

BREXIT AS AN ARBITRARY WITHDRAWAL OF EUROPEAN UNION CITIZENSHIP

*William Thomas Worster**

INTRODUCTION	95
I. INTERNATIONAL LAW ON NATIONALITY AND CITIZENSHIP	97
II. EUROPEAN UNION CITIZENSHIP	106
III. ACQUISITION OF EU CITIZENSHIP	109
IV. LOSS OF EU CITIZENSHIP	113
V. THE CASE OF BREXIT	121
CONCLUSION.....	133

INTRODUCTION

Millions of Britons are currently exercising their EU citizenship rights by living and working in other EU member states, so it was with shock that they learned that the UK electorate had voted in favor of leaving the EU (Brexit). Following the referendum, these Britons living in EU member states,¹ and the millions of Europeans living in the UK, began to fear for their status and residence rights: a fear that has not been diminished by the agreement between the EU and UK on the withdrawal terms (Withdrawal Agreement).² The reason is that, because the UK left the EU, Britons have lost their EU citizenship and the rights that attach

* The Hague University of Applied Sciences, The Hague, The Netherlands

1. There are somewhere between 1.3 and 2 million British nationals permanently resident in other EU member states. See S.O.S. FOR FOREIGN AND COMMONWEALTH AFFAIRS, THE PROCESS FOR WITHDRAWING FROM THE EUROPEAN UNION, 2016, Cm. 9216, ¶ 4.2 (UK); Asa Bennett, *What Will Brexit Mean for British Expats?*, TELEGRAPH (June 24, 2016), <http://www.telegraph.co.uk/news/2016/05/18/eu-facts-what-would-leaving-the-eu-mean-for-expats/> [<https://perma.cc/9PMF-6QTA>].

2. See Council Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Nov. 12, 2019, 2019 O.J. (C 384) 1 [hereinafter Withdrawal Agreement]; Rowena Mason, *EU Citizens in UK Face Brexit Uncertainty*, THE GUARDIAN (May 15, 2016), <https://www.theguardian.com/politics/2016/may/15/eu-citizens-uk-brexite-uncertainty-immigration-status-referendum> [<https://perma.cc/74J6-H4GY>] (Lord Keen of Elie, advocate general for Scotland and government’s home affairs spokesman in the House of Lords, replied to a question in the House of Lords that “UK citizens get the right to live and work in the other 27 member states from our membership of the EU. If the UK voted to leave the EU, the government would do all it could to secure a positive outcome for the country, but there would be no requirement under EU law for these rights to be maintained.”).

to that status. Chiefly among these rights is that EU citizens enjoy freedom of movement and residence within the EU, protection against discrimination on grounds of nationality, the right to vote in municipal and European Parliament elections, and consular protection by any EU member state. Without EU citizenship status, and without such rights, Britons cannot reside in the EU unless they obtain burdensome permission under domestic law. British nationals must now register as foreign nationals, subject to the domestic immigration laws of various EU member states and the provisions of the Withdrawal Agreement, prior to differing deadlines as late as December 2021.³ After this deadline, the status of British nationals in EU member states is presumably the same as that of any other unlawfully present foreign national.

This Article, however, will challenge the assumption that UK nationals have lost EU citizenship following Brexit because it amounts to an arbitrary withdrawal of citizenship, prohibited by international law. In turn, this Article argues that British nationals should continue to enjoy the rights and status of EU citizens beyond the registration deadlines at the end of 2021. The current public debate, and the Withdrawal Agreement itself, assumes that loss of EU citizenship is the automatic result of Brexit. Currently much of the discussion relies heavily on a narrative informed by the Vienna Convention on the Law of Treaties (VCLT) and general principles of international institutional law. These sources are quite valid for discussing the membership of a state in an international organization, but this narrative overlooks the law on human rights that applies to individuals. This argument is based on the right against arbitrary withdrawal of nationality in international law, and the evolving nature of EU citizenship being assimilated to a quasi-nationality.

3. See, e.g., FOREIGN COMMONWEALTH & DEVELOPMENT OFFICE, SPECIALISED COMMITTEE ON CITIZENS' RIGHTS: THIRD JOINT REPORT ON THE IMPLEMENTATION OF RESIDENCE RIGHTS UNDER PART 2 OF THE WITHDRAWAL AGREEMENT (UK), <https://www.gov.uk/government/publications/residence-rights-implementation-of-the-withdrawal-agreement-part-2-citizens-rights-third-joint-report-april-2021/specialised-committee-on-citizens-rights-third-joint-report-on-the-implementation-of-residence-rights-under-part-2-of-the-withdrawal-agreement> (reporting registration deadlines in EU Member States ranging from June 30 to December 31, 2021); *Living in the Netherlands After Brexit*, IMMIGRATION AND NATURALISATION SERVICE, <https://ind.nl/en/Pages/Living-in-the-Netherlands-after-Brexit.aspx> [<https://perma.cc/X3NN-FUJM>] (last visited Oct. 1, 2021); *Living in the Netherlands Under the Brexit Agreement*, IMMIGRATION AND NATURALISATION SERVICE, [https://ind.nl/en/Pages/Brexit-\(UK-Withdrawal-Agreement\).aspx](https://ind.nl/en/Pages/Brexit-(UK-Withdrawal-Agreement).aspx) [<https://perma.cc/QL5U-4WHV>] (last visited Oct. 1, 2021) (reporting on the deadline in the Netherlands of September 30, 2021).

In reaction to this potential change in status, at least one British national has already challenged her loss of EU citizenship before the Court of Justice of the European Union, which remains pending at the time of this Article. See Case C-673/20, *EP v Préfet du Gers & Institut National de la Statistique et des Études Économiques* (currently pending)

Some scholars have argued that “since the UK insists that it can no longer accept free movement, it cannot both have its cake and eat it. You cannot be in the Single Market without accepting its cardinal principles.”⁴ Surely, it is correct that when a member state is no longer a member of the EU that the benefits of the EU treaties no longer apply to its nationals. While this conclusion may assert an argument that is just, it is not the law. This Article will not challenge the right of the UK to leave the EU. The Lisbon Treaty clearly provides a right for states to leave the EU and necessarily lose all rights in the Union, such as participation in the common market. Instead, this Article will argue that the exit of an EU member state does not necessarily take its nationals with it.

I. INTERNATIONAL LAW ON NATIONALITY AND CITIZENSHIP

A key question for this Article is whether EU citizenship benefits from the same human rights protections that nationality enjoys under international law. The first part of this Article will briefly discuss the protection of nationality under international law.

The International Court of Justice considers nationality to be 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.”⁵ While nationality has social and emotional significance, as well as significance for an individual’s identity, as far as law is concerned nationality is reducible to a legal concept.⁶ That concept is one of a legal bond. That bond, in turn, grants an individual a status that provides for certain rights and duties under the law.⁷

Nationality is primarily, and for the purposes of international law, only, a legal status, although that statement is not meant to diminish the important social, cultural, local, and linguistic ties.⁸ While it often

4. Joseph Weiler, *The Case for a Kinder, Gentler Brexit*, EJIL:TALK! (Feb. 6, 2017), <http://www.ejiltalk.org/editorial-the-case-for-a-kinder-gentler-brexite/#more-14969> [https://perma.cc/DH5E-JPTB].

5. Nottebohm (Liech. v. Guat.), Judgment, 1955 I.C.J. 4, 23 (Apr. 6) (“According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, 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.”); ALBRECHT RANDELZHOFFER, *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 502 (3d ed. 1997) (“Nationality as a legal term denotes the existence of a legal tie between an individual and a State, by which the individual is under the personal jurisdiction of that State.”).

6. See Int’l Law Comm’n, Rep. on the Work of its Fifth Session, ¶ 130, U.N. Doc. A/CN.4/76 (1953); CARMEN TIBURCIO, *THE HUMAN RIGHTS OF ALIENS UNDER INTERNATIONAL AND COMPARATIVE LAW* 3 (2001).

7. See PAUL WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW* 29 (2d ed. 1979).

8. See JACK M. BARBALET, *CITIZENSHIP* 20 (1988); Audrey Macklin, *Who is the Citizen’s Other? Considering the Heft of Citizenship*, 8 *THEORETICAL INQUIRIES* L. 333, 334 (2007); Linda Bosniak, *Citizenship Denationalized*, *IND. J. GLOB. LEGAL STUD.* 447, 452–89 (2000); David

involves social links to the state, nationality or citizenship is essentially the “juridical expression” of that social bond.⁹

International law largely leaves questions of the acquisition and loss of nationality to states, although increasing international law does present some limitations to state discretion in this matter.¹⁰ For example, the Permanent Court of International Justice famously stated that there was no *a priori* reason that international law could not govern nationality law, which would only depend on the state of the development of the law.¹¹ Although states have a wide range of discretion in how they award their nationality, and other states will presume that the grant of nationality is effective,¹² those acts of state do not necessarily have to be recognized and given legal effect by other states, where those nationality grants are inconsistent with international law.¹³ International law also imposes limitations on revocation of nationality, which are in fact more intrusive into a state’s discretion than any restrictions on nationality acquisition.¹⁴

Held, *Between State and Civil Society: Citizenship*, in CITIZENSHIP 20 (Geoff Andrews ed., 1991); Michael Walzer, *Citizenship*, in POLITICAL INNOVATION AND CONCEPTUAL CHANGE 211 (Terrence Ball et al. eds., 1989).

9. See *Liech. v. Guat.*, 1955 I.C.J. at 23 (“[C]onstitute[s] the juridical expression of the fact that the individual upon whom it is conferred . . . is in fact more closely connected with the population of the State conferring nationality than with that of any other State.”).

10. See *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7); *Exchange of Greek and Turkish Populations*, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 10, at 19 (Feb. 21); *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A.) No. 4, ¶¶ 58–63 (Jan. 19, 1984); *Int’l Law Comm’n, Rep. on the Work of its Fifty-First Session*, U.N. Doc. A/54/10 (1999), reprinted in [1999] II(2) Y.B. Int’l L. Comm’n 23, U.N. Doc. A/CN.4/SER.A/1999/Add.1 [hereinafter *Draft Articles on Nationality*]; 1 ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW* 852–56 (9th ed. 2008); LASSA OPPENHEIM, *INTERNATIONAL LAW* 642 (8th ed. 1955) (“Nationality of an individual is his quality of being a subject of a certain State, and therefore its citizen. It is not for international law but for municipal law to determine who is, and who is not, to be considered a subject”). See generally William Thomas Worster, *European Union Citizenship and the Unlawful Denial of Member State Nationality*, 43 *FORDHAM INT’L L.J.* 767 (2020).

11. See *Nationality Decrees Issued in Tunis and Morocco*, 1923 P.C.I.J. (ser. B) No. 4, at 24 (“The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.”).

12. See *Draft Articles on Nationality*, *supra* note 10, art. 4, cmt. 7.

13. See *Convention on Certain Questions Relating to the Conflict of Nationality Laws* art. 1, Apr. 12, 1930, 179 L.N.T.S. 89 [hereinafter 1930 Hague Convention]; *European Convention on Nationality* art. 7, Nov. 6, 1997, E.T.S. No. 166; *Nationality Decrees Issued in Tunis and Morocco*, 1923 P.C.I.J. (ser. B) No. 4, at 24; *Liech. v. Guat.*, 1955 I.C.J. at 22; *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Inter-Am. Ct. H.R. (ser. A.) No. 4, ¶¶ 52–68; John Dugard (Special Rapporteur), *First Rep. on Diplomatic Protection*, U.N. Doc. A/CN.4/506 (Mar. 7, 2000).

14. See 1930 Hague Convention, *supra* note 13, art. 1; *European Convention on Nationality*, *supra* note 13, art. 3(2); RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* 121–67 (2d ed. 1994).

As far as human rights are concerned, everyone has a right to a nationality that prevents his or her state from revoking their nationality in an arbitrary, discriminatory manner.¹⁵ With the emergence of human rights law in the post-World War II era, and the inclusion of the right to a nationality in many major human rights treaties, the pendulum has confidently swung away from state discretion and in favor of the individual holding the right to a nationality.¹⁶ Part of the reasoning for the protection of nationality is that individuals have a “legitimate interest” in their nationality,¹⁷ and their nationality needs to be protected “as a means for ensuring greater juridical security for States and for individuals.”¹⁸ Some scholars have gone so far as to argue that deprivation of nationality is such a fundamental infringement on the security of the person that it requires “an overriding public interest and is

15. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 271 (Dec. 10, 1948); G.A. Res. 2200 (XXI), International Covenant on Civil and Political Rights, arts. 12(4), 26 (Dec. 16, 1966); American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123; European Convention on Nationality, *supra* note 13, art. 7; African Charter on Human and Peoples’ Rights art. 12(2), June 27, 1981, 1520 U.N.T.S. 217; Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175 [hereinafter Reduction of Statelessness]; Eri.-Eth. Claims Comm’n – Partial Award: Civilian Claims – Eritrea’s Claims 15, 16, 23 and 27–32 (Eri. v. Eth.), 26 R.I.A.A. 195 (Perm. Ct. Arb. 2004) [hereinafter Eritrea’s Claims]; Human Rights Council Res. 32/5, U.N. Doc. A/71/53, at 176 (June 30, 2016); Human Rights Council Res. 26/14, U.N. Doc. A/69/53, at 164 (June 26, 2014); Human Rights Council Res. 20/4, U.N. Doc. A/67/53, at 141 (July 5, 2012); Human Rights Council Res. 20/5, U.N. Doc. A/67/53, at 143 (July 5, 2012); Human Rights Council Res. 13/2, U.N. Doc. A/65/53, at 77 (Mar. 24, 2010); Human Rights Council Res. 10/13, U.N. Doc. A/64/53, at 54 (Mar. 26, 2009); Human Rights Council Res. 7/10, U.N. Doc. A/63/53, at 101 (Mar. 27, 2008); Human Rights Commission Res. 2005/45, U.N. Doc. E/2005/23, at 187 (Apr. 19, 2005); Human Rights Commission Res. 1999/28, U.N. Doc. E/1999/23, at 116 (Apr. 26, 1999); *id.* ¶ 2; Human Rights Commission Res. 1998/48, U.N. Doc. E/1998/23, at 160, ¶ 2 (Apr. 17, 1998); Human Rights Commission Res. 1997/36, U.N. Doc. E/1997/23, at 122, ¶ 2 (Apr. 11, 1997); *Yean & Bosico Children v. Dominican Republic*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005); U.N. Secretary-General, *Human Rights and Arbitrary Deprivation of Nationality*, U.N. Doc. A/HRC/25/28 (Dec. 19, 2013) [hereinafter *Arbitrary Deprivation of Nationality* 2013 Report].

Furthermore, denial of nationality might even raise a violation of Article 8 of the European Convention on Human Rights (the UK and all states of the EU are party, though the EU itself is not) if it were to violate rights to family and private life (identity). See *Ramadan v. Malta*, App. No. 76136/12, ¶ 62 (June 21, 2016), <http://hudoc.echr.coe.int/eng?i=001-163820> [<https://perma.cc/5TCX-ERJF>]; *Genovese v. Malta*, App. No. 53124/09, ¶ 30 (Oct. 11, 2011), <http://hudoc.echr.coe.int/eng?i=001-106785> [<https://perma.cc/XP3E-MS9S>]; *Savoia v. Italy*, App. No. 8407/05 (July 11, 2006), <http://hudoc.echr.coe.int/eng?i=001-76690> [<https://perma.cc/5ZNY-54FH>]; *Slivenko v. Latvia*, 2002-II Eur. Ct. H.R. 467, 486; *Karashev v. Finland*, 1999-II Eur. Ct. H.R. 403.

16. See Ineta Ziemele & Gunnar G. Schram, *Article 16*, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 301–02 (Gudmundur Alfredsson & Asbjørn Eide eds., 1999) (describing the debate over the inclusion and articulation of the right to a nationality in the Universal Declaration).

17. See *Draft Articles on Nationality*, *supra* note 10, pmb., cmt. 5.

18. See *id.* pmb.

subject to proportionality.”¹⁹ That being said, which state owes the individual a nationality remains unclear, so this is how we see the residual right to grant nationality being retained by states, so again, if the person is a dual national, this protection may not be of any help.

The limitation on arbitrary revocation has two aspects: procedure and substance.²⁰ The Court of Justice of the European Union (CJEU) has recognized the restriction on arbitrary revocation of nationality as a “general principle of international law”²¹ although it is unclear whether the Court only views the procedural protection or also the substantive protection as a part of that principle. Thus, a state must have a legal basis for the revocation of nationality and provide for legal process to challenge a revocation decision²² but it must also have a legitimate aim that is proportionate to an important state interest,²³ even if it has the legal basis and process.²⁴ In this sense, we can say that the individual must have the

19. See Kay Hailbronner, *Revocation of Citizenship of Terrorists: A Matter of Political Expediency*, in *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, 23, 23 (Eur. Univ. Inst., Working Paper RSCAS 2015/14) (“It is true that citizenship establishes a special relationship based upon security and stability. Security and stability on the side of the individual citizen require that denationalisation remains a rare exception. Citizenship implies rights, whether it is designated as a privilege, as a right to have rights or as a contract. For that reason deprivation of citizenship requires an overriding public interest and is subject to proportionality.”).

20. See *Arbitrary Deprivation of Nationality* 2013 Report, *supra* note 15, ¶ 40; U.N. Secretary-General, *Human Rights and Arbitrary Deprivation of Nationality*, ¶ 49, U.N. Doc. A/HRC/10/34 (Jan. 26, 2009).

21. See Case C-135/08, *Rottmann v. Freistaat Bayern*, 2010 E.C.R. I-1449, I-1489 (“That conclusion is, moreover, in keeping with the general principle of international law that no one is arbitrarily to be deprived of his nationality, that principle being reproduced in Article 15(2) of the Universal Declaration of Human Rights and in Article 4(c) of the European Convention on nationality. When a State deprives a person of his nationality because of his acts of deception, legally established, that deprivation cannot be considered to be an arbitrary act.”); see also *European Convention on Nationality*, *supra* note 13, art. 4(c).

22. See *European Convention on Nationality*, *supra* note 13, arts. 7, 12; *id.* Explanatory Report, ¶ 36 (providing that denaturalization must be foreseeable, proportional and provided in law); *Ivcher Bronstein v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 74, ¶ 95 (Feb. 6, 2001); U.N. Secretary-General, *Human Rights and Arbitrary Deprivation of Nationality*, ¶¶ 43–46, U.N. Doc. A/HRC/13/34 (Dec. 14, 2009); *Arbitrary Deprivation of Nationality* 2013 Report, *supra* note 15, ¶ 40; *Draft Articles on Nationality*, *supra* note 10, art. 17; Int’l Covenant on Civil and Political Rights, Comment No. 27: Freedom of Movement (Article 12), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 1, 1999) [hereinafter *Freedom of Movement*].

23. See *Elettronica Sicula S.p.A. (U.S. v. It.)*, Judgment, 1989 I.C.J. 15, ¶ 128 (July 20) (“Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law.” (citing *Asylum (Colom./Peru)*, Judgment, 1950 I.C.J. 266, 284 (Nov. 20))); *Eritrea’s Claims*, *supra* note 15; *Freedom of Movement*, *supra* note 22, ¶ 21; see also *Stewart v. Canada*, H.R.C. Views No. 538/1993, ¶ 8, U.N. Doc. CCPR/C/58/D/538/1993 (1996) (Evatt, Medina Quiroga, & Aguilar Urbina, dissenting).

24. See *Van Alphen v. Netherlands*, H.R.C. Views No. 305/1988, ¶ 5(8), U.N. Doc. CCPR/C/39/D/305/1988 (1990); *A v. Australia*, H.R.C. Views No. 560/1993, ¶ 9(2), U.N. Doc. CCPR/C/59/D/560/1993 (1997); *Freedom of Movement*, *supra* note 22; *Maurice Kamto (Special*

right to retain their nationality and only lose it when they intend to do so or when they commit acts where the possibility of loss of nationality was clearly predictable and proportionate to the act.

Historically some states have entered into treaties to dispose of their nationals' nationality;²⁵ however, this practice has now essentially ended and it is generally understood that individuals in, for example, transferred territory, should have a choice in the change of their nationality.²⁶ For example, the U.S. changed its practice to abolish revocation of nationality upon extended residence abroad,²⁷ and then eventually also abolished all revocation of nationality that is done against the wishes of the national.²⁸ However, choosing to retain the old nationality might mean that the person must leave the ceded territory. In a recent example, India and Bangladesh exchanged a great number of outstanding micro-enclaves. Whereas in prior agreements that exchanged some enclaves, the affected residents had to change their nationality to that of the new state,²⁹ in the most recent agreement exchanging the remaining enclaves, the affected individuals were given a choice of nationality.³⁰ We can compare this emerging rule to the long standing rule against forcible nationalization of residents or other persons over whom a state may wish to extend its allegiance.³¹

Rapporteur), *Eighth Rep. on the Expulsion of Aliens*, U.N. Doc. A/CN.4/651 (Mar. 22, 2012); Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, ¶¶ 35–45, U.N. Doc. A/69/10 (2014); Hailbronner, *supra* note 19.

25. See Treaty of Rapallo, It.-Kingdom S.H.S., Nov. 12, 1920, 34 L.N.T.S. 397; Legal and Financial Convention, Czech-Czech., Apr. 23, 1925, 1926 L.N.T.S. 335; Convention Concerning the Exchange of Greek and Turkish Populations, Greece-Turk., art. 7, Jan. 30, 1923, 32 L.N.T.S. 76 (“The emigrants will lose the nationality of the country which they are leaving, and will acquire the nationality of the country of their destination, upon their arrival in the territory of the latter country.”); Treaty Concerning the Transcarpathian Ukraine, Czech-U.S.S.R., Protocol, art. II, June 29, 1945, 1964 U.N.T.S. 310; Treaty, Pol.-U.S.S.R., July 6, 1945, Treaty, Pol.-U.S.S.R., Aug. 10, 1945, 10(II) U.N.T.S. 61 (1947); Communiqué Concerning the Agreement Between the U.S.S.R. and Poland Relating to the Change of Nationality and Repatriation, *reprinted in* Soviet News, Soviet-Polish Relations (1946); Berlin (Potsdam) Conference art. 12, 3 BEVANS 1224; Dziennik Ustaw No. 106 (1946) (providing for Polish nationality for the inhabitants of the annexed territory); Treaty of Peace, It.-U.S., arts. 19–20, Feb. 10, 1947, 61 Stat. 1245, 49 U.N.T.S. 3 (providing for nationality of persons in ceded territories).

26. See *In re Rau*, 6 I.L.R. 251, 251 (1930).

27. See *Schneider v. Rusk*, 377 U.S. 163, 168–69 (1964).

28. See *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

29. See Border Agreement, Bangl.-India, May 16, 1974, *reprinted in* 20 FOREIGN AFFS. REC. 158 (1974); Indo-Pakistan Agreement on East Pakistan Border Disputes, India.-Pak., Oct. 23, 1959, 362 U.N.T.S. 3; Joint Communiqué by P.M.s Nehru & Noon, Sept. 12, 1958, *reprinted in* 28 FOREIGN AFFS. REC. 25 (1982).

30. See Suhasini Haidar, *90% of Enclave Dwellers Give Choice of Nation*, THE HINDU (July 16, 2015), <http://www.thehindu.com/news/national/90-of-enclave-dwellers-give-choice-of-nation/article7426638.ece> [https://perma.cc/54NN-QVYM].

31. See *Draft Articles on Nationality*, *supra* note 10, art. 8(2) (“A successor State shall not

In cases of state succession and the adoption of new nationality laws, some people are at an increased risk of losing their nationality against their will. The International Law Commission (ILC) dealt with this risk by preparing *Draft Articles on Nationality of Natural Persons in relation to the Succession of States* to protect individuals' nationality.³² Obviously, these articles cover situations of the emergence of new states, merger of existing states, and the possible extinction of a prior one.³³ Where it does consider the secession of a state from another, the draft articles provide that there is a presumption that nationality and territory run together, *i.e.* that a person acquires the nationality of the place of usual residence upon that territory's change in character.³⁴ But this presumption can be rebutted based on the individual's right to opt for nationality of the new or former state,³⁵ because "the juridical relationship of nationality should not be based on formality or artifice, but on a real connection between the individual and the State."³⁶ It is true that many treaties in the past disposed of nationality, but the ILC identified the dominant practice as providing for a right of option in those cases, as long as the person maintained some connection to the state.³⁷ This practice is

attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless."); *id.* art. 11(1) ("States concerned shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned."); *see also* WEIS, *supra* note 8, at 102.

32. *Draft Articles on Nationality*, *supra* note 10.

33. *See Draft Articles on Nationality*, *supra* note 10, pmbl.

34. *See id.* art. 5

35. *See id.* art. 5, cmt. 2

36. *Id.* art. 5, cmt. 4; *see also* 1 DANIEL P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 518 (1967) ("the most satisfactory test"); Ian Brownlie, *The Relations of Nationality in Public International Law*, 39 BRIT. Y.B. INT'L L. 284, 318 (1963).

37. *See generally Draft Articles on Nationality*, *supra* note 10, art. 11, cmt. 2 (citing *inter alia* Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), June 28, 1919, 42 Stat. 1939, 225 Consol. T.S. 18891(2); Treaty of Peace Between the Allied and Associated Powers and Austria, Sept. 10, 1919; Treaty Between the Principal Allied and Associated Powers and Poland, June 28, 1919; Treaty Between the Principal Allied and Associated Powers and Czechoslovakia, Sept. 10, 1919; Treaty Between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State, Sept. 10, 1919; Treaty of Paris Between the Principal Allied and Associated Powers and Romania, Dec. 9, 1919; Treaty of Peace Between the Allied and Associated Powers and Bulgaria, Feb. 10, 1947; Treaty of Peace Between the Allied and Associated Powers and Hungary, June 4, 1920; Treaty of Peace Between Finland and the Soviet Government of Russia, Oct. 14, 1920; Treaty of Peace, July 24, 1923; Treaty of Peace with Italy, Feb. 10, 1947; Agreement Between India and France for the Settlement of the Question of the Future of the French Establishments in India, Oct. 21, 1954; Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, India-Fr, May 28, 1956)).

For a more contemporary example, see e.g., Transfer of Walvis Bay to Namibia Act, Act No. 203 of 1993 (Jan. 28, 1994), § 5(1) (S. Afr.) ("... any person who is ordinarily resident in Walvis Bay and who immediately prior to the date of transfer was a South African citizen and elects to retain South African citizenship, shall continue to be a South African citizen after that date, and

in keeping with the evolution of human rights to view nationality and/or citizenship as part of a person's identity, and thus protected by human rights law.³⁸

Some jurisprudence has evolved to give more content to the prohibition on arbitrary revocation. Substantive arbitrariness would certainly include certain grounds of discrimination,³⁹ including race,⁴⁰

such a person shall continue to be entitled to reside in Walvis bay.”).

38. See *Yean & Bosico Children v. Dominican Republic*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005) (concluding that by not granting children nationality, the state violates Article 8 of the Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3); U.N. Secretary-General, *Impact of the Arbitrary Deprivation of Nationality on the Enjoyment of the Rights of Children Concerned, and Existing Laws and Practices on Accessibility for Children to Acquire Nationality, inter alia, of the Country in Which They Are Born, if They Otherwise Would Be Stateless*, U.N. Doc. A/HRC/31/29 (Dec. 16, 2015); U.N. Secretary-General, *Status of the Convention of the Rights of the Child*, U.N. Doc. A/68/257 (Aug. 2, 2013) ¶ 57.

39. See U.N. GAOR, 3d Sess., 123d mtg. at 352, U.N. Doc. A/C.3/SR.123 (Nov. 5, 1948) (Eleanor Roosevelt stated that “individuals should not be subjected to action such as was taken during the nazi [sic] régime in Germany when thousands had been stripped of their nationality by arbitrary government action”).

40. See, e.g., *Reduction of Statelessness*, *supra* note 15, art. 9; International Convention on the Elimination of All Forms of Racial Discrimination art. 5, *adopted* Dec. 21, 1965, T.I.A.S. No. 94-1120, 660 U.N.T.S. 195 [hereinafter ICERD]; European Convention on Nationality, *supra* note 13, art. 5(1); Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7, at 15 (Sept. 15); H.R.C. Res. 20/5, *supra* note 15; H.R.C. Res. 13/2, *supra* note 15; H.R.C. Res. 10/13, *supra* note 15; H.R.C. Res. 7/10, *supra* note 15; H.R.C. Res. 2005/45, *supra* note 15; H.R.C. Res. 1999/28, *supra* note 15; *id.* ¶ 2; H.R.C. Res. 1998/48, *supra* note 15, ¶ 2; H.R.C. Res. 1997/36, *supra* note 15, ¶ 2; *Draft Articles on Nationality*, *supra* note 10, art. 15.

color,⁴¹ national origin,⁴² ethnicity,⁴³ gender⁴⁴ or sex,⁴⁵ religion,⁴⁶ social origin⁴⁷ language,⁴⁸ property,⁴⁹ birth⁵⁰ or “other status,”⁵¹ and political⁵² or “other opinion,”⁵³ although this list is probably not exclusive.⁵⁴ Other arbitrary revocations are not necessarily based on discrimination. For

41. See, e.g., Reduction of Statelessness, *supra* note 15, art. 9; ICERD, *supra* note 40, art. 5; European Convention on Nationality, *supra* note 13, art. 5(1); Acquisition of Polish Nationality, 1923 P.C.I.J. (ser. B) No. 7, at 15; H.R.C. Res. 20/5, *supra* note 15; H.R.C. Res. 13/2, *supra* note 15; H.R.C. Res. 10/13, *supra* note 15; *Draft Articles on Nationality*, *supra* note 10, art. 15.

42. See, e.g., Reduction of Statelessness, *supra* note 15, art. 9; ICERD, *supra* note 40, art. 5; European Convention on Nationality, *supra* note 13, art. 5(1); Acquisition of Polish Nationality, 1923 P.C.I.J. (ser. B) No. 7, at 15; H.R.C. Res. 20/5, *supra* note 15; H.R.C. Res. 13/2, *supra* note 15; H.R.C. Res. 10/13, *supra* note 15; H.R.C. Res. 7/10, *supra* note 15; H.R.C. Res. 2005/45, *supra* note 15; H.R.C. Res. 1999/28, *supra* note 15; *id.* ¶ 2; H.R.C. Res. 1998/48, *supra* note 15, ¶ 2; H.R.C. Res. 1997/36, *supra* note 15, ¶ 2; *Draft Articles on Nationality*, *supra* note 10, art. 15.

43. See, e.g., Reduction of Statelessness, *supra* note 15, art. 9; ICERD, *supra* note 40, art. 5; European Convention on Nationality, *supra* note 13, art. 5(1); Acquisition of Polish Nationality, 1923 P.C.I.J. (ser. B) No. 7, at 15; H.R.C. Res. 7/10, *supra* note 15; H.R.C. Res. 2005/45, *supra* note 15; H.R.C. Res. 1999/28, *supra* note 15; *id.* ¶ 2; H.R.C. Res. 1998/48, *supra* note 15, ¶ 2; H.R.C. Res. 1997/36, *supra* note 15, ¶ 2; *Draft Articles on Nationality*, *supra* note 10, art. 15.

44. See, e.g., H.R.C. Res. 7/10, *supra* note 15; H.R.C. Res. 2005/45, *supra* note 15; H.R.C. Res. 1999/28, *supra* note 15; *id.* ¶ 2; H.R.C. Res. 1998/48, *supra* note 15, ¶ 2; H.R.C. Res. 1997/36, *supra* note 15, ¶ 2.

45. See, e.g., Reduction of Statelessness, *supra* note 15, art. 9; ICERD, *supra* note 40, art. 5; European Convention on Nationality, *supra* note 13, art. 5(1); Acquisition of Polish Nationality, 1923 P.C.I.J. (ser. B) No. 7, at 15; H.R.C. Res. 20/5, *supra* note 15; H.R.C. Res. 13/2, *supra* note 15; H.R.C. Res. 10/13, *supra* note 15; *Draft Articles on Nationality*, *supra* note 10, art. 15.

46. See, e.g., Reduction of Statelessness, *supra* note 15, art. 9; ICERD, *supra* note 40, art. 5; European Convention on Nationality, *supra* note 13, art. 5(1); Acquisition of Polish Nationality, 1923 P.C.I.J. (ser. B) No. 7, at 15; H.R.C. Res. 20/5, *supra* note 15; H.R.C. Res. 13/2, *supra* note 15; H.R.C. Res. 10/13, *supra* note 15; H.R.C. Res. 7/10, *supra* note 15; H.R.C. Res. 2005/45, *supra* note 15; H.R.C. Res. 1999/28, *supra* note 15; *id.* ¶ 2; H.R.C. Res. 1998/48, *supra* note 15, ¶ 2; H.R.C. Res. 1997/36, *supra* note 15, ¶ 2; *Draft Articles on Nationality*, *supra* note 10, art. 15.

47. See, e.g., H.R.C. Res. 20/5, *supra* note 15; H.R.C. Res. 13/2, *supra* note 15; H.R.C. Res. 10/13, *supra* note 15.

48. See, e.g., H.R.C. Res. 20/5, *supra* note 15; H.R.C. Res. 13/2, *supra* note 15; H.R.C. Res. 10/13, *supra* note 15.

49. See, e.g., H.R.C. Res. 20/5, *supra* note 15; H.R.C. Res. 13/2, *supra* note 15; H.R.C. Res. 10/13, *supra* note 15.

50. See, e.g., H.R.C. Res. 20/5, *supra* note 15; H.R.C. Res. 13/2, *supra* note 15; H.R.C. Res. 10/13, *supra* note 15.

51. See, e.g., H.R.C. Res. 20/5, *supra* note 15; H.R.C. Res. 13/2, *supra* note 15; H.R.C. Res. 10/13, *supra* note 15.

52. See, e.g., H.R.C. Res. 10/13, *supra* note 15; H.R.C. Res. 7/10, *supra* note 15; H.R.C. Res. 2005/45, *supra* note 15.

53. See, e.g., H.R.C. Res. 20/5, *supra* note 15; H.R.C. Res. 13/2, *supra* note 15; H.R.C. Res. 10/13, *supra* note 15.

54. See, e.g., Reduction of Statelessness, *supra* note 15, art. 9; ICERD, *supra* note 40, art. 5; European Convention on Nationality, *supra* note 13, art. 5(1); Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7, at 15 (Sept. 15); *Draft Articles on Nationality*, *supra* note 10, art. 15 (prohibiting nationality discrimination “on any ground”).

example, according to the European Convention on Nationality, revocation is only reasonable in the following situations: voluntary acquisition of another nationality; acquisition of the nationality by fraud or deception; voluntary service in a foreign military force; conduct seriously prejudicial to the vital interests of the state; lack of a genuine link between the state and a national habitually residing abroad; or failure of a child to fulfill preconditions established by law.⁵⁵

These rules from human rights law limiting when a state may revoke nationality bind both the UK and EU.⁵⁶ The EU is not formally party to human rights treaties,⁵⁷ though it has committed itself to striving to protect human rights,⁵⁸ perhaps including human rights protecting nationality. Certainly the CJEU looks to treaties that the EU is not party to, but which formed the inspiration for EU legislation, in interpreting EU laws⁵⁹ and the EU has consented to the application of human rights obligations to EULEX in Kosovo.⁶⁰ The EU is itself also bound to the obligations of the EU member states when those member states transfer their powers and duties to the EU.⁶¹ The EU is additionally bound to customary international human rights law,⁶² which most likely includes the Universal Declaration of Human Rights and the rights to nationality

55. See European Convention on Nationality, *supra* note 13, art. 7(3) (limiting loss of nationality); *id.* art. 5(1) (providing for grounds which are *per se* procedurally or substantively arbitrary).

56. See generally Worster, *supra* note 10.

57. *But see* Council Decision 2010/48, 2010 O.J. (L 23) 35 (EC).

58. See Case C-36/02, *Omega Spielhallen v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9641, I-9653 (“The Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law.”).

59. See, e.g., *Joined Cases C-175, C-176, C-178 & C-179/08, Salahadin Abdulla v. Bundesrepublik Deutschland*, 2010 E.C.R. I-1532, I (interpreting Article 78 of the Treaty on the Functioning of the EU and the EU Qualification Directive in harmony with the 1951 Refugee Convention); Case C-31/09, *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, 2010 E.C.R. I-5572, I; see also Council Directive 2004/83, 2004 O.J. (L 304) 12 (EC); Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6233, 606 U.N.T.S. 267.

60. See S.C. Res. 1244, ¶ 11(j) (June 10, 1999) (establishing the United Nations Interim Administration Mission in Kosovo (UNMIK) and charging UNMIK with “[p]rotecting and promoting human rights”); UNMIK Reg. No. 2006/12, *On the Establishment of the Human Rights Advisory Panel*, U.N. Doc. UNMIK/REG/2006/12 (Mar. 23, 2006).

61. See, e.g., *Joined Cases 21-24/72, Int’l Fruit Co. v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1220, 1227; Case T-315/01, *Kadi v. Council*, 2005 E.C.R. II-3659, II-3718; Case T-306/01, *Yusuf v. Council*, 2005 E.C.R. II-3544, II-3620; see also Samantha Besson, *European Legal Pluralism After Kadi*, 5 EUR. CONST. L. REV. 237, 245 (2009); August Reinisch, *Securing the Accountability of International Organizations*, 7 GLOB. GOVERNANCE 131, 137–38 (2001); Pierre Pescatore, *External Relations in the Case-Law of the Court of Justice of the European Communities*, 16 COMMON MKT. L. REV. 615, 637–38 (1979).

62. See Case C-308/06, *Intertanko v. Sec’y of State for Transp.*, 2008 E.C.R. I-4100, I-4121.

discussed herein,⁶³ especially non-discrimination.⁶⁴ Furthermore, general principles of EU law and the Charter of Fundamental Rights of the European Union (CFR)⁶⁵ contain an obligation to comply with international law generally,⁶⁶ and could be understood to specifically contain an obligation to comply with human rights.⁶⁷ Thus, both the UK and EU must comply with human rights law governing loss of nationality. However, even if we agree that international human rights law binds the EU, we still need to determine whether the EU has any citizenship law that international law could impact.

II. EUROPEAN UNION CITIZENSHIP

Whatever EU citizenship is, there is no doubt that it is a new type of status in international law, though it is still fundamentally a status of a legal bond with the Union. And such a legal bond is the essential link that is protected by human rights law protecting nationality.

EU citizenship is an unusual form of citizenship in international law.⁶⁸ EU citizenship was created by the treaties on European Union,⁶⁹

63. See *Observance of Human Rights by States Which Are Not Parties to United Nations Human Rights Conventions Additional Working Paper*, U.N. Doc. E/CN.4/Sub.2/2000/2 (June 7, 2000); *Observance of Human Rights by States Which Are Not Parties to United Nations Human Rights Conventions Working Paper*, U.N. Doc. E/CN.4/Sub.2/1999/29 (June 15, 1999); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 335–45 (1991); Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 317–51 (1996); .

64. See *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003).

65. See Consolidated Version of the Treaty on European Union arts. 6(1), 6(3), 9, Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU]; Charter of Fundamental Rights of the European Union art. 52(3), Oct. 26, 2012, 2012 O.J. (C 326) 393 [hereinafter CFR]; Case C-130/10, *Parliament v. Council*, ECLI:EU:C:2012:472, ¶ 83 (July 19, 2012); Case C-400/10, *J. McB. v. L. E.*, 2010 E.C.R. I-8992, I-9012; Case C-479/04, *Laserdisken ApS v. Kulturministeriet*, 2006 E.C.R. I-8113, I-8129; Comm'n, *Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach*, at 7, COM (2011) 886 final (Dec. 12, 2011).

66. See TEU, *supra* note 65, arts. 3(5), 21(3); Consolidated Version of the Treaty on the Functioning of the European Union arts. 205, 207–08, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU]; Case C-366/10, *Air Transp. Ass'n Am. v. Sec'y of State for Energy & Climate Change*, 2011 E.C.R. I-13833, I-13885.

67. See TFEU, *supra* note 66, arts. 77, 214, 216; Case C-288/03 P, *Zaoui v. Comm'n*, ¶¶ 13–15 (Oct. 14, 2004), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=49666&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=39464892>; Case C-352/98 P, *Laboratoires Pharmaceutiques Bergaderm SA v. Comm'n*, 2000 E.C.R. I-5310, I-5324–25.

68. See THEODORA KOSTAKOPOULOU, *CITIZENSHIP, IDENTITY AND IMMIGRATION IN THE EUROPEAN UNION* 94–98 (2001); Eleanor Spaventa, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects*, 45 COMMON MKT. L. REV. 13, 16–18 (2008).

69. See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 2(9), Nov. 10, 1997, 1997

specifically the Maastricht Treaty of 1993, and later affirmed in the CFR⁷⁰ and Council Directive 2004/38.⁷¹ It was also included in the constitutional treaty,⁷² although that instrument was ultimately not adopted. The creation of a citizenship status by a supranational, international organization along the lines of the EU is almost unique in the world.⁷³ And yet, while the CJEU acknowledges that EU citizenship is a status that is “beyond the State,”⁷⁴ it is also “destined to be the fundamental status of all nationals of the Member States.”⁷⁵ Importantly, it does not displace or replace member state nationality or citizenship, but creates an additional citizenship.⁷⁶ As such, it is a status. It is distinct from the rights and duties borne by EU citizens, though it is the prerequisite to bear those rights and duties.⁷⁷ These rights include the right to vote and stand for election in European and municipal elections.⁷⁸

Obviously, EU citizenship is labelled a “citizenship,” rather than a “nationality.” Citizenship is generally understood to simply mean a concept similar to nationality, though citizenship as a status falls under domestic, not international law. For example, the U.S. distinguishes

O.J. (C 340) 1 (“Citizenship of the Union shall complement and not replace national citizenship.”); TEU, *supra* note 65, art. 9 (“Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”); TFEU, *supra* note 66, art. 20(1) (“Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”).

70. See CFR, *supra* note 65.

71. See Council Directive 2004/38, 2004 O.J. (L 158) 77 (EC).

72. See Treaty Establishing a Constitution for Europe art. I-10(1), Dec. 16, 2004, 2004 O.J. (C 310) 1 (“Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.”).

73. See Dora Kostakopoulou, *European Union Citizenship: Writing the Future*, 13 EUR. L.J. 623, 624–25 (2007). The only comparable case is that of ECOWAS that created its notion of a “community citizen”. See Revised Treaty of the Economic Community of West African States (ECOWAS) art. 1, July 24, 1993, 2373 U.N.T.S. 233 (1996) (“‘Community citizen or citizens’ means any national(s) of Member States who satisfy the conditions stipulated in the Protocol defining Community citizenship”); ECOWAS Protocol A/P.3/5/82 Relating to the Definition of Community Citizen art. 1 (May 29, 1982).

74. See *id.* ¶ 33 (citing Case C-135/08, *Rottmann v. Freistaat Bayern*, 2010 E.C.R. I-1449, I-1457).

75. See Case C-118/20, *JY v. Wiener Landesregierung*, ECLI:EU:C:2021:530, ¶ 33 (July 1, 2021) (citing Case C-184/99, *Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, 2001 E.C.R. I-6193, I-6242).

76. See TFEU, *supra* note 66, art. 20(1); Case C-224/98, *D’Hoop v. Office national de l’emploi*, 2002 E.C.R. I-6191, I-6222; Case 836/18, *Subdelegación del Gobierno en Ciudad Real v. RH*, ECLI:EU:C:2020:119, ¶ 35 (Feb. 27, 2020); Case C-118/20, *JY*, ECLI:EU:C:2021:530, ¶ 33.

77. See TFEU, *supra* note 66, art. 20(2); Case C-118/20, *JY*, ECLI:EU:C:2021:530, ¶ 33.

78. See TFEU, *supra* note 66, art. 20(2); Case C-118/20, *JY*, ECLI:EU:C:2021:530, ¶ 33 (citing Case C-221/17, *Tjebbes v. Minister van Buitenlandse Zaken*, ECLI:EU:C:2018:572, ¶ 38 (July 12, 2018)).

under domestic law between nationals who are citizens and those who are not,⁷⁹ although for all nationals and citizens, they would be considered to have nationality for purposes of international law. Because it is a legal status under domestic law, citizenship can give a right to vote or participate in the political life of the state, although the status itself is no guarantee of any particular rights.⁸⁰ Thus under domestic law, it may be the “right to have rights,”⁸¹ but under international law, nationality would be the status of any person, citizen or not, with a legal bond to the state. That being said, the terms “nationality” and “citizenship” are often used interchangeably with the same meaning,⁸² and while there may be some legal difference between domestic and international law, it is unclear whether there is any difference solely under international law.⁸³

EU citizenship, while not identical to nationality, contains the same essential concept of a legal bond that is protected by international law on nationality. This bond does not depend on the terms “national” or “citizen” but on the substantive connection between the individual and the international legal person. Nationality can also carry ethnic, cultural, linguistic and/or historic significance and the EU member states likely intended for EU citizenship to constitute a status distinct from member state nationality. However, they were not completely clear whether EU

79. See 8 U.S.C. § 1408.

80. See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN* 79 (2002); Sanja Ivic, *EU Citizenship as a Mental Construct: Reconstruction of Postnational Model of Citizenship*, 20 EUR. REV. 419, 419–37 (2012); Macklin, *supra* note 8, at 337; ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 54 (1975) (“Citizenship is a legal construct, an abstraction, a theory. . . . Emphasis on citizenship as the tie that binds the individual to government and as the source of his rights leads to metaphysical thinking about politics and law, and more particularly to symmetrical thinking, to a search for reciprocity and symmetry and clarity of uncompromised rights and obligations, rationally ranged one next to and against the other. . . . It is by such thinking . . . that the claims of liberty may be readily translated into the postulates of oppression.”).

81. See *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting); *Trop v. Dulles*, 356 U.S. 86, 101–02 (1958); HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 226 (1951).

82. See Christopher McCrudden, *Citizenship and Law: The Structure of the Green Paper Identifying the Hallmarks of Citizenship*, in *HALLMARKS OF CITIZENSHIP* 16 (J.P. Gardner ed., 1994); Eur. Union Inst., *Glossary on Citizenship and Electoral Rights*, GLOB. CITIZEN OBSERVATORY, <https://globalcit.eu/glossary/> [<https://perma.cc/GF9S-ABMS>] (“Citizenship: A legal status and relation between an individual and a state . . . that entails specific legal rights and duties. Citizenship is generally used as a synonym for nationality . . .”).

83. See WEIS, *supra* note 7, at 4–5 (“Conceptually and linguistically, the terms “nationality” and “citizen-ship” emphasize two different aspects of the same notion: State membership. Nationality stresses the international, citizenship the national, municipal aspect.”). This Article will not consider or discuss the French term *ressortissant*. See, e.g., Treaty of Peace Between the Principal Allied and Associated Powers and Austria arts. 249, 256, Sept. 10, 1919, 226 Consol. T.S. 8.

citizenship was akin to nationality or citizenship in the legal meaning of the term and it has been described as a form of dual nationality.⁸⁴

That being said, this author is not arguing that this status effectively qualifies as nationality under international law generally, for example for purposes of diplomatic protection. Instead, this author has confined argument to concluding that, under European law, EU citizenship qualifies as a sufficient legal bond between the individual and the Union such that the Union and EU member states must apply the same international law protections covering nationality. In fact, the CJEU has apparently already agreed with this approach, as will be discussed in more detail below.

III. ACQUISITION OF EU CITIZENSHIP

Before we discuss the rules on loss of EU citizenship and how those rules might apply in the case of Brexit, we first need to consider the rules on acquisition of EU citizenship in more detail. The European Commission has noted that acquisition of EU citizenship is often confusing for people.⁸⁵ The default rule in international law, where a state has not adopted a law on nationality, is that all of the residents of the territory at its independence are usually considered nationals.⁸⁶ While the EU has not adopted citizenship laws *per se*, it has adopted a form of citizenship law, so the default rule does not apply. The rule on acquiring EU citizenship merely refers to the nationality laws of the EU member states. Thus, the EU member state laws on nationality are the applicable EU law on citizenship, insofar as they comply with EU law.

84. See Case C-224/98, *D’Hoop v. Office national de l’emploi*, 2002 E.C.R. I-6191, I-6222; Case C-836/18, *Subdelegación del Gobierno en Ciudad Real v. RH*, ECLI:EU:C:2020:119, ¶ 35 (Feb. 27, 2020); Case C-118/20, *JY v. Wiener Landesregierung*, ECLI:EU:C:2021:530, ¶ 33 (July 1, 2021).

85. See *Third Report from the Commission on Citizenship of the Union*, at 7, COM (2001) 506 final (Sept. 7, 2001) [hereinafter *Third Citizenship Report*] (“The Commission notes that citizens do not always properly understand the link between citizenship of a Member State and citizenship of the Union.”); *id.* 7 n.4 (“The Commission receives a considerable number of letters from people asking how they can become a citizen of the Union without first obtaining the citizenship of a Member State.”); see also the statement by Mr. Emil Scuka, President of the International Union of Roma, at a press conference in the Italian Senate on Dec. 4, 2000 “The proper citizenship for Roma living in Europe is European citizenship.” (quoted in a report by Agence France Presse).

86. See CLIVE PARRY, NATIONALITY AND CITIZENSHIP LAWS OF THE COMMONWEALTH AND THE REPUBLIC OF IRELAND 355 (1957); see also *AB v. MB*, 17 I.L.R. 110 (DC TA 1951) (Isr.) (“So long as no law has been enacted providing otherwise, my view is that every individual who, on the date of the establishment of the State of Israel was resident in the territory which today constitutes the State of Israel, is also a national of Israel. Any other view must lead to the absurd result of a State without nationals—a phenomenon the existence of which has not yet been observed.”).

EU citizenship is dependent on member state nationality, but only for purposes of acquisition. EU citizenship is acquired when a person has EU member state nationality.⁸⁷ Thus, whether an individual acquires EU member state nationality is primarily within the discretion of the member state's nationality laws.⁸⁸ In this way, it is dependent on having EU member state nationality.⁸⁹ As such, there is an "independent" EU citizenship that is nonetheless "linked" to EU member state nationality.⁹⁰

Interestingly it is not explicit in the treaties that a person holding non-EU member state nationality automatically becomes an EU citizen when his or her state of nationality joins the EU. It could be arguable that the person originally acquired his or her state nationality, and as a non-EU member state at the time, the person did not acquire EU citizenship. After all, the EU treaties only provide for one mechanism for receipt of EU citizenship when a person is holding EU member state nationality. There is no mechanism for acquiring only EU citizenship at a later time, separate from a grant of EU member state nationality. Simply

87. See TFEU, *supra* note 66, art. 20(1); Case C-165/14, *Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, ¶ 107 (Feb. 4, 2016); Case C-34/09, *Ruiz Zambrano v. Office national de l'emploi*, 2011 E.C.R. I-1177, I-1251; Case C-413/99, *Baumbast v. Sec'y of State for the Home Dep't*, 2002 E.C.R. I-7091, I-7165–66; Case C-224/98, *D'Hoop*, 2002 E.C.R. at I-6222; Council Directive 2004/38, art. 2(1), 2004 O.J. (L 158) 77, 87 (EC); Comm'n, *Fourth Report on Citizenship of the Union*, COM (2004) 695 final (Oct. 6, 2004) [hereinafter *Fourth Citizenship Report*]; *Report from the Commission on Citizenship of the Union*, COM (1993) 702 final (Dec. 21, 1993) [hereinafter *1993 Citizenship Report*].

88. See Denmark and the Treaty on European Union, annex 1 § A, 1992 O.J. (C 348) 1, 2 (EC); Case C-369/90, *Micheletti v. Delegación del Gobierno en Cantabria*, 1992 E.C.R. I-4239, I-4262; Case C-192/99, *The Queen v. Sec'y of State for the Home Dep't. ex parte Kaur*, 2001 E.C.R. I-1237, ¶ 19; *1993 Citizenship Report*, *supra* note 87, at 2 ("wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned."); *Third Citizenship Report*, *supra* note 85, at 7 ("It is therefore worth pointing out that . . . it is for each Member State to lay down the conditions for acquiring and losing the nationality of that state."); *Fourth Citizenship Report*, *supra* note 87, at 5 ("Without prejudice to the fact that the Member States alone remain competent in the area of nationality laws, the Commission has presented its views on naturalisation of legal migrants in the Communication on immigration, employment and integration in 2003."); Comm'n, *Fifth Report on Citizenship of the Union*, COM (2008) 85 final (Feb. 15, 2008) [hereinafter *Fifth Citizenship Report*]; S.O.S FOR FOREIGN AND COMMONWEALTH AFFAIRS, NOTE TO THE ITALIAN REPUBLIC CONCERNING A DECLARATION THE UNITED KINGDOM REPLACING THE DECLARATION ON THE DEFINITION OF THE TERM "NATIONALS" MADE AT THE TIME OF SIGNATURE OF THE TREATY OF ACCESSION OF 22 JANUARY 1972 BY THE UNITED KINGDOM TO THE EUROPEAN COMMUNITIES, 1982, Cmnd. 9062 (UK), <https://treaties.fco.gov.uk/awweb/awarchive?item=79058> [<https://perma.cc/J98R-NDXB>] [hereinafter NOTE ON THE TERM "NATIONALS"].

89. It has even been described as being "parasitic" on EU Member State nationality, see R v. Sec'y of State of the Home Dep't [2013] QB 1008 [39] (UK).

90. See Case C-135/08, *Rottmann v. Freistaat Bayern*, 2010 E.C.R. I-1449, I-1488; Case C-165/14, *Rendón Marín*, ECLI:EU:C:2016:675, ¶ 108.

put, it could be argued that once a person received his non-EU member state nationality (at birth or naturalization), he or she missed the chance to get EU citizenship, notwithstanding his or her state's later accession to the EU. However, this interpretation has not been followed in practice, so when a state joins the EU, that state is considered an EU member state and, as its nationals are now nationals of an EU member state, they are also EU citizens.⁹¹ However, it is important to observe that this is a case of a person acquiring EU citizenship separately from the acquisition of member state nationality, because the grant of EU citizenship is not retroactive to the date of acquiring the EU member state nationality. In this way, EU citizenship and member state nationality are severable to a limited degree in this situation.

Despite referring to domestic law on EU member state nationality to identify the accrual of EU citizenship, the CJEU has held that there are limits to the exclusive application of domestic law. For example dual nationals EU/non-EU cannot be prohibited from enjoying EU rights under domestic law.⁹² In addition, as will be discussed in more detail in the next section, in revoking member state nationality, there may be consequences for an individual's EU citizenship so the member state must take EU law into consideration in applying its nationality laws.⁹³ However, in terms of acquisition of EU citizenship, EU law respects a very wide margin of appreciation for member state rules for acquisition of nationality, and EU citizenship follows the member state's laws.⁹⁴

An extreme example of the state discretion in acquisition of EU citizenship is that EU member states may prohibit some of their nationals from acquiring EU citizenship. EU member states have withheld EU citizenship from some of their nationals who have a long-standing connection to an overseas territory,⁹⁵ although generally these persons

91. See, e.g., S. Juz. Cont. Adm., July 10, 2008 (R.J., No. 11548/2004) (Spain) (concerning the status of Romanian nationals following the accession of Romania to the EU in January 2007).

92. See Case C-200/02, *Zhu v. Sec'y of State for the Home Dep't*, 2004 E.C.R. I-9925, I-9968 (citing Case C-369/90, *Micheletti*, 1992 E.C.R. at I-4262).

93. See Case C-135/08, *Rottmann*, 2010 E.C.R. at I-####.

94. See *id.* at I-1488; Case C-192/99, *The Queen v. Sec'y of State for the Home Dep't. ex parte Kaur*, 2001 E.C.R. I-1237, ¶¶ 19–27. Note, however, that acquisition of EU member state nationality and EU citizenship may enjoy stronger protection in situations comparable to the pending case of *JY*. See Case C-118/20, *JY v. Wiener Landesregierung*, ECLI:EU:C:2021:530, ¶¶ 53–67 (July 1, 2021) (recommending the Court to protect EU citizenship rights when the individual was induced to renounce the nationality of one EU member state on assurances that another EU member state would grant nationality).

95. See NOTE ON THE TERM “NATIONALS,” *supra* note 88 (“British citizens . . . [and p]ersons who are British subjects by virtue of Part IV of the British Nationality Act 1981.”).

Also note that the UK excluded certain EU citizenship rights from UK nationals in Jersey, Guernsey and Man who are EU citizens, but do not have the right to free movement. This was only possible because the exclusion was included in the EU treaties and those persons never acquired the rights in the first place. It would be quite a different matter for the UK to attempt to

may not have a status that international law understands as nationality.⁹⁶ However, member states may change and redefine which persons are “nationals” under its nationality law are thus not to be considered “nationals” for purpose of EU citizenship. For example, persons with a link to a British dependent territory are considered UK nationals for purposes of international law.⁹⁷ Upon its accession to the EU (then the European Community) in 1972, the UK submitted a special declaration, revised in 1981, that defined who qualified as a British national for purposes of the EU.⁹⁸ Because of this act, “British Dependent Territories Citizens,” “British Overseas Territories Citizens,” “British Subjects without Citizenship,” and “British Protected Persons” did not become EU citizens despite international law (and UK law for certain purposes) treating them as nationals.⁹⁹ In 2002, some British Overseas Territories Citizens (excepting those British Overseas Territories Citizens with a connection to the Sovereign Base Areas of Akrotiri and Dhekelia) received a change in status to British citizen and thus acquired EU citizenship.¹⁰⁰ Curiously enough, it is possible for a British Citizen by virtue of being a British Overseas Territories Citizen, to renounce British citizenship and retain British Overseas Territories Citizenship, and in so doing renounce EU citizenship as well.¹⁰¹ Interestingly enough, this means that British nationals, until Brexit, were defined exclusively in

revoke those rights. See TFEU, *supra* note 66, art. 355(5)(c) (“the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of . . . the European Economic Community and . . . the European Atomic Energy Community”).

96. See *Nottebohm (Liech. v. Guat.)*, Judgment, 1955 I.C.J. 4, 22–23 (Apr. 6).

97. See LAURIE FRANSMAN, *FRANSMAN’S BRITISH NATIONALITY LAW* 57 (3d ed. 2011); JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 519 (Oxford Univ. Press ed., 9th ed. 2019) (“In the case of the UK, the position is that the inhabitants of dependencies, whatever their internal status under the British Nationality Act 1981, are considered to have the status of national for purposes of international law.”).

98. See NOTE ON THE TERM “NATIONALS,” *supra* note 88; Andrew C. Evans, *Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981*, 2 Y.B. EUR. L. 173, 174 (1982).

99. See GERARD-RENÉ DE GROOT, *STAATSANGEHÖRIGKEITSRECHT IM WANDEL [CITIZENSHIP LAW IN TRANSITION]* 103, 408 (1989).

100. See British Nationality Act 1981, c. 61 (UK); British Overseas Territories Act 2002, c. 8 (UK); TFEU, *supra* note 66, art. 355(5)(b) (“the Treaties shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas of the United Kingdom”); *id.* art. 355(5)(c) (“the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of . . . the European Economic Community and . . . the European Atomic Energy Community”). This example would be a separate instance where a person receives EU citizenship independently of his or her acquisition of nationality.

101. See British Nationality Act 1981, c. 61 (UK); British Overseas Territories Act 2002, c. 8 (UK).

terms of EU law.¹⁰² In addition to the UK example, there are other member state examples,¹⁰³ such as the exclusion of Danish nationals with a connection to the Faeroe Islands,¹⁰⁴ who also never acquired EU citizenship along similar lines as the UK's approach. This degree of discretion has been found to be acceptable,¹⁰⁵ after all, until a person holds EU citizenship, he or she might not enjoy the same rights and protections, including protection against loss of EU citizenship, as EU citizens. Thus, in the area of acquisition of EU citizenship, the member states retain considerable freedom.

In any event, holding EU member state nationality is the only way to acquire EU citizenship as EU law does not explicitly provide for any other mechanism.¹⁰⁶ It would be interesting if the EU ever were to attempt to grant EU citizenship to any person not a member state national, perhaps in the way that some people are naturalized (or made honorary nationals) by parliaments, but for now acquisition is limited to cases where individuals hold EU member state nationality.

IV. LOSS OF EU CITIZENSHIP

While the member states retain a wide degree of discretion in rules on acquisition of nationality, EU law does limit states' ability to remove nationality. First, EU law has no express terms on loss of EU citizenship. Many authorities have concluded that EU citizenship is therefore fully linked to member state nationality and an individual acquires and retains EU citizenship only for so long as he or she retains EU member state nationality.¹⁰⁷ But this requirement is not explicitly indicated in the EU

102. See NOTE ON THE TERM "NATIONALS," *supra* note 88.

103. See Staatsangehörigkeitsgesetz [Citizenship Act], July 22, 1913, RGL at 538, as amended Aug. 12, 2021, BGBl I at 3538 (Ger.). The effect of this law is that ethnic Germans in Eastern Europe, not only East Germany, were deemed to be German nationals under the German Constitution [Grundgesetz] art. 116, and thus EU citizens. This provision was never revoked but its impact ceased to have significant practical effect after the reunification of Germany and the admission of many East European states into the EU. This example would be yet another situation where a person received EU citizenship separately from acquisition of his or her nationality.

104. See TFEU, *supra* note 66, art. 355(5)(a) ("the Treaties shall not apply to the Faeroe Islands").

105. See Case C-192/99, *The Queen v. Sec'y of State for the Home Dep't. ex parte Kaur*, 2001 E.C.R. I-1237, ¶¶ 19–27. We might even wonder how far this discretion goes in deciding which nationals receive EU citizenship. Presumably an EU member state could not discriminate for nationality acquisition on grounds of race, for example, but finding a precise legal basis for this argument is difficult. Additionally, the EU might not even have the competence to review this decision.

106. See *Third Citizenship Report*, *supra* note 85, at 7 ("[T]here is no separate way of acquiring citizenship of the Union. Nationality of a Member State is the only way to acquire citizenship of the Union.").

107. See TFEU, *supra* note 66, art. 20(1); *Third Citizenship Report*, *supra* note 85, at 7 ("Citizenship of the Union, as commentators have pointed out, is thus something 'superimposed'

treaties, so it is admittedly an interpretation of the provision that an individual has EU citizenship when he or she “hold[s]” member state nationality. As a result, the rules on loss of EU citizenship have largely followed the rules on loss of member state nationality.

Curiously there does not appear to be any possibility of renouncing EU citizenship, despite renunciation of nationality being generally considered a fundamental right across most nations in the world.¹⁰⁸ Most likely the negotiators of the Treaties on European Union never contemplated that any person would ever want to renounce EU citizenship. As a result, it does not appear possible to renounce EU citizenship without also renouncing EU member state nationality. It might be desirable to eventually provide for this option, in order to respect the fundamental freedom to renounce. In any event, the only currently available method for an individual to renounce EU citizenship is to renounce EU member state nationality as well.

Notwithstanding the fact that EU citizenship follows EU member state nationality, the CJEU has recognized a difference between situations of acquisition and loss of nationality,¹⁰⁹ in line with the same difference in treatment under human rights law. Acquisition, on the one hand, is a gate-keeping function, where an individual’s connection to the state is assessed and, if sufficient, the status of nationality is granted.¹¹⁰ But the status is not understood to be lost the moment the sufficient connection lapses. The reason is that, as discussed above, loss of nationality follows different rules from acquisition.

The CJEU has followed the same approach to loss of nationality under international human rights law in cases of loss of EU citizenship under EU law. CJEU determined that, prior to acquiring EU citizenship, an individual has no EU rights protecting the acquisition of EU citizenship.¹¹¹ Thus, in *ex parte Kaur*, the CJEU easily dismissed the individual’s claim to a right to EU citizenship. However, once EU

on national and in some cases regional or local citizenship to give the effect of multiple levels.”); Case C-165/14, *Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, ¶ 107 (Feb. 4, 2016); Kay Hailbronner, *Nationality in Public International Law and European Law*, in ACQUISITION AND LOSS OF NATIONALITY 37 (Rainer Bauböck ed., 2006).

108. See, e.g., William Thomas Worster, *The Constitutionality of the Taxation Consequences for Renouncing U.S. Citizenship*, 9 FLA. TAX REV. 921, 967 (2010); William Thomas Worster, *Human Rights Law and the Taxation Consequences for Renouncing Citizenship*, 62 ST. LOUIS U. L.J. 85 (2017).

109. See Case C-192/99, *ex parte Kaur*, 2001 E.C.R. at ¶¶ 19–27; Case C-135/08, *Rottmann v. Freistaat Bayern*, 2010 E.C.R. I-1449, I-1488; Case C-369/90, *Micheletti v. Delegación del Gobierno en Cantabria*, 1992 E.C.R. I-4239, I-4262; *Pham v. Sec’y of State for the Home Dep’t* [2015] UKSC 19, [45] (appeal taken from Eng.).

110. See *Draft Articles on Nationality*, *supra* note 10, art. 5; O’CONNELL, *supra* note 36; Brownlie, *supra* note 36.

111. See Case C-192/99, *ex parte Kaur*, 2001 E.C.R. at ¶¶ 19–27.

citizenship has been acquired, the individual does accrue EU rights and enjoys some protection of EU citizenship.¹¹² In *Rottmann*, the CJEU limited the state's discretion in nationality laws, one of the "last bastions of state sovereignty."¹¹³ The CJEU held that EU member states must take the loss of EU citizenship into consideration when depriving a national of member state nationality, and thus the deprivation must be proportionate.¹¹⁴ Removal of nationality resulting in termination of EU citizenship must serve a legitimate purpose,¹¹⁵ be proportionate,¹¹⁶ and not be arbitrary,¹¹⁷ the same or similar tests as applied to loss of nationality in human rights law. Thus, the *Rottmann* judgment did not prohibit Mr Rottmann's denationalization entirely,¹¹⁸ after all, he was ultimately successfully deprived of his nationality by the member state despite the CJEU judgment,¹¹⁹ but the principle in the case is that member state denationalization must be subjected to this additional standard, and is not entirely within the discretion of the member state. In addition, to the degree to which EU citizenship may form a part of a person's identity,¹²⁰ and the EU certainly promotes the development of a European identity,¹²¹ revocation of EU citizenship may impact human rights,¹²²

112. See Case C-135/08, *Rottmann*, 2010 E.C.R. at I-1488; Appl. No. 37/2010, Republic v. Nimal Jayaweera, Supreme Court (July 10, 2014) (Cyprus) (accepting, but reaffirming that *Rottmann* only applied to loss of nationality, not acquisition of nationality).

113. See Sandra A. Mantu, *Case C-135/08 Janko Rottman v Freistaat Bayern: The End of Nationality Legislation as We Know It?*, 24 J. IMMIGR. ASYLUM & NAT'Y L. 182, 191 (2010).

114. See Case C-135/08, *Rottmann*, 2010 E.C.R. at I-1488.

115. See *id.* at I-1489.

116. See *id.* at I-1489–90.

117. See *id.* at I-1489.

118. See UfR 211/2015 H, Publ. Pros. v. T ["Bookseller from Brønshøj"], No. 211/2015 Højesteret [Sup. Ct.] (June 8, 2016) (Den.) (revoking nationality, though without considering *Rottmann*).

119. See Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Nov. 11, 2010, 5 C 12.10, <https://www.bverwg.de/en/111110U5C12.10.0> [<https://perma.cc/Y5R9-3PZF>] (Ger.) (finding deprivation was proportionate, the fraud was very serious and even if he became stateless, he still retained the right to live in Germany based on marriage to a German national and Rottmann should be able to recover Austrian nationality which brings EU citizenship, and he excessively delayed requesting confirmation from the Austrian authorities).

120. See Case C-62/14, *Gauweiler v. Deutscher Bundestag*, ECLI:EU:C:2015:7, ¶ 61 (Jan. 14, 2015) (arguing that "a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States.").

121. See *Fifth Citizenship Report*, *supra* note 88, at 4 ("Citizens should be made aware of their European citizenship, its benefits as well as its rights and obligations, if they are to develop a sense of European identity and give their full support to European integration."); Case C-165/14, *Rendón Marín*, ECLI:EU:C:2016:675, ¶ 108 ("The fact that those rights have been recognised in the case-law of the Court has played a major, even a decisive, role in the construction of this fundamental status which, today, forms an essential part of the European identity enjoyed by citizens.").

122. Case C-221/17, *Tjebbes v. Minister van Buitenlandse Zaken*, ECLI:EU:C:2019:189, ¶

including those protected by the European Convention on Human Rights,¹²³ and thus also be limited.

Thus, the distinction between *Kaur* and *Rottmann* is the difference in treatment of acquisition and loss of nationality, and the protection of accrued EU citizenship.¹²⁴ It is true that some cases of loss of nationality do not appear to follow this distinction. For example, some courts have held that in case of nationality invalidation that is to say, the cancellation of the original grant of nationality due to fraud, the individual never actually acquired the EU member state's nationality and never acquired EU citizenship. Thus, the denationalization principles in *Rottmann* did not apply.¹²⁵ Such a case is therefore not truly one of revocation of nationality. Also, in a case where a person renounced his or her EU member state nationality as a precondition to acquiring a different EU member state nationality, the CJEU found that the acquisition of nationality must give due consideration to EU law.¹²⁶ The *JY* case is still pending before the CJEU, but the Advocate General's opinion did not focus on protecting the acquisition of EU citizenship, but on protecting the individual from the loss of EU citizenship. As such, these cases do follow the distinction between acquisition and loss. It is true that the *Rottmann* case concerned fraudulently acquiring German nationality, but the case was not viewed as a matter of acquisition because Rottmann initially had Austrian nationality and therefore already had EU citizenship, which deserved protection.¹²⁷ Interestingly, the courts of Germany have held that *Rottmann* protections applied even when the previously renounced nationality was not that of an EU member state¹²⁸ and the courts of the UK and Latvia have also upheld the requirement under EU law that a nationality revocation is proportionate without

45 (Mar. 12, 2019).

123. *See* *Genovese v. Malta*, App. No. 53124/09, ¶¶ 30–33 (Oct. 11, 2011), <http://hudoc.echr.coe.int/eng?i=001-106785> [<https://perma.cc/JW56-H5KX>] (This consideration will take on added weight should the EU become a party to the ECHR. Of course, the UK is already a party to the ECHR).

124. *See* Case C-135/08, *Rottmann*, 2010 E.C.R. at I-1488; Case C-221/17, *Tjebbes v. Minister van Buitenlandse Zaken*, ECLI:EU:C:2019:189, ¶ 40-41 (Mar. 12, 2019).

125. *See* HR 25 mei 2012, NJ 2012, 337 m.nt. GRDG (Verzoekers/de Staat der Nederlanden) (Neth.); HR 21 februari 2014, RvdW 2014, 374 m.nt. GRDG (Verzoekers/de Staat der Nederlanden) (Neth.).

126. *See* Case C-118/20, *JY v. Wiener Landesregierung*, ECLI:EU:C:2021:530, ¶ 53-67 (July 1, 2021).

127. *See* Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Nov. 11, 2010, 5 C 12.10, <https://www.bverwg.de/en/111110U5C12.10.0> [<https://perma.cc/YHM7-JQ4P>] (Ger.).

128. *See* Verwaltungsgericht [VG] Sigmaringen [Administrative Trial Court Sigmaringen], July 20, 2011, 1 K 1752/10, <https://openjur.de/u/357322.html> [<https://perma.cc/482P-7NH5>] (Ger.).

needing to specifically rely on *Rottmann*.¹²⁹ These views reaffirm that human rights law also apply to loss of nationality. In any event, the critical point is to identify whether the case is one of acquisition or loss of EU citizenship, and apply human rights protections to limit that loss.

The last question in this section is whether loss of EU member state nationality or EU citizenship must always have an effect on the other, or whether there is some possibility for separating the two statuses in cases of loss of one or the other. If EU citizenship is to be protected from loss to the same degree as member state nationality, yet still respect state sovereignty over its nationality, then there is potential for EU citizenship to detach from member state nationality. With such strong protections, loss of EU citizenship cannot simply follow automatically from loss of member state nationality.

There is some practice where EU citizenship and member state nationality can be severed. In the section above, this Article discussed the implied interpretation of the terms on EU citizenship to provide for the automatic granting of EU citizenship to non-EU member state nationals when their state joins the EU. This process is, strictly speaking, a different form and moment of acquisition of EU citizenship than provided in the Treaties on European Union because the individual is not also acquiring EU member state nationality at the same time. The two statuses are not necessarily linked in acquisition in such a case, but instead nationality in a state that joins the EU is a trigger for acquisition of EU citizenship at the moment the state joins the Union.

Following from this instance of severing the two statuses, this Article is examining the opposite scenario: when a state leaves the EU. Here as well there are no express terms in the Treaties providing for automatic change in citizenship status, and we simply assume that once the EU citizen's state leaves the EU, his or her EU citizenship terminates at the moment the state leaves. The EU treaties simply say that a person acquires EU citizenship when a person "hold[s]" EU member state nationality.¹³⁰ It does not necessarily imply that a person loses EU citizenship when the person no longer continuously "holds" EU member state nationality. The reasoning of *Rottmann* does seem to contain an assumption that the loss of EU member state nationality necessarily results in loss of EU citizenship, and thus that the two statuses are

129. See *Pham v. Sec'y of State for the Home Dep't* [2015] UKSC 19, [45] (appeal taken from Eng.) (accepting proportionality as measure for judicial review of revocation process); *In re NK, Lieta Nr. C03058707*, Latvijas Republikas Augstākās tiesas [Sup. Ct.], Mar. 4, 2013) (Lat.).

130. See TFEU, *supra* note 66, art. 20(1); Case C-224/98, *D'Hoop v. Office national de l'emploi*, 2002 E.C.R. I-6191, I-6222; Case C-34/09, *Ruiz Zambrano v. Office national de l'emploi*, 2011 E.C.R. I-1177, I-1251; Case C-165/14, *Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, ¶ 107 (Feb. 4, 2016); Case C-413/99, *Baumbast v. Sec'y of State for the Home Dep't*, 2002 E.C.R. I-7091, I-7165–66.

inseparable. Such an interpretation of the Treaties might not be persuasive. As we have seen, acquisition and loss have differing standards and requirements. Since EU citizenship is a “fundamental status” producing a direct political and legal link between the individual and EU, the rather drastic consequence of loss of EU citizenship cannot be so easily implied into the EU treaties without stronger controlling language. In any event, *Rottmann* only demanded that when a member state’s nationality laws impacted EU citizenship, EU law was relevant.

Furthermore, the same analysis announced in *Rottmann* would prohibit an EU member state from continuing to respect the individual’s member state nationality but only revoking that person’s EU citizenship unilaterally. After all, according to *Rottmann*, any loss of EU citizenship “falls, by reason of its nature and its consequences, within the ambit of EU law,”¹³¹ and such an act would undoubtedly have the same impact on EU rights that the CJEU contemplated in *Rottmann*. First, it is doubtful that a member state even has the competence to revoke the EU citizenship of one of its nationals on its own initiative. Second, the CJEU in *Zambrano* held that EU law prohibits any measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by the Treaty.¹³² If EU citizenship is a fundamental status that creates a legal bond between the person and the Union, and the Union does not cease to exist, then it is difficult to understand how a state could revoke the EU citizenship against the will of the person.

Directive 2004/38 might also be read to suggest that EU citizenship must be lost upon loss of member state nationality. The Directive states that “[f]or the purpose of this Directive . . . ‘Union citizen’ means any person having the nationality of a Member State.”¹³³ However, just as with *Rottmann*, this conclusion is also not necessarily correct. Firstly, the definition in the Directive is not actually accurate as there are some nationals of member states that do not acquire EU citizenship, for example, the people of the Faroe Islands.¹³⁴ When we have conflict between a directive and the Treaty on European Union (TEU), obviously, we defer to the TEU.¹³⁵ Furthermore, it is indeed correct that a person

131. See Case C-135/08, *Rottmann v. Freistaat Bayern*, 2010 E.C.R. I-1449, I-1487; Case C-165/14, *Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, ¶ 114 (Feb. 4, 2016).

132. See Case C-34/09, *Ruiz Zambrano v. Office national de l’emploi*, 2011 E.C.R. I-1177, I-1252; Case C-165/14, *Rendón Marín*, ECLI:EU:C:2016:675, ¶ 114 (“In my view, ‘depriving citizens of the genuine enjoyment of the substance of the rights conferred by their status as Union citizens’ corresponds to ‘the nature and consequences of the loss of the status of citizen.’”).

133. See Council Directive 2004/38, art. 2(1), 2004 O.J. (L 158) 77, 87 (EC).

134. See TFEU, *supra* note 66, art. 355(5)(a) (“the Treaties shall not apply to the Faeroe Islands”).

135. See TFEU, *supra* note 66, arts. 263-67, 288, 290-91; Case C-84/94, *UK v Council Eur.*

must have member state nationality in order to be a Union citizen, but just as with the terms in the Treaties on European Union, the Directive does not state that this test is applied continuously. It does not say that a Union citizen is only a citizen for as long as he retains member state nationality. And it certainly does not contemplate the scenario where the individual continues to hold the EU member state nationality and yet the member state ceases to be a member of the EU.

In the alternative, member states might seek to revoke EU citizenship by treaty with the EU and/or its other member states. However, such a practice would still be problematic. Any such agreement revoking EU citizenship arbitrarily would clearly violate human rights law if it was arbitrary and/or disproportionate.

Interestingly this conclusion has already been suggested to some degree in the differing treatment of the Danish territories of the Faeroe Islands and Greenland.¹³⁶ Inhabitants of the Faeroe Islands hold Danish nationality but from the founding of the EU, the Faroe Islands were excluded from the Union in the Danish accession treaty,¹³⁷ so the Faeroese, even though holding member state nationality, never acquired EU citizenship. This outcome is acceptable since this is a case of acquisition where member states have considerable discretion. To the contrary, Greenland nationals are also Danish nationals but, in this case, the territory was considered as Danish territory joining the EU. As such, the territory became EU territory and Greenlanders acquired EU citizenship. When Denmark later withdrew Greenland from EU territory and reclassified it with a new status in association with the Union, Greenlanders continued to enjoy EU citizenship.¹³⁸ Admittedly, the agreement reclassifying Greenland's status did not specifically attempt to revoke EU citizenship for those individuals.¹³⁹ However, this precedent

Union ¶ 37, 84 (annulling art. 5 of Council Directive 93/104/EC (Nov. 23, 1993), OJ 1993 L 307, 18 on grounds of lack of a legal basis in the EC Treaty); Joined Cases C-293/12 & C-594/12, *Digital Rights Ireland v Min. Comms, Marine & Nat. Res.*; *Kärntner Landesregierung, Seitlinger, Tschohl & Others*, ¶ 69 (annulling Directive 2006/24 (Mar. 15, 2006), OJ 2006 L 105, 54, on grounds of violating the CFR).

136. When Algeria seceded from France in 1962 it left the European Community, as it was known at the time. This process occurred before the creation of the European Union and before the creation of EU citizenship. See *THE PROCESS FOR WITHDRAWING FROM THE EUROPEAN UNION*, *supra* note 1, 13 n.3.

137. See TFEU, *supra* note 66, art. 355(5)(a) (“the Treaties shall not apply to the Faeroe Islands”).

138. See Gerard-René de Groot, *Zum Verhältnis der Unionsbürgerschaft zu den Staatsangehörigkeiten in der Europäischen Union* [*On the Relationship Between Union Citizenship and Nationalities in the European Union*], in *EUROPÄISCHES INTEGRATIONSRECHT IM QUERSCHNITT* 73 (Peter-Christian Müller-Graff ed., 2002).

139. See Treaty Regarding Greenland, *supra* note 95; LOV nr [Law Number] 21117 af 11.10.1972 om Danmarks tiltrædelse af De europæiske Fællesskaber Bilag 1 til loven: Akt vedrørende tiltrædelsesvilkårene og tilpasningerne af traktaterne Protokoller til Tiltrædelsesakten

shows that a change in the status of the territory should not impact the continued enjoyment of EU citizenship.

From the foregoing, just because a state leaves the EU, it does not necessarily follow that the EU citizens must automatically lose their EU citizenship. Surely the state no longer exists in an EU relationship, but that change does not necessarily affect individuals, especially considering their fundamental EU citizen status and human rights on loss of nationality. One important observation is that it is acceptable under the EU citizenship regime for a territory to be outside the EU and yet for the residents of that territory to hold EU citizenship. This conclusion is perhaps not surprising in that many persons resident outside of the EU may have EU citizenship. Many nationals of Latin American states also hold Spanish or Italian nationality, and thus EU citizenship.¹⁴⁰ What is different in the case of Greenland is for all of the residents of a specific territory, which is not EU territory to hold EU citizenship and have rights to reside in the EU, but this is not unique. It is also true for Dutch citizens with a link to the territories of the Dutch Kingdom in the Caribbean,¹⁴¹ as well as French citizens with a link to French overseas territories.¹⁴² These territories are outside of the EU, and yet all of the residents of those territories are EU citizens. Perhaps we do not consider these cases important because the numbers of EU citizens in those territories are not significant compared to the number of EU citizens overall, but in any event, these cases are well founded in EU law. Thus, there would be precedent for a territory to be outside the EU and yet for its nationals to retain EU citizenship, the only appreciable difference in that case being the sheer numbers of EU citizens in a non-EU territory.

Again, if we keep in mind that Union citizenship is meant to be a fundamental status, it seems harder to understand how it can be so easily lost as an automatic consequence of loss of member state nationality without the consent of the person concerned. Surely there must be some

Protokol nr. 4 om Grønland [Act on Denmark's Accession to the European Communities Annex 1: Act Concerning the Conditions of Accession and Adjustments Protocol No. 4 on Greenland] (Den.).

140. See Gerard-René de Groot, *Latin American European Citizens: Some Consequences of the Autonomy of the Member States of the European Union in Nationality Matters*, MAASTRICHT J. EUR. & COMPAR. L. 115, 120 (2002).

141. See Gerard-René de Groot, *Auf dem Weg zu einer europäischen Staatsangehörigkeit [Towards European Citizenship]*, in EUROPA '93: AUF DEM WEG ZUR EUROPÄISCHEN UNION 87101 (Martin Coen & Albert Bleckmann eds., 1993) [hereinafter de Groot, *Towards European Citizenship*]; Gerard-René de Groot, *Visumplicht Antillianen/Arubanen en het Europese burgerschap [Visa Requirements for Antilleans/Aruba and European Citizenship]*, 2000 MIGRANTENRECHT 51, 51–52 (2000) (Neth.); Rutsel Silvestre Jacinto Martha, *Antillianen, Arubanen en het vrije verkeer van werknemers in Europa [Antilleans, Arubans and the Free Movement of Workers in Europe]* STICHTING TIJDSCHRIFT VOOR ANTILLIAANS RECHT, JUSTICIA 205, 211 (1992) (Neth.).

142. See de Groot, *Towards European Citizenship*, *supra* note 141.

additional mechanism to remove a fundamental status, and without such a mechanism, it seems difficult to understand how the loss of EU citizenship is not arbitrary in the sense of not having a clear legal basis prescribing loss, and arbitrary in the sense of being unreasonable if it did not fall within one of the various grounds for reasonable revocation of status (e.g., in the European Convention on Nationality).

The conclusion must be that while it is possible for an EU member state to withdraw from the EU, it is considerably more difficult for the EU member state to revoke the individual's EU citizenship. It might be that the member state successfully leaves the EU and yet is unsuccessful in revoking EU citizenship.

V. THE CASE OF BREXIT

Focusing on the Brexit situation specifically, this Article will now apply the law to determine whether UK nationals will lose EU citizenship. Essentially, the loss of EU citizenship is not necessarily the automatic and correct outcome of Brexit. Scottish First Minister Alex Salmond surprised many authorities when he argued that an independent Scotland's nationals would continue to be EU citizens because they had acquired EU citizenship via the UK's membership in the EU.¹⁴³ Many authorities disagreed concluding that surely it was only logical that when a state left the EU that its nationals lost EU citizenship. This Article will conclude the opposite.

The first rule to consider is the Vienna Convention on the Law of Treaties (VCLT). The VCLT permits states a wide degree of flexibility to adhere to or renounce treaties provided the terms of the treaty regarding termination are respected.¹⁴⁴ However, there is no discussion that the UK

143. See Aidan O'Neill, *A Quarrel in a Faraway Country?: Scotland, Independence and the EU*, EUTOPIA LAW (Nov. 14, 2011), <https://eutopialaw.wordpress.com/2011/11/14/685/> [<https://perma.cc/5GQ9-6LH5>] (“[T]he question to ask is whether the CJEU would consider that the fact that Scotland became independent required that all (or any portion) of the previous UK citizenry thereby be deprived of their acquired rights as EU citizens? Given the CJEU’s high theology of the primacy of EU law, and of EU citizenship as being ‘the fundamental status of nationals of the Member States,’ it is suggested that the most likely position that the Luxembourg court would take, if faced with the question of Scottish independence, would be . . . [to] rule that Scotland and EWNI [England, Wales and Northern Ireland] should *each* succeed to the UK’s existing membership of the EU, but now as two States rather than as one.”) (emphasis in original).

Further, First Minister Salmond’s spokesman argued that Scotland would still be an EU Member State. See Jeremy Fleming, *Europe Question Dogs Scottish Referendum*, EURACTIV (Mar. 12, 2012), <https://www.euractiv.com/section/uk-europe/news/europe-question-dogs-scottish-referendum/> [<https://perma.cc/NH2G-4HYV>] (“Scotland is already part of the territory of the European Union and the people of Scotland are citizens of the EU—and, as distinguished legal, constitutional and European experts have confirmed, there is no provision for either of these circumstances to change upon independence, and the rest of the UK will be exactly [sic] the same position.”).

144. See Vienna Convention on the Law of Treaties art. 54, *opened for signature* May 23,

can leave the EU and do so while complying with the VCLT. The second issue under the VLCT is how the VCLT treats the rights of individuals. The “acquired rights” provision of the VCLT¹⁴⁵ does not help individuals,¹⁴⁶ but only parties to the treaties, *i.e.*, states. The VCLT does provide that treaties cannot violate *jus cogens*¹⁴⁷ but we are working with the understanding that revocation of citizenship is not a *jus cogens* norm. The VCLT, then, appears to be permissive of Brexit and does not clearly prohibit the loss of EU citizenship.

Next, applying the principles of international institutional law, there will be no further legal relationship in terms of EU rights and duties between the former member and the remaining members following Brexit, aside from the Withdrawal Agreement and other agreements entered into. So, for example, aside from any new agreements, the UK would not have any obligations towards the EU member states or member state nationals under the terms of the EU Treaties. But this analysis overlooks the important rights and duties, and more importantly, fundamental legal bond, that has been formed directly between individuals and the Union. The Union, after all, will continue to exist after Brexit, as will EU citizenship, and the member states will continue to have obligations towards othereach other and towards EU citizens. This bond is not necessarily completely dependent on the legal relations between states and international institutional law does not provide guidance for these rights.

Instead human rights law, which does provide rules on nationality and which has already applied to some degree to the legal bond inherent in EU citizenship, will govern the situation. First, we need to determine specifically which UK nationals have acquired EU citizenship, though this question is not particularly difficult. The EU does not have a citizenship law other than to refer to the TEU and discretion of the member state. When the UK joined the European Communities¹⁴⁸ and later the EC transformed into the EU with its own citizenship, the UK became a member state of the EU. Thus, its nationals could potentially acquire EU citizenship. We then examine UK laws on nationality to see which persons under that law are designated as eligible for EU

1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

145. *See id.* art. 70(1)(b).

146. *But see* Rowena Mason, *EU Citizens in UK Face Brexit Uncertainty*, THE GUARDIAN (May 15, 2016), <https://www.theguardian.com/politics/2016/may/15/eu-citizens-uk-brexite-uncertainty-immigration-status-referendum> [<https://perma.cc/T8ZV-97NZ>] (“Gisela Stuart, the chair of the Vote Leave campaign, said: ‘You have got the Vienna [C]onvention [on the Law of Treaties], which guarantees the rights of existing citizens and existing arrangements.’”).

147. *See* VCLT, *supra* note 144, arts. 53, 64.

148. *See* Treaty concerning the accession of the ... United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, (1972) OJ L 73, 5 (Mar. 27, 1972).

citizenship.¹⁴⁹ Because it is an acquisition question, the UK retains extensive discretion in deciding which persons are qualifying for UK nationality and which are qualifying for EU citizenship.¹⁵⁰ As already mentioned above, the UK even made a declaration on this issue.¹⁵¹ In that declaration, the UK limited its nationality, for purposes of EU citizenship, to “British citizens” and excluded other categories. Thus, any UK national holding “British citizenship” during the years that the UK was an EU member state, clearly held an EU member state nationality during that time and acquired EU citizenship. The other categories of UK nationals did not. Also, British citizens who acquired that status after the UK left the EU did not acquire EU citizenship. As these are acquisition questions, they do not benefit from the more robust protections applied to issues of loss.

The more difficult question is whether British citizens, who have already acquired EU citizenship, might now lose it.¹⁵² Brexit is not a case where EU citizenship throughout the Union is being abolished. Neither is British citizenship being abolished. Instead, efforts are being undertaken to revoke EU citizenship from British citizens. As noted above, under human rights law, such an act cannot be arbitrary and disproportionate, so we can first consider whether there is any valid legal basis and competence for revoking EU citizenship from these individuals and then consider whether that law is arbitrary or disproportionate.

As noted above, the EU does not have rules on loss of EU citizenship other than to refer to member state nationality law, and the UK has no laws on loss of EU citizenship only. The TFEU provision on EU citizenship might contemplate a continuous “holding” of nationality in order to retain EU citizenship, although this is not provided in the EU treaties with that degree of specificity.¹⁵³ Thus, the revocation of EU citizenship must be provided by some other, non-arbitrary, legal act in order to have a legal basis.

We could consider for argument’s sake that the UK might have attempted to unilaterally revoke EU citizenship under domestic law without revoking British citizenship. As a preliminary matter, this policy

149. See Denmark and the Treaty on European Union, *supra* note 88, annex 1 § A; Case C-192/99, *The Queen v. Sec’y of State for the Home Dep’t. ex parte Kaur*, 2001 E.C.R. I-1237, ¶¶ 19–27; 1993 *Citizenship Report*, *supra* note 87; *Third Citizenship Report*, *supra* note 85; *Fourth Citizenship Report*, *supra* note 87; *Fifth Citizenship Report*, *supra* note 88.

150. See Case C-192/99, *The Queen v. Sec’y of State for the Home Dep’t. ex parte Kaur*, 2001 E.C.R. I-1237, ¶¶ 19–27; *cf.* Case C-135/08, *Rottmann v. Freistaat Bayern*, 2010 E.C.R. I-1449, I-1488.

151. See NOTE ON THE TERM “NATIONALS,” *supra* note 88.

152. Or who received EU citizenship in a separate grant when the UK joined the EU and British citizenship became a qualifying EU member state nationality.

153. TFEU, *supra* note 66, art. 20(1) (“Every person holding the nationality of a Member State shall be a citizen of the Union.”) (not providing for loss of EU citizenship explicitly).

is outside of the mandate of the Brexit referendum as it was simply a question of membership in the EU as an international organization,¹⁵⁴ and the UK does not appear to have adopted any legislation on point. Nonetheless, this outcome is not possible because after Brexit, the UK would not be a member state of the EU. It might even be considered interfering with internal EU affairs if it attempted to control EU citizenship which was now foreign to the UK. Imagine if Ukraine sought to terminate the EU citizenship of any Ukrainians that had acquired EU citizenship. Ukraine, and the UK in our case, as non-EU member states, simply has no jurisdiction over a matter under EU law.

Perhaps the UK could have revoked EU citizenship unilaterally before Brexit? Again, it does not appear that the UK took this step, but even if it had, it would be defective. While the UK has some competence to revoke its own nationality from British citizens (not without controversy itself), and with it EU citizenship (also not without controversy), the UK does not appear to be competent to revoke EU citizenship only, separately from British citizenship. There are no provisions for this kind of measure, and it is not possible to sustain an argument that such authority can be implied in the EU treaties. As discussed in the previous section, such an interpretation would run counter to the notion that EU citizenship is a fundamental status bringing the individual into a direct legal bond with the Union. For example, where an EU member state incorrectly interpreted the EU treaties and determined that a person had lost EU citizenship yet maintained member state nationality, the EU would have jurisdiction to review such a claim and would not be bound to respect such an erroneous conclusion.¹⁵⁵ The matter would only fall within the

154. See European Union Referendum Act 2015, c. 36, § 1(1), (4)–(5) (UK).

(1) A referendum is to be held on whether the United Kingdom should remain a member of the European Union.

...

(4) The question that is to appear on the ballot papers is—

‘Should the United Kingdom remain a member of the European Union or leave the European Union?’

(5) The alternative answers to that question that are to appear on the ballot papers are—

‘Remain a member of the European Union

Leave the European Union’.

155. Cf. *Nottebohm (Liech. v. Guat.)*, Judgment, 1955 I.C.J. 4, 23 (Apr. 6) (holding that one state is not bound to always respect the acts of another state granting or revoking nationality, especially if such interpretation or application was not in compliance with international law).

competence of the EU, and through it, to the EU member states collectively. The UK would not be able to revoke EU citizenship unilaterally in this way either. In any event, there is no evidence that the UK ever took such a measure.

Perhaps the act of leaving the Union itself could be interpreted as a collective renunciation of EU citizenship? This argument is not convincing. First, as mentioned previously, there is no mechanism for renunciation of EU citizenship, without renouncing member state nationality. Second, as also mentioned above, renunciation calls for an individualized expression of intent on the part of the renunciant. Clearly, the act of leaving the Union did not amount to a collective renunciation of UK nationality, as a significant percentage of UK nationals clearly very much wanted to retain their EU citizenship.

It would seem that the only way individuals could potentially have their EU citizenship revoked, when not losing the underlying member state nationality, would be to include explicit terms in the EU-UK Withdrawal Agreement on EU citizenship revocation, which was not done.¹⁵⁶ The Withdrawal Agreement does not explicitly provide for the withdrawal of EU citizenship from UK nationals.¹⁵⁷ Numerous provisions in the Withdrawal Agreement on the residual rights of EU citizens and UK nationals in each other's territories strongly suggest that UK nationals are no longer EU citizens,¹⁵⁸ but this is an assumption and it is at least debatable that such legal effect is not included in the instrument itself.¹⁵⁹ The loss of EU citizenship is presented as if UK nationals have already lost EU citizenship prior to the adoption and entry into force of the Withdrawal Agreement,¹⁶⁰ presumably based on the conclusion that UK nationals lost EU citizenship by automatic operation of law when the UK withdrew. But, this interpretation is not without its own problems. For

156. See generally Withdrawal Agreement, *supra* note 2.

157. See generally Withdrawal Agreement, *supra* note 2.

158. See Withdrawal Agreement, *supra* note 2, pmbl., arts. 2, 9, 13–18, 20, 22–23, 26–28, 30, 32, 159; Protocol on Ireland/Northern Ireland pmbl., art. 3, 2019 O.J. (C 384 I) 92 (EU); Protocol on Gibraltar pmbl., art. 1, 2019 O.J. (C 384 I) 143 (EU).

159. See, e.g., Withdrawal Agreement, *supra* note 2, art. 2(c) (“‘Union citizen’ means any person holding the nationality of a Member State”); *id.* art. 2(d) (“‘United Kingdom national’ means a national of the United Kingdom”).

160. See, e.g., Withdrawal Agreement, *supra* note 2, art. 13(1) (“Union citizens and United Kingdom nationals shall have the right to reside in the host State under the limitations and conditions as set out in [various articles of the TFEU and Directive 2004/38/EC.]”); *id.* art. 14(1) (“Union citizens and United Kingdom nationals, their respective family members, and other persons, who reside in the territory of the host State in accordance with the conditions set out in this Title shall have the right to leave the host State and the right to enter it, as set out in Article 4(1) and the first subparagraph of Article 5(1) of Directive 2004/38/EC, with a valid passport or national identity card in the case of Union citizens and United Kingdom nationals, and with a valid passport in the case of their respective family members and other persons who are not Union citizens or United Kingdom nationals.”).

some of the same reasons discussed above, in interpreting such a treaty between the UK and EU, we cannot easily find that EU citizenship revocation is implied. Again, EU citizenship is a fundamental status that grants access to a wide range of civil rights and brings the person into direct political bond with the Union. The loss of EU citizenship is such a consequential outcome, potentially contrary to the wishes of many Britons and with human rights implications, that it would need to be expressly included in the Withdrawal Agreement. It would be very difficult to find these terms in a treaty by implication.

Even if EU citizenship revocation is the intended outcome and we can find terms on this point implicit in the text, the revocation must still comply with the limitations in international law discussed in this Article. As discussed above, states may not revoke nationality in such a way as it infringes on the sovereignty of another state. This result would be a case where a state denationalized its citizen(s) while abroad, rendering them stateless, and effective “dumping” them on the other state. While it is true that Brexit will not render people technically stateless since UK nationals in the EU would always be permitted to return to the UK, this conclusion is not the entire story. UK nationals may have lived abroad in the EU for a considerable time and intertwined their lives with their EU member state of residence. That being said, if those individuals lose EU citizenship, the EU member state in which they reside would not face more burdens than before Brexit. Certainly these EU member states would need to now tolerate the residence of individuals who have lost their legal rights to residence, but aside from the formal legal classification of their status, substantively little would change. For these reasons, Brexit and the loss of EU citizenship of UK nationals abroad would not significantly infringe the sovereignty of other states.

However, even if we can agree that the UK was successful in taking either a unilateral measure to abolish EU citizenship or including those terms in the Withdrawal Agreement by implication, we still trigger a *Rottmann* problem. Because the UK is not revoking or abolishing its own nationality, with an impact on EU citizenship, it is admittedly not a precise *Rottmann* situation; however, *Rottmann* was concerned with the effect of loss of EU citizenship on a person through action of the state, so if this situation can easily be assimilated to *Rottmann*. As such, the revocation must be legitimate,¹⁶¹ proportionate¹⁶² and not arbitrary.¹⁶³

First, international law generally requires some willful, positive act on the part of the person concerned to terminate nationality.¹⁶⁴ Second,

161. See Case C-135/08, *Rottmann v. Freistaat Bayern*, 2010 E.C.R. I-1449, I-1489.

162. See *id.* at I-1489–90.

163. See *id.* at I-1489.

164. See European Convention on Nationality, *supra* note 13, art. 7(3) (limiting loss of nationality); *id.* art. 5(1) (providing for grounds which are *per se* procedurally or substantively

nationality revocation cannot be imposed on a group, but can only follow an individualized determination.¹⁶⁵ It is difficult to identify the cause of the revocation of EU citizenship as none of the persons losing the status committed any acts that would be grounds for revocation. Many are, in effect, bearing the consequences of actions of others as a group. Thus, it would be possible for a protocol to the Withdrawal Agreement to provide for an individual renunciation option, but a non-consensual revocation must comply with the other protections.

Looking at the prohibition of arbitrary withdrawal more closely, revocation of EU citizenship without consent of the individual may be arbitrary both from a procedural and substantive perspective. As for the procedural aspect of arbitrariness, the revocation would need to be provided in law and in compliance with UK constitutional norms. However, procedural arbitrariness is an international law standard than is not necessarily accepting a domestic court's interpretation of its own laws as controlling.¹⁶⁶

Depending on how the UK approaches the revocation, it might be procedurally arbitrary if it is not part of the mandate from the referendum, specifically, whether the referendum constituted the will of the people. Setting aside the apparently aggressive role of Russian propaganda in the Leave campaign,¹⁶⁷ the referendum did not comply with what we would normally expect to be a democratic expression of will. For example, the rules on voting in the referendum limited the electors to those "who . . . would be entitled to vote as electors at a parliamentary election in any constituency" which was not inclusive of the entire UK national population.¹⁶⁸ However, the EU Referendum Act 2015 includes as potential electors Irish and Commonwealth citizens.¹⁶⁹ In the first case, Irish nationals are also EU citizens, and their EU citizenship was never in jeopardy, so why they would vote in the election for the UK to leave the EU is quite odd and can only be understood in the unique context of Anglo-Irish history. That being said, it is highly unusual that foreign EU

arbitrary).

165. See *id.* art. 7(3) (limiting loss of nationality); *id.* art. 5(1) (providing for grounds which are *per se* procedurally or substantively arbitrary).

166. See *Ivcher Bronstein v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 74 (Feb. 6, 2001).

167. See, e.g., Jamie Rigg, *The True Extent of Russian Meddling in Brexit Remains Murky*, ENGADGET (Dec. 15, 2017), <https://www.engadget.com/2017/12/15/facebook-twitter-russia-brexite-interference/> [<https://perma.cc/2XY6-WQWQ>].

168. See European Union Referendum Act 2015, c. 36, § 2(1)(a) (UK) ("Those entitled to vote in the referendum are—the persons who, on the date of the referendum, would be entitled to vote as electors at a parliamentary election in any constituency").

169. See *id.* c. 36, § 2(2)(a)–(b) ("A person falls within this subsection [entitled to vote in the referendum] if the person is either—a Commonwealth citizen, or a citizen of the Republic of Ireland.").

member state nationals would be permitted to vote to leave the EU when those nationals will be permitted to retain their EU citizenship regardless of the outcome of the referendum. However, in the second case of Commonwealth citizens, these persons are not even EU citizens, so for them as well, the lack of EU citizenship was not an issue. In fact, they might have the perverse incentive to vote Leave to increase their leverage in the UK labor market. Here as well it is difficult to understand how foreign nationals could opine on whether UK nationals must retain or lose their EU citizenship. Given the very narrow margin of success of the referendum, these small issues are not insignificant. If the referendum had a democratic deficit, then we might conclude that the will of the people was not clearly expressed and thus the very significant outcome of EU citizenship revocation as a consequence of Brexit is not reasonable. More specifically, it might be that leaving the EU would be reasonable, but the revocation of EU citizenship, over human rights concerns, is not. Thus, Brexit remains legally valid and the UK is no longer an EU member state, but without a mandate to include treaty terms that arbitrarily revoke EU citizenship.

In addition, such a revocation might have a retroactive legality problem when applying this rule to anyone currently holding EU citizenship. Unless we could find that revocation of EU citizenship without revocation of the dependent EU member state nationality was already implied in the law previously, we have a clear case of amending the law to provide for the possibility of citizenship revocation. Citizenship is not generally considered a criminal penalty, and instead is a civil one, and the CFR only expressly covers legality in criminal matters,¹⁷⁰ but this distinction does not entirely insulate any change from legality concerns.

However, arbitrariness has a substantive aspect as well. Several substantive issues can be identified. For example, looking at UK nationals resident or with long standing ties to EU member states, these individuals may have investments, homes, and lives that are rendered unstable and unpredictable. There may even be a violation of the right to family life under the European Convention on Human Rights as well for those who have married nationals of other EU member states.¹⁷¹

170. See CFR, *supra* note 65, art. 49.

171. See, e.g., *Maslov v. Austria*, 2008-II Eur. Ct. H.R. 301; *Üner v. Netherlands*, 2006-XII Eur. Ct. H.R. 129; *Keles v. Germany*, App. No. 32231/02, 44 Eur. H.R. Rep. 12 (2007); *Yilmaz v. Germany*, App. No. 52853/99, 38 Eur. H.R. Rep. 23 (2004); *Amrollahi v. Denmark*, App. No. 56811/00 (July 11, 2002), <http://hudoc.echr.coe.int/eng?i=001-60605> [<https://perma.cc/XW73-DJA7>]; *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 119; *Dalia v. France*, 1998-I Eur. Ct. H.R. 76; *Beldjoudi v. France*, 234 Eur. Ct. H.R. (ser. A) (1992); *Moustaquim v. Belgium*, 193 Eur. Ct. H.R. (ser. A) (1991).

The cause of revocation must also have valid grounds. Revocation would be excused if it involved the voluntary acquisition of another nationality; acquisition of the nationality by fraud or deception; voluntary service in a foreign military force; conduct seriously prejudicial to the vital interests of the state; lack of a genuine link between the state and a national habitually residing abroad; or failure of a child to fulfill preconditions established by law,¹⁷² but none of those situations appear to apply. If we follow the European Convention on Nationality as a guide for exemptions from arbitrariness, we do not find the political reorganization of the state as an exemption.¹⁷³ As we saw with the law on state succession or changes in territory, individuals are usually given some choice in elected to retain nationality when this type of reorganization occur. It could be argued that maintenance of UK nationality was “acquisition” of another nationality, although this argument is difficult to sustain. However, dual nationality can be valid ground for revoking nationality, so British citizens who also hold the nationality of another EU member state could lose the EU citizenship they derived from UK nationality under such a standard without the act being arbitrary; however, this outcome would be pointless because they would continue to hold EU citizenship by virtue of their other EU member state nationality. However, revoking EU citizenship from only one group of people on this ground could also be problematic from the perspective of discrimination.

A further aspect of arbitrariness, sometimes treated as a distinct test, is that revocation of nationality cannot be discriminatory.¹⁷⁴ In the case of Brexit, such revocation of EU citizenship would be implemented purely on the basis of member state nationality. Not only does international law prohibit discriminatory nationality revocation, but EU law does so also. The EU treaties provide that the EU institutions can act to prohibit discrimination on the basis of “sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”¹⁷⁵ None of these categories clearly covers Brexit and, in any event, this is only a permissive provision allowing the EU to act. It would not prohibit these acts on its own. The CFR also prohibits discrimination on “any ground” and includes as examples “sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability,

172. See, e.g., European Convention on Nationality, *supra* note 13, art. 7 (limiting scenarios for loss of nationality).

173. See European Convention on Nationality, *supra* note 13, art. 7(3) (limiting loss of nationality); *id.* art. 5(1) (providing for grounds which are *per se* procedurally or substantively arbitrary).

174. See, e.g., *id.*, art. 5(1).

175. See TFEU, *supra* note 66, art. 19(1).

age or sexual orientation.”¹⁷⁶ Following the list above, we could argue *ejusdem generis* that national origin or a comparable status was also protected.

However, the TEU and CFR also prohibit explicitly any discrimination on grounds of nationality.¹⁷⁷ Any agreement between the EU and UK to revoke EU citizenship from UK nationals only, who, at the time, would of course still have been EU citizens, would have been a clear distinction on the basis of nationality and violation of the TEU itself. Arguably, the EU would not have the competence to enter into such a treaty with one, soon to be, former member state dissolving its legal bond with some EU citizens on this basis. Even if we agreed that, as a treaty amending the TEU, the EU could discriminate among EU citizens for citizenship revocation on the basis of nationality, those terms would certainly need to be explicit in the amendment to the TEU to create an effective exception and overcome normative conflict. As mentioned above, it is quite difficult to presume that the EU implicitly agreed to terms that run contrary to a such a fundamental rule in the EU legal order.

However, in addition to EU law, states may not discriminate generally in their nationality law on revocation under human rights law. International law prohibits revocation on the basis of race, color, ethnicity, gender or sex, religion, social origin, language, property, birth or “other status,” political opinion or “other opinion.”¹⁷⁸ On its face, the revocation of EU citizenship does not appear to touch on any of these grounds; however, British nationals are losing their citizenship arguably based on national origin (only persons with a national origin in the UK),¹⁷⁹ and this is also a prohibited ground for discrimination. Withdrawal of EU citizenship from a group of people based on national origin would be arbitrary under any reading of human rights law; although, the withdrawal of EU citizenship from UK nationals only could be aligned with British citizenship, not necessarily national origin. The current trend in human rights law on national origin discrimination appears to permit this distinction,¹⁸⁰ though distinguishing between the two statuses is difficult.¹⁸¹

176. See CFR, *supra* note 65, art. 21(1).

177. See TFEU, *supra* note 66, art. 18; CFR, *supra* note 65, art. 21(2).

178. See CFR, *supra* note 65, art. 21(1).

179. See, e.g., H.R.C. Res. 20/5, *supra* note 15; H.R.C. Res. 13/2, *supra* note 15; H.R.C. Res. 10/13, *supra* note 15; H.R.C. Res. 7/10, *supra* note 15; H.R.C. Res. 2005/45, *supra* note 16; H.R.C. Res. 1999/28, *supra* note 15; *id.* ¶ 2; H.R.C. Res. 1998/48, *supra* note 15, ¶ 2; H.R.C. Res. 1997/36, *supra* note 15, ¶ 2.

180. See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment, 2021 I.C.J. 4, ¶ 105 (Feb. 4) (rejecting claim of discrimination by the UAE against Qataris on the basis of citizenship, not national origin).

181. See Comm’n. on the Elimination of Racial Discrimination, Jurisdiction of the Inter-State Communication by Qatar against the United Arab Emirates, U.N. Doc. CERD/C/99/3

In the alternative, withdrawal of EU citizenship on the basis of political¹⁸² (or other)¹⁸³ opinion could also be prohibited. One could imagine an argument that EU citizenship is being withdrawn based on the political views of UK nationals voting to withdraw the state of the UK from the Union, as well as the political views attributed to “Remain” voters who might actually disagree. The Brexit referendum did not contain any question about abolishing EU citizenship and was instead phrased only about the membership of the state in the Union.¹⁸⁴ Furthermore, the list of discriminatory bases is not limited to the examples given, so one could also imagine other similar and related claims.¹⁸⁵

Lastly, any revocation of citizenship, even if it is not arbitrary, must also be proportionate. Advocate General Szpunar has identified the lack of any proportionality assessment of the impact of loss of EU citizenship on the individual as highly problematic.¹⁸⁶ Furthermore, such a proportionality assessment must be individualized.¹⁸⁷ Szpunar has even rejected whether the individual undertook the loss of member state nationality, and thus EU citizenship, voluntarily, as irrelevant to the individualized proportionality assessment in some cases, such as renunciation for purpose of acquiring a different nationality.¹⁸⁸ It is

(Aug. 30, 2019) (tentatively accepting the claim of discrimination by Qatar against the UAE, though complaint is pending); Comm’n. on the Elimination of Racial Discrimination, Jurisdiction of the Inter-State Communication by Qatar against the Kingdom of Saudi Arabia, U.N. Doc. CERD/C/99/5 (Aug. 30, 2019).

182. See, e.g., H.R.C. Res. 10/13, *supra* note 15; H.R.C. Res. 7/10, *supra* note 15; H.R.C. Res. 2005/45, *supra* note 15; H.R.C. Res. 1999/28, *supra* note 15.

183. See, e.g., H.R.C. Res. 20/5, *supra* note 15; H.R.C. Res. 13/2, *supra* note 15; H.R.C. Res. 10/13, *supra* note 15.

184. See European Union Referendum Act 2015, c. 36, § 1(4)–(5) (UK).

185. See, e.g., Reduction of Statelessness, *supra* note 15, art. 9; ICERD, *supra* note 40, art. 5; European Convention on Nationality, *supra* note 13, art. 5(1); Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7, at 15 (Sept. 15); *Draft Articles on Nationality*, *supra* note 10, art. 15 (prohibiting nationality discrimination “on any ground”).

186. See Case C-118/20, *JY v. Wiener Landesregierung*, ECLI:EU:C:2021:530, ¶ 98 (July 1, 2021) (“It is clear from the order for reference that no review of the proportionality of the contested decision in the light of EU law has been conducted.”).

187. See *id.* ¶ 99 (“Accordingly, in order for such a decision to be compatible with the principle of proportionality, the relevant national rules must permit an individual examination of the consequences of revoking the assurance from the point of view of EU law.”); Case C-221/17, *Tjebbes v. Minister van Buitenlandse Zaken*, ECLI:EU:C:2019:189, ¶ 41 (Mar. 12, 2019).

188. See Case C-118/20, *JY*, ECLI:EU:C:2021:530, ¶¶ 100–01 (“The referring court asks whether the mere fact that *JY* renounced her citizenship of the Union and relinquished, voluntarily, her citizenship of the Republic of Estonia can be the decisive factor in the context of a review of proportionality. . . . [T]he situation of a national of a Member State such as *JY*, who has renounced her original nationality with the sole aim of satisfying the condition for the assurance of the grant of Austrian nationality laid down in national legislation . . . is *immaterial* when it comes to determining whether the revocation of the assurance as to the grant of the

quite difficult to understand how the loss of EU citizenship for millions of EU citizens, many residing and have integrated into the social communities of various EU member states for decades, is proportionate to the goal of the UK leaving the Union as a political matter. There is perhaps a sense that loss of EU citizenship is the natural outcome of Brexit, but it is not a necessary condition for leaving the Union. It could be considered disproportionate that a territory can leave the EU, but its nationals retain EU citizenship, obliging the remaining members of the EU to grant them EU citizenship rights without their nationals enjoying reciprocity. However, this outcome is already the case for many thousands of people who live in territories outside the EU but who might still qualify for nationality in an EU Member State, and thus EU citizenship, by right of *jus sanguinis*. We can also recall that the EU grants rights equivalent to EU citizenship fairly liberally so permitting British citizens to retain their EU citizenship and its rights would not be out of step with other existing EU policy. For example, a non-member state national is permitted residence in the EU for family reunification purposes and retains that right even if the family member who held EU citizenship dies or divorces the person.¹⁸⁹ Therefore, the revocation of EU citizenship would appear to place a surprise, disproportionate burden on thousands of individuals for the distinct goal of securing one EU member state's act to terminate political membership in the Union.

The EU and UK might attempt in a protocol to the Withdrawal Agreement to make EU citizenship revocation more proportionate by including a grant of EU citizenship rights, though not citizenship, to these persons. It is also true that many EU member states are granting generous terms to UK nationals who remain in EU territory. These actual and hypothetical measures, however, represents a diminished status significantly different from the fundamental legal bond these persons previous enjoyed with the Union. These individuals might have some residency protections, but can longer vote or enjoy the consular protection of other EU member states, among a host of other rights, and might lose those residency rights upon leaving the state of residence. And if the full extent of EU citizenship rights was restored, then, from a practical perspective, it is unclear what the benefit would be to denying British citizens EU citizenship. In any event, the removal of the status—as the loss of the legal bond directly with the Union—would likely fail as well on the other grounds mentioned above. Significantly, British citizens are also no longer “European” in their identity.

Testing Brexit against human rights rather than merely international institutional law produces a host of troubling problems, suggesting an

nationality has due regard to the principle of proportionality.”) (emphasis in original).

189. See Council Directive 2004/38, art. 12, 2004 O.J. (L 158) 77, 100 (EC).

arbitrary, disproportionate revocation of EU citizenship beyond the competence of the actors involved.

CONCLUSION

This Article has sought to bring a human rights narrative into the discussion of Brexit, which has to date been dominated by a narrative drawn from the law of treaties and international organizations. Yet, EU citizenship is a very different creature than the residual, indirect benefits individuals sometimes accrue from other international organizations.

This Article concludes that EU citizenship should continue for a particular group of UK nationals: individuals qualifying as “British citizens” under UK law, who have validly acquired EU citizenship, who do not actively choose to renounce their EU citizenship and, potentially also, are relying on their rights as EU citizens. It bears repeating that this Article is not concluding that all UK nationals will continue to qualify for EU citizenship. It is limited only to those who are British citizens and have acquired EU citizenship already. Future generations will not qualify because they cannot acquire it. The only legal means for achieving the revocation of acquired EU citizenship for any other groups must be a treaty between the EU and UK that expressly amends the treaties on European Union to revoke EU citizenship for this specific group. Nonetheless, in order to comply with human rights, such an agreement must also be non-arbitrary, non-discriminatory and proportionate. The extreme outcome of revocation for the entire group without individualized assessment is problematic, as are the generally arbitrary nature of the action. Under human rights, this Article has concluded that any UK national who has acquired EU citizenship prior to Brexit must continue to enjoy EU citizenship. It is not permissible to revoke EU citizenship from all UK nationals by implied or assumed automatic result of leaving the EU.

The UK can, of course, leave the Union. This result does not preclude the EU from adopting legislation in the future that might provide EU citizenship to an expanded group of persons: UK nationals who did not acquire EU citizenship prior to Brexit. This Article takes no view on whether the member states of the Union, or perhaps the Union itself, have the competence to amend the treaties or adopt legislation that would provide for such a supplementary access mode for EU citizenship.

This Article has not taken a view on whether EU member state nationals can continue to enjoy any rights and residency within the UK. Most likely, they do not. Now that the UK is no longer an EU member state, the UK no longer has EU obligations under the EU treaties, aside from the Withdrawal Agreement, and the benefits of EU citizenship cannot be invoked against the UK. Thus, strangely, some UK citizens would have the right to move to the EU and enjoy EU rights there, but

EU member state nationals would not have the right to move to the UK vice versa.

UK nationals who continue to hold EU citizenship do create a logistical challenge for obvious reasons, should the argument in this Article be accepted. The EU does not issue its own passports or other identity document evidencing EU citizenship. UK passports are themselves now insufficient to evidence status, whether they are still burgundy and bear the words “European Union” or not. As the UK is no longer an EU member state, those documents cannot conclusively establish status. Clearly, this challenge must be addressed, once continued EU citizenship is acknowledged.

But these possible complications should not discourage the assertion that UK nationals, who have acquired EU citizenship, should not lose it arbitrarily. In fact, the risk of not recognizing the continuing EU citizenship of these UK nationals is to diminish EU citizenship generally. It threatens its nature as a fundamental status linking the individual directly to the Union, and relegates it to a mere benefit for individuals that states can adopt and dispose of arbitrarily. As such, failure to recognize EU citizenship in this case, contrary to human rights, would so damage EU citizenship, that we might wonder why the Treaties on European Union envisioned citizenship at all, rather than a mere collection of rights.