REINING IN THE *NOTTEBOHM* CASE

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INTRODUCTION

The *Nottebohm* case[1] has been subject to extensive critique, debate, and analysis, yet it continues to have undue influence in the field of nationality law far beyond the narrow facts and situation of the original case. While essentially a case about diplomatic protection with overtones of opportunistic abuse of right, perhaps erroneously applied outside of dual nationality situations, the case is now cited as an authoritative statement of the core of nationality in international law, applied everywhere from the Court of Arbitration for Sport ("CAS") to the European Commission on topics far away from diplomatic protection.[2] In short, *Nottebohm* has taken on a life of its own. However, *Nottebohm* always had its critics. In fact, the case struggles to withstand even superficial critique. Perhaps as a result, the International Court of Justice ("ICJ")—in the recent Preliminary Objections Judgment in the *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case ("*Qatar v. UAE CERD*")[3] brought by Qatar against the UAE—may have begun a process of both rehabilitating *Nottebohm* and limiting its wider impact.

This article will begin by reexamining the *Nottebohm* case to identify its precise terms. The *Nottebohm* case is very well known, but it bears revisiting the precise context and facts of the case, and the language used by the Court in its Judgment. The article will then survey the legacy of *Nottebohm*, both its critics and its supporters, including some authorities who have taken *Nottebohm*'s central holding in new directions, perhaps unforeseen by the Court. Finally, the article will analyze the reference to *Nottebohm* in the *Qatar v. UAE CERD* case and highlight how the Court viewed the case in 1955 and how it views it now. It concludes with the opinion that the Court may be reining in expansive application of *Nottebohm* and attempting to restrict its impact to the core facts of the case. If this view is correct, it jeopardizes some efforts to use *Nottebohm* in a more expansive manner.

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[1] Nottebohm (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4 (Apr. 6) [hereinafter Nottebohm case].

[2] *See, e.g.*, *infra* notes 96–108 and accompanying discussion; *see also* Case C-482/18, Google Ireland Ltd. v. Nemzeti Adó- és Vámigazgatósága, Opinion of Advocate Gen. Kokott, ECLI:EU:C:2019:728, ¶ 44 & n.16 (Sept. 12, 2019); Case C-482/18, Google Ireland Ltd. v. Nemzeti Adó- és Vámigazgatósága, Judgment, ECLI:EU:C:2020:141 (Mar. 3, 2020) (agreeing in judgment with the opinion of the Advocate General, though without citing to *Nottebohm*).

[3] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Preliminary Objections, Judgment, 2021 I.C.J. Rep. 71 (Feb. 4) [hereinafter Qatar v. UAE CERD case].

I. BACKGROUND ON THE *NOTTEBOHM* CASE

A German national, Friedrich Nottebohm,[4] with extensive family business dealings based in Guatemala, traveled to Liechtenstein in 1939 to apply for naturalization in that state.[5] He had been born in Germany in 1881 and moved to Guatemala in 1905 to join his brothers in business with their firm.[6] Occasionally, he returned to Germany to manage his business interests there and visit family, but he resided permanently in Guatemala.[7] Another brother lived in Liechtenstein.[8] In 1939, he traveled to Liechtenstein, partly to visit family, and was in the country when Germany attacked Poland.[9] Shortly thereafter, he applied for Liechtenstein naturalization.[10] The law on nationality in Liechtenstein required him to reside in Liechtenstein for at least three years prior to the application and renounce his prior nationality, but both conditions could be waived.[11] Nottebohm complied with all of the prescribed requirements, including renunciation of his German nationality but requested waiver of the residence condition.[12] Shortly thereafter, the naturalization application was granted and he received Liechtenstein nationality.[13] He then requested a visa from the Guatemalan authorities in his new Liechtenstein passport in order to return to Guatemala and continue managing his business, which was granted.[14] He was already back in Guatemala by early 1940.[15] Upon return to Guatemala, he notified the Guatemalan authorities that he was no longer a German national and requested that his file with the Ministry of External Affairs in Guatemala be updated to reflect his Liechtenstein nationality.[16] He also sought and received the same change to his Guatemalan identity document and a certificate from the Civil Registry of Guatemala confirming recognition of his new

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[4] In keeping with Nottebohm's international migration and life, his first name appears variously in the ICJ judgment and other sources as Friedrich, Frederic, Frederick, or Federico. Nottebohm case, *supra* note 1, at 8–12, 16, 19. This article, somewhat arbitrarily, uses the first option.

[5] *Id*. at 13.

[6] *Id*.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 14.

[12] *Id.* at 14–15.

[13] *Id.* at 15.

[14] *Id.* at 16.

[15] *Id.*

[16] *Id.* at 17.

nationality.[17] These requests were apparently all approved.[18] There does appear to have been some confusion during this time about his nationality, but the confusion was whether he was a national of Liechtenstein or Switzerland, not Germany.[19] Most likely, this confusion was related to another confusion over whether Liechtenstein was truly a state under international law, a question which was only later settled when the ICJ confirmed Liechtenstein's statehood.[20]

Despite all of the steps to secure recognition of his new nationality, Guatemala arrested Nottebohm as an enemy alien and liquidated his properties, transferring him to the custody of the United States,[21] treating him in effect as a German national.[22] After exhausting all local remedies available to him, he requested assistance from his state of nationality by diplomatic protection, his only state of nationality being Liechtenstein.[23] Thus, Liechtenstein brought a case against Guatemala before the International Court of Justice.[24]

II. THE COURT'S JUDGMENT IN THE *NOTTEBOHM* CASE

In its Judgment, the Court confirmed that Guatemala need not recognize the Liechtenstein nationality of Nottebohm.[25] The Court explicitly stated that it "does not propose to go beyond the limited scope of the question which it has to decide, namely whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before the Court."[26] The Court affirmed that states may validly

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[17] *Id.*

[18] *Id.*

[19] From the Nottebohm case:

> [T]he request sent by [Nottebohm's company] to the [Guatemalan] Minister of Finance and Public Credit on September 13th, 1940 . . . referred to the fact that only one of the partners was "a national of Liechtenstein/Switzerland[.]" . . . Similarly unconnected with the exercise of protection was the Note addressed on October 18th, 1943, by the [Guatemalan] Minister of External Affairs to the Swiss Consul who, having understood that the registration documents indicated that Nottebohm was a Swiss citizen of Liechtenstein, requested, in a Note of September 25th, 1943, that this matter might be clarified. He received the reply that there was no such indication of Swiss nationality in the documents . . . .

Id. at 18.

[20] *See id.* at 20.

[21] *Id.* at 6–7, 12, 20.

[22] *Id.* at 9, 19.

[23] *Id.* at 8, 16.

[24] *Id.* at 6–7, 16.

[25] *Id.* at 26.

[26] *Id.* at 17.

grant nationality in their discretion in accordance with their laws,[27] and that the question before the Court was not of the validity of the naturalization, but of its international effects.[28] The Court stated that it did not seek to make any judgment on the nationality laws of Liechtenstein.[29]

Even the dissenting opinions of Judges Guggenheim, Klaestad, and Read reflect this distinction between the validity of naturalization and its effects on the international plane.[30] Guggenheim noted that there are cases in international law challenging the validity of naturalization,[31] but that *Nottebohm* was not such a case.[32] Instead, the question before the Court was whether the effects of nationality—i.e., diplomatic protection—can be separated from a valid grant of nationality.[33] In his view, this separation was only possible in cases of multiple nationality.[34] Klaestad noted that the Court

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[27] *Id.* at 20 ("It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation.").

[28] The Court reasoned:

> International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions. . . . In the present case it is necessary to determine whether the naturalization conferred on Nottebohm can be successfully invoked against Guatemala, whether, as has already been stated, it can be relied upon as against that State, so that Liechtenstein is thereby entitled to exercise its protection in favour of Nottebohm against Guatemala.

Id. at 21.

[29] *Id.* at 20 ("But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration.").

[30] *See id.* at 42 (Read, J., dissenting); *id.* at 28–29 (Klaestad, J., dissenting); *id.* at 51, 54 (Guggenheim, J. *ad hoc*, dissenting).

[31] *Id.* at 54 (Guggenheim, J. *ad hoc*, dissenting) ("International law furnishes examples of situations in which the grant of nationality is invalid, with the direct consequence that it cannot form the basis of diplomatic protection.").

[32] *Id.* at 58–59.

[33] Judge Guggenheim noted:

> Is it possible to accept the validity of F. Nottebohm's nationality for the purposes of the municipal law of Liechtenstein and yet to affirm that this nationality does not deploy all its international effects and that Liechtenstein is not, therefore, entitled to exercise diplomatic protection should the latter be disputed by Guatemala?

Id. at 58.

[34] Judge Guggenheim further noted:

> This dissociation of nationality from diplomatic protection is normally confined to situations in which the individual has two nationalities—either cumulatively or in succession—with the result that the right of protection may always be exercised by *one* State, thus preserving the possibility of a claim being asserted on the international level.

had heard arguments that the grant of nationality was invalid due to Liechtenstein acting out of compliance with its domestic nationality laws.[35] He noted that, insofar as the question was proof of the naturalization, the new nationality was clearly established,[36] and no fraud had been shown.[37] Read concluded that, although Guatemala had submitted the invalidity of naturalization, it had not satisfied its burden of proving the allegation.[38] Accordingly, in Klaestad's understanding, the ICJ accepted that the naturalization was valid and free from fraud.[39] Thus, even the dissenting views were in alignment with the majority that Nottebohm validly held Liechtenstein nationality and the question for the Court was the effects of that nationality.

Unfortunately, the Court either applied directly or by analogy the situation

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Id. at 59 (emphasis in original).

[35] Judge Klaestad noted:

> As to the national law of Liechtenstein, it is argued that the authorities of that State, in applying their Nationality Law of 4th January, 1934, have not observed its provisions, but in various respects departed therefrom . . . . On this ground, the Court is invited to declare that Mr. Nottebohm has not properly acquired Liechtenstein nationality in accordance with the law of the Principality.

Id. at 28 (Klaestad, J., dissenting).

[36] Judge Klaestad further noted:

> What the Court, in my opinion, can and must do with regard to the application of the Liechtenstein Nationality Law, is to ascertain whether the naturalization in question was in fact granted by the authority to which that law has attributed this competence. . . . On the evidence submitted to the Court, I am satisfied that the Prince did in fact give his consent to the naturalization of Mr. Nottebohm.

Id. at 29.

[37] *Id.* at 29–32. Judge Klaestad continued:

> The Government of Guatemala has finally contended that fraud was committed by Mr. Nottebohm when he applied for and obtained Liechtenstein nationality. It was argued that he fraudulently sought this naturalization solely for the purpose of escaping from the consequences of his German nationality under the shield of the nationality of a neutral State. . . . These allegations of fraud, which now appear to constitute the main aspect of this case, affect the plea in bar concerning nationality as well as the merits.

Id. at 32.

[38] *Id*. at 36 (Read, J., dissenting).

[39] Judge Klaestad critiqued:

> The present Judgment does not decide the question, in dispute between the Parties, whether the naturalization granted to Mr. Nottebohm was valid or invalid either under the national law of Liechtenstein or under international law . . . . As the Judgment has not decided that the naturalization granted to Mr. Nottebohm on 13th October, 1939, is invalid under Liechtenstein law, one must, for the purpose of deciding the present plea in bar, assume that it is valid.

Id. at 30–31 (Klaestad, J., dissenting).

of individuals with more than one nationality,[40] even though Friedrich Nottebohm clearly had only one nationality *de jure*.[41] The Court cited precedent that involved cases of more than one nationality and then stated that it would apply the "same principles" as were applied in those multiple nationality cases.[42] While the Court noted that the case before it was "similar,"[43] it affirmed that the principles called for a choice between more than one nationality.[44] Along the same lines, the Court cited to scholarly opinions concerning choice among nationalities[45] and prior practice in the Convention relating to the Conflict of Nationality Laws, which was, yet again, a matter of choice among multiple nationalities.[46] When it pronounced the rule on genuine connection, cited above, the Court said it was a means to determine whether the individual was "more closely connected with the population of the State conferring nationality than with that of *any other*

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[40] *Id.* at 22 (majority opinion).

[41] *See id.* at 41 (Read, J., dissenting) ("It is suggested that the link theory can be justified by the application to this case of the principles adopted by arbitral tribunals in dealing with cases of double nationality."); *id.* at 42 ("But the problems presented by conflicting claims to nationality and by double nationality do not arise in this case. There can be no doubt that Mr. Nottebohm lost his German nationality of origin upon his naturalization in Liechtenstein in October 1939.").

[42] *Id*. at 22 (majority opinion) ("The same issue is now before the Court: it must be resolved by applying the same principles").

[43] *Id.* ("The courts of third States, when confronted by a similar situation, have dealt with it in the same way.").

[44] The Court reasoned:

> [Courts that confronted similar cases] have done so not in connection with the exercise of protection, which did not arise before them, but where two different nationalities have been invoked before them they have had, not indeed to decide such a dispute as between the two States concerned, but to determine whether a given foreign nationality which had been invoked before them was one which they ought to recognize. International arbitrators have decided in the same way numerous cases of dual nationality . . . . Similarly, [these courts], when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality.

Id.

[45] *Id.* ("The same tendency prevails in the writings of publicists and in practice.").

[46] The Court stated:

> It explains the provision which the Conference for the Codification of International Law, held at The Hague in 1930, inserted in Article I of the Convention relating to the Conflict of Nationality Laws . . . . Article 5 of the Convention refers to criteria of the individual's genuine connections for the purpose of resolving questions of dual nationality which arise in third States.

Id. at 23.

State,"[47] yet there is no suggestion that a very strong connection with another state would support diplomatic protection absent formal nationality. To say that the Court had to determine whether Nottebohm's connection of nationality was stronger with Liechtenstein or Germany was to say that he had German nationality as well. This is clearly incorrect.[48] Klaestad confirmed that Nottebohm did in fact lose his German nationality,[49] and Read argued that no rule of positive international law had been submitted that controlled the precise situation before the Court.[50] Notwithstanding this error, the Court affirmed again that it was not adjudicating the validity of Nottebohm's naturalization.[51] It stated again that the question was the ability of Liechtenstein to exercise diplomatic protection due to that nationality: "Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State."[52]

In answering the narrow question of diplomatic protection, the Court made some observations about nationality, which have been extensively cited. The Court opined:

> 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

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[47] *Id.* (emphasis added).

[48] But see Peter Spiro's critique:

> [T]he Court may have been influenced by contingencies relating to German law and policy in the months leading up to the outbreak of the War. A July 1939 German Foreign Office circular urged Germans in Latin America to seek a foreign citizenship, assured of having it restored in peace. The 1913 Reich nationality law also provided for the readmission of former German nationals. The background facts may have contributed to the 'bad cases make bad law' take on the judgment.

Peter Spiro, Nottebohm *and "Genuine Link": Anatomy of a Jurisprudential Illusion* 9–10 n.19 (Inv. Migration Working Papers, Paper No. IMC-RP 2019/1, 2019), https://investmentmigration.org/wp-content/uploads/2020/10/IMC-RP-2019-1-Peter-Spiro.pdf [https://perma.cc/UQG8-9PJX] (citing PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 101 (2d ed. 1979)).

[49] Judge Klaestad opined:

> It appears, however, that such dispensation was considered unnecessary in view of the provisions of Article 25 of the German Nationality Law of 1913, according to which he would lose his German nationality by acquiring the nationality of Liechtenstein. That he there—by in fact lost his German nationality was, on 15th June, 1954, certified by the Senate of Hamburg.

Nottebohm case, *supra* note 1, at 29–30 (Klaestad, J., dissenting).

[50] *See id.* at 39 (Read, J., dissenting) ("I am bound, by Article 38 of the Statute, to apply international law as it is—positive law—and not international law as it might be if a Codification Conference succeeded in establishing new rules limiting the conferring of nationality by sovereign States.").

[51] *Id.* at 20 (majority opinion).

[52] *Id.* at 24.

> a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.[53]

The Court then determined that there was no pre-existing connection between Nottebohm and Liechtenstein.[54] It also expressed skepticism about Nottebohm's motivation for naturalization, perhaps being an attempt to evade designation as German, i.e., an enemy national.[55] Ultimately, the diplomatic protection claim failed.[56]

III. CRITIQUE OF THE *NOTTEBOHM* CASE

Firstly, the Court's reasoning in *Nottebohm* was probably wrong.[57] Peter

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[53] *Id.* at 23.

[54] The Court stated:

> These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation.

Id. at 26.

[55] The Court determined:

> Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations—other than fiscal obligations—and exercising the rights pertaining to the status thus acquired.

Id. Judge Read would later opine:

> In the first place, I do not think that international law, apart from abuse of right and fraud, permits the consideration of the motives which led to naturalization as determining its effects. . . . Further, even if his main purpose had been to protect his property and business in the event of Guatemalan belligerency, I do not think that it affected the validity or opposability of the naturalization. There was no rule of international law and no rule in the laws of Guatemala at the time forbidding such a course of action.

Id. at 42, 49 (Read, J., dissenting).

[56] *See id.* at 26 (majority opinion).

[57] *See* Jack H. Glazer, Note, *Affaire Nottebohm (Liechtenstein v. Guatemala): A Critique*,

Spiro has strongly criticized *Nottebohm* for being incorrectly decided and noted its limited application after having been decided.[58] Dimitry Kochenov has also concluded that *Nottebohm* has never been good law.[59] Paul Weis took a more conservative, though still critical, approach and argued that *Nottebohm* must be limited to the context of diplomatic protection only.[60] Others have argued that the genuine connection criterion identified by the Court is actually only applicable to cases of multiple nationality,[61] which the ICJ incorrectly assimilated with Nottebohm's situation. Robert Sloane also noted that *Nottebohm* is really a case about abuse of right and not a general statement of international law about the freedom to disregard nationality.[62] The argument about abuse of right was addressed more explicitly by Klaestad, showing that it was a relevant argument.[63] All of these critiques are correct. *Nottebohm* is only arguably good law insofar as it is limited to

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44 GEO. L.J. 313, 325 (1956); J. Mervyn Jones, *The Nottebohm Case*, 5 INT'L & COMP. L.Q. 230, 231, 243 (1956); Josef L. Kunz, *The Nottebohm Judgment (Second Phase)*, 54 AM. J. INT'L L. 536, 537–38, 553 (1960); Annemarieke Vermeer-Künzli, *Nationality and Diplomatic Protection: A Reappraisal, in* THE CHANGING ROLE OF NATIONALITY IN INTERNATIONAL LAW 76, 77 (Alexandra Annoni & Serena Forlati eds., 2013); Rayner Thwaites, *The Life and Times of the Genuine Link*, 49 VICTORIA UNIV. WELLINGTON L. REV. 645, 661 (2018).

[58] *See, e.g.*, Spiro, *supra* note 48, at 2.

[59] *See* Dimitry Kochenov, *Two Sovereign States vs. a Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matter* 4 (Eur. Univ. Inst. Robert Schuman Ctr. for Advanced Stud., Working Paper No. 2011/62, 2010) (describing genuine connection doctrine as "illogical orthodoxy"); Dimitry Kochenov, *Citizenship Without Respect: The EU's Troubled Equality Ideal* 46 (The Jean Monnet Center for Int'l & Reg'l Econ. L. & Juts., Working Paper No. 08/10, 2010) (describing genuine connection doctrine as "incoherent and logically inexplicable").

[60] *See* WEIS, *supra* note 48, at 179.

[61] *See generally* Audrey Macklin, *Is It Time to Retire Nottebohm?*, 111 AM. J. INT'L L. UNBOUND 492, 493 (2017).

[62] *See* Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INT'L L.J. 1, 16 (2009).

[63] Judge Klaestad noted:

> It is alleged by the Government of Guatemala that the Government of Liechtenstein, by granting its nationality to a German national at a time when Germany was at war, has committed an abuse of right or a fraud. For the purpose of the present case, it is unnecessary to express any views as to the possible applicability of the notion of abuse of right in international law.

Nottebohm case, *supra* note 1, at 31 (Klaestad, J., dissenting). Judge Read would later note:

> However, the position taken by Counsel makes it clear that the Final Conclusion 2*(b)* was intended to raise the issue of abuse of right. Abuse of right is based on the assumption that there is a right to be abused. . . . The doctrine of abuse of right cannot be invoked by one State against another unless the State which is admittedly exercising its rights under international law causes damage to the State invoking the doctrine.

Id. at 37 (Read, J., dissenting).

diplomatic protection of multiple nationals to avoid abuse of right. Genuine connection is only relevant when a state is seeking to exercise its own rights,[64] not as a general statement on the nationality bond.

Most of the cases that have been decided after *Nottebohm* have applied it in this way.[65] They have cited it to resolve cases of diplomatic protection for multiple nationality by identifying the state with the stronger link.[66] For example, in the *Soufraki* case, the claimant held multiple nationalities and argued that he could invoke one of those nationalities to protect his interests.[67] He argued that the case was not comparable to *Nottebohm* because it did not involve a "nationality of convenience."[68] However, the investment tribunal decided the case without distinguishing *Nottebohm* or applying the concept of the genuine link.[69] This approach was appropriate because the claim was made under a Bilateral Investment Treaty ("BIT") and was not based on diplomatic protection.[70] Rather than claiming nationality to support diplomatic protection, the individual was claiming his own right under the BIT that he held due to his nationality.[71] As such, *Nottebohm* did not apply, even though the claimant had multiple nationalities. In fact, when the International Law Commission ("ILC") sought to codify the law on diplomatic protection, the *Nottebohm* approach was not accepted as a general rule for claims of diplomatic protection for single nationals.[72] This approach

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[64] The Court reasoned:

> As the Permanent Court of International Justice has said and has repeated, "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law" . . . .

Id. at 24 (majority opinion) (internal citations omitted).

[65] *See, e.g.*, Flegenheimer (U.S. v. It.), 14 UNRIAA 327, 375–76 (1958) ("[I]t is doubtful that the International Court of Justice intended to establish a rule of general international law in requiring, in the Nottebohm Case, that there must exist as effective link between the person and the State in order that the latter may exercise its right of diplomatic protection in behalf of the former.").

[66] *See, e.g.*, Iran v. U.S., Case No. A/18, 5 Iran-U.S. Cl. Trib. Reps. 251, 263 (1984); *see also* Sloane, *supra* note 62, at 39; Cornel Marian, *Who Is Afraid of* Nottebohm*? Reconciling the ICSID Nationality Requirement for Natural Persons with* Nottebohm*'s "Effective Nationality" Test*, 28 J. INT'L ARB. 313, 313–14 (2011); Alice Sironi, *Nationality of Individuals in Public International Law: A Functional Approach*, *in* THE CHANGING ROLE OF NATIONALITY IN INTERNATIONAL LAW 53, 53, 57 (Alessandra Annoni & Serena Forlati eds., 2013).

[67] *See* Soufraki v. UAE, ICSID Case No. ARB/02/7, Award, ¶¶ 42–46 (July 7, 2004), 12 ICSID Rep. 156 (2007).

[68] *See id.* ¶ 45.

[69] *See generally id.*

[70] *See id.* ¶ 4 (specifically the BIT between Italy and the UAE).

[71] *See id.*

[72] Int'l Law Comm'n [ILC], Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc.

is not surprising in that, as mentioned above, the ICJ in *Nottebohm* expressly limited the application of the case to diplomatic protection and affirmed the underlying validity of the nationality.[73]

Diplomatic protection has long had a non-exclusive relationship with state nationality.[74] For example, in order to address the problem of stateless persons or states that were unwilling to protect their nationals,[75] the rules of protection before the U.N. Compensation Commission ("UNCC") were amended to grant states the right to submit claims on behalf of foreigners resident in their territory.[76] This possibility was already proposed in the ILC's Draft Articles on Diplomatic Protection.[77] But the rules at the UNCC went even further and granted non-states the possibility of protecting individuals.[78] This practice, however, has precedent, including in the well-known *Reparations* case at the ICJ in which the Court agreed that the U.N. can exercise protection over its employees.[79] On this basis, the Palestinian Authority has protected Palestinians.[80] In addition, international law has long recognized the right of the flag state to exercise protection over ships of its

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A/61/10, at 29–34 (2006) [hereinafter ILC Draft Articles] (stating that draft article provision "does not require an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case").

[73] Nottebohm case, *supra* note 1, at 24.

[74] *See* Eileen Denza, *Nationality and Diplomatic Protection*, 65 NETH. INT'L L. REV. 463, 464–65 (2018).

[75] *See generally* Carmel Whelton, *The United Nations Compensation Commission and International Claims Law: A Fresh Approach*, 25 OTTAWA L. REV. 607, 625, 627 (1993).

[76] *See* U.N. Comp. Comm'n [UNCC] Governing Council, *Decision Taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth Session Held on 26 June 1992*, U.N. Doc. S/AC.26/1992/10, art. 5(1)(a) (1992) (permitting a government to "submit claims on behalf of its nationals and, at its discretion, of other persons resident in its territory").

[77] *See* ILC Draft Articles, *supra* note 72, at 35–37; UNCC Governing Council, *Decision Concerning the Filing of "Late" Claims of the "Bedoun" Taken by the Governing Council of the United Nations Compensation Commission at Its 137th Meeting, on 2 July 2004*, at 2, U.N. Doc. S/AC.26/Dec.225 (2004).

[78] *See* UNCC Governing Council, *supra* note 76, art. 5(2) (permitting claims by an appointed body or authority on behalf of individuals where the state of nationality will not or cannot claim).

[79] *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 187 (Apr. 11) [hereinafter Reparations case].

[80] *See* Linda A. Taylor, *The United Nations Compensation Commission*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 197, 202 (Carla Ferstman et al. eds., 2009) (noting that the Palestinian Authority was permitted to file claims); UNCC Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Palestinian "Late Claims" for Damages Up to USD 100,000 (Category "C" Claims)*, at 4, U.N. Doc. S/AC.26/2003/26 (Dec. 18, 2003).

nationality and their crew.[81] The practice of diplomatic protection exceptions has always been to provide for more options for protection, not—as *Nottebohm* would have us believe—for fewer or no options.

About twenty years ago, *Nottebohm* gained traction beyond the question of diplomatic protection. For example, in his standard classroom textbook *International Law*, Malcolm Shaw notes correctly that *Nottebohm* applies to cases of diplomatic protection,[82] yet he also relies on *Nottebohm* as a standard for granting valid nationality.[83] Compare this approach with that of Ian Brownlie, discussing the *Nottebohm* case extensively in the section of his book *Principles of Public International Law* dedicated to the existence of a nationality connection,[84] and omitting any reference to it at all in the section of his book on diplomatic protection.[85] Within the section on nationality, he does mention *Nottebohm*'s potential impact on diplomatic protection briefly, but only insofar as the case provides for undermining the validity of nationality, with natural consequences for diplomatic protection.[86] However, recognizing the difficulties of *Nottebohm*, he also suggests that courts and tribunals should apply its standard of genuine connection in a "liberal way," so as to not be "too exacting in the matter of effectiveness."[87] This repurposing of *Nottebohm* to cover the existence of a valid connection of nationality appears in other situations as well.[88]

The International Criminal Tribunal for Rwanda ("ICTR") in the *Akayesu* case cited to *Nottebohm* when attempting to interpret the meaning of

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[81] *See* S.S. I'm Alone (Can. v. US), 3 R.I.A.A. 1609, 1617–18 (1935); M/V Saiga (No. 2) (St. Vincent v. Guinea), Judgment of July 1, 1990, 2 ITLOS Rep. 10, ¶¶ 103–09; Reparations case, *supra* note 79, at 202–03 (Hackworth, J., dissenting); *id.* at 206–07 n.1 (Badawi Pasha, J., dissenting).

[82] *See* MALCOLM N. SHAW, INTERNATIONAL LAW 813–14 (6th ed. 2008).

[83] *See id.* at 660.

[84] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 407–17 (7th ed. 2008).

[85] *See id.* at 477–79. Perhaps it is telling that when Crawford revised Brownlie's text a decade later, he took a slightly less expansive approach, citing *Nottebohm* only for the question of diplomatic protection. *See* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 676, 679 (9th ed., 2019). This subtle change in approach might reflect the shift to pull back from the wider application of *Nottebohm*.

[86] *See* BROWNLIE, *supra* note 84, at 417–18.

[87] *See id.* at 418. Here as well, Crawford takes a slightly different approach from Brownlie. While Brownlie thought that genuine connection should be applied in a "liberal way," *id.*, Crawford concluded that states should presume the validity of nationality—and necessarily the underlying genuine link—because states are presumed to act in good faith. *See* CRAWFORD, *supra* note 85, at 505–06.

[88] *See, e.g.*, Lawrence Ngobeni, *Barcelona Traction and Nottebohm Revisited: Nationality as a Requirement for Diplomatic Protection of Shareholders in South African Law*, 37 S. AFR. Y.B. INT'L L. 169, 184 (2012); Guy I. F. Leigh, *Nationality and Diplomatic Protection*, 20 INT'L & COMP. L.Q. 453, 472 (1971).

"national" in the Genocide Convention.[89] The Genocide Convention criminalized genocidal acts with the intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[90] The ICTR concluded, somewhat awkwardly, that "national" meant citizenship.[91] However, the ICTR had a slightly nuanced take on the ICJ's judgment in *Nottebohm*. In the original *Nottebohm* judgment, the ICJ concluded that "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."[92] But in *Akayesu*, the ICTR held that "[b]ased on the *Nottebohm* decision rendered by the International Court of Justice, the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties."[93] The critical terms on "genuine connection" disappear in the ICTR rephrasing of *Nottebohm*. In both cases, nationality is a shared legal bond with reciprocal rights and duties, but the ICTR omits what it arguably the most important holding of the ICJ in *Nottebohm* when it carefully excised the genuine connection.[94] However, even though the Tribunal modified *Nottebohm* in this manner, it also applied *Nottebohm* outside of a diplomatic protection claim, though it did so to expand the protection of individuals.[95]

The Court of Arbitration for Sport ("CAS") in *United States Olympic Committee (USOC) and USA Canoe/Kayak v. International Olympic Committee (IOC)* ("*USOC & USA Canoe*") has, somewhat hesitantly, accepted that *Nottebohm* "may indeed be relevant" for disregarding a valid grant of nationality in the context of identifying nationality for international sports purposes.[96] However, the CAS also stated that the case "may also be

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[89] *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 512 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

[90] *See id.* ¶ 510 (quoting Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277).

[91] *See id.* ¶¶ 510–12. The holding was awkward in that all the victims in Rwanda held the same nationality as the genocidaires, so the ICTR had to conclude that the Genocide Convention covers the intent to destroy any "stable group" where membership is "normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner." *Id.* ¶ 511.

[92] Nottebohm case, *supra* note 1, at 23.

[93] Akayesu, Case No. ICTR-96-4-T ¶ 512.

[94] *See* Nottebohm case, *supra* note 1, at 23.

[95] *Compare id.* at 13, 24, *with* Akayesu, Case No. ICTR-96-4-T ¶ 512.

[96] United States Olympic Comm. (USOC) & USA Canoe/Kayak v. Int'l Olympic Comm. (IOC), CAS OG 00/001, ¶ 19–20 (Ct. Arb. Sport Sept. 13, 2000) [hereinafter USOC & USA Canoe] ("The *Nottebohm* case is often cited as indicative of a notion that formal nationality or citizenship may be disregarded if it is not effective in the sense suggested by the facts of that precedent. That notion may indeed be relevant in deciding to disregard formal status of nationality (as in *Nottebohm* itself)").

relevant" for resolving situations of multiple nationality.[97] In any event, the CAS concluded that neither of those situations was at issue in the *USOC & USA Canoe* case,[98] so the CAS's position on the applicability of *Nottebohm* is still unclear. This case, however, demonstrates a new approach to using the central holding of *Nottebohm* outside of diplomatic protection to limit individual rights, rather than condition the exercise of a State's rights.

The European Commission has also attempted to extend the application of *Nottebohm* to the validity of nationality law, and, as such, individual rights.[99] The Commission and other European Union bodies have been pursuing a strategy of discouraging and curtailing "Citizenship-by-Investment" ("CBI") schemes for several years.[100] Following initial studies over the past decade, the Commission issued a report on "Investor Citizenship and Residence Schemes in the European Union" and began infringement proceedings against Cyprus and Malta over their CBI programs.[101] While criticizing CBI schemes in EU Member States for posing risks for security, money laundering, tax evasion, and corruption, the report more fundamentally invoked *Nottebohm* to criticize investment nationality as having no genuine connection to the state of nationality.[102] The Commission took the position

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[97] *Id.* ¶ 21.

[98] *See id.* ¶ 22.

[99] *See generally* Martijn van den Brink, *Revising Citizenship Within the European Union: Is a Genuine Link Requirement the Way Forward?*, 23 GERMAN L.J. 171 (2022).

[100] *See* Eur. Comm'n, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Under Article 25 TFEU: On Progress Towards Effective EU Citizenship 2013-2016*, ¶ 4.1, COM (2017) 32 final (Jan. 24, 2017); Eur. Comm'n, Dir.-Gen. Just. & Consumers, *Third Meeting of the Group of Member State Experts on Investor Citizenship and Residence Schemes in the EU*, *Minutes*, EU Doc. Ref. Ares(2019)7639548 (Dec. 11, 2019); Eur. Parl., European Parliament Resolution of 10 July 2020 on a Comprehensive Union Policy on Preventing Money Laundering and Terrorist Financing, ¶ 31, EU Doc. P9_TA(2020)0204 (July 10, 2020); European Commission Speech 20/1655, State of the Union Address by President von der Leyen at the European Parliament Plenary (Sept. 16, 2020).

[101] *See* Eur. Comm'n, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Under Article 25 TFEU: Investor Citizenship and Residence Schemes in the European Union*, at 3, 14, COM (2019) 12 final (Jan. 23, 2019) [hereinafter Eur. Comm'n, *Investor Citizenship and Residence Schemes*]; European Commission Press Release IP/20/1925, Investor Citizenship Schemes: European Commission Opens Infringements Against Cyprus and Malta for "Selling" EU Citizenship (Oct. 20, 2020) [hereinafter Eur. Comm'n Press Release IP/20/1925]; European Commission Infringement Decisions INF/21/2743, June Infringements Package: Key Decisions (June 9, 2021) [hereinafter Eur. Comm'n Infringement Decisions INF/21/2743].

[102] *See* Eur. Comm'n, *Investor Citizenship and Residence Schemes*, *supra* note 101, at 5. The report quoted part of the second sentence of the following text:

> A decision withdrawing naturalisation because of deception corresponds to a reason relating to the public interest. In this regard, it is legitimate for a Member State to wish

that other means of granting nationality were better established in concordant international practice—a "common understanding of the bond of nationality"—and thus justifiable.[103] On this basis, *jus sanguinis*, *jus soli*, and naturalization with a physical presence requirement were all acceptable means of acquiring nationality. Even a grant of nationality on the basis of "national interest" was acceptable when such interest was limited by tradition to individual achievements in culture, science or sports, or economic or commercial interest, but not mere investment in return for a passport.[104] Because there was no genuine connection for investment (though inexplicably there is such a connection for culture, science, or sports), the Commission argued that *Nottebohm* permits the EU and its member states to question these grants of nationality.[105] Significantly, the Commission does not argue that other EU Member States can disregard such grants of nationality.[106] Instead, it argues that states are violating EU law when they grant nationality by investment.[107] Essentially, the Commission concedes that the grants of nationality are valid. However, refusal to recognize nationality impacts not only the state's alleged abuse of right, but also the individual's right to their nationality. Recent practice of revoking grants of investment nationality from Russian nationals have been based on an argument that the grants were invalid *ab initio*.[108] This application of *Nottebohm* significantly expands its impact well beyond the ICJ's stated intentions.

IV. HUMAN RIGHTS CHALLENGE TO *NOTTEBOHM*

Secondly, as a further critique of *Nottebohm*, the case is not in harmony with contemporary human rights law, which might explain the limited practice following it. *Nottebohm* was decided before the adoption of the International Covenant on Civil and Political Rights ("ICCPR"), among other major human rights instruments, and the embrace of nationality as a human

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> to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality.

Id. at 2 (quoting Case C-135/08, Rottmann v. Freistaat Bayern, Judgment, 2010 E.C.R. I-1449, I-1489).

[103] *See id.* at 5.

[104] *See id.* at 6 (naturalization based on a monetary payment alone "departs from the traditional ways of granting nationality in the Member States and affects citizenship of the Union").

[105] *Id.* at 5–6.

[106] *See generally id.*

[107] *Id.* at 3, 5–6.

[108] *See, e.g.*, David de Groot, *Russia's War on Ukraine: Reassessing 'Citizenship by Investment' Schemes* (Apr. 4, 2022), https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729385/EPRS_ATA(2022)729385_EN.pdf [https://perma.cc/E5FV-ZGCB].

right.[109] It is now difficult to justify the application of *Nottebohm*, if it ever was correct at all, to nationality law when the link of nationality to a state is no longer a purely sovereign matter.

Nationality is widely protected under a range of sources of international human rights law. Most major human rights instruments, not only the ICCPR,[110] provide for the right to a nationality, including the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"),[111] the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"),[112] the International Convention on the Rights of All Migrant Workers ("Migrant Workers Convention"),[113] and the Convention on the Rights of Persons with Disabilities ("Disabilities Convention").[114] This development in the law, providing for a right to a nationality, ran in parallel to the supplementary movement to abolish statelessness.[115] Several treaties prohibit the creation of statelessness,[116] and the prohibition of statelessness is possibly also now a norm of customary international law.[117] In addition, some regional treaties also protect the right to a nationality, for example, the American Convention

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[109] *See Right to Return — Relevant Background*, HUM. RTS. WATCH (Apr. 4, 2004), https://www.hrw.org/news/2004/04/04/right-return-relevant-background [https://perma.cc/A8KQ-QLVE].

[110] *See* International Covenant on Civil and Political Rights art. 24(3), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("Every child has the right to acquire a nationality.").

[111] *See* International Convention on the Elimination of All Forms of Racial Discrimination art. 5(d)(iii), Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD] ("The right to nationality[.]").

[112] *See* Convention on the Elimination of All Forms of Discrimination against Women art. 9, Dec. 18, 1979, 1249 U.N.T.S. 13 (equality with men "to acquire, change, or retain nationality" and "with respect to the nationality of their children").

[113] *See* International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families art. 29, Dec. 18, 1990, 2220 U.N.T.S. 3 ("Each child of a migrant worker shall have the right to . . . a nationality.").

[114] *See* Convention on the Rights of Persons with Disabilities art. 18(1), Dec. 13, 2006, 2515 U.N.T.S. 3 (recognizing rights "to a nationality," "to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability," and "to obtain, possess and utilize documentation of their nationality").

[115] *See generally* William Thomas Worster, *The Obligation to Grant Nationality to Stateless Children Under Customary International Law*, 27 MICH. ST. INT'L L. REV. 441 (2019) [hereinafter Worster, *Stateless Children*] (arguing that, by now, statelessness is prohibited under customary international law, at least for cases of granting nationality by the state of birth to children who otherwise be stateless). *See also* William Thomas Worster, *The Obligation to Grant Nationality to Stateless Children Under Treaty Law*, 24 TILBURG L. REV. 204 (2019).

[116] *See, e.g.*, Convention on the Reduction of Statelessness art. 8, Aug. 20, 1961, 989 U.N.T.S. 175.

[117] *See* Worster, *Stateless Children*, *supra* note 115, at 456.

on Human Rights.[118] The European Convention on Human Rights does not protect a right to a nationality as such,[119] though nationality and protection against statelessness is indirectly partially protected through other rights in the ECHR.[120] More directly on point, the European Convention on Nationality ("ECN") specifically protects the right to a nationality,[121] though it has fewer parties than the ECHR. Similarly, the African Charter on Human and Peoples' Rights does not expressly cover nationality,[122] but has been interpreted to cover it.[123] In addition, the right to nationality has been reaffirmed in non-treaty declarations, such as the Universal Declaration of Human Rights[124] and the U.N. Declaration on the Rights of Indigenous Peoples.[125] Some authorities have gone so far as to argue that the right to a nationality is a non-derogable right.[126]

Nationality is therefore protected and states may not deprive individuals of their nationality arbitrarily.[127] Acts of deprivation resulting in

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[118] *See* Organization of American States, American Convention on Human Rights art. 20, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[119] *See generally* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, U.N.T.S. 221.

[120] *See* X. v. Austria, App. No. 5212/71, 43 Eur. Comm'n H.R. Dec. & Rep. 69 (1972); Karassev v. Finland, App. No. 31414/96, 1999-II Eur. Ct. H.R. 403; Makuc v. Slovenia, App. No. 26828/06, ¶ 160 (May 31, 2007), https://hudoc.echr.coe.int/eng?i=001-81215 [https://perma.cc/9Y8R-DEL9]; Genovese v. Malta, App. No. 53124/09, ¶¶ 30–33 (Oct. 11, 2011), https://hudoc.echr.coe.int/eng?i=002-355 [https://perma.cc/PYC3-U5HH]; Labassee v. France, App. No. 65941/11, (June 26, 2014), https://hudoc.echr.coe.int/eng?i=002-9780 [https://perma.cc/755A-BDUS]; K2 v. United Kingdom, App. No. 42387/13, (Mar. 9, 2017), https://hudoc.echr.coe.int/eng?i=001-172143 [https://perma.cc/2SG2-CP8S].

[121] *See* European Convention on Nationality arts. 3, 4(a)–(c), Nov. 6, 1997, E.T.S. No. 166; *see also* Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession art. 2, May 19, 2006, 2650 U.N.T.S.

[122] *See generally* African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217, O.A.U. Doc. CAB/LEG/67/3 rev. 5 (1982). *But see* African Charter on the Rights and Welfare of the Child art. 6(3), July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49 ("Every child has the right to acquire a nationality.").

[123] *See* Malawi African Association, et al. v. Mauritania, Communication 54/91, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 125–26 (May 11, 2000); Modise v. Botswana, Communication 97/93, Afr. Comm'n H.P.R., ¶ 88, (Nov. 6, 2000).

[124] *See* G.A. Res. 217 A (III), Universal Declaration of Human Rights, art. 15(1) (Dec. 10, 1948) ("Everyone has the right to a nationality.").

[125] *See* G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 6 (Sept. 13, 2007) ("Every indigenous individual has the right to a nationality.").

[126] *See* Expelled Dominicans & Haitians v. Dominican Republic, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 253 (Aug. 28, 2014); Girls Yean & Bosico v. Dominican Republic, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶¶ 136–38 (Sept. 8, 2005) ("Nationality is a fundamental right enshrined in the American Convention . . . and is non-derogable . . . .").

[127] *See, e.g.*, U.N. Secretary-General, *Arbitrary Deprivation of Nationality*, ¶¶ 48, 51,

statelessness have been understood to be arbitrary.[128] Deprivation that is discriminatory is also arbitrary and prohibited.[129] Whether the disregard of Liechtenstein nationality in *Nottebohm* constituted discrimination is beyond the scope of this article, but there is some space to speculate whether there is any overlap between genuine connection and prohibited discrimination grounds. Nationality laws may not proscribe or be applied in a manner that discriminates on the basis of race, color, gender, religion, political opinion, or national or ethnic origin.[130] Other deprivations may also be arbitrary when they are not proportionate to a legitimate purpose.[131] For example, the Ethiopian-Eritrea Claims Commission held that revocation of nationality was not arbitrary when it was undertaken for security purposes or when a person had another nationality.[132] These developments support the narrow reading of *Nottebohm*. It is difficult to understand how deeming a person's nationality invalid using a genuine connection argument could be proportionate. As Macklin concludes, the ICJ effectively rendered Nottebohm stateless.[133] One possible sole exception might apply for individuals with more than one nationality. This is precisely the type of case the Court used in *Nottebohm* to identify the relevant legal principles.[134] In any event, the critical difference under human rights law is that we must now consider the impact on individual rights, not only the rights of the state.

Following *Nottebohm*, by its own terms and in light of subsequent practice and development of human rights, we can only apply the case in the very unusual situation of a state espousing the claim of a dual national against another state of nationality to prevent an abusive situation. It has nothing to say about refusal to recognize nationality, and even less to say about challenging the validity of a grant of nationality. The grant or refusal of nationality (or denationalization) should only be disregarded when that state

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U.N. Doc. A/HRC/10/34 (Jan. 26, 2009).

[128] *See id.* ¶ 51.

[129] *See* U.N. Secretary-General, *Human Rights and Arbitrary Deprivation of Nationality*, ¶ 22, U.N. Doc. A/HRC/13/34 (Dec. 14, 2009).

[130] *See id.*; *see also* Human Rights Committee, General Comment No. 24, *General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant,* ¶ 9, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994).

[131] *See* U.N. Secretary-General, *Human Rights and Arbitrary Deprivation of Nationality*, *supra* note 129, ¶ 25.

[132] *See* Eritrea-Ethiopia Claims Comm'n, 26 R.I.A.A. 195, 219–24 (Perm. Ct. Arb. 2004).

[133] *See* Macklin, *supra* note 61, at 494.

[134] *See id.*

act was itself unlawful—*jus non oritur*[135]—or fraud/abuse of right,[136] or simply a lack of convincing proof that nationality was actually held *de jure*.[137] The only exception would be situations where such disregard would be to the disadvantage of the affected individual.[138]

V. *QATAR V. UAE CERD* CASE AT THE ICJ

It would seem that even the ICJ is now seeking to contain any attempt to apply *Nottebohm* beyond its narrow context. In the recent Preliminary Objections Judgment in the *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case,[139] brought by Qatar against the UAE, the Court may have begun the process of narrowing the holding in *Nottebohm*.

This case arose from the diplomatic dispute between Qatar and several Gulf States, including the UAE.[140] To counter allegations of supporting terrorism, those states imposed a list of restrictive measures against Qatar and Qatari nationals, in an effort to coerce Qatar into complying with certain demands.[141] Among these measures, the UAE and other Gulf states expelled Qatari nationals and prohibited their entry or return.[142] Qatar reacted by lodging disputes and claims before a number of international bodies and tribunals, including the ICJ. Qatar elected to bring a claim against the UAE under the CERD because the UAE had accepted the Court's jurisdiction for such cases.[143] After Qatar's request for provisional measures concerning the

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[135] *See* William Thomas Worster, *The Effect of Leaked Information on the Rules of International Law*, 28 AM. UNIV. INT'L L. REV. 443, 447–49 (2013); *see also* Nationality Decrees Issued in Tunis & Morocco (Fr. Zone), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 31 (Feb. 7) (holding that grant of nationality could be contrary to international legal obligations).

[136] *See* Sloane, *supra* note 62, at 15; *see also* Nottebohm case, *supra* note 1, at 50 (Guggenheim, J. *ad hoc*, dissenting) (citing Salem Case (Egypt v. U.S.), 2 R.I.A.A. 1161, 1209 (Perm. Ct. Arb. 1932) (Nielsen, Arb., dissenting)).

[137] *See* Nottebohm case, *supra* note 1, at 51 (Guggenheim, J. *ad hoc*, dissenting) (citing Hatton v. United Mexican States (U.S. v. Mex.), 4 R.I.A.A. 329, 331 (Mex.-US Gen. Claims Comm'n 1928)).

[138] *See, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 55–56 (June 21) (holding that South Africa's occupation of Namibia was not lawful and could not produce legal effects, except for those effects that benefitted the local population, such as the registration of births, deaths, and marriages).

[139] *See* Qatar v. UAE CERD case, *supra* note 3.

[140] *See id.* at 72, 84.

[141] *See id.* at 73, ¶¶ 44, 53–56.

[142] *See id.* ¶¶ 26–27.

[143] Note that Qatar also brought the same claim against the UAE and Saudi Arabia before the CERD committee. *See* CERD, Jurisdiction of the Inter-State Communication Submitted

treatment of its nationals was granted[144] and the Emirates' provisional measures request one year later was refused,[145] the Court granted the Emirates' preliminary objections and dismissed the case.[146]

In reaching this conclusion, the Court determined that the CERD covered issues of discrimination on the basis of national origin, among other grounds, but not on the basis of nationality.[147] The Court made the critical distinctions

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by Qatar Against the United Arab Emirates, U.N. Doc. CERD/C/99/3, ¶ 2 (Aug. 30, 2019); CERD, Admissibility of the Inter-State Communication Submitted by Qatar Against the United Arab Emirates, U.N. Doc. CERD/C/99/4, ¶ 2 (Aug. 30, 2019); CERD, Jurisdiction of the Inter-State Communication Submitted by Qatar Against the Kingdom of Saudi Arabia, U.N. Doc. CERD/C/99/5, ¶ 2 (Aug. 30, 2019); CERD, Admissibility of the Inter-State Communication Submitted by Qatar Against the Kingdom of Saudi Arabia, U.N. Doc. CERD/C/99/6, ¶ 2 (Aug. 30, 2019). Those cases have since been settled and the complaints withdrawn. *See* Decision of the ad hoc Conciliation Commission on the Termination of the Proceedings Concerning the Interstate Communication Qatar v. the United Arab Emirates (Jan. 26, 2023) https://www.ohchr.org/sites/default/files/documents/hrbodies/cerd/decisions/ahcc-cerd-qatar-v-uae-decision-termination-adopted-26-01-2023.doc; Decision of the ad hoc Conciliation Commission on the Termination of the Proceedings Concerning the Interstate Communication Qatar v. the Kingdom of Saudi Arabia (Jan. 19, 2022) https://www.ohchr.org/sites/default/files/documents/hrbodies/cerd/decisions/2022-12-02/AHCC-CERD-Qatar-v-KSA-DECISION-TERMINATION.pdf [https://perma.cc/7UDG-KRGC].

[144] *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Provisional Measures, 2018 I.C.J. 406, ¶¶ 75–79 (July 23) [hereinafter Provisional Measures 2018].

[145] *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Provisional Measures, 2019 I.C.J. 361, ¶¶ 30–32 (June 14) [hereinafter Provisional Measures 2019].

[146] *See* Qatar v. UAE CERD case, *supra* note 3, ¶¶ 31, 114–115.

[147] *Id.* ("[T]he term 'national origin' in Article 1, paragraph 1, of CERD, in accordance with its ordinary meaning, read in its context and in the light of the object and purpose of the Convention, does not encompass current nationality."). But see the dissenting opinion of Judge Bhandari:

> In its attempt to distinguish between 'nationality' and 'national origin', the majority highlights the immutable nature of the meaning of 'national origin' and frames it in opposition to the transient nature of the meaning of 'nationality'. In doing so, the majority attempts to allude that the two terms are fundamentally disparate. As a result of this approach, the Judgment insufficiently delineates the ordinary meaning of the term 'national origin' and thereby reaches no real consensus on its meaning for the reasons set out below.

Id. at 136 (Bhandari, J., dissenting). Note that the Court had previously agreed that it was at least "plausible" that nationality was covered by "national origin." *See* Provisional Measures 2018, *supra* note 144, ¶ 27 (stating "the Court need not decide at this stage of the proceedings" whether national origin "encompasses discrimination based on the 'present nationality' of the individual"). While recognizing that the provisional measures determination of plausibility does not prejudice the eventual decision of the Court, it is remarkable that, in a preliminary objections phase—not even a merits phase—the Court took such a sudden swing in the

between national origin, which was an issue of heritage and family descent that is identifiable with a nation,[148] and nationality, in the sense of citizenship.[149] This distinction is based on the language of the CERD which clearly excludes the distinction between citizens and aliens from its scope,[150] supported by the *travaux préparatoires*[151] and object and purpose of the Convention.[152]

Reference to *Nottebohm* in the proceedings of the case is surprisingly sparse, considering that the Court cited it for a critical point. Where the Court commented on *Nottebohm*, it cited it with approval,[153] giving us insight into how the Court now views its judgment from 1955. In the *Qatar v. UAE CERD* case, the Court stated that "nationality is a legal attribute which is within the discretionary power of the State and can change during a person's lifetime" with reference to *Nottebohm*.[154] Following this precedent, the Court understood citizenship to be a changeable political bond and concluded that the various grounds of prohibited discrimination under the CERD protected aspects of a person's background and heritage that are immutable.[155] Judges Bhandari and Robinson disagreed with this assessment, arguing that states with *jus sanguinis* national laws (such as Qatar), in which naturalization is unusual, nationality or citizenship would be just as immutable as national

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opposite direction to conclude that "nationality" was clearly not covered by "national origin." *See* Qatar v. UAE CERD case, *supra* note 3, ¶ 88.

[148] *See* Qatar v. UAE CERD case, *supra* note 3, ¶ 81 ("The Court notes that the other elements of the definition of racial discrimination, as set out in Article 1, paragraph 1, of the Convention, namely race, colour and descent, are also characteristics that are inherent at birth.").

[149] The Court stated:

> The Court considers that these provisions support the interpretation of the ordinary meaning of the term "national origin" as not encompassing current nationality. . . . In the Court's view, such express exclusion from the scope of the Convention of differentiation between citizens and non-citizens indicates that the Convention does not prevent States parties from adopting measures that restrict the right of non-citizens to enter a State and their right to reside there—rights that are in dispute in this case—on the basis of their current nationality.

Id. ¶ 83.

[150] *Id.* ¶ 82 (citing CERD, *supra* note 111, art. 1(2)).

[151] *Id.* ¶¶ 90–97.

[152] The Court also considered that the CERD was intended to partly address issues of decolonization and racial superiority. *See id.* ¶ 86 (citing G.A. Res. 1514 (XV), Declaration on the Granting of Rights to Colonial Countries and Peoples (Dec. 14, 1960)) (citing Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 132, ¶ 150 (Feb. 25)). The Court also noted the distinctions between citizens and aliens were commonplace. *See* Qatar v. UAE CERD Case, *supra* note 3, ¶ 93.

[153] *See* Qatar v. UAE CERD case, *supra* note 3, ¶ 81.

[154] *See id.* (citing Nottebohm case, *supra* note 1, at 20, 23).

[155] *See id*.

origin, and likely, effectively, are the same concept.[156] However, citing to *Nottebohm* to support an argument that nationality can be changed is quite surprising.[157] The very point of the Court's judgment in *Nottebohm* was to refuse to recognize a change of nationality and force the individual to retain *de facto* his previous nationality. Friedrich Nottebohm was not treated as a stateless person by Guatemala, but as a German national, a nationality he no longer held.[158] If anything, *Nottebohm* supports the immutability of nationality, yet the Court appears to be suggesting that it understands its judgment in *Nottebohm* to have recognized that the individual changed his nationality. And as a case of change—rather than loss, renunciation, or deprivation—one can only conclude that the Court believes that Friedrich Nottebohm validly lost German nationality and acquired Liechtenstein nationality. In this regard, we must recall that the ICJ expressly supported

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[156] Bhandari stated the following:

> Furthermore, the Judgment's attempt to distinguish between "nationality" and "national origin" becomes more complex and difficult to differentiate on the basis of immutability in the context of countries where nationality is based on jus sanguinis. Where nationality follows a jus sanguinis model, as is the case in many Gulf States, nationality coincides with national origin. Under the jus sanguinis model, in Qatar, "nationality is conferred by parentage—and naturalization is rare . . . the vast majority of Qatari nationals, including those affected by the measures, were born Qatari nationals and are Qatari in the sense of heritage—in other words, of Qatari 'national origin'". Nationality in this context is as immutable as "national origin" and is a characteristic that is inherent at birth contrary to the Court's assertion in paragraph 81."

See id. at 136–37 (Bhandari, J., dissenting) (internal citations omitted). Whereas Robinson opined the following:

> The majority has argued as a general proposition that, while nationality is changeable, national origin is a characteristic acquired at birth and for that reason is immutable. As a general proposition, the validity of this statement is questionable. It is too stark in its presentation of the difference between nationality and national origin and does not reflect the nuances distinguishing one from the other.
>
> National origin refers not only to the place from which one's forebears came; it may also refer to the place where one was born. For that reason, it is clear that national origin can encompass nationality because the place where one was born can give rise to both one's nationality as well as one's national origin. . . . As a matter of fact, the vast majority of persons who acquire nationality on the basis of *jus sanguinis* will spend the rest of their lives holding that nationality. In Qatar and the UAE, nationality is acquired on the basis of *jus sanguinis*. Therefore, a person who acquires nationality on the basis of *jus sanguinis* will, more likely than not, retain that nationality along with his national origin. In that sense, that person's nationality would seem to be just as unchangeable as his national origin.

Id. at 147–48 (Robinson, J., dissenting).

[157] *See id.* ¶ 81 (majority opinion) (citing Nottebohm case, *supra* note 1, at 23).

[158] *See* Nottebohm case, *supra* note 1, at 19, 25.

Liechtenstein's sovereign ability to prescribe nationality laws.[159] Thus the ICJ confirmed that *Nottebohm* was not a case of refusal to recognize the validity of nationality generally under international law, but rather refusal to give effect to one of the specific benefits of valid nationality—i.e., diplomatic protection.

The Court's holding is all the more important when viewed in the context of the parties' submissions. Qatar and the UAE each mentioned *Nottebohm* only once in the entire proceedings. In its written statement on the preliminary objections by the UAE, Qatar argued against the Emirates' submissions that nationality, unlike national origin, was excluded from the CERD.[160] The Emirates submitted that national origin should be interpreted to be akin to "ethnic origin" rather than the "legal bond" of nationality.[161] Qatar stated that, while the legal bond of nationality can, in principle, change, in actuality, for many states—including those in the Gulf region—nationality was not changeable, being based on immutable characteristics such as place of birth and descent.[162] In a footnote, Qatar further argued that nationality is also not so changeable because, according to *Nottebohm*, it must be based on a genuine connection.[163] For the ICJ to reject this submission and conclude that nationality is merely changeable, it forces us to question its commitment to the genuine connection criterion when it comes to the acquisition of nationality.

The UAE cited *Nottebohm* in response only during in the oral proceedings. Sir Daniel Bethlehem, arguing for the UAE, submitted that nationality was changeable because it was inherently a legal bond, not one of heredity.[164] In

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[159] *See id.* at 20.

[160] *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Preliminary Objections of Qatar, at 44–55 (Aug. 30, 2019) [hereinafter Preliminary Objections of Qatar], https://www.icj-cij.org/sites/default/files/case-related/172/172-20190830-WRI-01-00-EN.pdf [https://perma.cc/A92V-K495].

[161] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Preliminary Objections of U.A.E., at 43 (Apr. 29, 2019), https://www.icj-cij.org/public/files/case-related/172/172-20190429-WRI-01-00-EN.pdf [https://perma.cc/WC9X-CHET].

[162] *See* Preliminary Objections of Qatar, *supra* note 160, at 31 ("As an initial matter, the UAE's apparent assumption that legal nationality is universally fluid in this sense is at odds with restrictive citizenship regimes, including in the Gulf region, that depend on immutable characteristics, such as birthplace and heritage.").

[163] *See id.* at 31 n.94 ("The UAE also disregards the fact that nationality in the legal sense nevertheless relates to a genuine connection between the individual and the State, often arising from the very social ties that the UAE considers relevant to 'national origin.'") (citing Nottebohm case, *supra* note 1, at 23).

[164] *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Verbatim Record, at 35, ¶¶ 36–37 (Aug. 31, 2020), https://www.icj-cij.org/public/files/case-related/172/172-20200831-ORA-01-00-BI.pdf

the view of the UAE, nationality followed from "an express politico-legal act by a State" that was "a matter for sovereign determination by each State."[165] In effect, the UAE invited the Court to find that—according to *Nottebohm*—the substantive and immutable genuine connection between the individual and the state was not the core of nationality.[166] Instead, nationality was a politically and legally changeable status, following an intentional act of the state. In following the UAE's line of argument that nationality was a "sovereign determination," the Court accepted the invitation from the UAE and must be understood to have diminished genuine connection as the core of nationality, replacing it with the "politico-legal act" of granting the "legal bond."[167]

Bethlehem argued that the Council of Europe's European Convention on Nationality ("ECN") supports the politico-legal view of nationality rather than immutability view.[168] In supporting this argument, the ICJ further clarified its understanding of *Nottebohm*. Citing to the Convention's explanatory report, Bethlehem submitted for the UAE that the ECN defines nationality as a legal bond and not ethnicity.[169] However, he omitted to mention that the ECN requires states to take genuine connections and territorial origin of the individual into account when granting nationality.[170] The Council of Europe expressly relied on *Nottebohm* for the conclusion that nationality "has to accord with the individual's genuine connection with the

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[https://perma.cc/6GUR-M2QW]. Bethlehem stated the following:

> [A person] may try to hide these traits, but they cannot escape them. They were born with them and they are a matter of fact. They carry these traits with them throughout their lives. They cannot be divested. They are intrinsic to the individual. It is these intrinsic, hereditary characteristics of all human beings that the CERD had the purpose of addressing. Not so with nationality.

Id. at 35, ¶ 36.

[165] *See id.* at 35, ¶ 37 (citing Nottebohm case, *supra* note 1, at 20, 23).

[166] *See id.* ("[Nationality] is, to quote the Court again, 'a legal bond' which denotes 'the existence of reciprocal rights and duties' with the State conferring nationality.") (quoting Nottebohm case, *supra* note 1, at 23).

[167] *See id.*

[168] *See id.* at 35–36, ¶ 38.

[169] *See id.* (quoting European Convention on Nationality, *supra* note 121, art. 2(a)) (citing Council of Eur., *Explanatory Report to the European Convention on Nationality*, E.T.S. No. 166, ¶ 23).

[170] The Convention states the following:

> In deciding on the granting or the retention of nationality in cases of State succession, each State Party concerned shall take account in particular of: (a) the genuine and effective link of the person concerned with the State; (b) the habitual residence of the person concerned at the time of State succession; (c) the will of the person concerned; (d) the territorial origin of the person concerned.

European Convention on Nationality, *supra* note 121, art. 18(2).

State."[171] On the one hand, Bethlehem argued that nationality is an easily changeable sovereign politico-legal act, yet on the other hand, the Council of Europe has understood *Nottebohm* to require a less changeable genuine connection for the validity of the act. The fact that the ICJ agreed with Bethlehem suggests that the ICJ does not agree with the Council of Europe's expansive interpretation of *Nottebohm*.

The *Qatar v. UAE CERD* judgment clearly does not reverse *Nottebohm* and only affirms the narrow scope of the judgment, but *Nottebohm*'s days may yet be numbered. In his dissenting opinion in *Qatar v. UAE CERD*, Judge Robinson took issue with the Court's reliance on *Nottebohm*.[172] He argued that the case was "decided in 1955," hinting that it may have been eclipsed by other developments in the law, most importantly the human rights revolution.[173] He argues that the case "reflects a substantially State-centered approach to international law that has been affected by subsequent developments in human rights law."[174] He also mentions that "it is now generally accepted that a State is not entirely free to deprive a person of his nationality where this act would render the person stateless."[175] Not only does this view affirm the argument that the prevention of statelessness has moved into customary international law, but, by being made in the context of *Nottebohm*, it suggests that the refusal to recognize nationality for purposes of diplomatic protection might indeed be tantamount to the creation of statelessness. Perhaps a subtle revision to *Nottebohm* along the lines of the *Akayesu* judgment is yet to come. Nevertheless, after the *Qatar v. UAE CERD* judgment, we must revisit our understanding of *Nottebohm* and refrain from applying its holding beyond diplomatic protection of multiple nationals.

It is also difficult to distinguish the validity of nationality from its international effects. After all, the *Qatar v. UAE CERD* case was precisely a claim that the UAE could not discriminate under the CERD against Qatari nationals on the grounds of their nationality.[176] Qatari nationality was never at issue. In fact, had Qatari nationality been questioned, the national origin argument of Qatar would have been stronger because the alleged unlawful

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[171] The Explanatory Report states the following in full:

> The term "genuine and effective link" contained in sub-paragraph a was first used by the International Court of Justice in the Nottebohm case. It refers to a "substantial connexion" of the person concerned with the State. The legal bond of nationality therefore has to accord with the individual's genuine connection with the State.

Council of Eur., *Explanatory Report to the European Convention on Nationality*, E.T.S. No. 166, ¶ 113.

[172] *See* Qatar v. UAE CERD case, *supra* note 3, at 148–49 (Robinson, J., dissenting).

[173] *Id.* at 148.

[174] *Id.*

[175] *Id*. In this regard, see also Macklin, *supra* note 61, at 494 ("For purposes of diplomatic protection, the Court renders Nottebohm stateless.").

[176] *See* Qatar v. UAE CERD case, *supra* note 3, at 80 (majority opinion).

discriminatory treatment of Qataris would have been implemented against them due to their historical, original connection with the state of Qatar despite lacking nationality. The reason the ICJ could so easily dismiss Qatar's argument is that the allegedly mistreated individuals clearly had Qatari nationality.

VI. IMPACT OF THE *QATAR V. UAE CERD* CASE ON OTHER CASES APPLYING *NOTTEBOHM*

Following the *Qatar v. UAE CERD* case judgment, the few other bodies that have relied on the *Nottebohm* judgment may need to reassess their arguments that attempt to expand its application.[177] For example, the Court of Arbitration for Sport (and other international sports federations, as well as the International Olympic Committee) will need to examine the opinion in *USOC v. USA Canoe*.[178] The *dicta* in that case might still be applicable because it was examining a benefit of nationality (i.e., ability to represent a state and compete on its national team), not whether the underlying nationality was valid, although the CAS has expressed some skepticism about the rules on Olympic nationality generally.[179]

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[177] In addition, see discussion *supra* 85 for author's speculation that Crawford may have also reassessed the wider application of Nottebohm when he revised Brownlie's text.

[178] *See* USOC & USA Canoe, *supra* note 96, ¶¶ 19–21.

[179] For example, see language within the following CAS arbitral award:

> Therefore, the Panel decided to uphold the validity of Bylaw 204 (1)c [imposing a waiting period to build a strong genuine connection for nationality]. However, in the light of the Austrian decision [Emanuel V. v. Aust. Ice Hockey Assoc. & Int'l Ice Hockey Fed. (IIHF), Case No. 2 Ob 232/98a (Oberste Gerichtshof (OGH), Aust., Sept. 24, 1998)] the Panel strongly urges the Respondent to modify this rule at the next possible opportunity, bearing in mind its potential invalidity.

Nabokov & Russian Olympic Comm. (ROC) & Russian Ice Hockey Fed. (RIHF) v. Int'l Ice Hockey Fed. (IIHF), Case No. CAS 2001/A/357, Award, ¶ 14 (Ct. Arb. Sport Jan. 31, 2002). See another example in the following arbitral award:

> The Panel finds it inexplicable why an "invariable" policy should cause the Cuban Olympic Committee to prevent Mr. Miranda's first–ever participation in Olympic Games by refusing to agree to a reduction of the period of his Olympic ineligibility. . . . The Panel, therefore, requests the IOC to ask the Cuban Olympic Committee to reconsider its decision in light of the present award. The Panel also recommends that the IOC reexamine Paragraph 2 of the Bye-law to Rule 46 as presently worded with a view to determining whether an amendment could reduce unintended hardship in individual cases.

Miranda v. Int'l Olympic Comm. (IOC), Case No. CAS 00/003, Award, ¶ 44 (Ct. Arb. Sport *ad hoc* Div. (O.G. Sydney) Sept. 13, 2000) (critiquing the proportionality of the rule); *see also* Int'l Baseball Assoc. (IBA), Case No. CAS 98/215, Advisory Opinion, ¶ 32 (Ct. Arb. Sport Jan. 4, 1999) ¶ 32 ("National federations can safeguard their economic interests in athletes by requiring that the athlete may not represent another federation unless three years has elapsed, or the athlete has reimbursed his previous federation for all the costs which were incurred

The European Commission infringement actions against Cyprus and Malta,[180] however, are more problematic. The Commission is arguing that the grant of nationality is not supported in international law if it comes without a genuine connection.[181] The *Qatar v. UAE CERD* case, however, appears to affirm that the grant of nationality—even in the absence of genuine connections (and even in the case of purchase of nationality, as Friedrich Nottebohm purchased his Liechtenstein nationality)—is still valid. Moreover, by rejecting the UAE's arguments on the Council of Europe's interpretation of *Nottebohm*,[182] the EU must similarly be on notice that the ICJ is unlikely to agree with its views on *Nottebohm*. The only question, then, for the Commission, is whether other states must recognize a valid grant of nationality for other purposes. Under *Micheletti*,[183] it seems unlikely that an EU Member State can ever refuse to grant the benefits of a valid EU nationality to an individual. In that case, the Court of Justice of the European Union ("CJEU") held that a dual Italian/Argentine national could not be regarded by Spain as only an Argentine national based on the stronger connection to that state.[184] While the Court did not reference *Nottebohm*, the Advocate General did in his opinion to the Court.[185] He argued that the Treaties on European Union and the declarations states made in connection with the Treaties demonstrate that the *Nottebohm* criteria was expressly dismissed as an argument for refusal to recognize nationality.[186] In his view,

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during the athlete's training and education.").

[180] *See* Eur. Comm'n Press Release IP/20/1925, *supra* note 101; Eur. Comm'n Infringement Decisions INF/21/2743, *supra* note 101.

[181] *See* Eur. Comm'n, *Investor Citizenship and Residence Schemes*, *supra* note 101, at 5.

[182] *See supra* notes 168–71 and accompanying text.

[183] *See* Case C-369/90, Micheletti et al. v. Delegación del Gobierno en Cantabria, 1992 E.C.R. I-4258 [hereinafter Micheletti case].

[184] The CJEU stated:

> Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.
>
> Consequently, it is not permissible to interpret Article 52 of the Treaty to the effect that, where a national of a Member State is also a national of a non-member country, the other Member States may make recognition of the status of Community national subject to a condition such as the habitual residence of the person concerned in the territory of the first Member State.

See id. ¶¶ 10–11.

[185] *See* Case C-369/90, Micheletti et al. v. Delegación del Gobierno en Cantabria, Opinion of Advocate Gen. Tesauro, 1992 E.C.R. I-4243, ¶¶ 5, 7.

[186] *See id.* ¶ 7. *But see* Case C-482/18, Google Ireland Ltd. v. Nemzeti Adó- és Vámigazgatósága, Opinion of Advocate Gen. Kokott, ECLI:EU:C:2019:728, ¶ 44 & n.16

Nottebohm arose out of the context of diplomatic protection and was founded in a historical "romantic period of international relations."[187] In dismissing the relevance of *Nottebohm* and affirming that EU Member States may not impose a genuine connection test for recognizing nationality in other member states, the CJEU also affirmed that not only is the underlying grant of nationality undisturbed, but other EU member states are obliged to recognize that nationality. Under *Micheletti*, since the grant of nationality is valid even absent genuine connections, an infringement action against the state granting the nationality would be misplaced.

CONCLUSION

Nottebohm has come under extensive and well-deserved criticism. But it is important to recall the ICJ's own views as expressed in the case on the limited impact of the judgment. The Court, by its own words, only applied its central holding on genuine connection to cases of diplomatic protection.[188] Moreover, the Court appeared to mistakenly believe that Friedrich Nottebohm had dual nationality, meaning that its holding should only be applied in those situations.[189]

Cases that followed *Nottebohm* have only applied the Court's genuine connection test to multiple nationality in diplomatic protection situations. In one exception to this practice in the *Akayesu* case, the ICTR cited *Nottebohm* but omitted the genuine connection test.[190] In *USOC v. USA Canoe*, the Court of Arbitration for Sport only hesitantly endorsed *Nottebohm*'s genuine connection test in dicta, though it suggested that the test would be useful in multiple nationality cases, not only single nationality cases.[191] And in *Micheletti*, the CJEU also rejected any application of genuine connections

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(Sept. 12, 2019) (wherein Advocate General Kokott opined that, although the *Nottebohm* case was "relating to recognition of citizenship of another State for the exercise of diplomatic protection," the ICJ's judgment established a rule of genuine link as a limit on a state's "external legislative powers," which suggests that Kokott views *Nottebohm* far more expansively than Tesauro).

[187] Case C-369/90, Micheletti et al. v. Delegación del Gobierno en Cantabria, Opinion of Advocate Gen. Tesauro 1992 E.C.R. I-4243, ¶ 5. Tesauro stated in full:

> I do not believe that the case before the Court constitutes an appropriate setting in which to raise the problems relating to effective nationality, whose origin lies in a "romantic period" of international relations and, in particular, in the concept of diplomatic protection; still less, in my view, is the well known (and, it is worth remembering, controversial) *Nottebhom* [sic] judgment of the International Court of Justice of any relevance.

Id.

[188] Nottebohm case, *supra* note 1, at 22, 24.

[189] *Id.* at 24–26.

[190] *See supra* notes 89–95 and accompanying discussion.

[191] *See* USOC & USA Canoe, *supra* note 96, ¶¶ 19–21.

for assessing EU citizenship under EU law.[192] The only outlier at this point remains the European Commission infringement actions against Cyprus and Malta,[193] which are still at a very early phase and do not constitute good practice yet.

The ICJ contributed to this chain of subsequent practice in the *Qatar v. UAE CERD* case, reaffirming that *Nottebohm* was not a case about the validity of a nationality change but—by necessary implication—was focused only on diplomatic protection.[194] This view undercuts potential arguments in other fora that *Nottebohm* might be applied, either directly or by analogy, to challenge the validity of nationality.

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[192] *See* Micheletti case, *supra* note 183.

[193] *See* Eur. Comm'n Press Release IP/20/1925, *supra* note 101; Eur. Comm'n Infringement Decisions INF/21/2743, *supra* note 101.

[194] *See supra* notes 168–75 and accompanying discussion.