoption of the Universal Declaration of Human Rights, a number of regional human rights systems have been developed.[26] Although there are certain rights that appear in all these regional instruments, these rights are interpreted differently and are consequently not equally protected or enforced.[27] The rights granted to individuals in one region may be different from those granted to individuals in another. Robbins[28] is therefore of the opinion that the establishment of regional human rights systems has diverted the focus from the universal nature of human rights, and has led to the disparate treatment of individuals from region to region.[29] She proposes that regional human rights instruments must be replaced by a centralised, universal United Nations human rights system. This will ensure that human rights are described as 'human' rather than depicted as 'European', 'African' or 'American'.[30]

Whereas some commentators view the phenomenon of universal human rights as the basis for the idea of global citizenship, others use the same phenomenon – and more specifically the ever-increasing emphasis on human rights – as motivation for the constant reduction in the importance of citizenship. Tambakaki[31] explains in this regard as follows:

> Given that one of the most elementary differences between citizenship and human rights concerns their different functions, in that citizenship is dynamic because it is exercised, while human rights are passive because they protect, it is exactly the reversal of this understanding that we today witness. The rationale behind this reversal is straightforward: since international law often challenges and limits the state, human rights that are codified in international law and transcend the state could be used to the same effect – namely, to challenge and override state actions.

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[26]These systems currently include the European system, the Inter-American system, the Arab system and the African system. A regional human rights system is also envisaged for Asia. See Robbins n 20 above at 283.
[27]*Id* at 284-287.
[28]*Id* at 287.
[29]Leino 'A European approach to human rights? Universality explored' (2002) 71 *Nordic JIL* at 455-495 is of the opinion that human rights are even not always universally applied within a particular region. He argues that the concept of *universality* of rights finds no realization in the European Union. The mere fact that member states form part of the so-called European tradition is no guarantee that they subscribe to a coherent, uniform conception of human rights. Differences in historical background, as well as in religious, cultural, legislative and political practices and traditions are partly responsible for this situation. Moreover, administrative and judicial procedures in terms of which violations of human rights are assessed vary to such an extent that human rights in the individual member states are not practically realised to the same degree. In addition, the different methods of domestic application of the European Convention for the Protection of Human Rights and Freedoms of 1950 and other international human rights instruments, result in varying levels of protection for citizens of member states.
[30]Robbins n 20 above at 302.
[31]Tambakaki *Human rights, or citizenship?* (2010) at 19.

Kostakopoulou[32] rejects the idea of a form of citizenship that excludes resident non-nationals. She refers to the following negative consequences that such exclusion may have: First, the failure on the side of a government to consult all the inhabitants in a polity, irrespective of their nationality, is damaging to democracy and violates the liberal principle of equal concern and respect.[33] Secondly, the treatment of resident non-nationals as second class individuals, is a denial of their multifarious contributions, results in powerlessness, and identity misrecognition, and causes suffering that could have been prevented.[34] Thirdly, political exclusion may lead to instability in society insofar as those who are excluded are bound to eventually take action in order to obtain visibility and empowerment.[35] She accepts that state borders will not become redundant in the foreseeable future (and as a result seems to reject the notion of a global citizenship insofar as it presupposes a borderless international society of states), and pleads for the so-called denationalisation of citizenship in favour of aliens so as to, *inter alia*, deepen democracy.[36]

Tambakaki[37] points out that commentators such as Soysal,[38] even suggest that the concept of universal personhood has replaced citizenship of the nation state as the mechanism for allocating rights and obligations to individuals (including foreigners) within the nation state itself. In many respects universal human rights replace national rights, and consequently the justification for the state's obligations to foreign populations is no longer to be found in the nation state itself, but is legitimated by ideologies grounded in a transnational community organised by international human rights codes and conventions independent of any individual's citizenship in a particular nation state.

The fact that the proponents of, on the one hand, global citizenship and, on the other hand, the diminishing importance of citizenship, in both instances base their viewpoints on the same phenomenon, namely universal human rights, is a reflection of different points of departure. Those advocating the idea of global citizenship seem to emphasise the nature of citizenship as a status,

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[32]Kostakopoulou n 25 above at 100-111.
[33]*Id* at 105.
[34]*Id* at 105-106.
[35]*Id* at 106.
[36]*Id* at 198. On 199-200 she argues as follows: 'National citizenship may have enjoyed a privileged position in both theory and practice, but … its remarkable elasticity has reached its limit. It has come up against a complexity barrier, a certain point beyond which it cannot go. To continue to sustain the exclusion of non-national residents from the democratic process on the basis of nationalistic reasoning would be fundamentally inconsistent with the egalitarian premise of citizenship and the inclusive nature of democracy. In this respect, the case for changing the basic premise of citizenship is normatively compelling.'
[37]Tambakaki n 31 above at 20.
[38]Soysal *Limits of citizenship: Migrants and postnational membership in Europe* (1994) at 145.

while those promoting the diminishing importance of citizenship, appear to emphasise the human rights content of citizenship. In the former instance the individual's enjoyment of the full complement of human rights is dependent upon the granting of citizenship on grounds determined by domestic law, while in the latter instance the individual, including a foreigner, is, theoretically at least, entitled to the full extent of the internationally guaranteed human rights.

If one employs the very broad definition of culture to simply denote 'a way of life',[39] cultural rights can be linked to almost all human rights. Elsa Stamatopoulou[40] explains as follows:

> Cultural rights are an integral part of human rights, which are interdependent and indivisible; cultural rights are one of the most eloquent demonstrations of the inter-complementarity of human rights. Since human existence is imbued with culture in its various manifestations, in fact, cultural rights are cross-cutting, they depend on the implementation of other human rights and other human rights depend on the implementation of cultural rights.

She points out that cultural rights are interrelated with civil, economic, political and social rights, in particular the rights to life, liberty and security of the person, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of association, and freedom of movement. Cultural rights also relate to the rights to participate in public affairs, to an adequate standard of living, health care, food and housing, to work, as well as to vocational guidance and training, to rest and leisure, to education, to self-determination, and to freely dispose of natural wealth and resources and means of subsistence.[41]

Although the concept of global citizenship is first and foremost linked to the phenomenon of universal human rights that transcends the sovereignty of the nation state, Chidester[42] refers to the development that 'global citizenship has also appeared in recent formations of transnational identities with their own rights, responsibilities, loyalties and values that cut across the territorial boundaries of states'. He cites the following as examples: women's citizenship, ecological citizenship, consumer citizenship, media citizenship,

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[39]The Universal Declaration on Cultural Diversity adopted by UNESCO in October 2001 defines culture in its preamble as follows: '[C]ulture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and ... encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs'.

[40]Stamatopoulou *Cultural rights in international law: Article 27 of the Universal Declaration of Human Rights and beyond* (2007) at 143.

[41]*Id* at 143-144.

[42]Chidester n 24 above at 12-13.

sexual citizenship, mobility citizenship, flexible citizenship, and cosmopolitan citizenship.[43] What would be the sense of this fragmentation of global citizenship in terms of a wide variety of aspects that exert an influence on the life of an individual not only domestically but also internationally? Does global citizenship entail the sum total of all these different 'citizenships'? And does the term 'citizenship' denote the idea of a distinction between those who enjoy the full complement of rights flowing from a particular form of citizenship, and who do not? Should one not simply describe the international legal position of, for example women, in terms of the rights contained in international human rights instruments, and the domestic legal position with reference to the rights embodied in the Bill of Rights of a particular domestic constitution?

Where does cultural citizenship find itself in this fragmented and multi-layered concept of what initially was a rather simple idea denoting a particular status in terms of which a particular individual in a particular nation state qualified to be granted certain political, social and cultural rights? Chidester[44] explains that cultural citizenship embodies the distinctive cultural identity of citizens, and asserts claims for the recognition and protection of that identity. Cultural citizenship thus refers not only to a distinctive, local identity, but also to rights, including universal human rights, to protect that specific identity.[45] Odendahl and Peters in turn, emphasise the link between state stability and cultural heritage. They formulate their viewpoint as follows:[46]

> While a specific cultural heritage is used to legitimise state institutions, it is also crucial that these institutions are able to effectively organise cultural plurality at the sub-state level. Thus, the relationship between state stability and cultural heritage works two ways: first, institutions must be based on a specific cultural heritage. Second, the integration of culturally heterogeneous groups into the institutionally organized society depends on the ability of state institutions to provide a political and legal order around which cultural plurality can be organized.[47]

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[43] See Chidester *id* at 13 and the authors he refers to.
[44] *Ibid*.
[45] *Id* at 14. Ryan *Cultural studies: A practical introduction* (2010) at 170 explicitly states as follows: 'Considered as a transnational phenomenon, culture transcends, undermines, and displaces national borders'.
[46] Odendahl and Peters 'The significance of cultural heritage for state stability' in Raue and Sutter (eds) *Facets and practices of state-building* (2009) at 266.
[47] Stamatopoulou n 40 above at 169 argues in this regard that 'the need to address historic injustices looms high on the moral and material agendas of today's societies and I maintain that respect, protection and fulfillment of cultural rights provide a significant response to such historic injustices'.

3 The concept of self-determination

The migration of people between states may have a profound effect on the composition of a state's population. A homogenous population may eventually be turned into a population consisting of a plurality of cultural, religious and linguistic communities. This, in turn, may lead to tension between the different groups insofar as the maintenance (and even extension) of their particular religions, languages, and cultural practices are concerned. In this regard it is interesting to note that research in Asia has revealed[48] that labour-receiving states display contrasting tolerance for migrants. Malaysia and Singapore maintain strict immigration policies, rigid labour contract systems, low degrees of state tolerance for civil activism on behalf of migrants, few entitlements for unskilled migrants, and a prohibition on marriage between citizens and lower-skilled contract workers. Japan and the Republic of Korea favour tight immigration controls, absence of contract labour systems, large numbers of *de facto* migrant workers with few entitlements, and relatively high degrees of tolerance for civil activism. Both these states consider themselves strictly mono-ethnic and mono-cultural, and not countries of immigration. Unskilled migrants and their families are only allowed into these countries if they are ethnically close to their respective populations.

States receiving large numbers of migrants usually employ one of the following four models to manage the cultural differences between the local population and the migrants:[49] First, assimilation into the dominant culture (the French model); secondly, creation of a common culture (the American model); thirdly, multi-culturalism, that is the protection and promotion of cultural diversity (the Canadian model); and fourthly, separation insofar as migrants are not expected to assimilate to the dominant culture, and are to a large extent denied social integration because they are allowed into the receiving state for only a limited period, such as guest workers (the German and Swiss models). Generally, a broad distinction is only made between the cultural assimilation and the cultural integration of migrants. Cultural assimilation can be defined as the process in terms of which migrants are almost totally absorbed into the culture of the host state. The result is the disappearance of cultural differences. The opposite of cultural assimilation, is the recognition of cultural diversity, also referred to as multi-culturalism.[50] Integration describes the incorporation of migrants into the different structures of the host state (economic, political, educational and social) while to a large extent maintaining their cultural

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[48]Piper 'Obstacles to, and opportunities for, ratification of the ICRMW in Asia' in Cholewinski, De Guchteneire and Pécoud (eds) *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009) at 180-181.

[49]See Kälin 'Human rights and the integration of migrants' in Aleinikoff and Chetail (eds) *Migration and international legal norms* (2003) at 273.

[50]*Id* at 272.

identities. Integration, therefore, recognises multi-culturalism and the opposite is exclusion and marginalisation.[51] Multi-culturalism, as will become clear from the rest of the discussion, is fully in line with the right to self-determination as recognised in international law.

Vrdoljak[52] identifies two components of the concept of self-determination, namely one that relates to participation, and another that concerns identity.[53] She points out that although the former has received extensive attention in the discourse on self-determination, the latter has always been inextricably linked to the cultural rights of peoples. This relationship between self-determination and cultural rights is an uneasy one, especially when considered against the background of the international human rights framework. As Vrdoljak argues, this uneasiness can be ascribed to what these two rights have in common. Both are exercised collectively, and both are aimed at preserving the identity and continued existence of the group.[54] The fact that there is an unambiguous link between cultural rights and the right to self-determination, immediately places the task of the nation state pertaining to the protection and promotion of cultural rights in the spotlight.[55] Stamatopoulou describes the duty of the state in protecting and promoting cultural rights as follows:[56]

> A human rights analysis in terms of cultural rights reveals that state responsibility expands much beyond the obligation to respect the cultural rights

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[51] *Ibid*.

[52] Vrdoljak 'Self-determination and cultural rights' in Francioni and Scheinin (eds) *Cultural human rights* (2008) at 41.

[53] It is interesting to note that according to the preamble of UNESCO's Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It (1976), 'cultural life takes the form of an assertion of identity, authenticity and dignity', while art 1(3) of its Declaration on Race and Racial Prejudice (1978) specifically refers to 'the right to maintain cultural identity'. See Donders 'A right to cultural identity in UNESCO' in Francioni and Scheinin *id* at 317-340.

[54] The debate on the question whether cultural rights should be viewed as individual or group rights is not entertained in this contribution. However, what is accepted for purposes of this exposition is that even if cultural rights are proclaimed to be individual in nature, such rights are normally exercised communally. See in this regard Vrdoljak n 52 above at 56-63.

[55] The link between cultural rights and the right to self-determination is particularly clear in s 235 of the Constitution of the Republic of South Africa, 1996 that provides as follows: 'The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.' On an international level the International Covenant on Civil and Political Rights 999 UNTS 171 (1966) as well as the International Covenant on Economic, Social and Cultural Rights UNTS 3 (1966) in their common art 1(1) confirm this link by providing as follows: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

[56] Stamatopoulou n 40 above at 111-112. See also her remarks on 246-249.

> of the individual or of minorities. In our increasingly multicultural societies, it includes the responsibility to be a fair, non heavy-handed, non-stifling, neutral, wise and necessary arbiter of possible conflicts of cultures within its boundaries, a promoter of cultural pluralism.[57]

With regard to the relation between cultural identity and nationality, Horváth[58] argues with reference to the European Court for Human Rights' decision in *Beljoudi v France,*[59] that it seems as if social and cultural ties in certain circumstances may override nationality when deciding on the question whether a person should be allowed to stay in a country where he or she maintains strong cultural ties, rather than being deported to the country of which he or she is a national. The case in question concerned the deportation of the applicant from France, where he had family ties and had lived for most of his life, to Algeria, the state of his nationality. In a concurring opinion judge Martens reasoned as follows:

> Paragraph 1 of Article 3 of Protocol No 4 (P4-3) to the Convention [Convention for the Protection of Human Rights and Fundamental Freedoms] forbids the expulsion of nationals.[60] In a Europe where a second generation of immigrants is already raising children (and where violent xenophobia is increasing to an alarming extent) it is high time to ask ourselves whether this ban should not apply equally to aliens who were born and bred in a member State or who have otherwise, by virtue of long residence, become fully integrated there (and, conversely, become completely segregated from their country of origin). In my opinion, mere nationality does not constitute an objective and reasonable justification for the existence of a difference as regards the admissibility of expelling someone from what, in both cases, may be called his 'own country'. I therefore have no hesitation in answering the above question in the affirmative. I believe that an increasing number of member States of the Council of Europe

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[57]This implies that cultural rights should not be viewed as so-called negative rights that the nation state should merely tolerate, but rather as so-called positive rights that the nation state should actively protect and promote. See in this regard the remarks of, eg, Currie and De Waal *The Bill of Rights handbook* (2005) (4ed) 629 referring to s 31(1) of the Constitution of the Republic of South Africa, 1996 which determines that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practice their religion and use their language: 'Section 31 … certainly requires non-interference with a community's initiatives to develop and preserve its culture. In addition it is likely that it requires positive measures by the state in support of vulnerable or disadvantaged cultural, religious and linguistic communities that do not have the resources for such initiatives.'

[58]Horváth 'Cultural identity and legal status: Or, the return of the right to have (particular) rights' in Francioni and Scheinin n 52 above at 183-185.

[59]*Beljoudi v France* EctHR Application no 12083/86 (1992).

[60]The Constitution of the Republic of South Africa, 1996, in s 21(2) and (3), embodies a similar principle, by providing as follows:

(2) Everyone has the right to leave the Republic.

(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.

> accept the principle that such 'integrated aliens' should be no more liable to expulsion than nationals, an exception being justified, if at all, only in very exceptional circumstances.

An unduly heavy emphasis on the preservation and continued existence of a particular group through a process of integration may, as has been pointed out, give rise to deep divisions (with the concomitant tensions) within society. Although this option may be preferable from the viewpoint of the realisation of the right to self-determination, it is nevertheless a situation that one would rather wish to avoid. But the opposite situation is equally unacceptable. Total (forced) assimilation of different cultural groups may lead to exactly the same consequences – tension that eventually may result in xenophobic attacks on migrants. It would seem that the European experiment with multi-culturalism (in the sense that migrants profited from a rather relaxed immigration and integration policy) has failed in many respects. The consequence is a serious tightening of immigration policy, and a deliberate move away from integration to assimilation of foreigners into the populations of many European states. In this regard the recent pronouncements by the political leaders of, for example, the Netherlands, France, Belgium, Germany, and the United Kingdom regarding the position of immigrants may be cited to illustrate the point in question.

In the Netherlands, where six per cent of the population is Muslim, the government decided in 2011, to move away from multi-culturalism in the sense that it will in future be expected of migrants themselves to take responsibility for obtaining the necessary knowledge and skills so as to enable them to function effectively and independently in Dutch society.[61] The government emphasised that the integration of migrants into Dutch society must take place within the framework of the historically cultural basis of the Netherlands and the values of the Dutch constitutional state. These values include freedom, responsibility, equality, tolerance, and solidarity. Yet, it has been proposed by the 2011 Dutch government, that in future it be required of migrants to learn the Dutch language, that a ban be placed on the wearing of face-covering Islamic burqas as from 1 January 2013, and that it be expected of them to relinquish their non-Dutch nationality when they qualify for naturalisation. The reason for this rather drastic change in direction, has been explained as follows by the Minister: Multi-culturalism has failed to create a unity between the different groups in the Netherlands. Cultural diversity has resulted in the creation of serious divisions between these groups. Experience

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[61] See the letter of the Dutch Minister of the Interior dated 16 June 2011 to the Dutch parliament concerning a new vision on the integration of foreigners into Dutch society to be found at http://www.rijksoverheid.nl/ministerie/bzk/documenten-en-publicaties/notas/2011/06/16/integratienota.html (accessed on 8 August 2012).

has shown that multi-culturalism does not provide a solution to the dilemma of a pluriform society. The focus of the new policy will therefore be on finding common ground between the different groups, rather than emphasising the cultural differences between them. The new policy will not focus on the different groups as such, but is based heavily on the rights and duties of the individual as a citizen of the Dutch state. In view of the process of globalisation it is necessary to re-evaluate the content of citizenship. In this regard the Dutch government is of the opinion that unity (*samenhang*), social solidarity, and mutual involvement are of the utmost importance in ensuring the participation of citizens in a pluriform society where there are often clear signs of tension between groups as a result of differences between them. This approach implies that citizenship must first and foremost be seen as conferring a duty upon people to participate in all spheres of society: in the labour market, in education, in one's own suburb and living area, by protecting and adhering to the principles of the democratic constitutional state (*rechtsstaat*), and by respecting the rights of one's fellow citizens. At the same time citizenship must keep in mind the differences in origin, viewpoints, and religion without ignoring individual and common responsibility for society as a whole. The Dutch government is therefore aiming at eliminating all factors that could be detrimental to their new view on citizenship, such as discriminatory practices. The government aims to step back, especially on the level of local issues, so as to allow citizens a much greater say in the daily running of their suburbs and immediate living areas. Whether these planned changes will be implemented remain to be seen as the Dutch coalition government collapsed in April 2012, and a general election is scheduled for September 2012.

The French government under Sarkozy, announced in 2011 that it will in future aim at placing serious limitations on migrants entering France, but here too a change in government took place in 2012, with the resultant uncertainty as to whether the new approach to migration will eventually be implemented. What is, however, important is that France offers a clear indication of the current thinking in many European states on the issue of migration. In this regard, Dimier[62] points out that the French Constitution can be interpreted in two ways. The one approach

> is assimilationist and centralising, regarding the Republic as one and indivisible, and the French nation a cultural whole. The other is more regionalist, envisaging a republic that may be indivisible, but is certainly diverse and respectful of local cultures.

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[62]Dimier 'Unity in diversity: Contending conceptions of the French nation and republic' (2004) *Western European Politics* at 838.

The 2003 version of the French Constitution describes in its first clause the French Republic as a decentralised Republic, but at the same time as one and indivisible. In addition, the Constitution proclaims French as the language of the Republic. The supporters of the first approach rely heavily on the fact that the French Republic is one and indivisible and that French is recognised as the only language. They argue strongly that only people who share the French civilisation can be part of the Republic. The proponents of the latter approach, base their arguments on the fact that the Republic is a decentralised entity and criticise the fact that the Constitution does not explicitly recognise regional languages such as Corsican, notwithstanding it being part of the diversity of French culture.[63] In this regard Horváth[64] refers to a recently (2006) enacted French law that requires, *inter alia,* that prospective immigrants to France sign a reception and integration contract with the French state in which they undertake to attend civic courses on the values of the French Republic, and to learn the French language. The law further stipulates that a disregard of these requirements will be taken into account when deciding on the renewal of the residence permits of foreigners.[65] It can be expected that the French debate will continue as the discussions on European integration gather further momentum.

In 2011 the governments of Germany under Merkel, the United Kingdom under Cameron, and Belgium under Leterme, also admitted that the once highly acclaimed experiment of multi-culturalism in their respective countries has totally failed. Merkel stated that migrants who do not speak German are not welcome in Germany. In addition, it has recently been reported that the German regional court of Cologne prohibited the Jewish and Muslim communities from performing the religious rite of circumcision as it amounts to bodily harm.[66] In a united response, both these communities have expressed their anger at the decision of the court and called on the German parliament to take the necessary legislative steps to protect the religious rights of their members. Although the ruling of the court is not applicable to the whole of Germany, the German Medical Association has nevertheless instructed all doctors not to perform any circumcisions for the time being. In the United Kingdom Cameron argued that more must be done with regard to the promotion of western values under young Muslims so, in an attempt to prevent them from becoming radicals. Leterme pointed out that migrants must adapt to Belgium society, and that in future far greater emphasis will be placed on the integration (probably rather assimilation) of migrants so as to achieve this goal.

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[63] *Id* at 836-853.
[64] Horváth n 58 above at 181-182.
[65] Article 86 of *Loi no 2006-911 du 24 juillet 2006 relative à l'immigration et à l'intégration* (JO no 170 du 25 juillet 2006 at 11047 as cited by Hovárth n 58 above at 181 n 61.
[66] See *Legalbrief TODAY* Issue 3077 dated 13 July 2012.

In addition, Israel has recently announced that it plans to deport some 60 000 African migrants back to their countries of origin, mainly Muslim countries. Although it is suspected that many of these migrants probably qualify for refugee status, the official reason advanced for their deportation, is that they pose a danger to the Zionist-Jewish way of life.[67]

These examples illustrate that states seem to be far more concerned with protecting their own right to self-determination from influences considered to pose a danger to the preservation of their way of life, than with granting minority migrant groups the right to internal self-determination. However, at the same time on international law level, developments concerning the right to self-determination of minority groups is apparently moving in the opposite direction, which is, under certain circumstances, making it easier for such groups even to secede from a particular state in order to realise their right to self-determination.[68] In this regard, the decision of the Supreme Court of Canada on Quebec[69] and the advisory opinion of the International Court of Justice on Kosovo[70] are instructive.[71] In *Quebec* it was stated that although public international law does not make provision for a right to secession, it also does not deny such a right. In *Kosovo* it was confirmed that the unilateral declaration of independence by Kosovo did not violate any rule of public international law, and was therefore permitted. The *uti possidetis* principle

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[67] See 'Israeli Court Clears Deporting South Sudan Migrants' to be found at http://www.reuters.com/article/2012/06/07/us-israel-migrants-africans-idUSBRE8560CI20120607 (accessed 8 August 2012). Migrants from time to time experience difficulties in finding a state that is prepared to accommodate them. This phenomenon exacerbates the serious plight of migrants. States sometimes even refuse to accept their own nationals who do not qualify for refugee status back into the country. In this regard it has been reported in *Legalbrief TODAY* Issue 3070 dated 4 July 2012 that the Iraqi parliament has decided to ban their own nationals, in particular Iraqi Kurds, who failed to achieve refugee status in Europe and the United Kingdom, and is consequently deported back to Iraq, from entering the country. Iraq has even threatened to impose a fine upon airlines who take part in the deportation programme.

[68] Vrdoljak n 52 above at 78 remarks in this regard as follows: 'A legacy of decolonization and the end of the Cold War for international law is an appreciation that self-determination is a process, and not a right extinguished upon independence. This realization has significant implications for its inter-relation with cultural rights, also. If self-determination is a process then it is to be realized through political, civil, social and cultural rights within a state which ensures effective participation of all inhabitants and the distinct identity of its constituent groups. The arrangements may entail the granting of extensive autonomy to groups in respect of economic, social and cultural matters. However, should there be gross violation or denial of these rights, then it becomes a matter of international concern and is no longer confined to the internal affairs of the state. In such cases, the exercise of self-determination as secession becomes the ultimate mechanism for protecting group identity and the cultural rights of its members.'

[69] *Reference re Secession of Quebec* (1998) 37 ILM 1340 pars 112, 126 and 138.

[70] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* 2010 ICJ Rep pars 56, 79 and 84. See however the separate opinions of judge Simma in pars 3, 8 and 9 and judge Yusuf in pars 2 and 6.

[71] See in this regard Dugard *International law: A South African perspective* (2011) (4ed) 99-109.

thus seems to be no bar to the exercise of the right to external self-determination in the form of secession.

One of the ways in which states tend to distinguish between the fundamental rights positions of citizens and migrants, involves the granting of the franchise only to citizens. This approach, however, is slowly changing. The prime example in this regard, is the current position in the European Union in terms of which member states allow migrants to vote on local government level.[72] If one takes into account that migrants usually have to pay tax in the country where they work and live, a strong argument can be advanced in favour of granting them at least some form of participation in the political decision-making process through the right to vote.

4 The public international and municipal law positions of migrating people

Public international law guarantees migrants the right to freedom of language, religion and culture. The emphasis is thus on the *rights* of migrants. In this regard article 27 of the International Covenant on Civil and Political Rights (1966)[73] can be cited:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[74]

This right is not only reserved for the nationals of a particular state,[75] and article 5(1)(e) and (f) of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live,[76] explicitly extends this right to non-nationals:

> Article 5
> (1) Aliens shall enjoy in accordance with domestic law and subject to the relevant international obligations of the State in which they are present, in particular the following rights: …
> (e) The right to freedom of thought, opinion, conscience and religion; the right to manifest their religion or beliefs, subject only to such

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[72]Kostakopoulou n 25 above at 110.
[73]999 UNTS 171.
[74]See also art 2 of the International Covenant on Economic, Social and Cultural Rights UNTS 3 (1967) and art 2 of the Universal Declaration of Human Rights GA res 217 (111) 1948.
[75]The Human Rights Committee established in terms of art 28 of the Covenant in its General Comment no 23 on art 27 (General Comment No 23/CCPR/C/21/Rev 1/Add 5) explicitly stated in item 5.2 that the enjoyment of this right is not limited to nationals and permanent residents.
[76]GA res 40/144 1985.

limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights of others;

(f) The right to retain their own language, culture and tradition.

In 2011, in particular, developments around multi-culturalism have seen a strong shift away from an emphasis on the rights of migrants to the duties of migrants. Public international law generally does not identify any specific duties of migrants, it being left to municipal law to determine the nature and scope of these. However, in the case of aliens, article 4 of the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, provides that 'aliens shall observe the laws of the State in which they reside or are present and regard with respect the customs and traditions of the people of that State'.

Naturally, the ideal would be to strike a balance between the rights and duties of migrants. This, it seems, can only be achieved by the recognition of the international law rights of migrants (that is, *inter alia*, to allow them to speak their own language and practice their own religion and culture), but at the same time expecting of them to become part and parcel of the society with which they have chosen to associate themselves, by, amongst others, learning the language of their new homeland, and working actively towards the promotion of its interests.

The standard of treatment of aliens in the receiving state is unfortunately not as clear as it may seem at first glance at the abovementioned documents. It is generally accepted that as far as the personal rights of aliens are concerned, the applicable standard is an international law one. With regard to the property rights of aliens, however, there is a clear difference of opinion as to the applicable standard. Third world states claim that the standard against which the legality of the nationalisation of the property of aliens, for example, should be measured is a municipal law standard, whereas developed countries insist that the standard to be used is an international law one.[77] As cultural rights are often linked to land, the uncertainty as to the standard of treatment of aliens to be employed by states, may have a direct bearing on the effective realisation of the cultural rights of migrants. In this sense international law is seriously lacking in the protection of aliens.

International instruments as well as some constitutions, such as the Constitution of the Republic of South Africa, 1996, tend to make a rather stark distinction between cultural rights, religious rights, and language rights.

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[77]Dugard n 71 above at 299-306.

Without attempting to provide a definitive definition of culture, it must be pointed out that in its broadest sense, culture would normally include religion and language. A clear interaction exists between, on the one hand, culture in its narrow sense and, on the other hand, religion and language. The interaction between culture and religion specifically, is clearly illustrated in the South African Constitutional Court's decision in *MEC for Education: KwaZulu-Natal v Pillay*[78] that concerned the refusal of a secondary school to allow a girl with a Tamil background to wear a nose stud as confirmation of both her cultural and religious beliefs. The Court described the relationship between culture and religion as follows:

> The alleged grounds of discrimination are religion and/or culture. It is important to keep these two grounds distinct. Without attempting to provide any form of definition, religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community. However, there will often be a great deal of overlap between the two; religious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum and may be based on the community's underlying religious or spiritual beliefs. Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.[79] … That is particularly so in this case where the evidence suggests that the borders between culture and religion are malleable and that religious belief informs cultural practice and cultural practice attains religious significance. As noted above that will not always be the case: culture and religion remain very different forms of human association and individual identity, and often inform peoples' lives in very different ways. But in this matter, culture and religion sing with the same voice and it is necessary to understand the nose stud in that light – as an expression of both religion and culture.[80]

What is most important for migrants in the above exposition of the court's view, is probably not so much the relation between religion and culture, but rather the fact that religion and culture (and one might add, language) is an expression of individual identity. Although many people initially thought that globalisation would contribute to a diminishing importance of the rights defining the identity of individuals, exactly the opposite has occurred. Insofar as globalisation has accentuated local awareness, consciousness, sensitivity, sentiment, and passion, it has led to an increased assertion of identity.[81]

As has been pointed out earlier in this contribution, international human rights

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[78]2008 1 SA 474 (CC).
[79]Paragraph 47.
[80]Paragraph 60.
[81]See Stamatopoulou n 40 above at 8.

instruments also apply to migrants, whatever the reason for their migration. In this sense, they may largely claim the same human rights protection as other persons travelling between states. Despite the fact that migration has become such a worldwide phenomenon, and is still growing as a result of globalisation, a comprehensive international migration regime has not yet been established.[82] The existing international law instruments are principally aimed at the protection of specific groups of migrants such as refugees[83] and workers.[84]

The position of so-called 'irregular migrants', in particular, demands urgent attention in both international and municipal law. Although these persons could in theory insist on the protection of international human rights norms, Betts[85] shows that in practice there remain serious gaps in the international system with regard to, *inter alia*, the interpretation and application of the relevant international norms, and the allocation of the responsibility to specific international institutions, when it comes to protecting these persons. He therefore suggests that the best way to deal with this problem is by way of international soft law instruments. Although soft law instruments are not binding on states, since they generally take the form of standards and guidelines, Betts[86] describes the advantages of following this path as follows:

> 'Soft law' represents a form of non-binding normative framework in which existing (often 'hard law') norms from other sources are consolidated within a single document. Soft law guidelines may, for example, be compiled through drawing upon experts or through facilitating an inter-state agreement on the interpretation of how existing legal norms apply to a particular area. The value of soft law is that it can provide clear and authoritative guidelines in given areas without the need to negotiate new binding norms.

5 Conclusion

What should one's conclusion be in view of the preceding exposition? It seems fair to emphasise the following points by way of conclusion:

- Globalisation and the consequent large-scale migration of people are phenomena that will, in all probability, increase in scope and importance in years to come. As a result of their international character, these issues

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[82] Aleinikoff 'International legal norms and migration: A report' in Aleinikoff and Chetail n 49 above at 26-27.
[83] See, eg, the Statute of the Office of the UN Commissioner of Refugees GA res 429 (V) 1950, the Convention Relating to the Status of Refugees GA res 428 (V) 1950 and the Protocol Relating to the Status of Refugees 606 UNTS 267.
[84] See, eg, the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families GA res 45/158 1991.
[85] Betts n 2 above at 535-536.
[86] *Id* at 542.

cannot be left to individual states to deal with as they please. Although one of the consequences of these processes is the diminishing importance of state boundaries and the territorial integrity of states, the sovereignty of states still requires that they be granted at least a margin of appreciation pertaining to the practical implementation of the internationally agreed upon norms and procedures governing the position of migrants. In this sense one could probably refer to the gradual development of a global citizenship.

- Citizenship as a term employed to denote the legal status of an individual, and as a concept used to distinguish between citizens and migrants, seems to be of dwindling importance. Instead, protection by states of the human rights of the individuals within their borders is becoming the real yardstick in measuring the domestic legal position of individuals, including migrants, and not so much the question whether a person is endowed with the status of citizenship. A real possibility exists that the concept of citizenship may eventually become redundant.

- The extent to which the cultural, linguistic, and religious rights of migrants are currently recognised, determine to a large extent their legal position in the receiving state. As adherence to all human rights without distinction between citizens and non-citizens grows universally, the position of migrants will consequently improve. Such a development could probably be regarded as an important contributing factor to the establishment of a so-called global citizenship. However, insofar as cultural, linguistic and religious rights, in particular, still denote the identity of individuals, states will have to give specific attention to the recognition of these rights. In this respect, it is simply not realistic to expect multi-culturalism to give way to the total integration of migrants into the populations of the receiving state.

- International human rights law, including cultural, linguistic and religious rights, is often perceived as a set of norms that should take precedence over municipal law. In this regard it is important to note that international human rights law almost exclusively deals with the rights of individuals insofar as it places a duty on states to recognise, protect and promote the rights contained in international human rights instruments. It does not primarily concern itself with the duties owed by individuals to the states in which they find themselves. These are, in the main, left to municipal law to regulate. It is against this background that the current reaction against multi-culturalism in Europe must be seen. The emphasis is increasingly shifting from the rights of migrants to their duties. The ideal situation would be to achieve a balance between the

rights and duties of aliens. One of the important issues that needs clarification in this regard, is the uncertainty with regard to the applicable standard of treatment to be applied to, for example, the property rights of aliens.

- The logical outcome of the move away from the recognition of multi-culturalism pertaining to migrants, to an almost forced assimilation of these people into the local population, is the narrowing (and in some cases almost the permanent closure) of the fundamental rights divide between these two groups, including the (limited) right to vote on (at least) local government level. As the modern world increasingly develops into a global village, a rigid distinction based on the different fundamental rights positions between the local population and migrants, cannot be sustained indefinitely. Once this gap is finally closed, the right to self-determination of migrants will probably not be taken as seriously as is currently the case.

- In terms of international law, the nation state has a duty to recognise, and where applicable promote, the different cultures within its borders. Cultural plurality is a fact of life and it is the state's duty to manage that plurality in such a way that all cultural groups experience cultural self-determination. At the same time, however, especially regional law such as in the European Union, seems increasingly to limit the sovereignty of states with regard to their treatment of aliens within their borders, and push towards equal fundamental rights positions for citizens and aliens alike. Once again the consequences of this trend are clear: the concept of citizenship will eventually become redundant and the positions of citizens and aliens will be determined solely with reference to the fundamental rights applicable to them.