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## ARTICLES

### SPECIAL SECTION – SOCIAL INTEGRATION IN EU LAW: CONTENT, LIMITS AND FUNCTIONS OF AN ELUSIVE NOTION

# FROM ALTERNATIVE TRIGGERS TO SHIFTING LINKS: SOCIAL INTEGRATION AND PROTECTION OF SUPRANATIONAL CITIZENSHIP IN THE CONTEXT OF BREXIT AND BEYOND

FRANCESCA STRUMIA\*

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ABSTRACT: Brexit highlights how supranational citizenship is held to ransom by a European citizen's home Member State. When the home Member State pulls the cord, supranational citizenship can be switched off. This evidences on the one hand the weakness of European citizens' position in their host Member States. On the other hand it challenges the resilience of supranational citizenship as a status. In the eyes of some, the fragility of supranational citizenship that Brexit reveals is but a side effect of democracy. In other views, that fragility and its implications for the rights of individual citizens call for a rescission of supranational citizenship's link of derivation from nationality. This *Article* problematizes the latter link from a novel angle. It explores the role of social integration in building an alternative link, for purposes of rights, status, and belonging, to the national space of a host Member State. Seen from this angle, the derivation link to nationality is just one aspect of supranational citizenship's anchoring to an underlying national space. While European citizenship stays formally linked to nationality of a home Member State, over the course of a European citizen's cross-border experience the substantive link to an underlying national space shifts between home and host Member State. This shift discloses novel opportunities to protect supranational citizenship in the context of a Member State withdrawal from the EU.

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KEYWORDS: Brexit – European citizenship – supranational citizenship – genuine links – social integration – free movement.

## I. INTRODUCTION

As many things Brexit, the problem of citizenship rights after the United Kingdom (UK) EU withdrawal has proven extremely divisive. Reactions span the disinterest of those who see loss of supranational citizenship as a non-issue. The resignation of those who consider it the unavoidable side effect of an exercise in democracy. And the rage of those who hold it as a destiny's joke. If questioned as to their position, many in the first group would probably say that national citizenship is a cosy enough vest not to need a supranational coat as an embellishment. Those in the second would point to the legitimate choice of a majority. Those in the third would reiterate the old promise of the Court of Justice that Union citizenship was destined to be the fundamental status of nationals of the Member States.<sup>1</sup>

Despite this divergence of views, or maybe precisely because of it, the question of citizens' rights has held a central place in the political debate unleashed by the British referendum on leaving the EU; as well as in the negotiations between the UK and the other 27 EU Member States following the formal triggering of Art. 50 of the TEU in March 2017. In the context of the latter negotiations, citizens' rights have represented a threshold issue conditioning progression from a first phase of discussion on the terms of the UK withdrawal to a second phase focusing on the shape of the future relation between the UK and the EU. Beyond the official negotiations, citizens' rights have occupied much space in the media, in the imaginary of scholars, and in the scrutiny of courts.<sup>2</sup>

The debate has been rich and heterogeneous. However it is weakened by two shortfalls. A first shortfall is in the way the problem of citizenship loss has been framed.

<sup>1</sup> For a possible sample of the three positions, see e.g. A. MENÉNDEZ, *Which Citizenship? Whose Europe? The Many Paradoxes of European Citizenship*, in *German Law Journal*, 2014, p. 907 *et seq.* (in the sense that Union citizenship is a misnomer and misses several aspects of traditional citizenship – hence not such a desirable embellishment); M. VAN DEN BRINK, D. KOCHENOV, *A Critical Perspective on Associate EU Citizenship after Brexit*, in *DCU Brexit Institute Working Papers*, no. 5, 2018; D. KOSTAKOPOULOU, *Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens*, in *Journal of Common Market Studies*, 2018, p. 854 *et seq.* The Court of Justice first announced the promise in judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para 21.

<sup>2</sup> A Dutch District Court attempted to refer to the Court of Justice the very question of the feasibility of loss of citizenship in February 2018. See A. ARNULL, *UK Nationals and EU Citizenship: References to the Court of Justice and the February 2018 Decisions of the District Court, Amsterdam*, in *EU Law Analysis*, 28 March 2018, [eulawanalysis.blogspot.co.uk](http://eulawanalysis.blogspot.co.uk). The reference has eventually not been submitted following a domestic appeal, see P. TEFFER, *Dutch Request to Clarify Brexit Britons' Rights Annulled*, in *EUobserver*, 19 June 2018, [euobserver.com](http://euobserver.com).

At a principles level the debate has become somewhat polarized between a politics and democracy camp, in whose view supranational citizenship is a necessary sacrifice; and a law and fundamental rights camp, in whose view the disposal of citizens' rights and status is an unacceptable legal outcome.<sup>3</sup> At a pragmatic level, attention has focused on the losses of British nationals in the EU and EU citizens in the UK to the detriment of other less evident instances of citizenship loss. A second shortfall is in the approaches proposed to supranational citizenship protection. These have been characterized by a certain narrowness of the short-term response – negotiations have focused on safeguards of the immediately affected rights.<sup>4</sup> And by a certain radicalism of theoretical responses and longer-term reform proposals. Theoretical responses and reform options have mostly focused on how to alter the structure of supranational citizenship, emancipating it from national citizenship.<sup>5</sup>

This article proposes to address both shortfalls. In respect of the former, it re-frames the problem of supranational citizenship loss, by articulating it within a matrix of variables. It also shifts the focus from the formal problem of the derivative character of European citizenship to the substantive one of the quality of the relation between a supranational citizen and his home Member State. In respect of the latter, the article looks for answers in host Member State links. It engages, for these purposes, the doctrine of genuine links between international and European law.

The central finding is that EU law and international law support, albeit from different angles, the idea that genuine links to a host country trigger for a number of purposes a relation of belonging alternative to nationality. This suggests in turn that European citizenship's link to an underlying national space can shift, for certain purposes, from a home to a host Member State. While supranational citizenship maintains its link of derivation from national citizenship of a home Member State, it gradually attaches over the course of a cross-border experience, to the national space of a host Member State. This shifting character of European citizenship's link to a national space offers a potential shield in the context of Member State withdrawal.

The *Article* contributes on the one hand to the multifarious literature on Brexit and citizenship. Scholars across disciplines have questioned among others the applicability to the Brexit context of legal doctrines that safeguard Union citizenship rights;<sup>6</sup> the viability of claims for protecting citizens' family rights under the European Convention on

<sup>3</sup> For a sample of the two positions see M. VAN DEN BRINK, D. KOCHENOV, *A Critical Perspective on Associate EU Citizenship*, cit.; D. KOSTAKOPOULOU, *Scala Civium*, cit.

<sup>4</sup> See *infra*, section II.2.

<sup>5</sup> See *infra*, section II.3.

<sup>6</sup> G. DAVIES, *Union Citizenship-Still Europeans' Destiny after Brexit?* in *European Law Blog*, 7 July 2016, europeanlawblog.eu.

Human Rights (ECHR);<sup>7</sup> the possibility of ‘freezing’ citizenship rights;<sup>8</sup> the inevitability of the citizenship downgrade that Brexit brings about;<sup>9</sup> and the framing of a EU’s duty to protect its citizens.<sup>10</sup> This *Article* adds to that literature by offering an intermediate assessment between accounts focusing on addressing the immediate citizen rights’ effects of Brexit, and accounts arguing for an entire rethinking of the premises and structure of supranational citizenship. On the other hand it contributes to the literature on social integration,<sup>11</sup> by linking the EU law side and the international law side of the doctrine of genuine links.

Part II frames the problem of citizenship loss in the context of Brexit. It proposes a matrix of citizenship loss, it considers what aspects of the matrix have been addressed in the current withdrawal arrangements, and it explores how Brexit discloses the fragility of supranational citizenship. Part III focuses on supranational citizenship protection. It explores the options on the table to mitigate the home State link. It then introduces the notion of host State links and it examines their role in both EU and national law. It ultimately articulates how host State links may protect citizenship in the context of Member State withdrawal.

## II. BREXIT AND LOSS OF CITIZENSHIP

### II.1. THE MATRIX OF LOSS OF CITIZENSHIP

Brexit’s detrimental effect for the condition of European citizens has been hailed from so many sides that it sounds as almost a platitude at this point. Yet the debate on Brexit and citizenship has foregone a systematic reflection on the dimensions of citizenship loss that Brexit entails.<sup>12</sup> Citizenship loss has been considered in a fragmented, if not opportunistic, fashion. The UK Government has thought of the interests of its nationals in the EU; the EU of the interests of its citizens in the UK; the citizens have fought for the rights,<sup>13</sup> or the sta-

<sup>7</sup> G. MARRERO GONZÁLEZ, *Brexit, Consequences for Citizenship of the Union and Residence Rights*, in *Maastricht Journal of European and Comparative Law*, 2016, p. 5 *et seq.*

<sup>8</sup> P. MINDUS, *European Citizenship After Brexit: Freedom of Movement and Rights of Citizenship*, Basingstoke: Palgrave McMillan, 2017.

<sup>9</sup> D. KOCHENOV, *EU Citizenship and Withdrawals from the Union: How Inevitable is the Radical Downgrading of Rights?*, in *LSE Europe in Question Discussion Paper Series*, no. 111, 2016.

<sup>10</sup> D. KOSTAKOPOULOU, *Scala Civium*, cit.

<sup>11</sup> See e.g. C. O’BRIEN, *Real Links, Abstract Rights and False Alarms: the Relationship between the ECJ’s ‘Real Link’ Case Law and National Solidarity*, in *European Law Review*, 2008, p. 643 *et seq.*; R. LYSS, *A Right to Belong: Legal Protection of Sociological Membership in the Application of Art. 12(4) of the ICCPR*, in *New York University Journal of International Law and Policy*, 2013-2014, p. 1097 *et seq.*

<sup>12</sup> See e.g. P. MINDUS, *European Citizenship After Brexit*, cit.

<sup>13</sup> See e.g. UK Court of Appeal, judgment of 20 May 2016, *Schindler v. Chancellor of the Duchy of Lancaster*, [2016] EWCA 469.

tus they stand to lose.<sup>14</sup> Media have looked for sensation, scholars for a boost to their theories, national courts for some extra visibility.<sup>15</sup> In the whirlwind of the involved interests, the full spectrum of citizenship loss that Brexit entails has hardly been laid bare.

Hence the first challenge in tackling citizenship loss is framing the problem that it raises. There are several sides to citizenship loss with Brexit. These are best illustrated through a matrix intersecting the variable static/mobile with the variable British national EU citizen/non-British national EU citizen.

	Static	Mobile
Non-British national EU Citizens	Loss of potential rights of movement Loss of slice of status	(in the UK) Loss of residence rights (elsewhere) Loss of slice of status and potential rights of movement
British National EU Citizens	Loss of status Loss of potential rights of movement and residence	Loss of status Loss of actual rights of movement and residence

Static British national EU citizens will lose, with Brexit, their European citizenship. European citizenship, under Art. 20 of the TFEU, is indeed an addition to nationality of a Member State. With the UK withdrawal, British nationals will no longer be nationals of a Member State. Loss of European citizenship status entails loss of political voice in the European institutions. It also entails loss of potential rights of movement and residence in the EU. This is a particularly momentous deprivation for those young British nationals who were under age at the time of the UK EU referendum and could not express their vote. Mobile British nationals, who reside in other EU Member States, will also of course lose their citizenship status. This will deprive them of the automatic EU law right to reside and work in their Member State of residence. With the right to reside, they will lose corollary EU law rights to equal treatment for social security and tax purposes,<sup>16</sup> as well as to family reunification with third country national family members.<sup>17</sup> Their political voice in local elections in their host Member State will be silenced from one day to the next. Although *ad hoc* agreements in the context of the withdrawal negotiations look set to address several of these losses, the relevant rights post-Brexit will no longer de-

<sup>14</sup> See A. ARNULL, *UK Nationals and EU Citizenship*, cit.

<sup>15</sup> For an argument in this sense in respect of a Dutch District Court proposed reference to the CJEU on EU citizenship rights, see R. MCCREA, *Brexit, EU Citizenship Rights of UK Nationals and the Court of Justice*, in *UK Constitutional Law Association Blog*, 8 February 2018, ukconstitutionallaw.org.

<sup>16</sup> See Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

<sup>17</sup> See Art. 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

scend from EU citizenship status. In other words, Brexit will turn “British expats into post-European third country nationals”.<sup>18</sup>

Non-British national EU citizens will lose a slice of their European citizenship, the one corresponding to their right to move and reside in the UK. This will represent a loss of potential rights for static non-British national EU citizens and for non-British national EU citizens residing in a Member State other than their own and other than the UK. It will represent a loss of actual rights for non-British national EU citizens living and residing in the UK. For all non-British national EU citizens, Brexit brings about in any case a slight shrinking of status.

The matrix of citizenship loss reveals that Brexit bears on Union citizenship both in terms of lost rights to enter, actually or potentially, practically or virtually, a host Member State; and in terms of weakening of supranational citizenship status. The draft withdrawal agreement addresses some of the actual, practical citizenship rights that are lost with UK exit.<sup>19</sup> However only a further reflection can embrace also the potential and virtual rights that fall victim to Brexit. And spell out as a result the way in which Brexit diminishes the prospects of supranational citizenship.

## II.2. CITIZENS’ RIGHTS PROTECTED IN THE WITHDRAWAL AGREEMENT

Several proposals on the treatment of the actual and practical citizens’ rights that Brexit threatens have been advanced in the context of the negotiations to date. A first proposal on the treatment of relevant rights came from the European Commission in May 2017.<sup>20</sup> The proposal aimed at ensuring lifetime protection for the rights of Union nationals having exercised free movement prior to the UK’s withdrawal. This includes EU citizens in the UK, British nationals in the EU Member States, and their family members, regardless of their nationality. The proposal purported to guarantee to the rights of the mentioned categories the same level of protection after Brexit as enjoyed under EU law.<sup>21</sup> The UK Government published a further proposal in June 2017, in which it first advanced the concept of “settled status”.<sup>22</sup> Under the original UK proposal, settled status was to be offered to EU citizens who would have completed five years of continuous residence in the UK by the date of the UK withdrawal, or by the end of a subsequent

<sup>18</sup> P. MINDUS, *European Citizenship After Brexit*, cit., p. 29.

<sup>19</sup> Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 March 2018. See *infra*, section II.2.

<sup>20</sup> Commission Position Paper of 12 June 2017 on Essential Principles on Citizens’ Rights, ec.europa.eu.

<sup>21</sup> *Ibidem*.

<sup>22</sup> UK Government, Policy Paper of 26 June 2017, *Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU*, www.gov.uk.



two year “grace period”.<sup>23</sup> Settled status, under the UK proposal, resembled EU permanent residence but was to be governed by UK immigration law.

In December 2017, the EU and the UK side reached a tentative agreement on the post-Brexit status of British nationals resident in the EU and EU citizens resident in the UK.<sup>24</sup> In comparison to the proposals advanced by both sides during the summer, the December agreement was slightly more generous in terms of citizens’ rights protections. First, it purported to protect any EU citizen resident in the UK on Brexit day, and any British national resident in an EU Member State on the same day, regardless of the length of their pre-Brexit residence. Second, the agreement offered protection not only to family members resident with relevant EU citizens or British nationals on Brexit day, but also to those who had been in a family relationship with the protected EU citizen or British national on Brexit day, but would only join him or her in the host State at a later stage. And finally, under the December terms, the post-Brexit rights of the protected citizens were to be grounded in EU rather than in domestic law.<sup>25</sup>

The December terms have largely passed into the draft withdrawal agreement prepared by the European Commission and endorsed by the European Council in March 2018.<sup>26</sup> The draft agreement extends protection of residence rights to a larger group of EU citizens and British nationals. EU citizens whose residence in the UK will begin after Brexit day but before the end of the transition period that will follow are protected.<sup>27</sup> And the same goes, *mutatis mutandis*, for British nationals resident in a EU Member State.<sup>28</sup> The protected citizens will gain permanent residence in the host State after five years of continuous residence. These five years may include both periods of residence prior to Brexit, during the transition period, and following the end of the transition period. The right to permanent residence is based in EU law and is only lost through absences from the host State exceeding five continuous years.<sup>29</sup>

Hence two quadrants of the loss of citizenship matrix – the two referring to mobile citizens – fall within the scope of the protections granted by the withdrawal agreement. The latter agreement however leaves several aspects unprotected. First, while the rights of British nationals in their EU Member State of residence are safeguarded, the rights of the same British nationals to intra-EU mobility are in jeopardy. The withdrawal agreement is silent in this respect. The technical note annexed to the December 2017 joint

<sup>23</sup> *Ibidem*.

<sup>24</sup> Joint report of 8 December 2017 from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Art. 50 TEU on the United Kingdom’s orderly withdrawal from the European Union.

<sup>25</sup> *Ibidem*. For an analysis, see F. STRUMIA, *EU Citizens’ Rights and EU Citizenship Loss under the Brexit Divorce Deal*, in *ECAS Citizens’ Brexit Observatory*, 11 December 2017, [ecas.org](http://ecas.org).

<sup>26</sup> Draft Agreement on the Withdrawal of the United Kingdom, cit.

<sup>27</sup> *Ibid.*, Art. 9, para. 1, let. a).

<sup>28</sup> *Ibid.*, Art. 9, para. 1, let. b).

<sup>29</sup> *Ibid.*, Art. 14.

report reserves the question of free movement for British nationals residing in the EU to further negotiation.<sup>30</sup> Further, for the rights that are protected under the withdrawal agreement, what is lost is the status that they come with under EU law. Both British nationals residing in the EU and EU citizens residing in the UK under the terms of the withdrawal agreement are destined to live as members of a protected immigrant minority rather than as a class of transnational citizens. This aspect is of no small consequence. Beyond the rights explicitly protected under the withdrawal agreement, their condition will be a matter of concessions on the part of the host State government. It will be up to the host State government, for instance, to recognize any political rights to the former holders of EU law rights. Also, under the withdrawal agreement, host States retain the freedom to identify through law conduct that, if occurring after the end of the transition period, may disqualify the citizens protected under the withdrawal agreement from their residence rights.<sup>31</sup> This signals that despite the grounding of rights under the withdrawal agreement in EU law, after Brexit and with the passage of time, rights holders under the agreement will slowly slip out of the protective vest of EU law.

If the withdrawal agreement offers some albeit incomplete protection in respect of the rights covered by two of the quadrants in the matrix of citizenship loss, it does nothing in respect of the other two quadrants. Given the personal scope of the withdrawal agreement, static citizens and their potential rights of movement and residence are left unaddressed.

As are the virtual rights that European citizenship entails beyond movement and residence. European citizenship gives to its holders a stake in a political and territorial community stretching beyond the boundaries of a citizen's state of nationality and embracing the other Member States.<sup>32</sup> With Brexit all British nationals lose that stake. While non-British national EU citizens lose the stake that shared supranational citizenship gave them in the UK legal and political community.

So begins the Brexit induced weakening of the status of supranational citizenship. The withdrawal agreement – assuming it stands at the end of the negotiations and eventually comes into force<sup>33</sup> – can rescue part of supranational citizenship's content from the Brexit fire, however it cannot safeguard the edifice. In respect to the latter, one is left to assess the damage.

<sup>30</sup> Joint technical note of 8 December 2017 expressing the detailed consensus of the UK and EU positions on Citizens' Rights, ec.europa.eu.

<sup>31</sup> Art. 18, para. 2, of the Draft Agreement on the Withdrawal of the United Kingdom, cit.

<sup>32</sup> See L. AZOULAI, *Transfiguring European Citizenship: From Member State Territory to Union Territory*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, pp. 190-191. Also see R. BAUBÖCK, *Democratic Inclusion. Rainer Bauböck in Dialogue*, Manchester: Manchester University Press, 2017.

<sup>33</sup> At the time of writing, the prospect of a “no deal” outcome of the negotiations cannot be written off. See e.g. *The Dangerous Delusion of No Deal Brexit*, in *The Economist*, 2<sup>nd</sup> August 2018, [www.economist.com](http://www.economist.com).

### II.3. THE HOME STATE RANSOM AND THE FRAGILITY OF SUPRANATIONAL CITIZENSHIP

Ultimately Brexit highlights an old feature of European supranational citizenship. European citizenship derives from and depends on the nationality of a Member State. In the language of the Treaties, it is “additional to”, and does not replace national citizenship.<sup>34</sup> In scholarly comments, this dependence of European citizenship on nationality has been called a “birth defect”,<sup>35</sup> and has warranted the epithet of “parasitic” for European citizenship.<sup>36</sup>

Brexit opens up a new perspective on the dependency of European citizenship on national citizenship. It shows how, in the context of Member State withdrawal, the derivation link between national and European citizenship becomes a short leash. By pulling that leash, the home Member State triggers all the angles of citizenship loss that are recorded in the above considered matrix. It can silence a European citizen’s rights of movement and residence, actual and potential, as well as the transnational stakes that European citizenship comes with. Member State withdrawal lays bare, in other words, the fragility of supranational citizenship.

This revealed fragility corroborates the disenchantment with supranational citizenship that specialist literature already manifested from several directions. European citizenship has been accused, among others, of being a misnomer for a limited set of market rights.<sup>37</sup> Of real citizenship it misses, from this point of view, the social and solidarity sides. It has also been criticized for having been made dependent, in legislation and in jurisprudence, on the “law of taking the bus”.<sup>38</sup> Its legal protection, in other words, is triggered only by reference to sometimes spurious cross-border links. Supranational citizenship creates and perpetuates, as a consequence, an artificial cleavage between mobile and static citizens.<sup>39</sup>

To these disaffected views, the experience of Member State withdrawal adds a further reason for complaint. It leads to question the very credibility of the project of supranational citizenship. The Court of Justice has repeatedly described Union citizenship

<sup>34</sup> Art. 20 TFEU.

<sup>35</sup> R. BAUBÖCK, *The Three Levels of Citizenship in the European Union*, in *Phenomenology and Mind*, 2015, p. 67.

<sup>36</sup> G. DAVIES, K. ROSTEK, *The Impact of Union Citizenship on National Citizenship Policies*, in *European Integration Online Papers*, 2006, eiop.or.at.

<sup>37</sup> See A. MENÉNDEZ, *Which Citizenship? Whose Europe?*, cit.

<sup>38</sup> D. KOCHENOV, *On Tiles and Pillars: EU Citizenship as a Federal Denominator*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 41.

<sup>39</sup> R. BAUBÖCK, *Citizenship in Cloud Cuckoo Land?*, in *Cloud Communities: The Dawn of Global Citizenship?*, *Global Citizenship Observatory*, 2018, globalcit.eu. Also see S. IGLESIAS SÁNCHEZ, *A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., pp. 390-391.

as “destined to be the fundamental status” for nationals of the Member States.<sup>40</sup> This promise of fundamental status embodies part of the legal heritage that the CJEU has ascribed to Member States’ nationals. The CJEU has held in some of its seminal judgments that the now EU represents a “new legal order of international law”, “the subjects of which comprise not only the Member States but also their nationals”.<sup>41</sup> As a result, EU law is intended to confer upon individuals “rights which become part of their legal heritage”.<sup>42</sup> The limitations of national sovereignty that European integration has entailed are aimed in part at protecting this legal heritage.

Brexit brings into stark relief the difficulty of reconciling the sovereign power of a Member State to withdraw with the host of individual rights that EU law confers on its natural person subjects. Some comments emphasize that the dismissal of part of that legal heritage is the price of democracy. And there is little that the Court can or should do to meddle with that.<sup>43</sup> This view forgets in part that the high stakes linked to the project of supranational citizenship are not the sole result of judicial enthusiasm. A precise political project,<sup>44</sup> endorsed by repeated democratic iterations,<sup>45</sup> was at the basis of what is now supranational citizenship. This was a project to foster a sense of belonging among the people of Europe through an entrenchment of their special rights.<sup>46</sup> These special rights and the legal heritage that European citizenship has then built around them constitute an important part of a body of law that several theorists, from Philip Jessup to Kaarlo Tuori, have identified as a first concrete example of transnational law.<sup>47</sup> The citizenship loss implications of Member State withdrawal question the very credibility, and reliability of this body of transnational law.

Ultimately, by reminding how short is the leash to which supranational citizenship is attached, Brexit reignites the old debate on the derived nature of European citizenship. The derivative link between national and European citizenship has lent itself to several perspectives of inquiry in the literature. A first perspective questions the nature of the

<sup>40</sup> See e.g., among many, *Grzelczyk*, cit., para 21; Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano* [GC], para 41.

<sup>41</sup> Court of Justice, judgment of 5 February 1963, case 26/62, *van Gend & Loos*.

<sup>42</sup> *Ibidem*.

<sup>43</sup> See e.g. M. VAN DEN BRINK, D. KOCHENOV, *A Critical Perspective on Associate EU Citizenship*, cit., pp. 14-15.

<sup>44</sup> See P. ADONNINO, *A People's Europe. Reports from the ad hoc Committee*, Bulletin of the European Communities 7/85, aei.pitt.edu. The *ad hoc* Committee second report stressed the importance of citizens’ “special rights” in order to give the individual citizen a “clearer perception of the dimension and existence of the Community” and advanced a number of proposals in this sense.

<sup>45</sup> To the extent that the project has been realized through Treaty reform, and through secondary legislation.

<sup>46</sup> The European Council endorsed the second Adonnino report and approved its proposals in Milan on 28 and 29 June 1985, under the label “A People’s Europe”.

<sup>47</sup> See P. JESSUP, *Transnational Law*, New Haven: Yale University Press, 1956; K. TUORI, *On Legal Hybrids and Legal Perspectivism*, in M. MADURO, K. TUORI, S. SANKARI (eds), *Transnational Law. Rethinking European Law and Legal Thinking*, Cambridge: Cambridge University Press, 2014, p. 11 *et seq.*

relation between citizenship and nationality that this link suggests. Kochenov has argued, for instance, that nationality is the status that demarcates citizens from aliens, while citizenship is a set of entitlements.<sup>48</sup> A further perspective focuses on the source of the rights coming with supranational citizenship in light of the derivation link.<sup>49</sup> The same link invites to ponder the multi-level nature of European citizenship.<sup>50</sup>

Under the Brexit light, new nuances emerge for each of these perspectives. Can citizenship as a set of entitlements ever be delinked from nationality as a status? How resilient can the transnational rights linked to European citizenship otherwise be? And which is really the base layer for the multi-level construction of European citizenship?

As the matrix of citizenship loss reveals, all of these questions arise as a result of the home State ransom to which European citizenship is subject. If the home State of a European citizen pulls the leash, the very status of supranational citizenship is lost. This suggests to shift the focus, in the debate on the derivative character of European citizenship, from the latter's formal link of derivation from nationality to its substantive link to a home Member State. In particular, the nature and the elasticity of that link deserve some attention.

### III. CITIZENSHIP PROTECTION BETWEEN HOME AND HOST STATE

#### III.1. CHECKS ON THE HOME STATE LINK

That the dependency on a home Member State endangers a European citizen's citizenship is not a novel finding. The link between a European citizen and his home Member State has been questioned before in this perspective.<sup>51</sup> On the one hand, in the interest of protecting European citizens' rights, EU law imposes some checks on that link. On the other hand, as part of the debate on protection of EU citizens' and British nationals' rights in the wake of Brexit, several potential options to sever, qualify or bypass the home Member State link have been considered in policy and political fora.

In the former respect, while the EU Member States are competent to determine who their nationals are, EU law imposes some checks on the way that determination is

<sup>48</sup> D. KOCHENOV, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, in *Columbia Journal of European Law*, 2009, p. 169 *et seq.*

<sup>49</sup> See e.g. Y.N. SOYSAL, *Limits of Citizenship: Migrants and Postnational Membership in Europe*, Chicago: The University of Chicago Press, 1994 (relevant rights are based in personhood rather than nationhood); also see F. STRUMIA, *In-Between the Lines of the High Court Brexit Judgment: EU Transnational Rights and their Safeguards*, in *EU Law Analysis*, 6 November 2016, eulawanalysis.blogspot.com.

<sup>50</sup> For reflections in this sense see e.g. E. OLSEN, *European Citizenship: Mixing Nation State and Federal Features with a Cosmopolitan Twist*, in *Perspectives on European Politics and Society*, 2013, p. 505 *et seq.*; also see R. BAUBÖCK, *The Three Levels of Citizenship*, *cit.*

<sup>51</sup> For an analysis of the limits of this link see e.g. D. KOCHENOV, *Ius Tractum of Many Faces*, *cit.*, p. 171 *et seq.*

carried out.<sup>52</sup> At the time of the adoption of the Treaty of Maastricht, the Member States annexed a declaration to the Treaty, to the effect that “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”.<sup>53</sup> The conclusions of the Edinburgh European Council of December 1992 reiterated the point.<sup>54</sup> The case law of the Court of Justice has long recognized that it is for each Member State to lay down the conditions for the acquisition and loss of its nationality.<sup>55</sup>

However the Court has reiterated that the relevant competence must be exercised “with due regard” to EU law, thereby introducing a check on the way the Member States establish and rescind the link with their own nationals. The court first introduced this proviso, as an *obiter dictum*, in the *Micheletti* case,<sup>56</sup> which concerned recognition of the nationality of a Member State on the part of another Member State for purposes of the exercise of EU law rights. It reconfirmed it in the 2001 *Kaur* case,<sup>57</sup> which revolved around the role of unilateral declarations annexed to the Accession Treaty of the UK in determining who British nationals are for purposes of Community law. The ruling in the 2002 *Chen* case,<sup>58</sup> again concerning in relevant part recognition of nationality of a Member State on the part of another Member State reiterated the proviso. Most recently, the Court confirmed and clarified the proviso in the 2010 *Rottmann* case,<sup>59</sup> concerning withdrawal of a Member State nationality resulting in the loss of EU citizenship.

Mr. Rottmann, originally an Austrian national, naturalized as a German national. Under relevant Austrian law, he automatically lost Austrian nationality upon acquiring German nationality. Mr. Rottmann omitted to mention in his application for naturalization in Germany that he was subject to criminal proceedings in Austria. When the German authorities became aware of this, they withdrew Mr. Rottmann’s German nationality on the ground that he had acquired German nationality through deception. Upon losing Germany nationality, Mr. Rottmann would not automatically reacquire Austrian nationality, and would thus lose European citizenship and possibly remain stateless. Mr. Rottmann brought an action for annulment of the withdrawal decision and in the course of the ensuing litigation, the German federal administrative court referred two questions to the CJEU. It asked, in substance, whether EU law prevented either Germany or Austria from applying their respective nationality laws, in a situation where such application would lead

<sup>52</sup> Court of Justice, Judgment of 2 March 2010, case C-135/08, *Rottman* [GC], paras 39 and 48.

<sup>53</sup> Declaration no. 2 annexed to the Treaty of Maastricht.

<sup>54</sup> Conclusions of the Presidency, Edinburgh European Council of 11-12 December 1992, p. 53.

<sup>55</sup> See e.g. Court of Justice, judgment of 7 July 1992, case C-369/90, *Micheletti and others*, para. 10; Court of Justice, judgment of 20 February 2001, case C-192/99, *Kaur*, para. 19.

<sup>56</sup> *Micheletti and others*, cit., para. 10. Also see Court of Justice, judgment of 19 October 2004, case C-200/02, *Zhu and Chen*, para. 37.

<sup>57</sup> *Kaur*, cit.

<sup>58</sup> *Zhu and Chen*, cit.

<sup>59</sup> *Rottmann* [GC], cit.

to a European citizen losing European citizenship and possibly remaining stateless.<sup>60</sup> The Court held that a decision to withdraw nationality in a similar situation is not contrary to EU law and particularly to the provision on European citizenship, provided that such decision respects the principle of proportionality.<sup>61</sup> The thrust of the *Rottmann* judgment is that a decision on nationality which results into the loss of Union citizenship must be proportional in light of the consequences it entails for the person concerned and his family 'with regard to the loss of the rights enjoyed by every citizen of the Union'.<sup>62</sup> To be proportional, the relevant determination must strike an acceptable balance between public interests and individual interests.<sup>63</sup> In other words, the *Rottmann* rule invites national courts to "weigh considerations relating to the national interest [...] against the significance of losing EU citizenship".<sup>64</sup> In this way, the *Rottmann* judgment sets some clear limits against the exercise of the home Member State ransom.

Relevant limits, albeit considered in the literature,<sup>65</sup> cannot help protect the rights of European citizens that are lost in conjunction with a Member State's secession. The type of individual assessment that the *Rottmann* ruling prescribes is not viable in the context of collective loss of citizenship rights as in the case of Member State withdrawal. In the context of Brexit other options have been rather considered to protect citizens' rights from the consequences of the home Member State ransom.

Among these, the ALDE group in the European Parliament has advocated the introduction, as part of the UK withdrawal arrangements, of a form of associate European citizenship.<sup>66</sup> Associate citizenship would be extended to willing British nationals in ex-

<sup>60</sup> *Ibid.*, paras 22-35.

<sup>61</sup> *Ibid.*, para. 59.

<sup>62</sup> "In such a case, it is, however, for the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law. Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality." *Ibid.*, paras 55 and 56.

<sup>63</sup> See G. DAVIES, *The Entirely Conventional Supremacy of Union Citizenship and Rights*, in J. SHAW (ed.), *Has the Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUI Working Papers, no. 62, 2011, p. 9.

<sup>64</sup> See J. SHAW, *Setting the Scene: the Rottmann Case Introduced*, in J. SHAW (ed.), *Has the Court of Justice Challenged Member State Sovereignty in Nationality Law?*, cit., p. 4.

<sup>65</sup> G. DAVIES, *Union Citizenship. Still Europeans' Destiny after Brexit?*, in *European Law Blog*, 7 July 2016, europeanlawblog.eu.

<sup>66</sup> See European Parliament Committee on Constitutional Affairs, Draft Report of July 2016 on possible evolutions of and adjustments to the current institutional set-up of the European Union, amendment

change for a monetary fee. The proposal has raised much criticism.<sup>67</sup> However, a detailed study has considered it legally feasible within the frame of the existing treaties.<sup>68</sup>

Relying on the possibilities enabled by the existing treaties frame from a different direction, several European Citizens' Initiatives have further challenged the dependency of European citizens' status on a home Member State. A first initiative aims at severing the link between nationality and European citizenship for European citizens affected by Brexit.<sup>69</sup> A second more ambitious initiative labelled "Permanent European Union Citizenship" was submitted in May 2018, following on a previous, now closed, initiative titled "Retaining European Citizenship".<sup>70</sup> A further now closed initiative aimed at enabling the issuance of European passports to British nationals following Brexit.<sup>71</sup> While all these attempts have so far struggled to reach any significant consensus, they do signal the unease that Brexit has raised with the current frame for supranational citizenship rights.<sup>72</sup>

Beyond the policy proposals seeking to emancipate the status of European citizens from the home Member State link, legal avenues to protect citizens' rights despite that link have also been considered.<sup>73</sup> In particular, the possibility to protect European citizens' rights as acquired rights under international law has received early attention in the debate surrounding Brexit.<sup>74</sup> The Vienna Convention on the Law of Treaties and the ECHR represent potential avenues to treat European citizens' rights threatened by Brexit as acquired rights. Both options offer however only weak protection. Relevant provisions of the Vienna Convention protect, in the context of a treaty's termination, the acquired rights of State parties rather than the rights of individuals affected beyond State

882. Also see C. GOERENS, *European Associate Citizenship*, in *Charlesgoerens.eu Blog*, 2017, [www.charlesgoerens.eu](http://www.charlesgoerens.eu); G. AUSTIN-GREENALL, S. LYPINSKA, *Brexit and Loss of EU Citizenship: Cases, Options, Perceptions*, in *Citizen Brexit Observatory*, October 2017, [ecas.org](http://ecas.org), pp. 8-10.

<sup>67</sup> See M. VAN DEN BRINK, D. KOCHENOV, *A Critical Perspective on Associate EU Citizenship*, cit.

<sup>68</sup> V. ROEBEN, J. SNELL, P. TELLES, P. MINNEROP, K. BUSH, *The Feasibility of Associate EU Citizenship for UK Citizens post-Brexit*, Study for Jill Evans MEP, 2017, [www.greens-efa.eu](http://www.greens-efa.eu).

<sup>69</sup> See the initiative *Flock Brexit, EU Citizenship for Europeans: United in Diversity in Spite of jus soli and jus sanguinis*, [www.flockbrexit.eu](http://www.flockbrexit.eu).

<sup>70</sup> See the initiative *Permanent European Union Citizenship*, [www.eucitizen2017.org](http://www.eucitizen2017.org).

<sup>71</sup> See the initiative *European Free Movement Instrument (Choose Freedom Initiative)*, [choosefreedom.eu](http://choosefreedom.eu).

<sup>72</sup> For an analysis see G. AUSTIN-GREENALL, S. LYPINSKA, *Brexit and Loss of EU Citizenship*, cit., pp. 9-10.

<sup>73</sup> That is legal avenues beyond any ad hoc arrangement entailed in the withdrawal agreement or agreement on the future UK-EU relation.

<sup>74</sup> See e.g. House of Lords, European Union Committee, *Brexit: acquired rights*, HL 2016-17, p. 82; A. FERNÁNDEZ TOMÁS, D. LÓPEZ GARRIDO, *The Impact and Consequences of Brexit on 'Vested' Rights of EU Citizens Living in the UK and British Citizens Living in the EU-27*, Study for the AFCO Committee, 2017, [www.europarl.europa.eu](http://www.europarl.europa.eu); S. DOUGLAS-SCOTT, *What Happens to 'Acquired Rights' in the Event of a Brexit*, in *UK Constitutional Law Association Blog*, 2016, [ukconstitutionallaw.org](http://ukconstitutionallaw.org); M. WAIBEL, *Brexit and Acquired Rights*, in *American Journal of International Law Unbound*, 2017, p. 440 et seq.



parties.<sup>75</sup> And the ECHR only protects European citizenship rights to the extent these overlap with human rights protected under the Convention. Many key European citizenship rights have no corresponding right under the Convention.<sup>76</sup>

Brexit has thus raised much attention to the possibility of protecting rights of European citizenship through reforming, mitigating or working around the home Member State link. Much less attention has been paid to the balance between home and host Member State links in the experience of supranational citizenship, and to the possible shifts in that balance that Member State withdrawal may inspire or justify. The doctrine of real links offers a vantage point for a reflection in this sense. It governs, in EU law, the respective responsibilities of home and host Member States towards citizens in the exercise of their supranational rights.

### III.2 REAL LINKS BETWEEN HOME AND HOST MEMBER STATES

Real, or genuine, link tests apply in several areas of EU citizenship and free movement law. In spite of a certain semantic variety in the way they are framed in legislation and case law – genuine or real links to the competent Member State,<sup>77</sup> degrees of integration in society,<sup>78</sup> connections to the employment market of a Member State,<sup>79</sup> degrees of connection to society<sup>80</sup> – relevant tests point in a common direction. They bring considerations of social integration, in a host or home Member State, to bear on the award and distribution of citizenship rights and protections. In particular, they are deployed in two ways. First, they apply as an eligibility criterion for entitlements and benefits. Second, they warrant security of status.

In the former respect, the search for genuine links proving social integration balances the EU law imperative of non-discrimination with the host Member States' recognized interest in fending off undue burdens on their public finances.<sup>81</sup> Social integration becomes a condition of eligibility for fruition of a range of state awarded benefits on an equal treatment basis with nationals of a host Member State. Students, for instance, are eligible for maintenance aid only after five years of uninterrupted residence in a host Member State. In the case law, this residence requirement that is codified in the Citi-

<sup>75</sup> Art. 70, para. 1, let. b) of the Vienna Convention on the Law of the Treaties. Also see International Law Commission, *Draft Articles on the Law of Treaties with commentaries – Commentary to draft Art. 66*, in *Yearbook of the International Law Commission*, 1966, para. 3.

<sup>76</sup> See G. AUSTIN-GREENALL, S. LYPINSKA, *Brexit and Loss of EU Citizenship*, cit., pp. 12-13. An example are political rights conferred by European citizenship. The ECHR gives no protection to relevant rights.

<sup>77</sup> See Court of Justice: judgment of 11 July 2002, case C-224/98, *D'Hoop*, para. 38; judgment of 21 July 2011, case C-503/09, *Stewart*, para. 92.

<sup>78</sup> Court of Justice, judgment of 18 November 2008, case C-158/07, *Förster* [GC], para. 49.

<sup>79</sup> Court of Justice, judgment of 23 March 2004, case C-138/02, *Collins*, para. 71.

<sup>80</sup> Court of Justice, judgment of 22 May 2008, case C-499/06, *Nerkowska*, para. 39.

<sup>81</sup> Court of Justice, judgment of 15 March 2005, case C-209/03, *Bidar* [GC], para. 56.

zenship Directive,<sup>82</sup> is justified as a means to prove a degree of social integration in the host Member State society.<sup>83</sup> On similar grounds, residence requirements can condition the award of jobseekers' allowances.<sup>84</sup> They can be a legitimate means to prove that the claimant is genuinely seeking employment hence warranting a genuine connection between the claimant and the host Member State's employment market.<sup>85</sup>

From a different perspective, social integration is also at the basis of a European citizen's right of permanent residence in a host Member State after five years of continuous residence.<sup>86</sup> The Court has emphasized this point in holding that periods of imprisonment cannot count towards achievement of the relevant right and that they interrupt continuity of residence.<sup>87</sup> They negate indeed the degree of integration that is – according to the Court – at the very basis of the concept of permanent residence.<sup>88</sup>

As a condition of eligibility for rights, genuine link tests apply not only in respect of host Member States, but also in respect of home ones. With regard to students' finance, the Court has repeatedly recognized the legitimate interest of home Member States in conditioning the exportability of awards on the part of home students to the establishment of a real link to their society.<sup>89</sup> With regard to jobseekers' allowances, the Court has recognized that home Member States have, like host ones, a legitimate interest in testing the genuine link between the claimant and their geographical employment market.<sup>90</sup> Enlarging the reasoning to welfare benefits in general, the Court has found, in a case concerning a home Member State, that it is a legitimate interest of the Member State competent to award a benefit, whether home or host Member State, to seek to ascertain a genuine link with the claimant.<sup>91</sup> According to the Court, home Member States may legitimately resort to a range of elements to corroborate that link in case of

<sup>82</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

<sup>83</sup> *Bidar* [GC], cit. paras 57 and 59; *Förster* [GC], cit., paras 51-54.

<sup>84</sup> Art. 24, para 2, of Directive 2004/38 carves out social assistance for jobseekers from the guarantee of equal treatment for migrant EU citizens. However the CJEU clarified in *Vatsouras* that "benefits of a financial nature intended to facilitate access to the employment market" are not social assistance. Court of Justice, judgment of 4 June 2009, joined cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, para. 45.

<sup>85</sup> *Collins*, cit., paras 69-72; *Vatsouras*, cit., paras 38-40.

<sup>86</sup> Directive 2004/38, art. 16.

<sup>87</sup> Court of Justice, judgment of 16 January 2014, case C-378/12, *Onuekwere*, paras 24-25; also see judgment of 16 January 2014, case C-400/12, *G*, para 38.

<sup>88</sup> *Ibidem*.

<sup>89</sup> See e.g. Court of Justice: judgment of 26 February 2015, case C-359/13, *Martens*; judgment of 18 July 2013, joined cases C-523/11 and C-585/11, *Prinz and Seeberger*. Also see F. STRUMIA, C. BROWN, *The Asymmetry in the Right to Free Movement of European Union Citizens: the Case of Students*, in *EU Law Analysis*, 12 July 2015, eulawanalysis.blogspot.co.uk.

<sup>90</sup> *D'Hoop*, cit., paras 38-39.

<sup>91</sup> *Stewart*, cit., paras 89-90.

welfare claims from their own nationals. Relevant elements include for instance past presence, connection to the social security system, portion of life spent in the home Member State.<sup>92</sup>

If in the case of host Member State cases genuine link tests work to limit the financial burdens imposed by equal treatment obligations, in the case of home ones they work as a limit to the financial burdens imposed by the obligation not to discourage the exercise of free movement.<sup>93</sup> In practice, the design of genuine link tests on the part of home Member States attracts stricter scrutiny on the part of the CJEU.<sup>94</sup> In theory, the recognition of comparable legitimate interests of respectively host and home Member States points to a further function of the assessment of social integration in EU law. The latter works as a criterion for allocation of responsibility for citizens between home and host Member States.

Resort to such an allocation criterion lends support to accounts emphasizing European citizenship's reliance on residence rather than on nationality. Residence triggers host Member States' responsibility. And absence of residence weakens the responsibility of Member States of nationality. Gareth Davies who famously saw supranational citizenship rights "anywhere one hangs his hat" considered this reliance on residence a natural outcome of the principle of equal treatment for migrant citizens.<sup>95</sup> Along similar lines, Daniel Thym has interpreted recent case law on benefits as pointing to an integration model of supranational social citizenship.<sup>96</sup> Strength of entitlement is proportional to duration of residence. Accounts of this type have fostered a degree of disenchantment with the role of nationality in the EU.<sup>97</sup>

Brexit reemphasizes supranational citizenship's dependency on nationality. Allocation of responsibility for citizens through the scrutiny of genuine links however weakens the implications of that dependency. Even if supranational citizenship itself lays its roots in nationality, the entitlements that come with it have shifting roots. Depending on a

<sup>92</sup> *Stewart*, cit., paras 93-101.

<sup>93</sup> See e.g. *Prinz and Seeberger*, cit., para. 36.

<sup>94</sup> Emblematic is the case of student finance. See F. STRUMIA, C. BROWN, *The Asymmetry in the Right to Free Movement*, cit.

<sup>95</sup> G. DAVIES, "Any Place I Hang My Hat?" or: *Residence is the New Nationality*, in *European Law Journal*, 2005, p. 55.

<sup>96</sup> D. THYM, *The Evolution of Citizens' Rights in Light of the EU's Constitutional Development*, in D. THYM (ed.), *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU*, Oxford: Hart Publishing, 2017, p. 111 *et seq.* Also see Court of Justice, judgment of 14 November 2017, case C-165/16, *Lounes* [GC], paras 56 and 58.

<sup>97</sup> See e.g. G. DAVIES, "Any Place I Hang My Hat?"; cit.; D. KOCHENOV, *Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship*, in *EUI Working Papers*, no. 23, 2010. But see O'BRIEN, *Real Links, Abstract Rights and False Alarms*, cit., p. 654 (real links preserve the emotional value of national attachments).

European citizen's place of real social integration, they may ripen in host or home Member States.

The second function of genuine links and social integration, as a guarantee of security of status, corroborates the point. In respect of host Member States social integration protects status from loss through expulsion and deportation. Social and cultural integration is one of the factors that a host Member State has to weigh, together with length of residence, before subjecting a European citizen to an expulsion decision on grounds of public policy or public security.<sup>98</sup> With duration of residence, expulsion decisions become subject to more exacting requirements. A permanent resident European citizen can be expelled only on serious grounds of public policy or public security.<sup>99</sup> A European citizen who has resided in the host Member State for ten years can only be expelled on imperative grounds of public security.<sup>100</sup> On the one hand, the weight given to duration of residence for purposes of protection from expulsion suggests an implied presumption of social integration. Length of residence is one of the main elements deployed in EU law as a proof of real connection to, and social integration in, the society of a Member State. On the other hand, the case law emphasizes that even when the threshold of serious grounds of public policy or public security, or imperative ground of public security, are met, the public interest must be weighed against the position of the offender European citizen. In particular, national authorities have to consider, on a case by case basis, the solidity of the European citizen's social, cultural and family ties with the host Member State. They have to assess, in other words, his social integration.

In respect of home Member States genuine links protect status from the erosive effect of experiences of free movement. This protective effect can be detected in case law concerning benefits that are an expression of a national community's cohesiveness and mutual solidarity, such as for instance compensation for war victims. These benefits are outside the material scope of EU law, hence Member States are competent to decide on their award and withdrawal. However they are bound to respect EU law in the exercise of that competence. In particular they cannot act in a way that deters free movement, unless they pursue a legitimate competing purpose. The Court has found that one such legitimate purpose is seeking to establish that there is a connection between the recipient of a war victims benefit and the society of the awarding Member State.<sup>101</sup> In this context, the connection requirement does not work as a criterion to allocate responsibility for a citizenship benefit between home and host Member States. Responsibility for a war victim benefit cannot be transferred to a host Member State. The requirement rather works as a guarantee of enduring status in the home Member State. Free

<sup>98</sup> Directive 2004/38, Art. 28, para. 1.

<sup>99</sup> *Ibid.*, Art. 28, para. 2.

<sup>100</sup> *Ibid.*, Art. 28, para. 3.

<sup>101</sup> See e.g. *Nerkowska*, cit., para. 37.

movement albeit not comparable to an experience of expatriation may diminish the status of a national in his home Member State. It may force him out of the inner circle of belonging that justifies obligations of mutual solidarity. The survival of those obligations may however be justified by additional factors corroborating nationality and evidencing enduring membership in the society of people of the home Member State. Hence the status-protective role of genuine links tests in this domain.

This second function of genuine links suggests that nationality, albeit still holding the formal ropes from which European citizenship hangs, tends to lose relevance over the course of a supranational citizen's cross-border experience. Once a national leaves a home Member State to exercise free movement, nationality may need to be corroborated by other factors to prove an enduring connection to the home Member State. And once a European citizen has entered a Member State other than the one of nationality, he gradually earns status there based on factors other than nationality. Free movement thus triggers a broader system of assessment of belonging in the different parts of a supranational sphere encompassing both home and host Member State.<sup>102</sup> Within this broader sphere, nationality becomes just one of a host of citizenship enabling factors.<sup>103</sup>

Through resizing the role of nationality as an enabling factor for supranational citizenship, social integration increases the relevance of host State links. These links may help shield supranational citizenship from the home State ransom. The potential of the concept of social integration in this sense may be better grasped through extending the analysis to embrace international law. International law jurisprudence on the right to cross-border movement recognizes to social integration a role similar to that emerging in EU free movement law. Social integration contributes, in relevant jurisprudence, to resize the role of nationality in defining the link that warrants an individual's right to enter a country.

### III.3. SOCIAL INTEGRATION AND THE RIGHT TO ENTER A COUNTRY IN INTERNATIONAL LAW

The right to international free movement is codified in several international law instruments. These include, among others, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the ECHR.<sup>104</sup> In all these instruments, the right to international free movement is defined as

<sup>102</sup> For an account of this broader sphere, see L. AZOULAI, *Transfiguring European Citizenship*, cit., pp. 190-191.

<sup>103</sup> In this sense, recent case law of the Court of Justice has assessed the obligations of host Member States in respect of protection from extradition of EU citizens other than their own nationals. See Court of Justice: judgment of 6 September 2016, case C-182/15, *Petruhhin* [GC]; judgment of 10 April 2018, case C-191/16, *Pisciotti* [GC]; order of 6 September 2017, case C-473/15, *Adelsmayr*.

<sup>104</sup> Art. 13 UDHR; Art. 12 ICCPR; Arts 2 and 3 of Protocol 4 to the ECHR.

the composition of two halves. The first half is the right to leave any country, including one's own. The second half is the right to enter one's own country.<sup>105</sup>

The concept of one's own country, for purposes of this international right of entry, is a rather fuzzy one. In some instruments, the right to entry is clearly linked only to the country of nationality.<sup>106</sup> Others refer to the vaguer concept of one's own country.<sup>107</sup>

The most advanced interpretation of what counts as one's own country has emerged through the application of the provisions of the ICCPR on the part of the UN Human Rights Committee. Ever since its adoption of a General Comment on the Right to Free Movement in 1999,<sup>108</sup> the Human Rights Committee has been at the vanguard of the interpretation and application of the relevant right in international law. In particular, the Committee has repeatedly engaged with the right to enter one's own country, prompting an evolution in the definition of the latter concept. It is in the jurisprudence of the Committee in the context of individual communications that social integration has gained a prominent role in this respect.

Already in the 1999 General Comment, the Committee clarified that 'one's own country' is meant as a broader concept than country of nationality. It encompasses at the very least – in the view of the Committee– the countries with which a person has special ties or claims beyond those of a "mere alien".<sup>109</sup> As examples of relevant ties, the General Comment refers to a series of hypotheses of undue manipulation of a person's nationality. These include, for instance, arbitrary deprivation of nationality in violation of international law, denial of nationality in conjunction with the absorption of a country within a new or different national entity, and arbitrary denial of nationality to stateless persons.<sup>110</sup> The General Comment hints however that the list is open and other types of links and ties may qualify a country as one's own. While it does not further define those links and ties, it refers explicitly to the rights of permanent residents in respect to a country of residence.<sup>111</sup> Thereby impliedly opening the way to considerations of social integration.

As to the Committee's approach in communications based on individual complaints of infringement of the international law right to entry, two phases may be distinguished. In an earlier phase going until the early year 2000s, the Committee maintained a more conservative attitude towards the concept of "own country". While reiterating that this is

<sup>105</sup> For an analysis of the relative weight of the two halves respectively in the EU and international law right to free movement, see F. STRUMIA, *Reassessing the Uncertain Prospects of Free Movement of Persons: A Third Way between the "Economic" and the "Constitutional" Model*, paper presented at the EUSA fifteenth biennial conference, Miami, 4-6 May 2017.

<sup>106</sup> See e.g. Art. 3, para. 2, of Protocol 4 to the ECHR.

<sup>107</sup> Art. 12, para. 4, ICCPR.

<sup>108</sup> Human Rights Committee (CCPR), General Comment no. 27 (1999) on Article 12 (freedom of movement) of 1 November 1999, CCPR/C/21/Rev.1/Add.9.

<sup>109</sup> *Ibid.*, para. 20.

<sup>110</sup> *Ibidem.*

<sup>111</sup> *Ibidem.*

a broader concept than nationality, the Committee in this first phase stopped short of engaging in social integration scrutiny. The seminal case in this phase is *Stewart v. Canada*,<sup>112</sup> in which the Committee examined the complaint of a Scotland-born British national who had lived since the age of seven in Canada, where he was a permanent resident. He had acquired a substantial criminal record in Canada, which eventually made him subject to deportation. The Committee found that Stewart could not claim protection of his right to remain in Canada under the ICCPR as Canada had not become his "own country". Stewart had entered Canada under its immigration laws and would have had the opportunity to apply for nationality. The fact that he refrained from doing so, and disabled himself from doing so through committing crimes, had to be taken as an indication that he had opted to remain an alien.<sup>113</sup> The majority's decision in *Stewart v. Canada* raised however a fierce dissent. Dissenters pointed to the importance of notions of social membership for purposes of assessing whether a country is a person's own. They emphasized that the relevant provision of the ICCPR is concerned with the "strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it".<sup>114</sup> They added that there are factors other than nationality that may create a connection between an individual and a country stronger than the one created by nationality. Among possible factors in this sense, they considered long standing residence, close personal and family ties, and intention to remain, together with the absence of ties to other countries.<sup>115</sup>

While the Committee remained on the position taken in *Stewart* in the subsequent case of *Madafferi v. Australia* decided in 2006,<sup>116</sup> the 2010 communication in *Nystrom v. Canada* inaugurated a new phase in the Committee's appraisal of the concept of own country.<sup>117</sup> The dissenters' view in *Stewart* became the voice of the majority. Nystrom was a Swedish national born in Sweden during his Australian-resident mother's temporary visit to some relatives there. At 27 days old he followed his mother to Australia, where he had since lived. He spoke no Swedish and had no contacts with his relatives in Sweden. He lived in Australia thinking of being a citizen. However when he accrued a substantial criminal record, Australia decided to cancel his transitional visa and to deport him to Sweden. Nystrom claimed that Australia had become his "own country". This time the Committee found in his favour. In drawing its conclusions, the Committee

<sup>112</sup> Human Rights Committee (CCPR), Views of 1 November 1996, communication no. 538/1993, *Charles E. Stewart v. Canada*.

<sup>113</sup> *Ibid.*, paras 12.5 and 12.8.

<sup>114</sup> *Ibid.*, Individual opinion of Elizabeth Evatt and Cecilia Medina Quiroga, cosigned by Francisco José Aguilar Urbina, para. 5.

<sup>115</sup> *Ibid.*, para. 6.

<sup>116</sup> Human Rights Committee (CCPR), Views of 26 August 2004, communication no. 1011/2001, *Francesco Madafferi and Anna Maria Immacolata Madafferi*.

<sup>117</sup> Human Rights Committee (CCPR), Views of 18 July 2011, communication no. 1557/2007, *Nystrom v. Australia*.

appropriated the view of the dissenters in *Stewart* and relied on the strong ties that Nystrom had to Australia.<sup>118</sup> In particular, the Committee referred to the length of Nystrom's residence in Australia, to the fact that he was treated there in many respects like a citizen as he could vote in local elections and serve in the army, to his family ties, his knowledge of the language, and the absence of any ties to Sweden.<sup>119</sup>

A few years later, in *Warsame v. Canada*, the Committee reiterated similar reasoning.<sup>120</sup> Warsame was born in Saudi Arabia of Somali parents. He had never been to Somalia and never claimed his citizenship there. He had lived in Canada since the age of four and was a permanent resident there. Because of his criminal record he had become subject to deportation and as a defence claimed that Canada was his "own country" under the ICCPR. The Committee resorted once again to the special ties rationale.<sup>121</sup> It recognized that Canada was Warsame's own country within the meaning of the ICCPR in consideration of his having lived all his conscious life there and having received there all his education.<sup>122</sup> The absence of any meaningful ties to Somalia corroborated the Committee's conclusion.<sup>123</sup>

Social integration, under the semblances of the "special ties" that bind a person to a country other than the one of nationality, has thus gained a central place in the jurisprudence of the Human Rights Committee. It has become a determining factor in identifying the enduring and consequential connections between a person and a country that allow designating the latter country as the former person's own. In this sense, in international law social integration brings the resizing in the role of nationality that was evidenced in EU law one step further. Beyond being a beacon of status and a condition for rights, social integration acts here as the trigger, alternative to nationality, of a relation of belonging between a person and a country. In this international law capacity, social integration holds the potential to further problematize the derivation link of European citizenship from nationality.

#### III.4. PROTECTING SUPRANATIONAL CITIZENSHIP THROUGH HOST STATE LINKS

Even just as an intellectual exercise, the transposition of the international law "own country" frame to the EU law domain is not without obstacles. In international law one of the factors considered in the assessment of whether a country is a person's own is the absence of ties to other countries.<sup>124</sup> Absence of any such ties strengthens a mi-

<sup>118</sup> *Ibid.*, para. 7.4.

<sup>119</sup> *Ibid.*, para. 7.5.

<sup>120</sup> Human Rights Committee (CCPR), Views of 1 September 2011, communication no. 1959/2010, *Jama Warsame v. Canada*.

<sup>121</sup> *Ibid.*, para. 8.4.

<sup>122</sup> *Ibid.*, para. 8.5.

<sup>123</sup> *Ibidem.*

<sup>124</sup> See e.g. *Nystrom v. Australia*, cit., para. 7.4.



grant's claim for entry. In the case of European citizens, the right to enter a host Member State depends on the very existence of ties, in the form of nationality, to another Member State. Free movement within the EU is not meant to sever a citizen's ties to the Member State of origin.<sup>125</sup> It entails exit from a home Member State, but not expatriation. The European citizen earns his integration in a host Member State while retaining intact his links to the Member State of nationality. In a strict application of the Human Rights Committee "own country" test, this permanence of links to a home Member State would weaken the claim of the European citizen in respect of the host Member State. However, ties to a country of origin are, also in the international law context, one of several factors playing a role in the assessment of whether a country is a person's own. The EU law context warrants holistic consideration of all such factors. It is the peculiarity of European citizenship that it offers the opportunity to articulate one's life between two or more Member States, retaining simultaneous links to all of them. For European citizens, in other words, ties to a Member State of nationality and ties to a host Member State are not in competition, but rather complementary or even parallel. The presence of the former says little as to the intensity of the latter.

Whether through the EU law doctrine of genuine links, or through resort to the international law definition of one's own country on the basis of social membership, social integration ultimately points to a shift in European citizenship's link to an underlying national space. It shows how throughout the development of a citizen's cross border experience, that link shifts, in a number of respects, from a derivation link to a home Member State to an attachment link to a host Member State. The EU law doctrine of genuine links evidences a shift in respect of the rights and status descending from supranational citizenship. The international law doctrine of social membership for purposes of the definition of one's own country inspires a shift in respect of the source of a European citizen's belonging in a host Member State. In international law, social integration changes the relation between a person and his host country from one of hospitality into one of belonging. In the EU context, the relation between a European citizen and his host Member State is originally one of heightened hospitality, rooted in mutual recognition, on the part of the Member States, of the rights and status of their respective nationals.<sup>126</sup> With the European citizen's gradual integration, that relation potentially becomes one of direct belonging. This transformative view of the relation between citizen and host Member State, albeit inspired by international law, finds support in a recent holding of the Court of Justice. The Court suggested in the *Lounes* ruling that "the rights conferred on a Union citizen by Art. 21(1) TFEU [...] are intended among oth-

<sup>125</sup> But see G. DAVIES, "Any Place I Hang My Hat?" cit., p. 53.

<sup>126</sup> F. STRUMIA, *European Citizenship and EU Immigration: A Demoi-cratic Bridge Between the Third Country Nationals' Right to Belong and the Member States' Power to Exclude*, in *European Law Journal*, 2016, pp. 437-441.

er things to promote the gradual integration of the Union citizen concerned in the society of the host Member State".<sup>127</sup>

The shifting character of the derivation link discloses in turn a new perspective for the protection of supranational citizenship in the context of Member State's withdrawal. It warrants close scrutiny of a supranational citizen's host Member State links, before dismissing European citizenship entirely together with loss of Member State nationality status. But how exactly can host Member State links protect supranational citizenship? They certainly cannot sever and replace, as things stand, home Member State nationality as the formal source of European citizenship. They can nonetheless serve several other functions.

First, they are a tool in the hands of politicians in the context of withdrawal negotiations. On the one hand they have already been deployed in this respect. The status that the draft withdrawal agreement designs for EU citizens in the UK and British nationals in the EU is a celebration of host Member State links. It is after all but the result of mutual recognition, between the EU Member States on the one hand, and the UK on the other one, of the rights and status of a minority of sufficiently integrated intra-EU migrants.<sup>128</sup> On the other hand, host Member State links could be acknowledged as a general principle orienting the negotiation of further open points. It has been argued that Brexit prompts a transition from the realm of supranational to that of international law, where reciprocity is a key rule.<sup>129</sup> The doctrine of genuine links that, as has been seen, has developed in both supranational and international law, and to some extent sits across the two domains, is well equipped to weather that transition. In particular, host State links could work as a corrective principle, standing for the individual interests of citizens against the sometimes capricious character of reciprocity.

Second, host Member State links are a tool in the hands of administrators called to implement the withdrawal arrangements, as well as of adjudicators. They can work as a criterion of interpretation of the eventual UK withdrawal agreement. On the one hand they could be at the basis of a set of guidelines on the application and implementation of the final withdrawal agreement. Relevant guidelines could help handle the cases of citizens who have troubles evidencing the residence requirements prescribed in the withdrawal arrangements. This could be the case, for instance, of citizens who have been dividing their time between the UK and another EU Member State in part-year residency arrangements. On the other hand, relevant links could help courts, whether the UK ones or the Court of Justice, in reviewing the position of any classes of citizens who may have fallen through the cracks of the withdrawal arrangements. These may in-

<sup>127</sup> *Lounes* [GC], cit., para. 56.

<sup>128</sup> On the grounding of Union citizenship in mutual recognition of belonging, see F. STRUMIA, *Supranational Citizenship and the Challenge of Diversity. Immigrants, Citizens and Member States in the EU*, Martinus Nijhoff, 2013, pp. 278-314.

<sup>129</sup> M. VAN DEN BRINK, D. KOCHENOV, *A Critical Perspective on Associate EU Citizenship*, cit., p. 18.

clude, for instance, citizens who cannot meet the employment status and resources requirements for lawful residence as they have been acting as carers for family members through informal arrangements. Host State links' role as a source of belonging warrants the taking into account, in relevant situations, of a broader range of factors than length and continuity of residence, in assessing individual claims towards host Member States. Similarly, host Member State links could provide a default criterion of adjudication to courts, should the negotiations, and the resulting citizen protective arrangements, fall apart. Failing EU and national law, international law would become the very regime of reference to address citizenship protection instances. The Human Rights Committee "own country" jurisprudence could become directly relevant in a similar scenario.

Third, links to a host State can be a tool in the hands of supranational legislators. They could inspire a post Brexit rethinking of the link between national and supranational citizenship. A rescission of the derivation link of supranational citizenship from national one is unlikely to make the agenda of integration. However a redefinition of European citizenship's link to a national space that allowed it to shift, on the ground of social integration, from home to host Member States would go a long way in entrenching the status of supranational citizenship. A similar reform would respond to the citizenship threats that Brexit has highlighted. However it would be less contentious than some of the existing proposals to protect European citizenship by severing its link to a national citizenship. In particular, other than an associate European citizenship, a European citizenship based on a shifting Member State link would not postulate a vertical link between Union and citizens that would be as hard to establish as it would be to justify. It would rather rely on the shifting of the link of derivation of supranational citizenship from nationality of a Member State of origin to, possibly, residence in a host Member State. This shifting link would also not question the grounding of supranational citizenship in the mutual recognition, on the part of the Member States, of the status and entitlements of their respective nationals. Hence preserving the horizontal and derivative character of European citizenship.<sup>130</sup>

And lastly, host State links can be a tool in the hands of thinkers, whether jurists or philosophers or political theorists, to reconceptualize supranational citizenship even beyond the Brexit context. The above suggested perspectives focus on the situation of migrant citizens, whether British nationals in the EU or EU citizens in the UK. These are the citizens that Brexit most immediately and directly affects. Hence they have monopolized the attention in citizenship debates and negotiations. As Gareth Davies points out, "bad luck for the Brits who stayed at home".<sup>131</sup> And bad luck for those quadrants of the citizen-

<sup>130</sup> On the horizontal character of European citizenship, see F. STRUMIA, *Individual Rights, Interstate Equality, State Autonomy: European Horizontal Citizenship and Its (Lonely) Playground from a Trans-Atlantic Perspective*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 615 *et seq.*

<sup>131</sup> G. DAVIES, *The State of Play on Citizens' Rights after Brexit*, in *European Law Blog*, 6 February 2018, europeanlawblog.eu.

ship loss matrix that do not make it to the eye of the public. Bad luck, that is, unless the citizenship implications of Member State withdrawal prompt a more profound reflection on supranational citizenship. This reflection would have to touch upon the weight of supranational citizenship for static citizens. It would have to consider the stakes that supranational citizenship could and should entail for static citizens in Member States other than their own. Those stakes could be enabled by virtual membership opportunities. And they could be protected through a theory of virtual host Member State links.<sup>132</sup>

Ultimately, engaging host Member State links as a means of citizenship protection yields some novel answers to old questions in the debate on the derivative character of supranational citizenship. The relation between national and supranational citizenship is confirmed as one of derivation. Yet it emerges that the link between supranational citizenship and an underlying national space can shift from home to host Member States over the course of a citizen's cross-border experience. The latter experience does not only activate the transnational rights that European citizenship promises. It gives them resilience by weaving genuine, albeit possibly virtual, links to a host Member State. As those links ripen into stakes in a community other than the one of nationality, European citizens' transnational rights become entrenched. Hence the nature of the base layer for European citizenship's multi-level architecture becomes clearer: that base layer is national in quality, but it is shifting in position.

#### IV. CONCLUSION

Lawyers, historians and curious observers from various perspectives will maybe wonder in a few decades what Brexit felt like to scholars a few months before it was due to actually happen. Perhaps some survivors will relate that, between the euphoria of its proposers, and the depression of its disaffected opponents, a certain Brexit fatigue had begun to emerge in academia. A spur of papers, conferences, special issues, *ad hoc* reports, specialist studies had engendered a degree of scholarly exhaustion.

Yet every event, for however doomed, makes history. And hence opens up learning perspectives. Other than a non-issue, an exercise in democracy, or a destiny's joke, Brexit can be seen as a test in the evolution of the troubled notion of supranational citizenship, calling for its mechanisms to engage their next gear.

This *Article* has taken the latter perspective as inspiration to fight back the Brexit exhaustion and as a lens to inform its quest on citizenship. While the debate on citizens' rights in the context of Brexit has focused so far either on plugging the most immediate holes, or in rethinking entirely the architecture of European citizenship, this *Article* has questioned supranational citizenship's ability to adapt to its next challenge. It has found

<sup>132</sup> For an initial reflection in this sense see, F. STRUMIA, *Global Citizenship for the Stay-at-Homes, in Cloud Communities: The Dawn of Global Citizenship?*, cit.

two answers to its quest. First, there is no need to question supranational citizenship's derivative status and its hanging from national level belonging. Second, and notwithstanding this, social integration, under the semblances of a range of genuine links, acts as a trigger of belonging alternative to nationality. Over the course of a citizen's cross-border experience, the supranational vest, in a number of respects, changes hook and comes to depend from belonging at a national level other than the one of nationality. This shifting ability of its link to a national space ultimately equips supranational citizenship with the potential tools to fend off any Member State's ransom.

