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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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### The Nationality of the Offender and the Jurisdiction of the International Criminal Court

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[22] The Rome Statute of the International Criminal Court<sup>1</sup> (ICC) attributes a central role to the nationality of the accused. It provides that unless the situation in which the crime was committed was referred to the court by the Security Council under Chapter VII of the United Nations Charter,

the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court ...:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.<sup>2</sup>

However, the statute does not clarify the meaning of the terms ‘national’ and ‘state of nationality’, and the court’s Rules of Procedure and Evidence<sup>3</sup> do not contain any specifications in this regard. Moreover, no reference to the issue was made in the *travaux préparatoires* of the statute or the subsequent work of the Preparatory Commission for the International Criminal Court.

This provision might stir controversy in several situations. Suppose that A, a dual national of a state party to the ICC Statute (X) and a state not party to it (Y) commits a crime while on a peacekeeping mission in state Z, not party to the statute, under the direction of Y. A state party refers the situation to the ICC.<sup>4</sup> The prosecutor establishes that there is sufficient evidence to proceed against A, and that the court has jurisdiction owing to the suspect’s X nationality. Could Y challenge the jurisdiction of the court on the grounds that Z (the territorial state) has not accepted ICC jurisdiction and that Y, with which A is claimed to have stronger ties than with X, is also not party to the statute?<sup>5</sup>

Similarly, if an accused has changed nationality after having committed a war crime in a third state and is to be tried on the basis of the acceptance of ICC jurisdiction by the state of his previous nationality, could his counsel argue that the court does not have jurisdiction, as the accused is no longer a national of the latter state? If this argument were accepted, could refugees not contend that upon becoming refugees they, too, severed their legal ties [23] with their state of nationality, placing in doubt its rights to enforce its criminal laws over them

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<sup>1</sup> Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9\*, corrected through July 1999 by UN Doc. PCNICC/1999/INF/3\*, at <<http://www.un.org/law/icc/>>, reprinted in 37 *ILM* 999 (1998) (uncorrected version) [hereinafter ICC or Rome Statute].

<sup>2</sup> *Id.*, Art. 12(2) (emphasis added); see also *id.*, Art. 13.

<sup>3</sup> UN Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000), at <<http://www.un.org/law/icc/>>.

<sup>4</sup> See Rome Statute, *supra* note 1, Arts. 13-14.

<sup>5</sup> Such a challenge is arguably possible under *id.*, Art. 19(2)(c); see also notes 25-28 *infra* and corresponding text.

pursuant to the active personality principle and to delegate such jurisdiction over them to the ICC? Moreover, some states equate stateless residents with nationals for the application of their criminal laws. Would their acceptance of ICC jurisdiction suffice to ensure the court's jurisdiction over such persons in the absence of the territorial state's consent and referral by the Security Council?

Arguments along these lines do not lack support in legal doctrine and practice. Admittedly, the number of offenders who might attempt to benefit in this way from the lack of definition of the concept of 'state of nationality' may be rather limited, even marginal. Nonetheless, the severity of the crimes involved suggests that these issues should be settled, if possible, before the ICC becomes operational.

This paper proposes to offer some solutions to the intricate problems the court may face unless this potential loophole is fixed before the ICC begins its work. A short discussion of nationality as a concept of international law, identifying areas of possible controversy concerning individuals' nationality, precedes consideration of the relevant jurisdictional basis of the ICC, the active personality principle. Next, the term 'state of nationality' in (international) criminal law is examined with reference to problems of multiple nationality, a change of nationality by the accused, and stateless and refugee criminals. Where international criminal law apparently offers no adequate solutions, an attempt will be made to fill the gaps. The Note concludes with a summary of the proposed solutions and a call for early decisions on the questions raised here, where feasible, before the ICC issues its first indictment.

## 1 NATIONALITY AND INTERNATIONAL CRIMINAL JURISDICTION

### 1.1 *Nationality as a Concept of International Law*

According to the Encyclopedia of Public International Law, 'Nationality as a legal term denotes the existence of a legal tie between an individual and a State, by which the individual is under the personal jurisdiction of that State.'<sup>6</sup> This connection entails mutual rights and duties, such as the individual's right to diplomatic protection and the state's obligation to admit the individual into its territory.<sup>7</sup> Nationality is also 'said to constitute the juridical expression of the fact that the individual upon whom it is conferred ... is in fact more closely connected with the population of the State conferring nationality than with that of any other State.'<sup>8</sup>

The existence of such a unique bond is not always obvious. This is why the concept has provoked contention in legal fora for nearly a century.

The bulk of the problems related to nationality arise because the legal systems of the world have not managed to agree on a uniform basis for conferring nationality on persons at birth. Two major systems coexist: one recognizes descent as a basis for conferring nationality (*jus sanguinis*), whereas the other considers persons born on the territory of a state as its nationals (*jus soli*). The simultaneous operation of these principles, together with voluntary naturalization and the automatic acquisition of nationality prescribed by law in certain cases (*e.g.*, marriage), has resulted in according two or more nationalities to a significant number of

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<sup>6</sup> Albrecht Randelzhofer, 'Nationality', in 3 *Encyclopedia of Public International Law* 501, 502 (1997).

<sup>7</sup> Paul Weis, *Nationality and Statelessness in International Law* (2d ed. 1979).

<sup>8</sup> *Nottebohm Case* (Liech. v. Guat.), Second Phase, 1955 *ICJ Rep.* 4, 23 (Apr. 6).

people.<sup>9</sup> The multiple allegiances thus created lead to problems such as conflict of laws, conflict of jurisdictions, and controversies concerning military obligations.

[24] Another problem relates to the acquisition and/or loss of nationality subsequent to birth. The creation, termination, or transfer of allegiance in this way raises issues concerning the temporal limits of the rights and duties of the individual toward the states concerned and those of the states toward the individual. In other situations, the automatic operation of nationality laws leaves persons without a nationality. These cases evoke complex questions about admission, diplomatic protection, authority, and jurisdiction.<sup>10</sup>

Similar problems arise with regard to refugees. Whereas the bonds of nationality still exist formally, refugees by definition cannot or are not willing to avail themselves of the protection of their state of nationality. Their allegiance was terminated. Their status implies loss of that state's effective authority over them.<sup>11</sup>

The validity of a person's nationality is also relevant to this inquiry. As stated by the Permanent Court of International Justice in *Nationality Decrees in Tunis and Morocco* and confirmed in various contexts since then, 'questions of nationality are ... in principle within [the] reserved domain [of domestic jurisdiction].'<sup>12</sup>

Nonetheless, while it is for each state to determine who its nationals are and this determination is presumed to be valid for international purposes,<sup>13</sup> its right to define its nationality laws, and thus regulate the nationality of individuals, is not unlimited.<sup>14</sup> This limitation applies not only to the grant of nationality at birth, but also to naturalization and the conditions of loss of nationality. While not uncontested in international law, a considerable body of opinion holds that states may object to the validity of a person's nationality and international tribunals shall not recognize it where the connection between the state and the individual is inadequate, or where nationality has been conferred or withdrawn in an improper manner (for instance, by forced (de)naturalization, or (de)naturalization in violation of international law or treaty obligations, or for illegal purposes).<sup>15</sup> In the present context, these

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<sup>9</sup> See, e.g., Manley O. Hudson, 'Nationality, Including Statelessness', [1952] 2 *Yearbook of the International Law Commission* 3, 7-11, UN Doc. A/CN.4/SER.A/1952/Add.1; Weis, *supra* note 7, at 169-204; Ian Brownlie, 'The Relations of Nationality in Public International Law', 1963 *BYIL* 284, 302-11.

<sup>10</sup> See, e.g., Hudson, *supra* note 9, at 13-23; 1 *Oppenheim's International Law* 886-90 (Robert Y. Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter *Oppenheim*]; Randelzhofer, *supra* note 6, at 508-09.

<sup>11</sup> *Oppenheim*, *supra* note 10, at 890-96; Atle Grahl-Madsen, 'Protection of Refugees by Their Country of Origin', 11 *Yale J.I.L.* 362, 370-75, 389-90 (1986); Frank E. Krenz, 'The Refugee as a Subject of International Law', 15 *ICLQ* 90 (1966); Louis I. de Winter, 'Nationality or Domicile? The Present State of Affairs', 128 *Recueil des Cours* 347, 382-83 (1969 II).

<sup>12</sup> *Nationality Decrees in Tunis and Morocco* (Fr. v. Gr. Brit.), Advisory Opinion, 1923 PCIJ (ser. B) No. 4, at 24. For sources confirming this principle, see, for example, European Convention on Nationality, Nov. 6, 1997, Art. 3, *ETS* No. 166, 37 *ILM* 44 (1998); Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, Art. 1, 179 *LNTS* 89. The principle has been claimed to have entered customary international law. See Nissim Bar-Yaacov, *Dual Nationality* 2 (1961); John R. Dugard, First Report on Diplomatic Protection, UN Doc. A/CN.4/506, at 35, para. 96 (2000), at <<http://www.un.org/law/ilc/sessions/52/52docs.htm>>.

<sup>13</sup> *Oppenheim*, *supra* note 10, at 854-56.

<sup>14</sup> *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion, Inter-American Court of Human Rights (ser. A) No. 4 (1984), 79 *ILR* 283, 296; *Nationality Decrees in Tunis and Morocco*, *supra* note 12, at 24.

<sup>15</sup> European Convention on Nationality, *supra* note 12, Art. 3(2); Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, *supra* note 12, Art. 1; Hudson, *supra* note 9, at 10; Ian Brownlie, Brownlie, *Principles of Public International Law* 395-96, 401 (5th ed. 1998); Ruth Donner, *The Regulation of Nationality in International Law* 121-67 (2d ed. 1994); J. Mervyn Jones, *British Nationality Law and Practice* JONES 15 (1956); Haro Frederik van Panhuys, *The Rôle of Nationality in International Law: An Outline* 161-65 (1959); Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* 788-90, paras. 1192, 1194-95 (3d ed. 1984); Weis, *supra* note 7, at 90, 101-27; Gerald Fitzmaurice, 'The General Principles of

principles may be taken to imply that a conferral or waiver of nationality with the aim of securing or obstructing international criminal jurisdiction over the accused – being *mala fide*, and often involuntary or based on an insufficient connection – should not be recognized under international law.<sup>16</sup>

[25]

### 1.2 *The Active Personality Principle*

Nationality gains relevance in international criminal law through the active personality or nationality principle.<sup>17</sup> According to this principle, states may exercise jurisdiction over offenses committed by their nationals abroad. Whereas civil-law systems apply the principle frequently and without distinctions, common-law jurisdictions tend to confine it to serious offenses or to impose a double criminality requirement.<sup>18</sup> Even though it is not applied uniformly, the nationality of the accused is clearly a universally accepted basis for extraterritorial jurisdiction in relation to the crimes covered by the ICC Statute.<sup>19</sup>

While the principle is most frequently justified on grounds of the allegiance owed by a person to his state of nationality and state sovereignty,<sup>20</sup> a more pragmatic reason is that many countries – mainly those with a civil-law tradition – generally do not extradite their own nationals.<sup>21</sup> Jurisdiction over crimes committed by nationals abroad is necessary to prevent such crimes and criminals from escaping prosecution.<sup>22</sup>

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International Law Considered from the Standpoint of the Rule of Law', 92 *Recueil des cours* 1, 196-205 (1957 II).

<sup>16</sup> Further controversy may arise from the practice of some states of not allowing their nationals to renounce their nationality. While this practice may arguably lead to inequitable results and prejudice to the status of such persons, it is not prohibited by international law and, in the view of the author, such nationality should therefore be considered valid for the application of international criminal law. The fact that the effectiveness of one's nationality is not taken into account in criminal proceedings lends support to this position. A possible exception could be made for persons whose intention to renounce their nationality is guided by fear of persecution on bases covered by the Convention Relating to the Status of Refugees, July 28, 1951, Art. 33, 189 *UNTS* 137 [hereinafter Refugee Convention]. In such cases, the rules suggested below on jurisdiction over refugees could be applied.

<sup>17</sup> Another nationality-related principle of international criminal law is passive personality, which provides for jurisdiction by states whose nationals were injured by the crime. As it is not among the jurisdictional bases recognized by the ICC Statute, *supra* note 1, this principle is not discussed here.

<sup>18</sup> Brownlie, *supra* note 15, at 306; Malcolm N. Shaw, *International Law* 466 (4th ed. 1997); Geoff Gilbert, 'Crimes Sans Frontières: Jurisdictional Problems in English Law', 1993 *BYIL* 415, 417; Robert Y. Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws', 1957 *BYIL* 146, 153; Sharon A. Williams, 'Article 12', in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 329, 340-41 (Otto Triffterer ed., 1999).

<sup>19</sup> Harvard Draft Convention on Jurisdiction with Respect to Crime, with Comment, Art. 5, reprinted in 29 *AJIL* Supp. 439 (1935) [hereinafter Harvard Draft Convention]; Gilbert, *supra* note 18, at 417; Williams, *supra* note 18, at 340-41.

<sup>20</sup> See, e.g., Brownlie, *supra* note 15, at 306; van Panhuys, *supra* note 15, at 127. For a more exhaustive list of justifications, see Harvard Draft Convention, *supra* note 19, at 519-20.

<sup>21</sup> Nationality of Requested State, 6 Whiteman, Digest § 18, at 865-84; M. Cherif Bassiouni, *International Extradition and World Public Order* 435-42 (1974); Ivan A. Shearer, *Extradition in International Law* 94-132 (1971); Bert Swart, 'Human Rights and the Abolition of Traditional Principles', in *Principles and Procedures for a New Transnational Criminal Law* 505, 531-32 (Albin Eser & Otto Lagodny eds., 1991); Williams, *supra* note 18, at 340-41.

<sup>22</sup> *Re Gutierrez*, 4 S.J.F. pt. 2, at 56 (6a época 1957) (Mex.), translated in 24 *ILR* 265, 266; see also Harvard Draft Convention, *supra* note 19, at 520; Gilbert, *supra* note 18, at 417-18.

## 2 APPLICATION OF THE ACTIVE PERSONALITY PRINCIPLE: NATIONALITY-RELATED PROBLEMS

### 2.1 *The Offender Is a Multiple National*

The application of the nationality principle is usually straightforward. Nonetheless, complications may arise regarding criminal jurisdiction over, say, multiple nationals. Although commentators have recognized some of the problems related to dual nationality and criminal jurisdiction,<sup>23</sup> these problems have not been studied in detail.

In proceedings before the ICC, absent a jurisdictional ground other than active personality, a multiple national accused could claim that since one of the states of which he is a national – whether or not the state of his dominant nationality<sup>24</sup> – has not accepted its [26] jurisdiction, the court is not competent to deal with the case. This argument could be made under Article 19(2) of the Rome Statute, which provides that ‘challenges to the jurisdiction of the Court may be made by: (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58.’<sup>25</sup> Similarly, a ‘State from which acceptance of jurisdiction is required under article 12’ could raise such objections.<sup>26</sup>

The pretrial chamber would have to decide on such challenges as a preliminary jurisdictional issue.<sup>27</sup> As part of this decision, the chamber would need to determine whether each state of the accused’s nationality must have accepted its jurisdiction. It might even be required to examine whether the objecting state can validly consider the suspect as its national and whether it is the state of his dominant nationality. Although the ICC would have the power to decide on questions relating to its own jurisdiction,<sup>28</sup> these issues should preferably be examined and, if possible, settled before the court is established.

The 1935 Harvard Draft Convention is one of the few sources that deals explicitly with criminal jurisdiction in relation to multiple national offenders.<sup>29</sup> Although not of a

<sup>23</sup> See, e.g., Brownlie, *supra* note 15, at 306; Fitzmaurice, *supra* note 15, at 213.

<sup>24</sup> Dominant nationality can be defined as the nationality of the state with which the person has the strongest factual ties. In international arbitrations it was frequently a contentious issue whether the tribunal or commission had jurisdiction over dual nationals. While they tended to assume jurisdiction irrespective of the claimant’s dominant nationality where the other nationality was not that of the defendant state, e.g., *Flegenheimer claim*, 25 *ILR* 91 (Italy-U.S. Conciliation Commission 1958); *Salem case* (U.S. v. Egypt), 2 *R.I.A.A.* 1161, 1188 (1932); see also Dugard, *supra* note 12, at 54-57, paras. 161-74, dominant (or effective) nationality was often held decisive by a commission established following a general agreement where the two nationalities of a claimant were those of the claimant and defendant states and the defendant objected to jurisdiction in the specific case because the injured person possessed its nationality, e.g., Case No. A/18, 5 *Iran-U.S. Claims Tribunal Reports* 251, 265 (1984); *Esfahanian v. Bank Tejarat*, 2 *Iran-U.S. Claims Tribunal Reports* 157, 166 (1983); *Mergé claim*, 22 *ILR* 443, 455 (Italy-U.S. Conciliation Commission 1955); see also Dugard, *supra*, at 42-54, paras. 121-61. While the recent case law of the Iran-United States Claims Tribunal has made a significant contribution toward solving this problem, the determination of dominance remains difficult in practice. The Tribunal has identified some criteria, including ‘habitual residence, center of interests, family ties, participation in public life and other evidence of attachment,’ Case No. A/18, *supra*, at 265, but the uniqueness of each case makes the weighing of relevant factors a delicate exercise for which no clear-cut rules are available. See, e.g., *Nemazee v. Iran*, 25 *Iran-U.S. Cl. Trib. Rep.* 153, 157-62 (1990); *Esfahanian v. Bank Tejarat*, *supra*, at 166-68; *Golpira v. Iran*, 2 *Iran-U.S. Cl. Trib. Rep.* 171, 174 (1983); David J. Bederman, ‘Nationality of Individual Claimants Before the Iran-United States Claims Tribunal’, 42 *ICLQ* 119, 129-35 (1993).

<sup>25</sup> Rome Statute, *supra* note 1, Art. 19(2). Article 58 spells out the procedures for issuing an arrest warrant or summons to appear before the court.

<sup>26</sup> *Id.*, Art. 19(2)(c). Article 12 spells out the preconditions to the exercise of jurisdiction by the court.

<sup>27</sup> *Id.*, Art. 19; Rules of Procedure and Evidence, *supra* note 2, Rules 58-60. In the exceptional case when the challenge is made after the confirmation of charges and leave for the challenge is granted, this would be the task of the trial chamber. Rome Statute, *supra*, Art. 19; Rules 58-60 *supra*.

<sup>28</sup> Rome Statute, *supra* note 1, Arts. 17-19.

<sup>29</sup> Harvard Draft Convention, *supra* note 19.

binding nature, it carries great weight, as the drafters sought on the basis of extensive research to codify international custom as it stood at that time. Even its suggestions *de lege ferenda* are based on a well-documented study of state practice and *opinio juris*, as well as legal writings.

The Draft Convention supports the right of any state of which the accused is a national to prosecute the crime:

Whether, in case of double or multiple nationality, an accused is a national of the State which is attempting to prosecute and punish is a question to be determined by reference to such principles of international law as govern nationality. *If international law permits the State to regard the accused as its national, its competence is not impaired or limited by the fact that he is also a national of another State.*<sup>30</sup>

This paragraph reflects the principle of equality, which holds that since all states of which the person is a national are equals, they may derive the same rights from this link irrespective of its strength, including the right to exercise jurisdiction over crimes committed by that person.<sup>31</sup>

The above quotation addresses national rather than international criminal jurisdiction. However, active personality enjoys universal recognition as a basis of municipal criminal jurisdiction over the crimes covered by the ICC Statute and the ICC Statute explicitly provides for active personality as a basis of jurisdiction. Consequently, acceptance of the statute by the state of nationality would be a logical extension of the principles applied to establish municipal criminal jurisdiction based on the active personality principle.<sup>32</sup> The law and [27] practice on extradition also supports this possibility. Like a state that has requested and been granted a person's extradition, the ICC is entitled to assume the validity of the state of nationality's consent. Consequently, the consent of any state that under international law can validly consider the offender its national is a sufficient basis for the court's jurisdiction.

Both international and municipal judgments on this issue are rare. The few available cases of interest have dealt with one specific crime, treason.<sup>33</sup> The reviewed decisions

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<sup>30</sup> *Id.* at 533 (emphasis added).

<sup>31</sup> The issue under consideration here is not referred to in the reviewed national criminal and penal codes.

<sup>32</sup> This view is adopted, for instance, in Gerhard Hafner *et al.*, 'A Response to the American View as Presented by Ruth Wedgwood', 10 *EJIL* 108, 116-19 (1999). In contrast, others have claimed that the delegation of jurisdiction to international judicial bodies should not simply follow the principles establishing national criminal jurisdiction. According to the argument, as the weight of an international judicial decision is much greater than that of a municipal judgment, the exercise of jurisdiction by an international body over nationals of third parties is not acceptable because that may in practice lead to adjudication of interstate disputes if the indictee has committed the crime in his official capacity at the direction of his state of nationality. Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', 64 *Law & Contemporary Problems* 13, 47-52 (2001). This argument is not unconvincing. Yet, despite similar objections by the United States during the *travaux préparatoires* and since then concerning ICC jurisdiction based on the acceptance of the statute by the territorial state only, *see, e.g.*, Ruth Wedgwood, 'The International Criminal Court: An American View', 10 *EJIL* 93, 99-102 (1999), the statute was nevertheless adopted by the Rome Conference and signed and ratified by numerous states. Thus, unless the ICC or another competent body comes to a different conclusion, the generally accepted thesis is likely to remain the one advocated by Hafner *et al.* and is the one adopted here.

<sup>33</sup> These cases were governed by the protective rather than the active personality principle and were concerned with duties of allegiance arising from some link other than nationality. (Courts often refer to the protective principle to establish jurisdiction over crimes committed abroad against the security of the state. *See further* Brownlie, *supra* note 15, at 306.) This may limit their relevance here. However, as an act can be treasonable only if committed by a national or else by a person who owes allegiance to the state, nationality and allegiance are central issues in these cases, *see, e.g.*, Joyce v. Director of Public Prosecutions, 1946 A.C. 347; *Rex v. Neumann*, 1946 AllSA 1238 (Transvaal Spec. Criminal Court), making them interesting in this context. *Cf.* Brownlie, *supra*, at 306 (rather than mentioning it in the context of the protective principle, Brownlie cites Joyce as an instance of the application of the nationality principle to aliens owing allegiance, making the distinction between the two principles somewhat ambiguous).

## Chapter 2

confirmed that not only (dual) nationals,<sup>34</sup> but also alien residents owing (qualified) allegiance<sup>35</sup> to the state may be guilty of treason, even after having relinquished that residence. The only relevant allegiance was held to be that owed to the prosecuting state. The defense that the accused was a national of another state – possibly even of the state he had supported through his treason – and that his bond with it was stronger than the one between him and the state trying him, was rejected.<sup>36</sup> Hence, these cases support the applicability of the equality principle to criminal jurisdiction, at least on the basis of the protective principle.

As Haro Frederik van Panhuys noted, the equality principle also applies to the related issue of extradition. If one of the suspect's nationalities is that of the requested state, extradition could be refused even to another state of nationality, regardless of the strength of [28] each link.<sup>37</sup> This position finds confirmation in some municipal decisions.<sup>38</sup> It thus appears that even this field of international criminal law lends support to the principle of equality. Since the nonextradition of nationals constitutes part of the rationale for the active personality principle, extradition and the application of the active personality principle should arguably follow the same rules. Consequently, the principle of equality should also be applied

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<sup>34</sup> In none of the reviewed decisions concerning treason was the dominant nationality or dominant link principle upheld. In contrast, in *Kawakita v. United States*, 343 U.S. 717 (1952), a (Japanese-U.S.) dual national was held to have committed treason against the United States in support of Japan. The Court failed to consider the issue of dominant nationality. The judges held that the only possible defense was coercion by the other state of nationality. The possibility of a defense based on the dominance of the other nationality can thus be excluded by implication.

<sup>35</sup> In the reviewed treason cases involving non-nationals, the accused persons claimed in defense that only nationals could be charged with this crime. In *Joyce*, *supra* note 33, the finding of guilt for treason against England was based in part on Joyce's residence in England prior to having committed the offense (delivering anti-British talks in English on German radio during the Second World War). More significantly, however, the judgment attributed great importance to the fact that, having described himself as a British national for this purpose, Joyce had acquired, and at the time of the commission of the crime abroad was still in possession of, a British passport. Because he was thus under the protection of the Crown, he owed allegiance to it and was found guilty of treason. The Court did not consider his American nationality, or the possible dominance of this link of allegiance, relevant to the case.

In *Rex v. Neumann*, *supra* note 33, the decisive link of allegiance was the oath taken by Neumann on enlisting in the armed forces of the Union of South Africa as a volunteer. His domicile in the Union prior to his departure as a member of the armed forces and his family's continued presence there even at the time he committed the treasonable acts were also taken into account. His German nationality (*i.e.*, that of the country he supported by the acts in question) was not considered relevant.

<sup>36</sup> See *Neumann*, *supra* note 33; *Public Prosecutor v. Drechsler*, 13 *Annual Digest* 73 (Supreme Court 1946) (Nor.); *Re Penati*, Foro It. II 1947, 89 (Cass. 1946), 13 *Annual Digest* 74; *Public Prosecutor v. Thompson*, referred to in *id.* at 74 (Supreme Court 1946) (Nor.); *Public Prosecutor v. Karlsson*, referred to in *id.* at 74 (Supreme Court 1946) (Nor.).

<sup>37</sup> Van Panhuys, *supra* note 15, at 137; see also Shearer, *supra* note 21, at 131. Note that van Panhuys did not consider dominant nationality to be decisive in cases where each state of which the individual is a national submits competing requests for his extradition. In support of this view, he referred to the fact that states do not always give precedence to the request by the state of nationality in case of competing requests for the extradition of a person with only one nationality. Van Panhuys, *supra*, at 137.

<sup>38</sup> See, *e.g.*, American Embassy, Mexico City, to Dep't of State, Despatch No. 954, Feb. 27, 1961 (concerning Alex R. Enojos), Whiteman, *supra* note 21, at 867-68; Extradition (Albanian National) case, No. 779, 5 *Annual Digest* 281 (Areopagos 1929) (Greece); *Extradition (Czechoslovak Request) case*, No. 25659/1926, translated in 3 *Annual Digest* 303 (Justice Minister 1926) (Hungary); see also *International Criminal Law in the Netherlands* 107 (Bert Swart & André Klip eds., 1997) (referring to similar Dutch practice) [hereinafter Swart & Klip]. Interestingly, in a few cases, *Austro-German Extradition case*, 9 BGHSt 175 (1957) (Fed. Sup. Ct. 1956) (FRG), translated in 23 *ILR* 364; *In re Feiner*, 9 BGHSt 53 (1957) (Fed. Sup. Ct. 1956) (FRG), translated in 23 *ILR* 367; Austrian Nationality case, 4 BVerfGE 322 (1955), translated in 22 *ILR* 430, the defense was also based on the inclusion of the nationality of the requested state, Germany, in the dual nationality of the accused. However, the decisions were based on the fact that the persons concerned were no longer German nationals. They therefore did not discuss the question of extradition of dual nationals in general.



to municipal criminal jurisdiction based on active personality and to ICC jurisdiction over such persons.

In sum, although few in number and in most cases not of recent origin, the available sources generally support the application of the principle of equality above that of dominant nationality in international criminal law as regards the state's jurisdiction. This proposition implies that if any of the states of the suspect's nationality has accepted the jurisdiction of the ICC, the court is entitled to prosecute him.<sup>39</sup> Because this interpretation conforms with the Rome Statute, no amendment would be required for its implementation.

## 2.2 *The Offender Has Changed Nationality*

The question of jurisdiction may become more complex when the accused has changed his or her nationality. Depending on the sequence of the commission of the crime, the prosecution, and the change of nationality, various arguments can be constructed regarding jurisdiction. The issues involved in such cases have attracted some attention in criminal law. Yet despite a considerable degree of agreement, views are far from uniform.

In 1927 the International Conference for the Unification of Penal Law resolved that '[I]a loi ... (x) s'appliquera également à l'étranger qui, au moment de la perpétration de l'acte, était ressortissant de ... (x); elle s'appliquera également à celui qui a obtenu la nationalité ... (x) après la perpétration de l'acte.'<sup>40</sup>

Similarly, Article 5 of the 1935 Harvard Draft Convention based jurisdiction on nationality either at the time of the commission of the crime or at the time of prosecution.<sup>41</sup> In the view of the drafters, the first could be justified by reference to the notion that, by committing a crime, the accused becomes liable to his own state and this liability persists even after he has lost that nationality.

**[29]** Jurisdiction based on the suspect's nationality at the time of prosecution was justified in the following terms:

Although possibly a little difficult to justify theoretically, the jurisdiction of a State to prosecute or punish those who have become its nationals after committing a crime seems adequately supported by the practically complete control over its nationals which international law allows the State. If the accused is a national at the time of prosecution or punishment, whatever the State may do falls within its general competence under international law; and it is immaterial that the accused may not have been a national when he committed the offence charged. There is no principle of international law which forbids the exercise of such a jurisdiction over nationals. Indeed, if a contrary rule were followed, impunity might result from naturalization in a State which refuses extradition of its nationals ....<sup>42</sup>

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<sup>39</sup> Similarly, under the principle of complementarity, Rome Statute, *supra* note 1, Arts. 17-19, all states of which the suspect is a national (or that can establish jurisdiction on another basis) may prosecute him instead of surrendering him to the court.

<sup>40</sup> International Conference on the Unification of Penal Law, Resolution, Art. 8 (1927), quoted in Harvard Draft Convention, *supra* note 19, Commentary, at 532. The passage reads as follows in English: 'The law ... (x) would also apply to the foreigner who, at the time of the commission of the act, was a national of ... (x); it [the law] would also apply to someone who obtained ... (x) citizenship after the commission of the act' (unofficial translation).

<sup>41</sup> Harvard Draft Convention, *supra* note 19, at 519; see also van Panhuys, *supra* note 15, at 130 (interpreting this rule as proof of the lack of relevance of allegiance in traditional international law).

<sup>42</sup> Harvard Draft Convention, *supra* note 19, Commentary, at 532. In the ICC context, the question whether nationality at the time of punishment (as opposed to prosecution) is sufficient is not relevant and will therefore not be dealt with here. While undeniably of importance, the issue whether jurisdiction should depend on the date of application for naturalization or the date of naturalization (the date of application for or grant of asylum in the case of refugees) is also not addressed here.

## Chapter 2

The commentary further explains that the person's possession at any other time (between the commission of the crime and prosecution or before the commission of the crime) of another state's nationality does not suffice as a basis for jurisdiction by that state.<sup>43</sup> The principles expressed in the Harvard Draft Convention have been confirmed by a few municipal judgments<sup>44</sup> and some legal writings.<sup>45</sup>

A similar – although more limited – position is expressed in the 1929 Harvard Draft Convention on Nationality: 'The naturalization of a person does not terminate liability for an offense committed by him against his former state while a national thereof ...'<sup>46</sup>

In this regard Dutch courts held that the accused's loss of their Dutch nationality by joining the German Waffen SS did not deprive Dutch courts of jurisdiction over war crimes they had committed as members of that organization. Former Dutch nationality – in these cases even before the commission of the crimes – was considered a sufficient basis of jurisdiction.<sup>47</sup> In one such case the court held:

Where Dutch nationals, by fulfilling such elements [of the statutory definition of the offense], lose their nationality a reasonable interpretation of the law requires that ... they should be presumed to have committed all the elements of the offence as Dutch nationals since it would otherwise be senseless to make Dutch nationals punishable for such an offence ....

....

[30] The rules of international law do not, in the Court's view, bar punishment of persons who by enlisting with the enemy have lost Dutch nationality and, in respect of this category, the jurisdiction of the Dutch Court continues to be valid.<sup>48</sup>

Note, however, that these paragraphs address problems arising from a peculiarly drafted decree and do not reflect a view applied in other types of cases.

The lack of consensus on jurisdiction based on the nationality of the accused at the time of prosecution is well demonstrated by the various formulas found in national criminal and penal codes. While some expressly provide for the application of the active personality principle on the basis of nationality at the time of prosecution, at least with regard to certain crimes,<sup>49</sup> or hold nationality at the time of or after the commission of the crime to be sufficient for jurisdiction,<sup>50</sup> the majority of the reviewed codes merely refers to nationals.<sup>51</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *S. v. Mharapara*, 1985 (4) SA 42 (High Court), aff'd, 1986 (1) SA 556 (Zimb.), 84 *ILR* 1. On nationality at the time of prosecution, see *Polyukhovich v. Australia*, (1991) 101 A.L.R. 545 (Austl.), 91 *ILR* 3; *X v. Public Prosecutor*, NJ 344 (Dist. Ct. Middelburg), aff'd, NJ 344 (Ct. App. Hague 1953), translated in 19 *ILR* 326; *Public Prosecutor v. J. S. R.*, NJ 646 (Ct. App. Hague), rev'd, NJ 646 (Supreme Court 1950), translated in 17 *ILR* 137 (the latter decision not explicitly dealing with jurisdiction based on nationality at the time of prosecution but with the acquisition of nationality subsequent to the commission of the crime).

On jurisdiction based on nationality at the time of the commission of the crime, see *Public Prosecutor v. Menten*, NJ 26 (District Court of Amsterdam 1977), NJ 358 (Supreme Court 1978), RvdW 109 (District Court Hague 1978), NJ 30 (Sup. Ct. 1979), NJ 373 (Dist. Ct. Rotterdam 1980), NJ 79 (Sup. Ct. 1981), translated in 75 *ILR* 331, 333, 335, 337, 345, 360. Arguably, *In re Mittermaier*, Foro It. I 1946, 137 (Cass. 1946), 13 *Annual Digest* 69, also belongs to the latter category. However, this case, which dealt with treason, is somewhat exceptional, as the Italian Criminal Code provision on treason in force at the time explicitly stated that even former Italian nationals could be prosecuted for this crime.

<sup>45</sup> See, e.g., Milan Sahovic & William W. Bishop, 'The Authority of the State: Its Range with Respect to Persons and Places', in *Manual of Public International Law* 311, 360-61 (Max Sorensen ed., 1968).

<sup>46</sup> Harvard Draft Convention on Nationality and Comment, Art. 13, 23 *AJIL Spec. Supp.* 13, 44 (1929). While this quotation may imply otherwise, the commentary makes it clear that the provision refers to offenses in general, not only those committed *against* the state.

<sup>47</sup> *In re S.S. Member Ahlbrecht*, 14 *Annual Digest* 196 (Spec. Ct. Cass. 1947) (Neth.) (referring to the relevant part of the judgment in a note at 200).

<sup>48</sup> *Public Prosecutor v. L. J. L.*, 74 *ILR* 704, 706-07 (Dist. Ct. Roermond 1976).

<sup>49</sup> Para. 65 *Strafgesetzbuch* (Aust.); Penal Code § 6, para. 2 (Fin.); see also War Crimes Act, No. 48 (1945), as amended 1988, No. 3 (1949) (Austl.), at <<http://scaleplus.law.gov.au>> (visited June 19, 2001); War Crimes Act,

Australia and the United Kingdom have accepted nationality at the time of prosecution as the basis for jurisdiction over war crimes committed during the Second World War. The Australian War Crimes Act of 1945, as amended in 1988, provides for the prosecution of persons who committed such crimes in Europe and are residents or nationals of Australia at the time of the prosecution. The UK War Crimes Act of 1991 establishes jurisdiction over similar crimes committed in Germany or German occupied territories if the offender ‘was on 8th March 1990, or has subsequently become, a British citizen or resident in the United Kingdom.’<sup>52</sup>

The exercise of jurisdiction based on the nationality of the accused at the time of prosecution has been criticized in legal doctrine as retroactive application of penal laws.<sup>53</sup> A dissenting opinion in the *Polyukhovich* case expressed similar views:

[I]f there was no power [on the part of the Australian Parliament] to prohibit conduct outside Australia by a person who was not a citizen or resident at the time when the conduct was engaged in because that conduct was not an aspect of Australia’s external affairs, the subsequent acquisition of Australian citizenship ... cannot make that conduct an aspect of Australia’s external affairs unless there be some international relationship which requires Australia to impose on a person who becomes a citizen or resident a penalty or liability for that conduct.<sup>54</sup>

**[31]** Moreover, dealing with a crime committed by a Pakistani national who subsequently became an Indian subject, the High Court of Punjab ruled that the Indian courts did not have jurisdiction over an act committed by a foreigner abroad. The court judged it

1991, c. 16 (UK), at <[http://www.hms0.gov.uk/acts/acts1991/Ukpga\\_19910013\\_en\\_1.htm](http://www.hms0.gov.uk/acts/acts1991/Ukpga_19910013_en_1.htm)> (visited June 19, 2001). See further text at note 52 *infra*.

<sup>50</sup> Crim. Code para. 7.3.71 (Can.); Code pénal Arts. 113-16 (Fr.); Strafgesetzbuch [StGB] para. 6(2) (1962 draft) (FRG); StGB § 7(2)(1); Penal Code Art. 6(2) (Greece); Penal Law para. 15(a) (Isr.); Wetboek van Strafrecht Art. 5 (Neth.); Penal Code ch. 2, § 2, para. 2 (Swed.) (note, however, that the Swedish Penal Code equates nationals and residents for the purpose of the application of this rule and requires presence in Sweden at the time of prosecution).

<sup>51</sup> The Australian Commonwealth Criminal Code as of 1995; the Criminal Code of Bangladesh as of 1994; the Criminal Code of Bosnia-Herzegovina as of 2000; the Criminal Code of the People’s Republic of China as of 1982; the Colombian Penal Code as of 1967; the Danish Criminal Code as of 1987; the French Penal Code as of 1959; the Penal Code of Greenland as of 1970; the Criminal Code of the Hungarian People’s Republic as of 1962; the Indian Penal Code as of 1999; the Italian Penal Code as of 1977; the Criminal Code of Japan as of 1996; the Norwegian Penal Code as of 1996; the Pakistan Penal Code as of 1960; the Polish Penal Code as of 1970; the Romanian Penal Code as of 1973; the Criminal Code of the Russian Federation as of 2000; the Sri Lankan Penal Code as of 1981; the Swiss Penal Code as of 2000; the Turkish Penal Code as of 1998; the United States Code as of 2000, Title 18, Crimes and Criminal Procedure; the Criminal Code of the Socialist Republic of Vietnam as of 1986; the Criminal Code of the Federal Republic of Yugoslavia as of 2000. In the view of the author, it is unclear whether the general reference to nationals in these codes is to be interpreted as excluding jurisdiction in cases of subsequent naturalization.

<sup>52</sup> UK War Crimes Act, 1991, *supra* note 49, Art. 1 (emphasis added); see also Australian War Crimes Act, *supra* note 49, § 11. Covering residents as well as nationals, the Acts establish a jurisdictional basis wider than the traditional scope of the active personality principle. This aspect may be seen as reflecting a recent trend in some states to establish municipal criminal jurisdiction over international crimes on grounds of any ‘substantial link,’ which could reduce the relevance of these sources in the present context.

<sup>53</sup> Lotika Sakar, ‘The Proper Law of Crime in International Law’, 11 *ICLQ* 446, 458-59 (1962).

<sup>54</sup> *Polyukhovich v. Australia*, *supra* note 44, 91 *ILR* at 33 (Brennan, J., dissenting). While addressing the constitutionality of the Australian War Crimes Act, *supra* note 49, the decision and dissenting opinions contain arguments that are arguably of more general applicability. However, this case can be interpreted as confirming the principle of universal jurisdiction. Michael P. Scharf, ‘The ICC’s Jurisdiction over Nationals of Non-Party States: A Critique of the U.S. Position’, 64 *Law & Contemporary Problems* 67, 82 n.83 (2001). Although its broad jurisdictional basis may reduce the relevance of the Act and this case in the present context, it does not diminish the importance of the specific arguments raised by Judge Brennan.

immaterial that the accused later became an Indian national and was so at the time of prosecution.<sup>55</sup>

Extradition decisions differ widely on the issue. Some cases have found nationality at the time of the decision on extradition to be determinative.<sup>56</sup> A Swiss court interpreted the words ‘citizen’ and ‘subject’ in an extradition treaty (in provisions confirming the rule of nonextradition of nationals) to cover only persons who were Swiss nationals at the time of the extradition proceedings. It thus granted extradition of a person who had lost her Swiss nationality after the commission of the alleged crime but before the extradition proceedings.<sup>57</sup> In contrast, in the case of *Martin M.*, the Hungarian authorities denied an extradition request on the basis of the active personality principle because of the accused’s Hungarian nationality at the time of the commission of the alleged crime.<sup>58</sup> While some extradition treaties contain an attempt to resolve this question by stating that the nationality of the accused shall be considered to be his nationality on the date of the alleged crime,<sup>59</sup> others specify the date of decision on extradition as the material moment.<sup>60</sup>

Since any other rule might lead to undesirable results, including impunity and abuse, it is suggested here that the principles expressed in Article 5 of the 1935 Harvard Draft Convention, which are supported by many municipal penal laws and some municipal decisions, should continue to be applied.<sup>61</sup> Nationality either at the time of prosecution or at the time of the commission of the crime should be sufficient for jurisdiction, even before the ICC. This rule is in harmony with the provisions of the statute, and if the court should find that it reflects international law, it could be applied without amending the statute.<sup>62</sup>

### [32]

<sup>55</sup> *Ram Narain v. Central Bank of India*, 18 ILR 207 (High Ct. Punjab 1951).

<sup>56</sup> *In re D. G. D.*, 7 *Annual Digest* 335 (Ct. of Thrace 1933) (Greece); *Extradition (Czechoslovak Request) case*, *supra* note 38; U.S. Dep’t of State to Spanish Embassy, Dec. 3, 1959 (concerning extradition of José Luis Segimón de Plandolit), Whiteman, *supra* note 21, at 869; American Embassy to Ministry of Foreign Affairs, Note 2960, 1944 (concerning Francis Xavier Fernández), *id.* at 869-70. Dutch practice follows the same principle. See Swart & Klip, *supra* note 38, at 107. In *Federal Republic of Germany v. Rauca*, [1983] 145 D.L.R.3d 638 (Ont. C.A.), 88 ILR 278 (Can.), the Canadian nationality of the accused acquired after the commission of the war crimes for which he was sought was considered but did not prevent his extradition to his state of origin, Germany, where the alleged crimes were committed.

<sup>57</sup> *In re Del Porto*, BGE 57 I 12 (1931), 6 *Annual Digest* 307. Note that the Court came to this conclusion on the basis of the principle adopted in legal writings according to which a person who acquired the nationality of his or her state of refuge after having committed a crime elsewhere may not be extradited under the nationality exception.

<sup>58</sup> *In re Martin M.*, 3 *Annual Digest* 303 (Crim. Ct. Budapest 1925).

<sup>59</sup> *The Law and Practice of Extradition* 4 (Ivor Stanbrook & Clive Stanbrook eds., 1980). See also examples cited in Whiteman, *supra* note 21, at 871.

<sup>60</sup> The European Convention on Extradition, Dec. 13, 1957, Art. 6(1)(c), ETS No. 24, at <<http://conventions.coe.int>> (visited June 19, 2001), states that ‘[n]ationality shall be determined as at the time of the decision concerning extradition.’ This principle is confirmed in the Convention Relating to Extradition Between the Member States of the European Union, Sept. 27, 1996, Art. 7(1), 1996 O.J. (C 313) 11. The UN Model Treaty on Extradition, Dec. 14, 1991, 30 *ILM* 1407 (1991), does not define the material moment.

<sup>61</sup> The principle *nullum crimen sine lege*, together with the double criminality rule, may impose further limitations. This question cannot be considered here in detail. Nonetheless, it must be noted that in the new state of nationality the act in question may conceivably have not been criminalized yet at the time of its commission, or was illegal there but not in the state of origin. These possibilities raise the following questions: Would these rules of criminal law prevent prosecution by the new state of nationality in (any of) these cases? Is there a real potential that similar problems will also arise with regard to the jurisdiction of the ICC, for instance, if nationals of a nonparty commit an act in their state of origin that is a crime at the time under the ICC Statute and under the penal code of their new state of nationality (a state party), but not of the state of origin?

<sup>62</sup> Under Articles 17-19 of the Rome Statute, *supra* note 1, the court has the competence to rule on questions of admissibility and jurisdiction.

### 2.3. *The Offender Is a Stateless Person*

By definition, stateless persons have no nationality, so that active personality appears meaningless in cases involving stateless offenders. This lacuna might considerably reduce the chances of ever prosecuting such persons.

The drafters of the 1935 Harvard Draft Convention apparently considered this legal situation to be acceptable. They argued that the 1927 resolution of the International Conference for the Unification of Penal Law and the Italian Penal Code of 1930, which assimilate stateless persons to nationals,

are not supported by general practice; the case is not one likely to arise often; and when the case does arise a jurisdiction on some other principle will ordinarily be found under other articles of this Convention. Extradition may of course be granted to the State where the crime was committed.<sup>63</sup>

Indeed, some municipal decisions have rejected jurisdiction over stateless persons.<sup>64</sup> The lack of reference in the ICC Statute to stateless persons appears to reflect this position.

Some sources, however, evidence a change of attitude from the position in the Harvard Draft Convention, which may necessitate the corresponding amendment of the ICC Statute. One indicator of this change is that some states extend the active personality principle to (permanent) residents irrespective of nationality.<sup>65</sup> Other states have adopted legislation assimilating stateless residents to nationals for the purpose of applying their penal laws.<sup>66</sup> Furthermore, some commentators have contended that stateless persons should be treated as nationals of the state of domicile in connection with criminal jurisdiction<sup>67</sup> and extradition.<sup>68</sup>

<sup>63</sup> Harvard Draft Convention, *supra* note 19, Commentary, at 534; see also *id.* at 533.

<sup>64</sup> See, e.g., Slouzak Minority in Teschen (Nationality), 10 *Deutsches Recht Vereinigt mit Juristische Wochen-Schrift* 2234 (1940 II) (People's Ct. 1940) (Ger.).

<sup>65</sup> Criminal Code Act, No. 12 (1995), para. 70.5(1)(b)(i-ii) (Austl.), at <<http://scaleplus.law.gov.au>> (nationals and residents); Crim. Code paras. 7(1), 7(2) (Den.) (nationals and residents); Penal Code § 6(3) (Fin.) (nationals and permanent residents); Penal Law Art. 15(a) (Isr.), unofficially translated in 30 *Isr. L. Rev.* 5 (1996) (nationals and residents); Penal Code § 12(3) (Nor.) (nationals and domiciled aliens); Penal Code ch. 2, § 2(1) (Swed.) (citizens and domiciled aliens); Crim. Code Art. 6(1) (Vietnam) (nationals and permanent residents). The assimilation of residents to nationals may be designed to establish a basis of jurisdiction wider than nationality, approaching universality.

<sup>66</sup> Codice Penale Art. 4 (Italy) (assimilating stateless residents to nationals for the purposes of the code); Penal Code Art. 4 (Rom.) (covering stateless residents); Ugolovnyi Kodeks RF Art. 12(1) (Russ.) (referring to permanent resident stateless persons).

Even today the criminal codes of many states do not provide for jurisdiction based on active personality over stateless persons residing within their boundaries. Some of these are the Australian Commonwealth Criminal Code as of 1995 (unless the person is resident at the time of the commission of the act, see § 70.5); the Penal Code of Austria as of 2000; the Criminal Code of Bangladesh as of 1994; the Criminal Code of Bosnia-Herzegovina as of 2000; the Criminal Code of Canada as of 1999; the Penal Code of the People's Republic of China as of 1982; the Colombian Penal Code as of 1967; the French Penal Code as of 1959; the Greek Penal Code as of 1973; the Penal Code of Greenland as of 1970; the Criminal Code of the Hungarian People's Republic as of 1962; the Indian Penal Code as of 1999; the Criminal Code of Japan as of 1996; the Pakistan Penal Code as of 1960; the Polish Penal Code as of 1973; the Sri Lankan Penal Code as of 1981; the Swiss Penal Code as of 2000; the Turkish Penal Code as of 1998; the United States Code as of 2000, Title 18, Crimes and Criminal Procedure; the Criminal Code of the Federal Republic of Yugoslavia as of 2000.

<sup>67</sup> Sahovic & Bishop, *supra* note 45, at 36. Research conducted in connection with this Note has not revealed any municipal or international judgments in which this position was upheld.

<sup>68</sup> Van Panhuys, *supra* note 15, at 137. Following the logic of the application of the active personality principle, this approach could justify criminal jurisdiction on the part of the state of (permanent) residence. *Contra T v. Swiss Fed. Prosecutor's Office*, BGE 92 I 382 (1966), 72 *ILR* 632, 633. Van Panhuys proposed in effect universal jurisdiction over stateless persons, arguing that the penal laws of any state could cover crimes committed abroad by a stateless person. He justified this contention by suggesting that in such cases there would be no state whose jurisdiction over the person had to be respected by other states. Van Panhuys, *supra*, at 127. No support for this view has been found elsewhere in the reviewed sources.

Even the ICC *travaux préparatoires* acknowledged the special relationship between stateless persons and their state of permanent residence in the Preparatory Committee's conclusion that for stateless persons the applicable law should be that of the state of their permanent [33] residence.<sup>69</sup> Moreover, the rule that in matters of criminal jurisdiction stateless persons should be treated as if they were nationals of the state of their habitual residence has been confirmed in several conventions on international criminal law.<sup>70</sup>

If in line with these sources it is accepted that a state should have criminal jurisdiction over stateless residents under the active personality principle, should such jurisdiction be granted to the state of residence or that of permanent residence only? Despite the lack of uniformity, the majority of conventions and municipal penal codes appears to refer to habitual or permanent residence. This tendency and the relative strength and stability of the link constituted by permanent or habitual residence lead the present author to believe that only this state, if there is one, should have jurisdiction under the active personality principle. A state where the stateless person is residing temporarily should not be entitled to acquire any rights over him relating to criminal jurisdiction that it does not possess over other non-nationals.

Finally, even if it is accepted that the state of permanent residence could prosecute crimes committed by a stateless permanent resident abroad on the basis of active personality, could this right be retained if she abandons her residence in that state? In such cases, considering that the link created by the establishment of permanent residence is weaker – at least in legal terms – than nationality and that in most states the nonextradition rule applies only to nationals, one might be tempted to deny any state jurisdiction based on the active personality principle over crimes committed by stateless persons. The absence of any link between the state of permanent residence and the offender if the person moved to another state would result in terminating the former state's jurisdiction, whereas the state of new permanent residence could not try her for lack of a connection with her at the time of the offense.

This option, while justifiable, may lend itself to abuse. Offenders would have an incentive to seek residence in another state to terminate their criminal liability based on active personality. Moreover, under the 1954 Convention Relating to the Status of Stateless Persons,<sup>71</sup> such persons enjoy certain rights in the country of habitual residence besides those granted to other aliens (except refugees). Consequently, their legal position falls somewhere between that of aliens and that of nationals. This status could justify granting the state of permanent residence broader rights of jurisdiction over stateless persons than it holds over aliens in general, possibly including jurisdiction based on permanent residence at the time either of the commission of the crime or of its prosecution.

No sources reviewed for this Note address this issue, but solutions can be derived from the rules proposed above with regard to change of nationality. Arguably, the exercise of jurisdiction based on either of these two grounds would not be appropriate, as permanent residence usually constitutes a less stable or at least less formal legal bond than nationality. As indicated above, criminal jurisdiction based on nationality at the time of prosecution is not universally accepted even for persons who have a nationality. The right of a new state of

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<sup>69</sup> See the report of the committee's second meeting, UN Doc. A/51/22, Vol. 2, pt. 3 bis, sec. 2(b)(2)(c) (1996), at <gopher:// gopher.igc.apc.org/00/orgs/icc/undocs/prepcom2/prepcom\_report.IIb> (visited Aug. 14, 2001). This conclusion, however, was reached outside the context of the active personality principle.

<sup>70</sup> See, e.g., International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, Art. 6(2)(c), 37 *ILM* 249 (1998); Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, Art. 4(1)(b)(i), 28 *ILM* 493 (1989) (this provision concerns all aliens habitually resident on the party's territory); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, Art. 6(2)(a), 27 *ILM* 668 (1988); International Convention Against the Taking of Hostages, Dec. 17, 1979, Art. 5(1)(b), 1316 *UNTS* 205 ('if the State considers it appropriate').

<sup>71</sup> Sept. 28, 1954, 360 *UNTS* 130.

residence to prosecute past crimes would be even more difficult to justify. Moreover, this option could give states an incentive to grant residence to an accused with the (partial) aim of [34] gaining jurisdiction over him. Such an approach would violate the principle of good faith, which, in turn, could invalidate the jurisdictional basis of the ICC.<sup>72</sup>

Another alternative would be to grant a state jurisdiction over crimes committed by a stateless person while a permanent resident of that state, which jurisdiction could be retained after he abandons that residence. This author favors that option, as it would minimize the risk of abuse by individuals and states and provide clear advantages from the perspective of criminal justice (e.g., increased deterrence), while not exposing the already disadvantaged stateless persons even more to states that will not grant them similarly extensive rights in return.<sup>73</sup>

In sum, the rule suggested here is the following: The state of permanent residence may exercise jurisdiction – and consent to international jurisdiction – over crimes committed by a stateless person after his acquisition of permanent residence in that state. These rights will prevail even after the person has abandoned his residence there. In contrast, no state shall have the right to prosecute that person or let him be prosecuted by the ICC under the active personality principle for crimes committed before he established his residence there.<sup>74</sup>

The principle thus proposed stands in sharp contrast with the only source that deals with the issue, the 1935 Harvard Draft Convention quoted above, and is not uniformly supported by state practice. Moreover, the ICC Statute refers to nationals only, and no rule of international law<sup>75</sup> assimilates stateless persons to nationals of the state of their permanent residence for the purpose of criminal jurisdiction. In these circumstances, the principle that ‘[a] treaty shall be interpreted in good faith *in accordance with the ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose’<sup>76</sup> and the principle of strict construction<sup>77</sup> could be invoked to prevent the exercise of ICC

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<sup>72</sup> Trial Chamber Two of the International Criminal Tribunal for the Former Yugoslavia (ICTY) rejected the defense motion for the release of *Slavko Dokmanovic*, which claimed that the arrest and rendition of the accused was illegal. *Prosecutor v. Dokmanovic*, Motion for Release, No. IT-95-13a-PT (Oct. 22, 1997). *Cf. Prosecutor v. Barayagwiza*, Motion for Orders to Review and/or Nullify Arrest and Provisional Detention, No. ICTR-97-19-I (Nov. 3, 1999), at <<http://www.icty.org>> (reversing the trial chamber and ruling that abuse of process compelled the appeals chamber to order the accused’s release and dismiss the indictment) (visited June 19, 2001). It could be argued that the *Dokmanovic* decision lends support to the notion that the illegality of the grant of nationality and bad faith in the proceedings do not affect the jurisdiction of the court. Yet, as there is a significant difference between securing the presence of the accused by acting in bad faith or by arguably illegal means (a challenge that the trial chambers also considered unfounded) and establishing personal jurisdiction over the accused in a similar manner, in the view of the author *Dokmanovic* is irrelevant in this context.

<sup>73</sup> One of the most recent studies covering stateless persons proposes a similar solution in the context of diplomatic protection for dealing with the relationship between stateless persons and the state in which they habitually reside. Dugard, *supra* note 12, at 57-60, paras. 175-84. Even though diplomatic protection and criminal jurisdiction concern distinct fields of law, their common origin in allegiance and the fact that Dugard’s proposals reflect a change in international law concerning the status of stateless persons may lend some support to the rule suggested here.

<sup>74</sup> If the person goes through a subsequent bona fide and voluntary naturalization in a state, the rule stated for change of nationality, see text at notes 61-62 *supra*, would apply without reservation. Similarly, prosecution by the state of origin would be possible if the person became stateless by losing the nationality of a state after the commission of the crime.

<sup>75</sup> Under Article 21(1)(b) of the Rome Statute, *supra* note 1, the court may apply rules and principles of international law.

<sup>76</sup> Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31(1), 1155 UNTS 331 (emphasis added). The provision reflects customary international law. See *Territorial Dispute (Libya/Chad)*, 1994 ICJ Rep. 6, 21-22, para. 41 (Feb. 3).

<sup>77</sup> On this principle, see, for example, Andrew Ashworth, *Principles of Criminal Law* 80-82 (3d ed. 1999). Even though the status of the principle is somewhat ambiguous, *id.* at 81, its application is required by the Rome Statute, *supra* note 1, Art. 22(2), with respect to the definition of crimes.

jurisdiction under Article 12(2)(b) over crimes committed by stateless persons. Yet, as it would serve the purposes of justice, enhance deterrence, and accord with the developments that have taken place in international law concerning the status of stateless persons, the future modification of the statute or at least the addition of an interpretive provision to the Rules of Procedure and Evidence to this effect appears desirable and justified.<sup>78</sup>

### [35]

#### 2.4 *The Offender Is a Refugee*

Problems related to refugees have received little attention in international criminal law. Yet such persons pose some delicate questions about national jurisdiction and the ICC's competence to exercise jurisdiction over them based on the active personality principle. While not provided for in the Rome Statute, as will be shown, substitution of the state of asylum's acceptance of the court's jurisdiction for that of the state of nationality would be advantageous and legally justifiable, at least in certain cases. This option would arguably require amending the statute or at least adding an interpretive provision to the Rules of Procedure and Evidence.

The *non-refoulement* provision of the 1951 Refugee Convention does not prohibit the extradition of refugees for nonpolitical crimes (including those covered by the Rome Statute).<sup>79</sup> Nevertheless, it is often treated as a bar to extradition to the state of origin, which is thus seldom granted.<sup>80</sup> Unless another state can prosecute the case on some ground,<sup>81</sup> the offender is likely to escape trial.<sup>82</sup>

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<sup>78</sup> Arguably, since the object and purpose of the ICC Statute is to try the worst war criminals, the court would be justified in interpreting 'nationality' broadly. See Vienna Convention on the Law of Treaties, *supra* note 76, Art. 31(1). However, the aim of the drafters and states parties to the statute was to prosecute war criminals on the basis of the active personality or the territorial principle in the absence of a Security Council referral. Thus, in the view of the author, a liberal interpretation of the relevant provisions that would provide for ICC jurisdiction on the basis of any substantial link could not be justified under the teleology of the statute, as it would approach universal jurisdiction, a principle rejected by the majority of states in Rome.

<sup>79</sup> Refugee Convention, *supra* note 16, Art. 33; see also Guy S. Goodwin-Gill, *The Refugee in International Law* 149-50 (2d ed. 1996).

<sup>80</sup> Goodwin-Gill, *supra* note 79, at 147-50. Case law indicates that failure to extradite is not based on the treatment of the refugee as a national for the purposes of extradition. See, e.g., *T v. Swiss Fed. Prosecutor's Office*, *supra* note 68; *Re Rubio*, 40 *ILR* 212 (Sup. Ct. 1962) (Chile); *Re Colafic*, J.C.P. 1963, II, 13126 (CA Paris 1961), 44 *ILR* 187. These decisions dealt with and denied the applicability to extradition of the Refugee Convention, *supra* note 16, Art. 12(1), which provides for the treatment of refugees as nationals in matters of civil jurisdiction.

<sup>81</sup> As most contemporary conflicts are noninternational, territorial, active, and passive personality jurisdictions are often possessed by the same state.

<sup>82</sup> This problem is well illustrated by the case of *Léon Mugesera*, a Rwandan national who was granted asylum in Canada. Before fleeing from Rwanda, Mugesera had publicly incited genocide against the Tutsi in 1992. After this became known, in 1998 the Canadian Immigration and Refugee Board found Mugesera guilty of direct and public incitement of genocide and deprived him of his resident status. In 1996 his extradition was requested by Rwanda. As he had committed crimes falling under the exception in the Refugee Convention, *supra* note 16, Art. 1(F), the IRB could withdraw his refugee status and he could be extradited to Rwanda. However, 'Canada intends neither to judge Mugesera before its criminal courts' (following a policy decision not to exercise universal jurisdiction) 'nor to extradite him to Rwanda' (for fear of criticism by nongovernmental organizations and international human rights bodies based on the state of the Rwandan justice system) 'so that he can stand trial there. Absent a request from an enthusiastic Spanish prosecutor, Mugesera may well escape a criminal trial.' William A. Schabas, 'Case Report: Mugesera v. Minister of Citizenship and Immigration', in 93 *AJIL* 529, 533 (1999). As the case did not fall within the temporal jurisdiction of the ICTR, the Tribunal did not have jurisdiction over it.



In a few recent cases, states of asylum have attempted to exercise criminal jurisdiction over refugees for war crimes and crimes against humanity committed before the grant of asylum. These decisions invoked the principle of universal jurisdiction rather than active personality. However, the limited applicability of universal jurisdiction often restricted the range of prosecuted offenses. In some cases, prosecution failed for lack of jurisdiction.<sup>83</sup>

By applying for asylum, the refugee has indicated his intention to sever his allegiance to his state of nationality, which is confirmed by his unwillingness or inability to avail himself of its protection. This raises complex legal questions about the authority of his state of origin over him. As pointed out by Frank Krenz, 'It remains a moot point in how far the country of nationality remains entitled ... to enforce its laws against, a refugee who has fled abroad.'<sup>84</sup>

The International Criminal Tribunal for the Former Yugoslavia recently addressed the validity of refugees' nationality for international purposes in the *Tadić, Blaškić, and Čelebići* [36] cases.<sup>85</sup> In *Tadić* – discussing Article 4(1) of the Fourth Geneva Convention of 1949 on protected persons – the appeals chamber noted that as early as '1949 the legal bond of nationality was not regarded as crucial and allowance was made for special cases. In the ... case of refugees, the lack of both allegiance to a State and diplomatic protection by this State was regarded as more important than the formal link of nationality'<sup>86</sup> and called for an approach 'hinging on substantial relations more than on formal bonds.'<sup>87</sup>

Sources on (international) criminal jurisdiction do not specifically address jurisdiction over refugees. The 1935 Harvard Draft Convention does not cover this issue. Moreover, no national criminal code has been found that explicitly deals with applicability to refugees. While the criminal codes that cover (permanent) residents<sup>88</sup> also extend jurisdiction over refugees residing on the territory of that state, these provisions are few in number and appear to provide for jurisdiction over offenses committed by residents only if they still reside in the state at the time of prosecution. By establishing himself in another country, the refugee could terminate such jurisdiction. Moreover, these provisions are not necessarily based on the principle of active personality; hence, they cannot justify corresponding jurisdiction by the ICC.

It thus appears that international criminal law does not attribute a special status to the bond of asylum. However, the practical and legal problems cited above indicate the need for a separate regime of criminal jurisdiction over refugees. Such a solution is proposed below.

It is often contended that there is a clear parallel between nationality and asylum.<sup>89</sup> A refugee's status could therefore be perceived as similar to that of a person who has changed nationality. Accordingly, the rules proposed above concerning jurisdiction over offenders who have changed nationality would imply that the state of asylum could exercise jurisdiction (and

<sup>83</sup> See Brigitte Stern, 'Case Report: *In re Javor, In re Munyeshyaka*', 93 *AJIL* 525, 529 (1999); Ruth Wedgwood, National Courts and the Prosecution of War Crimes, in 1 *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* 390, 401 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000); Fiona McKay, 'Universal Jurisdiction in Europe', at <<http://www.redress.org>> (visited June 19, 2001).

<sup>84</sup> Krenz, *supra* note 11, at 109.

<sup>85</sup> *Prosecutor v. Tadić*, Judgment, No. IT-94-1-A, paras. 163-66 (July 15, 1999), 38 *ILM* 1518 (1999); *Prosecutor v. Blaškić*, Judgment, No. IT-95-14-T, paras. 125-27 (Mar. 3, 2000); *Prosecutor v. Delalić*, Judgment, No. IT-96-21-T, paras. 245-59 (Nov. 16, 1998) [hereinafter *Čelebići case*]. All three judgments are available online at <<http://www.un.org/icty>> (visited June 19, 2001).

<sup>86</sup> *Tadić*, *supra* note 85, para. 165; see also *id.*, paras. 164-65 nn.204-05.

<sup>87</sup> *Id.*, para. 166. While made in a different context, these conclusions confirm a change of attitude in international law concerning the status of refugees and the validity of their nationality under international law. See also Dugard, *supra* note 12, at 57-60, paras. 175-84.

<sup>88</sup> See codes listed in note 65 *supra*.

<sup>89</sup> See, e.g., Luke T. Lee, *Consular Law and Practice* 358 (2d ed. 1991); Grahl-Madsen, *supra* note 11, at 381.

the right to accept the ICC's jurisdiction) over crimes committed by the person before he sought refuge; over those committed by him while enjoying asylum there; and over those committed after the grant of refugee status, and even after he has abandoned that state or lost his refugee status.

A limitation to this rule was suggested above with regard to stateless persons – *i.e.*, that the new state of residence should not be entitled to prosecute past crimes – on the basis that permanent residence creates a less stable bond than nationality. In a similar vein, an exception from the proposed rule on change of nationality should arguably also be made with regard to refugees. It could be justified by reference to the fact that asylum is not accepted in international law as quite as strong and formal a link as nationality;<sup>90</sup> hence, the analogy with nationality is imperfect and appears too weak to justify jurisdiction based on nationality at the time of prosecution, which is somewhat controversial even for persons who do have that state's nationality. Moreover, without this exception states might be inclined to grant a refugee asylum so as to ensure his prosecution in their own courts or by the ICC. Such acts [37] would violate the principle of good faith.<sup>91</sup> Consequently, it is proposed here that no state of which the refugee is not a national should be able to exercise jurisdiction under the active personality principle over crimes committed by him before he fled his state of origin.

In contrast, the present author believes that with regard to crimes committed after the grant of asylum, the state of asylum should have jurisdiction, even when the crimes were committed abroad. If the states of permanent residence and asylum are different, the more formal ties created by asylum should entitle this state to exercise jurisdiction. This solution would conform with the above-stated continuity rule and the principles proposed for jurisdiction over stateless persons. The rule would be still more easily justifiable for refugees, as asylum constitutes a stronger legal connection than permanent residence.<sup>92</sup>

Under the rules suggested in the context of change of nationality, the state of former nationality retains jurisdiction over crimes committed abroad while the offender was its national even if he subsequently lost his nationality.<sup>93</sup> The application of a similar rule to refugees appears justified but, as pointed out above, is often impossible in practice because the *non-refoulement* principle precludes the person from physically coming within the state's jurisdiction. However, *refoulement* is legally possible for acts falling within the ICC's jurisdiction, as they should lead to the loss of refugee status under the Refugee Convention and the presence of the accused in the national jurisdiction can thus be secured.<sup>94</sup> Moreover, the principle of *non-refoulement* applies to extradition to the state of origin when the refugee fears persecution. The arguments raised in its favor do not hold with respect to surrender to an impartial international court, which would not constitute *refoulement*. The person could therefore be surrendered to the ICC without revoking his refugee status. These arguments demonstrate that the ICC would not necessarily be prevented from exercising jurisdiction over refugees for crimes committed before their flight if their state of origin has accepted its

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<sup>90</sup> At first glance, the ICTY's opinions in the *Tadić*, *Čelebići*, and *Blaškić* cases, *supra* note 85, appear to contradict this position. While the link of a refugee with his state of origin may in fact be less strong and real than the one between him and his state of asylum, this is not the point at issue here. Rather, it is suggested that the grant of asylum reflects a less substantial commitment by the state of asylum than a grant of nationality; hence, on the basis of a mere grant of asylum, this state should not be entitled to derive the totality of the rights from this act that international law provides it over its nationals.

<sup>91</sup> See note 72 *supra*.

<sup>92</sup> Special Rapporteur Dugard's report to the International Law Commission on diplomatic protection, *supra* note 12, lends support to this option. On the relevance of this source in the present context, see note 73 and corresponding text *supra*.

<sup>93</sup> See text at notes 73-74 *supra*. The same principle was proposed to be applied to stateless persons and their state of permanent residence, see text at note 62 *supra*.

<sup>94</sup> Refugee Convention, *supra* note 16, Art. 1(F)(a).

statute. The rule is also theoretically justifiable pursuant to the principles stated with regard to a change of nationality by the offender. If the rule stated in that context were reversed with regard to refugees, a controversial legal situation could result in which the country of origin has jurisdiction over persons who sought asylum and subsequently became naturalized in another state but not over those who have not yet acquired a new nationality.

As concluded above, severance of ties with the country of origin suffices to justify the termination of jurisdiction by that state over crimes committed after the loss of nationality. Even though a refugee is formally still considered a national by his state of origin, arguably his clearly indicated intention to loosen his ties with this state should be respected. The resulting lack of allegiance should be reflected at least with regard to jurisdiction over crimes committed after he sought asylum.<sup>95</sup> Since receiving countries are in any case as likely as states of origin to have well-functioning criminal justice systems,<sup>96</sup> the chances of prosecuting such crimes would not be decreased by the adoption of this principle. If this approach is accepted, the consent of a state to ICC jurisdiction should be considered valid for refugees enjoying asylum within its borders.

An exception should be made, however, for a refugee who, after the commission of the crime, avails himself of the protection of his state of origin. In this case his wish to sever his [38] ties with that state has been temporary, and should not be taken into account for determining international jurisdiction over him. As his nationality becomes effective again and his refugee status is terminated, his state of origin could reassume jurisdiction (the ICC could prosecute him on the basis of that state's consent) in accordance with the proposed rule that nationality at the time of prosecution is sufficient for jurisdiction based on active personality.<sup>97</sup>

In short, the following rules are proposed for criminal jurisdiction over refugees: Jurisdiction may be exercised by the state of asylum (or permanent residence) for crimes committed after the person sought asylum, but not for those committed earlier. The state of origin should retain jurisdiction over crimes committed before the refugee fled the country, or at least its acceptance of ICC jurisdiction should be considered valid for its nationals enjoying asylum or maintaining their permanent residence elsewhere. This state, however, should not have jurisdiction over acts committed after the person sought refuge abroad, nor should its acceptance of ICC jurisdiction be considered valid for those offenses.<sup>98</sup>

This proposal would be compatible with the purpose, but arguably not the wording, of the Rome Statute. The principles of treaty interpretation and strict construction would thus necessitate a change in the statute or some other form of clarification before these rules could be applied by the court.<sup>99</sup> Nonetheless, the example of numerous war criminals who have fled

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<sup>95</sup> See quotation and text at note 84 *supra*.

<sup>96</sup> This problem was demonstrated in the decision of the Austrian Supreme Court in the *Cyjetković* case in 1994. The Court based its jurisdiction over the accused partly on the fact that there was no functioning criminal justice system in the country where the crime had taken place. *Re Dusko C.*, Oberster Gerichtshof, No. 15Os99/94 (July 13, 1994), at <<http://www.ris.bka.gv.at/jus/>>; see also McKay, *supra* note 83.

<sup>97</sup> See Refugee Convention, *supra* note 16, Art. 1(C); see also note 74 *supra*.

<sup>98</sup> These principles are proposed to guide jurisdiction over refugees in the sense of the 1951 Refugee Convention, *supra* note 16. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, Art. 1(1), 1001 *UNTS* 45, also defines as refugees

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

In fact, such people may constitute the majority of contemporary refugees. But as long as there is no persecution or severance of allegiance, the author believes that the active nationality principle should be applied in its traditional form.

<sup>99</sup> See note 78 *supra*. Once a treaty amendment concerning the role of the state of asylum in granting the court jurisdiction over refugees is initiated, the principles discussed above would not restrict the freedom of state

and will flee their states of origin, gaining refugee status elsewhere and escaping prosecution, highlights the need for such a change.

### 3 PROBLEMS AND SOLUTIONS

The previous parts of this Note examined problems posed by the application of the active personality or nationality principle to cases involving dual nationals, persons who have changed nationality, stateless persons, and refugees as accused, in the contexts of municipal criminal law and international criminal jurisdiction. With regard to dual nationals, it was concluded that, in line with the rule in the 1935 Harvard Draft Convention on Jurisdiction with Respect to Crime, each state of which the offender is a national should be entitled to exercise jurisdiction over crimes committed by him. In cases involving change of nationality, it was again found that the Harvard Draft Convention presented the best solution: a state has jurisdiction over crimes committed by a person if he was its national at the time of the commission of the crime or if he is one at the time of its prosecution.

As for stateless offenders, it was proposed that the state of permanent residence be granted jurisdiction over crimes committed by such persons while they were permanent residents there, even if they later abandon that residence. This rule, although clearly deviating from the principle put forward by the 1935 Harvard Draft Convention, is supported by subsequent legal developments.

[39] Finally, refugee offenders presented the most complex problems. Four categories of cases were examined. With regard to the first, jurisdiction by the state of asylum over crimes committed by the refugee after receiving asylum, it was suggested that this state should have the right to exercise jurisdiction. Nevertheless, as its relationship to the accused is less strong than the link of nationality, the state of asylum should not be entitled to exercise jurisdiction over crimes committed by the person before he sought asylum. With respect to the rights of the state of origin, it was found that crimes committed after the person fled the country should not fall within its jurisdiction. In contrast, in the absence of arguments justifying an exception, it was recommended that the state of origin should retain jurisdiction over crimes committed by the person before he sought refuge elsewhere.

Furthermore, if the state itself has the right to exercise jurisdiction over a certain crime, absent any prohibition to the contrary in international law, it arguably has the right as well to accept ICC jurisdiction over that crime. Consequently, if the state of nationality is party to the statute but the territorial state is not, and if the Security Council did not refer the case to it, the court should be competent to exercise jurisdiction over the offender under the same conditions as the relevant member state.<sup>100</sup> Conversely, each state proposed in this Note to have jurisdiction and the right to consent to the court's jurisdiction would be entitled to prosecute the accused in its own courts rather than surrender him to the ICC, if it had custody over him.<sup>101</sup>

In the case of dual nationals and offenders who have changed nationality, desirable clarification of the court's competence to exercise jurisdiction under the active personality principle could be accomplished by inserting new provisions on the interpretation of 'state of nationality' in the Rules of Procedure and Evidence. This change could be made at any time after the establishment of the ICC, in accordance with Article 51 of the statute and Article 3 of the rules.<sup>102</sup> Such an approach may not suit in the case of stateless persons and refugees

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parties to the statute, and they could provide for the right of the state of asylum to consent to the court's jurisdiction even over crimes committed before the grant of asylum.

<sup>100</sup> See note 32 *supra*.

<sup>101</sup> See Rome Statute, *supra* note 1, Arts. 17-19.

<sup>102</sup> *Id.*; Rules of Procedure and Evidence, *supra* note 2.

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since the rules suggested here deal with issues stemming from the express reference to 'nationals' in Article 12(2) of the statute. The best alternative would arguably be to amend the statute, but that can only take place seven years after the establishment of the court.<sup>103</sup> The author urges, however, that remedies be sought as soon as possible, as cases of all four types may appear in the docket of the court at an early stage of its operation. Although the ICC has the competence to inquire into its own jurisdiction over the cases before it,<sup>104</sup> international criminal law might be better served if these issues were considered before they must be decided in the future ICC courtrooms in The Hague.

The rules suggested above were derived from available sources in the field of (international) criminal law concerning jurisdiction and extradition. Owing to the scarcity of available sources, especially contemporary ones, and their frequent indeterminacy, the proposed solutions often rely to some extent on the author's personal perceptions of justice and fairness. The inquiry was guided by the intention to endorse the purpose of the court to deter the commission of crimes covered by its statute while not unduly expanding criminal jurisdiction. Understandably, the proposed principles will not be acceptable to all lawyers faced with the problems concerned. It is hoped, however, that the difficulties examined here will increase awareness of these problems and contribute to a creative process enabling the development of appropriate solutions.

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<sup>103</sup> Rome Statute, *supra* note 1, Arts. 121, 123.

<sup>104</sup> *Id.*, Arts. 17-19.