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Active personality and non-extradition of nationals in international criminal law at the dawn of the twenty-first century : adapting key functions of nationality to the requirements of International Criminal Justice

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1 Introduction

1 COMPLEMENTARY FUNCTIONS OF THE BOND OF NATIONALITY IN INTERNATIONAL CRIMINAL LAW: ACTIVE PERSONALITY AND NON-EXTRADITION OF NATIONALS

In the politico-legal sense, nationality signifies the existence of a legal link between the individual (natural person) and a state.¹ Through this link, the individual comes under the personal jurisdiction of the state, giving rise to mutual rights and obligations under municipal law. Nationality in this sense may be perceived as a status (of belonging to the state as opposed to being an alien) or as a relationship (comprising material rights and duties).²

Nationality is also a well-established, traditional concept of public international law.³ As permanent population (*i.e.* nationals) is one of the elements of the definition of the 'state', it is inseparably linked to the concept of statehood. Consequently, it is fundamental to the post-Westphalian international system and hence to the modern conception of public international law. Nationality is central to such important fields of the discipline as state responsibility for injuries to aliens and diplomatic protection.⁴

1 In its other meaning (described as historico-biological or ethnological-sociological), nationality denotes the tie (or sense of unity) between individuals, created by a presumed common ancestry, a shared culture, language, traditions, *etc.* Cf. Chapter 7, note 17, *infra*. Due to the existence of multi-ethnic states and diasporas, these meanings and the groups of person covered by them frequently do not coincide. However, in the English language 'nationality' is seldom used in its ethnological-sociological sense, reducing the potential for confusion.

2 P. Weis, *Nationality and Statelessness in International Law* (2nd ed., 1979) 3-7 and 29-32; A. Randelzhofer, 'Nationality' in R. Bernhardt (ed.) *Encyclopedia of Public International Law*, Vol. 3 (1997) 501 at 502; H. F. van Panhuys, *The Rôle of Nationality in International Law: An Outline* (1959) 24-38. Cf. K. S. Sik, *De meervoudige nationaliteit* (1957) 3-8.

3 For a general definition of and on problems related to the concept of 'nationality' under international law, see Chapter 2, *infra* at 23-24. Cf., *e.g.*, Weis, *supra* note 2; Randelzhofer, *supra* note 2; van Panhuys *supra* note 2.

4 See, *e.g.*, F. V. García Amador, 'Third Report on International Responsibility of States for Injuries to Aliens' to the International Law Commission, UN Doc. A/CN.4/111, in *Yearbook of the International Law Commission* 1958, Vol. II, 47 at 66-67, paras. 22-28; and International Law Commission, 'Draft Articles on Diplomatic Protection with commentaries' (2006), http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf.

Albeit seldom afforded focussed attention in this context,⁵ the bond of nationality has an at least equally prominent place in the study of international criminal law.⁶ It gains significance in this context in a twofold manner: through the nationality of the (suspected) perpetrator, and through that of the victim.⁷ The first of these manifestations is central to the subject(s) of this study: the active personality principle of criminal jurisdiction and the non-extradition of nationals.⁸

None of these concepts are recent inventions. The origins of the rule that a state may reserve itself the right to refuse extradition⁹ of its nationals as an exception to a general obligation assumed in an international agreement to extradite suspected or convicted criminals apprehended on its territory date

5 One of the most comprehensive studies of the role of nationality in international criminal law is a chapter devoted to nationality as a basis of extraterritorial criminal jurisdiction and to the role of nationality in extradition by van Panhuys, *supra* note 2 at 126-138.

6 International criminal law is a branch of public international law. (*E.g.*, A. Cassese, *International Criminal Law* (2003) 16.) *Cf.* text accompanying notes 48-50, *infra*.

7 Forming the basis of the passive personality principle of extraterritorial jurisdiction, this projection of the role of nationality in international criminal law is outside the scope of the present study.

8 Admittedly, the nationality of the perpetrator also plays a significant role in two relatively novel areas of international cooperation in criminal matters: the transfer of criminal proceedings and the transfer of enforcement of custodial sentences. However, in these contexts, nationality is merely one of several factors based on which transfer may be requested. Accordingly, due to an equal role commonly attributed to residence, the role of nationality is in fact much less significant here than a quick look at the relevant regimes may suggest. Moreover, where nationality is central, conventions commonly require the consent of both the requesting and transferring state and often even that of the accused or convicted person, or provide for grounds unrelated to nationality upon which cooperation may frequently be refused. (See, *e.g.*, European Convention on the International Validity of Criminal Judgments, *European Treaty Series [ETS]* No. 70; European Convention on the Transfer of Proceedings in Criminal Matters, *ETS* No. 73; Convention on the Transfer of Sentenced Persons, *ETS* No. 112; Scheme for the Transfer of Convicted Offenders within the Commonwealth, available at <http://www.commonwealth.org>; *cf.* S. Oeter, 'Effect of Nationality and Dual Nationality on Judicial Cooperation, Including Treaty Regimes Such As Extradition' in D. A. Martin and K. Hailbronner (eds.) *Rights and Duties of Dual Nationals: Evolution and Prospects* (2003) 55 at 62-63.) As a result, few controversies arise related to transferring criminal proceedings or the enforcement of prison sentences in relation to nationality. For this reason, the relevance of these areas to the present study is limited. They will accordingly be treated here in a cursory manner, to the extent of their relevance to the problems addressed in relation to the active personality principle and the non-extradition of nationals.

9 The *Encyclopedia of Public International Law* defines extradition as the official surrender of a fugitive from justice, regardless of his consent, by the authorities of the State of residence to the authorities of another State for the purpose of criminal prosecution or the execution of a sentence. Thus, extradition constitutes only one, albeit the most important, aspect of the broader spectrum of mutual legal assistance between States in criminal matters.

T. Stein, 'Extradition' in *Bernhardt*, *supra* note 2, Vol. 1, 327 at 327. For similar definitions, see M. Ch. Bassiouni, *International Extradition: United States law and practice* (4th ed., 2002) 29 [hereinafter *International Extradition*]; R. Y. Jennings and A. Watts (eds.) *Oppenheim's International Law* (9th ed., 1992) 948-949.

back at least to medieval times.¹⁰ In spite of considerable changes in the international legal system, in international criminal law and in international cooperation in criminal matters since its conception, the non-extradition of nationals has survived and it remains a constant feature of every-day life. However, despite or exactly because of its frequent invocation and the resulting perceived frustration of (international) criminal justice, the non-extradition of nationals (or 'nationality exception'¹¹) is one of the more controversial practices in the field of international cooperation in criminal matters.

The extent of its actual negative impact is, however, often overestimated. Civil law jurisdictions, where this practice is widespread, compensate for the failure to surrender the accused by enabling domestic prosecution of crimes committed by nationals abroad, under the principle of active personality (or 'nationality'). This principle is the most widely recognized basis of the exercise of extraterritorial criminal jurisdiction. Traditionally justified by the notion of the sovereign power of the ruler over his subjects and the allegiance owed by subjects to him, the origins of this principle too reach far back in history, going even further than do the roots of the presently dominant principle of criminal jurisdiction, territoriality.¹² Albeit the extent of the exercise of jurisdiction over extraterritorial acts of nationals is far from uniform,¹³ the competence of states to exercise criminal jurisdiction over extraterritorial acts of their nationals is well-established in international law.¹⁴

Whereas their origins and justifications clearly indicate a considerable degree of complementarity between these two projections of nationality, active personality is not a panacea for all the 'evils' invoked by the non-extradition of nationals. Domestic prosecution commonly requires that the act constitute a crime in the state of nationality. Moreover, prosecution at a venue distant from the place of the commission of the offence imposes considerable costs and restrictions on the collection of evidence, calling of witnesses, *etc.*, reducing its effectiveness.¹⁵

10 The origins of this phenomenon are sometimes traced back even further, to ancient Greek city states and the Roman Empire. *E.g.* M. Plachta, '(Non)-Extradition of Nationals: A Neverending Story?', 13 *Emory International Law Review* (1999) 77 at 81.

11 On the manner in which this term is used in this study see Chapter 7, *infra*, note 1.

12 V. Lowe, 'Jurisdiction' in M. D. Evans (ed.) *International Law* (2003) 336 at 339.

13 See Chapter 2, *infra*, at 25; *cf.* M. Ch. Bassiouni, 'The Sources and Content of International Criminal Law: a Theoretical Framework' in K. Koufa (ed.) *The New International Criminal Law (Thesaurus Acroasium, Vol. 32)* (2003) 19 at 41 [hereinafter 'Sources and Content']; M. Akehurst, 'Jurisdiction in international law', 46 *British yearbook of international law* (1974) 145 at 156.

14 Jennings and Watts, *supra* note 9 at 462; I. Brownlie, *Principles of Public International Law* (5th ed., 1998) 306; Lowe, *supra* note 12 at 339; Bassiouni, 'Sources and Content', *supra* note 13 at 41.

15 At least in part with the aim to compensate for the negative effects of the nationality exception to extradition, conventions have been concluded to enable the transfer of criminal proceedings to a state unable to extradite its national for foreign prosecution or to transfer execution of the sentence already pronounced in a foreign jurisdiction to the state of nationality. Resort to such measures is relatively infrequent today but they are gaining popularity. *Cf.* note 8, *supra* on the limited relevance of these fields to this study.

Yet, for reasons of their complementarity, it is impossible to assess the effect of one of the two principles on international criminal justice in isolation from the other. It is equally unfeasible to suggest ways to adapt these functions to the requirements of contemporary international criminal law distinctly from each other. Accordingly, this study seeks to provide a comprehensive account of these two manifestations of the role of nationality¹⁶ by addressing relevant questions as far as practicable and logical from the perspectives of both.

2 THE RELEVANCE OF THE SUBJECT TO INTERNATIONAL CRIMINAL LAW IN THE TWENTY-FIRST CENTURY

Devoting a Ph.D. dissertation in international criminal law today to such traditional, over-analyzed or seemingly anachronistic concepts as the active personality principle of criminal jurisdiction and the non-extradition of nationals at a university twenty kilometers from the headquarters of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court, one easily ends up being seen as the cuckoo's egg.

In fact, the notion most of us are likely to have in mind when referring to 'international criminal law' today is that it is

a body of international rules designed both to proscribe international crimes and to impose upon States the obligation to prosecute and punish at least some of those crimes. It also regulates international proceedings for prosecuting and trying persons accused of such crimes.¹⁷

Where and how does the subject of this study fit in here?

The answer is simple. The above statement correctly reflects the narrow definition of the term, emphasizing what is sometimes referred to as the 'vertical' aspect of international criminal law, *i.e.* the prosecution and punishment of international crimes before domestic and international courts. However, in the original broad sense, 'international criminal law' is better described as '*a complex legal discipline consisting of overlapping and concurrent sources of law* and emanating from the international legal system and from national legal sys-

16 It should, however, be emphasized that this study is in no way claimed to give a comprehensive account of the role of the concept of nationality in international criminal law today. Firstly, it does not address the application of active personality in relation to corporations. Secondly, it does not cover the principle of passive personality and problems related thereto. Finally, it does not provide an in-depth analysis of problems that may arise in the context of transfer of proceedings and transfer of sentenced persons in relation to nationality.

17 Cassese, *supra* note 6 at 15. It should, however, be noted that Cassese subsequently recognizes the existence of other meanings traditionally attributed to the term. (*Ibid.* 15.)

tems.¹⁸ It is made up of a variety of fields, containing penal and procedural aspects, with the first covering *inter alia* 'theories of criminal jurisdiction and their ranking', and the latter containing 'extraterritorial criminal jurisdiction and modalities of inter-state cooperation in penal matters',¹⁹ including extradition. In this sense, international criminal law has a substantial 'horizontal' component, one relating to national jurisdiction and enforcement of criminal laws, as well as interstate cooperation in criminal matters.

This last component is also frequently referred to in contemporary legal discourse as 'transnational criminal law'. The implied emphasis on its interstate aspects underlines the distinct nature of the rules and problems pertaining to this segment of the discipline and may be taken as signifying the relative closeness of ties of this area with the mother discipline, international law, as opposed to criminal law.

The weight of attention centered around the first – 'vertical' – aspect of international criminal law in the past two decades. Voluminous books and a myriad of articles have been written addressing various aspects of this popular field. In contrast, the 'horizontal' component of international criminal law has been clearly understudied.

Does this lack of scholarly attention signify the decline of the significance of horizontal international and/or of 'transnational' criminal law? In other words, are the fields falling outside of the circle of international criminal law in the narrow sense in general or the particular topic(s) of this study in particular still relevant to international criminal law and to international criminal justice today, in the era of international criminal jurisdictions?

They clearly are. The oldest components, including the rules applicable to extraterritorial criminal jurisdiction, international cooperation in criminal matters including extradition, later joined by mutual assistance in criminal matters and the recognition and enforcement of foreign criminal judgments²⁰

18 Bassiouni, 'Sources and Content', *supra* note 13 at 28, emphasis added. See too G. Schwarzenberger, 'The Problem of An International Criminal Law', 3 *Current Legal Problems* (1950) 263 [Schwarzenberger presents international criminal law as having six meanings. These are essentially the same as the components identified by Bassiouni.] and B. Broomhall, *International Justice and the International Criminal Court: between sovereignty and the rule of law* (2003). Broomhall perceives international criminal law as 'encompass[ing] increasingly narrow concentric rings of doctrine. Outermost is the whole area of comparative transnational or inter-State criminal law, that is, of national laws that deal with international or cross-border aspects of substantive and procedural criminal law.' (At 9.) In the view of the present author, Bassiouni's perception which may be visualized in the form of overlapping *and* concentric circles better reflects the relationships between the various components.

19 Bassiouni, 'Sources and Content', *supra* note 13 at 37, *cf. ibid.* 35-37.

20 On this evolution, see, *e.g.*, Cassese, *supra* note 6 at 15; R. Haveman, 'Introduction: A System Sui Generis' in R. Haveman, O. Kavran, J. Nicholls (eds.) *Supranational Criminal Law: A System Sui Generis* (2003) 1 at 4; C. Warbrick, 'International Criminal Cooperation And The New International Criminal Law' in Koufa, *supra* note 13, 209 at 225-238.

are at least as important today as the law and practice of international(ized) criminal courts and tribunals. This is evidenced by reference to various aspects of horizontal international criminal law in news reports on an almost daily basis. Even though their evolution in the last decades was less spectacular than that of the vertical component of international criminal law, there is ample progress in the fields falling outside of the narrow definition. They clearly remain relevant to international life and the fight against crime, domestic as well as international.

2.1 *Active Personality*

Extraterritorial and international criminal jurisdiction, constituting together with the traditional territorial jurisdiction a legal boundary on the reach of international criminal law, greatly expanded in the past century.²¹ This is at least in part due to the fact that with the increase of globalization even common crime has lost its primarily territorial (domestic) nature. With criminals acting and moving across borders, the exercise of extraterritorial criminal jurisdiction has by necessity become a common practice all over the world, increasing the need and demand for clear legal regulation and international cooperation. Even common law systems, traditionally opposed to extending the force of their criminal laws to extraterritorial acts increasingly attempt to penalize certain extraterritorial acts of their nationals. Territoriality is clearly no longer the sole universally recognized basis for the exercise of criminal jurisdiction today. Next to universal jurisdiction, active personality too is gaining increasing significance. It is therefore all the more important to adapt its regulation and exercise to the requirements of the twenty-first century.

Globalization has namely brought about another relevant change, one related to nationality, necessitating such an adaptation. With migration across borders, resettlement and intermarriage of people becoming an everyday fact of life, phenomena such as multiple nationality and naturalization have become increasingly normal features of our globalized life.²² The domestic criminal jurisdiction principle of active personality is clearly not sufficiently equipped to be applied to such specific cases, hence its adjustment is necessitated.

Moreover, the principle of active personality recently found its place in international criminal law in its newest – vertical – sense: it is taken up in the ju-

21 This expansion relates to universal jurisdiction as well as to other basis of criminal jurisdiction. See, e.g., A. Pearlroth/Redress, 'Universal Jurisdiction in the European Union', Report (2003), available at <http://www.redress.org/conferences/country%20studies.pdf>; Bassiouni, *International Extradition*, *supra* note 9 at 388.

22 See, e.g., K. Hailbronner, 'Nationality' in T. A. Aleinikoff and V. Chetail (eds.) *Migration and International Legal Norms* (2003) 75; T. A. Aleinikoff and D. Klusmeyer, 'Plural Nationality: Facing the Future in a Migratory World' in T. A. Aleinikoff and D. Klusmeyer (eds.) *Citizenship Today: Global Perspectives and Practices* (2001) 63.

jurisdictional provisions of the Statute of the International Criminal Tribunal for Rwanda²³ and the Rome Statute of the International Criminal Court.²⁴ These institutions constitute a truly new form of jurisdiction, in many respects only faintly resembling domestic criminal jurisdictions. Domestic criminal law or principles of interstate cooperation in criminal matters cannot readily be assumed to apply to them. The question thus arises how the domestic criminal jurisdiction principle of active personality can be translated to international jurisdictions, and what if any adaptations are necessary.

2.2 *Non-extradition of Nationals*

With the expansion of extraterritorial criminal jurisdiction came the painful recognition that the exercise of criminal jurisdiction remains subject to a factual boundary, the physical presence of the accused within the jurisdiction. The exercise of jurisdiction *in absentia* is increasingly controversial in international criminal law, even when it concerns domestic prosecution for domestic common crimes. Friction arises especially when the case involves a foreign element. It is then at least desirable that the state wishing to exercise jurisdiction attempts to obtain physical custody of the accused. This type of situations are becoming more and more common in today's globalized world. Due to the increased mobility of individuals including criminals and due to the transboundary or international nature of crimes involved, extradition is thus often indispensable to bringing the accused to justice in a foreign jurisdiction.

In turn, physical custody of the convict (implying his or her presence in the jurisdiction) is a *sine qua non* for the enforcement of custodial sentences. A state whose authorities intend to enforce such a sentence over a person not present in the relevant jurisdiction (*i.e.* a person sentenced *in absentia* or a fugitive criminal) must therefore rely on the cooperation (*i.e.* extradition) of the state on whose territory he or she is present to be able to proceed with enforcement.

The importance and controversiality of extradition is not to be underestimated in relation to international criminal courts and tribunals. Constituted as an international organization and as subsidiary organs of the UN Security Council, respectively, the ICC and the *ad hoc* tribunals do not possess territory of their own but are situated in a sovereign state. Their seat is often far from the place of the commission of the crimes under their jurisdiction, and they are

23 Article 1 of the Statute of the International Criminal Tribunal for Rwanda (33 *International Legal Materials* [ILM] (1994) 1598) establishes the competence of the Tribunal 'to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States [...]', in accordance with its provisions. (Emphasis added.)

24 Article 12(2) of the Rome Statute of the International Criminal Court (UN Doc. A/Conf.183/9* (17 July 1998), 37 *ILM* (1998) 999 [hereinafter ICC Statute or Rome Statute].) grants the ICC jurisdiction, based on referral by a state party or initiated by the Prosecutor *proprio motu, inter alia*, if the 'State of which the person accused of the crime is a national' is a state party to the Statute.

separated by international borders not only from evidence but also from the accused themselves. Perhaps even more importantly, they lack a police force. As a consequence, their work and success depend on the cooperation of states. Most relevantly to this study, due to the impermissibility of prosecution *in absentia* before the ICC, the ICTY and the ICTR,²⁵ a widespread failure of the states on whose territory the accused individuals are present to cooperate (*i.e.* to hand over the person) would be detrimental to the functioning of these bodies. This fact renders a study of relevant aspects of cooperation by states with the *ad hoc* tribunals and the ICC all the more important, even though the Statutes of all three bodies expressly avoid any reference to extradition, describing the handing over of persons to these bodies as 'surrender'.²⁶

It is thus clear that extradition is not an outdated institution but remains central to international criminal law and to international criminal justice even in the era of international criminal jurisdictions. One may thus expect, considering the long history and increasing significance and frequency of international cooperation in criminal matters, that the rules of the game would be settled by now, at least with regard to the oldest form of such cooperation, extradition. Nothing could be further from the truth! Exactly because of its long history and conception in ages long gone, traditional extradition principles – which may not have been uncontroversial even upon their conception – increasingly come under fire. One of the most prominent examples of this development relates to one of the subjects of this study, the non-extradition of nationals.

It may be argued that, due to significant changes in the international community and in the international legal system, the non-extradition of nationals may have become an anachronistic feature of international cooperation in criminal matters. As a result, even the most recent justifications of the nationality exception may not hold. First, as the non-extradition of nationals is commonly perceived as a sovereign prerogative, the claimed decline of the importance of state sovereignty in contemporary international law and international relations may be invoked against retaining this practice.²⁷

Secondly, thanks to the advance of printing technology and the IT-revolution, information about foreign legal systems is readily available to the masses. Accordingly, the argument that a state should not lend a helping hand to the prosecution of one of its nationals for acts done abroad of which (s)he did not know and could not have known were criminal in that foreign legal system is losing its

25 *Ibid.*, Article 63(1); ICTY Statute (32 *ILM* (1993) 1159), Articles 20 and 21(4)(d); ICTR Statute, *supra* note 23, Articles 19 and 20(4)(d). Cf. Rules of Procedure and Evidence of the Special Court for Sierra Leone, available at <http://www.sc-sl.org/rulesofprocedureand-evidence.pdf>, Rule 60; Statute of the Iraqi Special Tribunal, available at http://www.cpa-iraq.org/human_rights/Statute.htm, Article 20(d)(4).

26 On the validity of this distinction and on its relevance to this study see Section 3.2. *infra*.

27 It should, however, be noted that, as Hailbronner (*supra* note 22 at 75) argues, due to the many functions of nationality '[i]t is not surprising [...] that the frequently described decline of the notion of sovereignty has not led to a decline of the concept of nationality. It seems that, on the contrary, nationality issues are gaining importance.'

appeal. This is all the more true with regard to the extradition of nationals having their long-term residence and/or conducting legal or illegal business abroad.

Thirdly, globalization and increased cooperation in criminal matters, together with joint fight against international crime and the establishment of international criminal jurisdictions have brought about a previously unknown degree of harmonization of national criminal laws, at least but not exclusively at the regional level. As a consequence, foreign legal systems are far more similar and far less unpredictable than they used to be at the birth of the nationality exception. Whereas standards of justice and perceptions of fairness may vary, differences in more and more cases will be insignificant. Accordingly, the argument that this measure is necessary to prevent one's nationals being subjected to unfair prosecution abroad is losing validity by the day.²⁸

In addition, these processes have not only made the study of the nationality exception more complex: by apparently considerably increasing chances for abuse,²⁹ they have rendered it even more controversial. From a rational

28 A related argument has been voiced by the drafters of the Harvard Draft Convention on Extradition as early as 1927. In that context, it was submitted that '[i]f justice administered in other States cannot be trusted, then there should be no extradition at all.' (21 *American Journal of International Law* (1927), Suppl. 21 at 128.) Turning the argument around, one may ask 'if the non-extradition of nationals has a human rights element to it, should the principle not apply to all extraditees?'

In answering this question, it should be emphasized at the outset that it is not human rights as such but the advantage related to conducting one's defense in a language the accused understands, in a legal system (s)he is reasonably familiar with, the availability of character witnesses and closeness of family and friends – beneficial to rehabilitation – what is commonly emphasized today. (See Chapter 7, at 199, *infra*.) In addition, the state of nationality is held to owe this protection to its nationals in return for their allegiance. Human rights law does not oblige a state to offer a similar degree of protection to all persons within its boundaries whose extradition is requested, or even to offer protection against possible human rights violations, with a possible exception related to fundamental human rights. In fact, many contemporary extradition agreements do acknowledge foreseen severe violations of human rights as a ground for refusing extradition. This provision is, however, distinct from the right to refuse extradition on grounds of nationality. In addition, the right to a fair trial confirmed in the majority of constitutions of the world without respect to the nationality of the person concerned, is also quite different from the (constitutional) right of nationals not to be extradited. (See Chapter 6, at 166, *infra*.)

Pushing the above argument to the extreme could mean that there would be no extradition at all. Alternatively, replacing the non-extradition of nationals with human rights protection as a ground for refusal would not satisfy the arguments related to allegiance and familiarity with language and legal system as rationales for the non-extradition of nationals. As the two bases of refusing extradition differ in purpose, they cannot be substituted for one another.

29 On this issue, see Chapter 3, *infra*. A calculated exercise of forum-shopping by individuals (to avoid criminal responsibility by obtaining a new citizenship) has a clearly negative impact on international criminal justice. Corresponding abuse by a state in the form of forum-shopping in terms of prosecution or extradition, while contributing to the maximization of penalty and hence of the effectiveness of (the deterring force of) criminal law, is also seen by this author as obstructive phenomena. Introducing friction and mistrust in an international cooperation regime (for whose maintenance trust is crucial), such practices may have a long-term systemic negative impact on effective cooperation and hence on the prospects of international criminal justice.

perspective, there remain less and less reasons to cling on to this rule which has probably led to unjustifiable impunity and caused international friction on a myriad of occasions.

Yet, a realistic study of the subject must recognize that the (non-)extradition of nationals is a question surrounded and a business driven by emotions and national sentiments. It is for this reason that the nationality exception has survived so many changes in the international community. However, the effect of the above described and other changes on this traditional ground for refusing extradition and recent attempts to reform or abolish it cannot go unnoticed. Moreover, attitudes to international criminal justice have been significantly altered over the years, changing our perception of the non-extradition of nationals. Yet, very little attention has been devoted to this subject in recent scholarship. Considering that its fundamentals, role and justifiability are increasingly questioned, further consideration of the subject and its changing role in international criminal law is clearly warranted.

Additionally, one must recognize the significance of the impact of globalization on the bond of nationality. In a world where a considerable amount of persons hold multiple nationalities and naturalization is increasingly open to the masses, the determination of the relevant status of individuals in relation to extradition is not a straightforward matter. It thus requires focused study.

3 AIMS AND SCOPE OF THE RESEARCH

3.1 *Research Questions*

Against the background of the above sketched extensive changes of the international politico-legal environment and international criminal law, this study undertakes to identify the place of the active personality principle and the non-extradition of nationals in international criminal law today. It will attempt to dust off these principles by identifying contemporary problems related to them and by suggesting ways to adapt them to the current needs and requirements of international criminal justice.

To this end, answers will be sought to the following questions in relation to both phenomena:

1. What is its impact on international criminal justice?
2. What problems should legislatures and courts be aware of and what responses and adaptations are called for to address them?
3. What alternatives are there?

3.2 *Scope*

The present study adopts a broad perspective of international criminal law. As the application of the active personality principle and the non-extradition of nationals are predominantly domestic and interstate phenomena, the focus of the analysis is to a large extent on domestic jurisdictions and on interstate

cooperation in criminal matters. In other words, the weight of the study lies within the boundaries of horizontal international criminal law,³⁰ not covered by the narrow definition of the discipline.

Yet, it is recognized that no study of international criminal law can be complete today without discussing the applicability and relevance of the problems at hand to international criminal jurisdictions. Accordingly, the central issues of this study will be considered also at this plane. In this context, the analysis will focus on the ICC, the only permanent international institution in this field, whose jurisdiction is not limited in time and space. The ICTY and the ICTR have been functioning for over a decade without facing significant *legal* problems related to the subject(s) of this study and are presently working towards winding up their operations in line with their completion strategies.³¹ It is accordingly unlikely that new problems of the type discussed here would arise in relation to their jurisdiction or surrender regime.³²

Let us, however, pause for a moment at the issue of non-extradition of nationals in relation to these bodies. In fact, the drafters of the statutes of the ICTY, ICTR (and of the ICC) intended expressly to rule out the application of the non-extradition of nationals under the state cooperation regime of these bodies. To this end, the Statutes describe the handing over of persons to the respective body as 'surrender', avoiding any references to 'extradition'. As a result of this distinction, the matter seemed hardly controversial, certainly in relation to *ad hoc* international criminal tribunals. Due to their establishment by the UN Security Council under Chapter VII of the Charter of the United Nations, 'an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal [is to] be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations.'³³

30 See text accompanying notes 17-19, *supra*. 'Transnational criminal law' is indeed a more widely adopted term than 'horizontal international criminal law'. However, it is often used to denote the web of interstate regimes of cooperation in criminal matters, de-emphasizing or even excluding the relevance of domestic legislation such as extradition acts (as opposed to extradition treaties) and legislation concerning bases of domestic criminal jurisdiction. 'Horizontal international criminal law' is preferred here for its inclusion of these aspects, crucial for the present study.

31 See UN Doc. S/Res/1503 (2003) and S/Res/1534 (2004); *cf.* UN Doc. S/2006/353 (available at <http://www.un.org/icty/publications-e/assessments/documents/2006-531eng.pdf>) and UN Doc. S/2006/358 (available at <http://69.94.11.53/ENGLISH/completionstrat/s-2006-358e.pdf>) for recent assessments by the ICTY and ICTR, respectively, of the progress made towards the goals formulated by the UN Security Council in this regard.

32 It may be noted in relation to the application of the active personality principle that the jurisdiction of the ICTY is based exclusively on the principle of territoriality (*supra* note 25). Accordingly, the nationality of the accused is not relevant to the exercise of its jurisdiction. In turn, the simultaneous application under the ICTR Statute (*supra* note 23) of the principles of territoriality and active personality suggest that few problems could arise in this context. To the author's knowledge, the ICTR has not indicted Rwandan nationals for (purely) extraterritorial crimes, and in the light of its completion strategy new indictments are not to be expected.

33 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (2003), available at www.un.org/icty/legaldoc-e/basic/statut/s25704.htm, Section VI, para. 126.

This obligation is confirmed in the provision of the respective Statutes on 'Co-operation and judicial assistance',³⁴ and is clarified in Rule 58 of the ICTY's and Rule 59 of the ICTR's Rules of Procedure and Evidence (RPE), reiterating that the obligations to cooperate and to provide judicial assistance expressed in the Statute 'shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.'³⁵

Yet, some states have refused to hand over their nationals to the *ad hoc* tribunals, considering that their constitutional provisions on the non-extradition of nationals apply even in this context.³⁶ Moreover, legislation adopted by others, while not prohibiting the surrender of nationals, apply national extradition procedures or other conditions to the surrender of offenders to the Tribunals.³⁷

Nevertheless, legally speaking, the RPE make it clear that states may not deny extradition of their nationals to the ICTY and the ICTR, and this obliga-

34 Article 29 of the ICTY Statute (*supra* note 25) and Article 28 of the ICTR Statute (*supra* note 23) require states to 'co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.' Moreover, they provide (in *ibid.*, para. 2) that

States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

[...]

(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the International Tribunal.

35 Rule 58 of the ICTY's RPE as amended latest on 30 May 2006, available at <http://www.un.org/icty/legaldoc-e/index.htm>; Rule 58 of the ICTR's RPE as amended latest on 21 May 2005, available at <http://69.94.11.53/default.htm>.

36 See UN Asia and Far East Institute, 2000 Conference on International Cooperation to Combat Transnational Organized Crime with Special Emphasis on Mutual Legal Assistance and Extradition, Topic 2: 'Refusal of Mutual Legal Assistance of Extradition', Resource Material Series No. 57, 191, available at <http://www.unafei.or.jp/pdf/57-16.pdf>. Cf. Polish Code of Criminal Procedure, Sections 604(1)(1) and 615(3) (subjecting cooperation with the ICTY to the nationality exception, available at http://www.era.int/domains/corpus-juris/public_pdf/polish_ccp.pdf); 1996 Constitutional Act on the Cooperation of Croatia with the ICTY, Article 3 (subjecting cooperation to consistency with the Constitution, which in turn prohibits the extradition of nationals (Article 9(2)); 1995 Swiss Federal Order on Cooperation with the International Tribunals for the Prosecution of Serious Violations of International Humanitarian Law, Chapter 2, Section 1, Article 10(2) (subjecting the surrender of nationals to guarantees that the person will be returned to Switzerland after the trial). Both implementing acts are available at http://www.oup.co.uk/best.textbooks/law/cassese_internationalcriminallaw/cases/ch19/. In addition, Yugoslavia repeatedly failed to comply with its surrender obligations referring to its domestic legislation prohibiting the extradition of its nationals. (See, e.g., A. H. J. Swart, 'Arrest and Surrender' in A. Cassese, P. Gaeta, J. R. W. D. Jones (eds.) *The Rome Statute for an International Criminal Court* (2002) 1639 at 1668-1669.)

37 See, e.g., legislation on cooperation with the ICTY by Denmark (Article 2); Finland (Section 4); Italy (Article 11); Netherlands (Article 2); Norway (Section 2), Sweden (Section 7); USA (Article 2), available at http://www.oup.co.uk/best.textbooks/law/cassese_internationalcriminallaw/cases/ch19/. These provisions suggest that legislators considered that cooperation with the Tribunals may be subjected to limits set by domestic law. A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law* (1998) 2 at 12; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Judgment on the Request of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ICTY, Appeals Chamber, 29 October 1997, para. 54.)

tion is supported by a realistic prospect of its enforcement through a new UN Security Council resolution. Accordingly, non-compliance is unlikely to invoke legal questions related to the applicability of the nationality exception, rather in relation to the general obligation to cooperate and consequences thereof. In contrast, due to its different method of establishment and general lack of SC backing, the non-extradition of nationals may be somewhat more problematic in relation to the ICC, justifying a closer analysis.³⁸

The role and contribution of internationalized (mixed or hybrid) criminal courts to international criminal law must not go unrecognized. Yet, due to the great diversity among the existing bodies in terms of certain relevant attributes (e.g. method of establishment, status, powers, relation to domestic jurisdiction, jurisdiction, applicable law), an in-depth study of the application of active personality and the non-extradition of nationals in relation to those would have required lengthy analyses of their nature. In light of this fact, and due to their limited spatial and temporal jurisdiction, a comprehensive study

38 See Chapter 6, *infra*.

39 The jurisdictional provisions of the existing internationalized criminal courts display a great variation. Whereas some do have jurisdiction over certain extraterritorial crimes of nationals of the relevant state, problems are unlikely to arise in a significant number of cases. The Statutes of the Extraordinary Chambers for Cambodia (Law on The Establishment of Extra Ordinary Chambers in The Courts of Cambodia for The Prosecution of Crimes Committed During The Period of Democratic Kampuchea, available at <http://www.senate.gov.kh/06-01-01.htm>) and of the Special Court of Sierra Leone (available at <http://www.sc-sl.org/scsl-statute.html>, Article 1) define jurisdiction on the basis of territoriality, and/or do not specifically mention the case of extraterritorial jurisdiction over acts of nationals.

Admittedly, the Statute of the Iraqi Special Tribunal (*supra* note 25, Articles 1(b) and 10) and UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, available at <http://www.un.org/peace/etimor/untatR/Reg0015E.pdf>, Article 2(2)) establish jurisdiction over certain extraterritorial crimes of Iraqi and East Timorese nationals, respectively. Yet, the equal role attributed to residence in Iraq in the first case and the specific context requirements in both contexts suggest that few problems related to the active personality principle will arise here too.

Legal controversies are similarly not to be expected in relation to the extradition of nationals. Internationalized criminal courts are commonly set up in agreement with the authorities of the state for which they are set up. Accordingly, it is unlikely that local authorities would deny transfer of indicted persons based on this rule. On the other hand, as internationalized criminal courts do not have powers binding on states other than the state involved in its establishment, others may arguably validly invoke the nationality exception if requested to hand over their nationals. (On the status of the SCSL and its powers in relation to states other than Sierra Leone, see Zs. Deen-Racsmany, 'Prosecutor v Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity', 18 *Leiden Journal of International Law* (2005) 299.) Yet, but for a few exceptions such as Liberian ex-President Taylor soon to be tried by the SCSL in the Hague and the rather remote possibility of members of the UN force stationed there being tried for crimes committed in Sierra Leone (*Cf.* SCSL Statute, Art. 1(2-3).) it is not likely that many foreign nationals (or even dual nationals) would be indicted by these bodies. Hence, the non-extradition of nationals is unlikely to become more than theoretically relevant to their functioning.

Should problems nonetheless arise in relation to the application of active personality or the non-extradition of nationals, the findings and suggestions of this study applicable in relation to domestic jurisdiction and the ICC are proposed to apply, to the extent that is justified by the status of these bodies, their powers, jurisdiction and applicable law.

of problems arising in those contexts did not appear necessary or justified within the confines of this dissertation.³⁹

It should, moreover, be noted that the European Union has been pioneering in the field of international cooperation in criminal matters in the past decades. Not only did it adopt a significant number of instruments – ranging from framework decisions to multilateral conventions – dealing with novel aspects of international cooperation in criminal matters; under the European Arrest Warrant,⁴⁰ the EU has gone further than any previous international regime or instrument in circumscribing the nationality exception. Accordingly, the EU can serve as a useful case-study. The regulation of the nationality exception under the European Arrest Warrant will therefore form a crucial part of this study.

For reasons to be explained in subsequent chapters, relevant characteristics and aspects of the two international regimes central to this study (the International Criminal Court and the European Arrest Warrant) fall within the domain of horizontal international criminal law, with certain modifications and exceptions.⁴¹ Accordingly, the scope of the study is in many respects confined to the horizontal component of international criminal law.

4 FORM AND METHODOLOGY

In contrast to ‘traditional’ Ph.D. theses in international (criminal) law, this dissertation contains, next to this introduction and a concluding chapter, six separate but contextually intertwined articles published in renowned international and/or European (criminal) law journals, addressing various aspects of the thesis. The central questions posed above will thus be answered through the looking glass and in the course of six distinct studies, each focussing on a

40 Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), *Official Journal of the European Communities* L190 18.7.2002 1.

41 This is not to deny that both regimes have components and aspects that fall in the ambit of the ‘vertical’ circle(s) of international criminal law. In relation to the ICC, a court set up to prosecute international crime, the general vertical element is well-known and obvious. Moreover, the intention of the drafters (although not explicit in the phrasing of the Statute) to exclude substantive grounds for refusing extradition (see Chapter 3, Section 3.A. and Chapter 6, Section 3.1., *infra* for a discussion of the drafting history of Article 102 of the Rome Statute (*supra* note 24)) is a clearly vertical characteristic.

In the context of the EAW, a vertical element is introduced in Article 2(2) of the Framework Decision (*supra* note 40), which specifies ‘crimes within the jurisdiction of the International Criminal Court’ among the offences that must give rise to surrender under an European arrest warrant.

Yet, in the view of the author, the reference to ‘surrender’ as opposed to ‘extradition’ under both regimes, combined with certain procedural and substantive differences especially in relation to the EAW do not render ‘surrender’ in either contexts sufficiently different from ‘extradition’. Their novel aspects are insufficient to justify – in and of themselves – non-application of fundamental components of domestic laws, including statutory and constitutional rules concerning the non-extradition of nationals. (See Chapter 6, Section 3.2. *infra*.)

specific topical issue related to the status and operation of the active personality principle and/or the non-extradition of nationals. This format has the advantage that each part of the study has been available to a broader, less specialized public than a single manuscript would be, and they were published at the time that their contexts were most topical.

On the other hand, this brings with the realities of legal publishing (*i.e.* the scope of an article being determined by topical issues as well as by the preference and interest of the readership as perceived by editors) and spatial, structural, and other requirements and conditions raised by editors and publishers. Due to this fact, the thesis does not consist of chapters in a traditional sense, building and following upon each other, having, where possible, a comparable structure. In fact, not only the structure but even the line of argumentation is often interrupted, issues and arguments are repeated, or are not dealt with in a depth that would appear justified by the title and the purpose of this study. This introduction identifying the central issues and a concluding chapter that provides a synthesis of the answers to the main questions of this study are included to compensate for possible shortcomings resulting from this particular format – one permitted by the Leiden University Ph.D. regulations and encouraged and motivated by the realities of contemporary legal scholarship.

This format enabled and required the author to make use of a wide range of research methods and review various types of materials, based on what appeared most appropriate and suitable for each individual article. Depending on the purpose and type of materials covered, comparative, deductive and inductive methods have been applied.

Due to the many loopholes still existing in this dynamically developing old-new discipline and to the thus required future oriented nature of the research, the author has made extensive use of deduction, an approach whose validity and utility to public international law research has been convincingly questioned by, *inter alia*, Schwarzenberger.⁴² Significantly, even he has admitted that '[m]ethods are but tools, and tools ought to be chosen with special regard for the material to which they are to be applied',⁴³ leading him to the conclusion that

[yet] nothing prevents lawyers from devoting themselves also to the task of planning in the field of international law. All that they may be asked is to keep the three different functions [i.e. analysis and systematization; functional interpretation; and sensorial criticism *de lege ferenda*, including constructive planning] which their science fulfills in watertight compartments and to apply in each case methods which are most likely to fulfill their specific object.⁴⁴

42 G. Schwarzenberger, 'The Inductive Approach to International Law', 60 *Harvard Law Review* (1947) 539.

43 *Ibid.* 539.

44 *Ibid.* 568. In addition, other scholars have recognized that 'the process of establishment of custom, truly speaking, is neither inductive nor deductive, but both at once, which is to say that it is a process of analogy, or of legal hermeneutics.' (R. Kolb, 'Selected Problems in the Theory of Customary International Law', 50 *Netherlands International Law Review* (2003) 119 at 131.)

The author has taken these words to heart. The purpose of this study is primarily to provide, in the words of Schwarzenberger, 'sensorial criticism [*de lege ferenda*] including constructive planning', hence the extensive reliance on deduction. However, this task presupposes an initial 'analysis and systematization' of the state of the law in relevant areas of international criminal law, and it has necessitated at times (primarily in relation to the non-extradition of nationals) even 'functional interpretation', requiring resort to the other methods.

Similarly, the type of materials covered in the chapters varies greatly, depending on the purpose of the individual article, the method applied and the availability of relevant materials. As international criminal law is a branch of public international law,⁴⁵ the sources mentioned in Article 38 of the Statute of the International Court of Justice (ICJ) have been sought in the first place.⁴⁶ The author has attempted to consult as many types of primary sources specified therein as possible. Multilateral international agreements (including the Statute of the International Criminal Court), and bilateral extradition treaties and mutual assistance agreements were consulted where suitable and to the extent copies were accessible. Evidence of customary international law (*opinio juris*) was sought *inter alia* in reservations and declarations to the treaties consulted, primarily with the aim to identify trends and patterns. The other component of customary international law, state practice, as well as general principles of law were traced primarily in relevant domestic judgments and decisions.⁴⁷ In addition, applicable domestic statutes (criminal codes, codes of criminal procedure, extradition acts, acts implementing obligations flowing

45 *E.g.*, Cassese, *supra* note 6 at 16.

46 Article 38(1) specifies the following categories of sources to be applied by the ICJ in its function to decide disputes in accordance with international law:

- a. international conventions, whether general or particular, [...];
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. [...], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Whereas the ICJ generally follows the above list, it is increasingly considered as being non-exhaustive. On several occasions, the Court itself made references, for instance, to normative resolutions of the UN General Assembly or to relevant resolutions of the UN Security Council.

On the other hand, the Court has not deviated from its general practice in terms of the types of sources cited even when considering matters of international criminal law, nor did the parties do so in their pleadings in, *e.g.*, the *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo *v.* Belgium), available at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>.

47 It should, however, be noted that the relevance of judgments by domestic courts in relation to identifying state practice on extradition is reduced by the fact that extradition is often subject to executive discretion. See, *e.g.*, I. A. Shearer, *Extradition in International Law* (1971) 197-200; Bassiouni, *International Extradition*, *supra* note 9, at 890-896.

from the ICC Statute or the EAW) and constitutions were surveyed for relevant provisions in order to identify general principles resorted to by states in relation to the application of the active personality principle and the extradition of their nationals and related subjects. Moreover, where necessary and justified by the lack of other sources or by the prominence and expertise of scholarly bodies or individual scholars, the opinions of these were also consulted and cited where applicable as secondary sources.

Recognizing their increasing acceptance as valid sources of international law and their central importance to the subject, the analysis covers relevant decisions of international organizations (including, *e.g.*, UN Security Council resolutions establishing the *ad hoc* tribunals and decisions adopted by EU organs).

Due to the particular nature of international criminal law as an 'essentially hybrid branch of law [which may be described as] public international law impregnated with notions, principles, and legal constructs derived from national criminal law and human rights law',⁴⁸ there is a small deviation from public international law research proper. Recognizing the relatively great significance of elements drawn from municipal criminal law to international criminal law,⁴⁹ also to its 'horizontal' component, this study relies on domestic judgments and national statutes to a considerable extent in search of customary rules and general principles of international criminal law, *de lege lata* and *de lege ferenda*.⁵⁰

48 Cassese, *supra* note 6 at 21, emphasis in original.

49 See, *ibid.* 18, 28-36; *cf.* Bassiouni, 'Sources and Content', *supra* note 13 at 37-40 on the particular nature of international criminal law and on the relevance of municipal statutes and decisions to it. Bassiouni considers international criminal law to be a new discipline. In his view,

ICL's principal sources of law can be distinguished as between international law for *ratione materiae*, *ratione personae*, and enforcement obligations, and national criminal law for enforcement modalities. Furthermore, additional collateral sources of ICL exist, namely: international and regional human rights law; general principles of criminal law recognized by the world's major criminal law systems; and emerging international criminological perspectives. All these sources of ICL complement one another, even though they frequently overlap and at times present certain inconsistencies. (*Ibid.* at 37-38.)

In the view of the author, this list is not incompatible with the ICJ list, it merely relies to a larger extent than usual in public international law on sources drawn from municipal legal systems.

50 Addressing the sources of public international law, Rosenne acknowledged the import of municipal decisions to certain areas of the broader discipline:

Another generic class of case is where questions of international law actually or supposedly arise in the course of litigation between individuals, including criminal cases brought by the public authority. Here too several important branches of public international law have been developed largely through internal legislation and international litigation – for instance details of the application of diplomatic protection and consular and related privileges and immunities, or *extradition*.

(Sh. Rosenne, *Practice and Methods of International Law* (1984) 109. Emphasis added.)

5 STRUCTURE

This introduction is followed by six chapters written in the form of articles and a general conclusion. Chapter 2 addresses the active personality principle. It reviews domestic solutions – if any – to problems related to the application of this principle of extraterritorial jurisdiction to some classes of persons whose relevant nationality is not uncontroversial (*i.e.* dual or multiple nationals, persons who underwent a change of nationality, stateless persons and refugees). It attempts to identify rules to settle conflicts and controversies related to jurisdictional competence in such problematic cases so as to prevent abuse, or suggests solutions *de lege ferenda*. Due to the significant loopholes in international criminal law relating to the exercise of active personality jurisdiction in these cases and in light of the inter-relation of the two fields, relevant extradition laws and practices have also been studied, and the principles identified in this context are incorporated in the proposals concerning active personality. Acknowledging the similarity between national jurisdictions and the ICC in relevant respects, the study proposes to adopt the rules established or suggested to be applied in domestic jurisdictions in similar cases before the ICC.

Turning then to similar problems caused by naturalization in the context of the non-extradition of nationals, Chapter 3 assesses the impact of this phenomenon on international criminal justice. It first examines solutions adopted by states in relation to the non-extradition of nationals to persons naturalized there or in another state. It then provides an overview of methods (including domestic prosecution based on the nationality principle) resorted to in various jurisdictions to minimize abuse and to counterbalance any negative effects of the non-extradition of naturalized nationals on criminal justice. Finally, the study examines the impact of naturalization on the ICC state cooperation regime. It should be emphasized that, in the ICC context, the impact of naturalization in relation to the non-extradition of nationals will be limited to cases where the custodial state (state of nationality) fails to exercise its primary jurisdiction.⁵¹

The next three chapters touch upon the overarching question whether the non-extradition of nationals is in fact on the decline. Chapter 4 evaluates the European Arrest Warrant's (EAW) accomplishments in connection with the nationality exception and draws attention to problems arising under specific provisions of domestic implementing acts. It also reviews the history of the regulation of the nationality exception in Europe and addresses the question whether the EAW justifies the conclusion that states attribute a decreasing importance to the non-extradition of nationals. The study draws attention to potential problems, arising from the absence of a dual criminality requirement, concerning foreign prosecution and enforcement of sentences based on the principle of active personality in the state requested to surrender its national.

51 See Chapter 3, text accompanying notes 82-83, *infra*.

Chapter 5 reviews relevant domestic developments (*i.e.* constitutional complaints) that took place shortly after the completion of the previous article. The study first devotes attention to the intention of the drafters of the EAW to differentiate the form of cooperation envisaged therein from extradition, referring to it for this reason as ‘surrender’. It then reviews in detail the arguments central to the four decisions available at that time rendered in domestic courts (in Poland, Germany, Greece and Cyprus) on the compatibility of surrendering nationals under a European arrest warrant with constitutional (or statutory) bans on the extradition of nationals. Based on the conclusions of this part, the study addresses the legal consequences of this choice – dilemmas and problems – in the jurisdiction of EU members. The article also considers the chance that similar problems may arise in the context of the subsequently adopted Nordic Arrest Warrant that envisaged a regime resembling to a large extent the EAW’s approach to the non-extradition of nationals.

The final piece in this trilogy, Chapter 6, identifies the lessons of these four constitutional challenges, later joined by a decision in the Czech Republic, for domestic implementation of the obligation to surrender nationals to the ICC. The ICC Statute namely adopts the same semantic distinction between extradition and surrender, although attributing a different meaning to the latter. The study starts out with a discussion of the relevance of the EAW context to the ICC and a survey of the EAW experience related to its regime concerning the surrender of nationals to other EU member states. It then seeks to determine whether arguments invoked in the EAW context could be adopted by domestic courts to deny the surrender of nationals to the ICC under domestic law, and attempts to identify the factors that may play a role in the latter context.

This study proceeds from the assumption that ICC jurisdiction will commonly be invoked, following the principle of complementarity,⁵² only after the possibility of domestic prosecution has been ruled out. Accordingly, as the active personality principle cannot offer a cure to impunity in such cases, the author pleads for a comprehensive and effective review of domestic constitutional rules against the extradition of nationals.

Chapter 7, in turn, deals with the question of alternatives. It analyzes and evaluates the option of extending the nationality exception to or replacing it with the non-extradition of residents. It starts out with a search for precedents in extradition regimes, in related fields of international cooperation in criminal matters and in domestic laws for assimilating residents to nationals. Having identified what could at best be seen as an indication of a new customary rule *de lege ferenda* permitting the non-extradition of residents based on expectations of more effective rehabilitation, the Chapter evaluates the desirability and legitimacy of such a rule. It looks, *inter alia*, at the possibility of extending the scope of the active personality principle in a similar manner, evaluating it

52 ICC Statute, *supra* note 24, Arts. 17-18. See too *ibid.*, Art. 1.

from the perspectives of public international law, international criminal justice and the rights of the accused. In addition, it addresses possible problems related to the rehabilitation argument. The Chapter concludes with suggestions concerning the best ways perceived by the author to modernize the nationality exception.

The concluding Chapter 8 presents a synthesis of the findings of the above studies. It gathers the answers identified in the previous chapters to the three questions posed in the Introduction, first in relation to the active personality principle and secondly in respect of the nationality exception. The chapter ends with general observations that emerge from this dissertation, confirming, *inter alia*, the relevance of the active personality principle and the non-extradition of nationals to modern international criminal law.