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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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3

**A New Passport to Impunity?
Non-Extradition of Naturalized Citizens versus Criminal Justice**

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ABSTRACT

Recent media reports have highlighted the risk that criminals could evade justice through naturalization: if the state does not extradite its citizens and is unable or unwilling to prosecute them, then the grant of nationality could equal to providing sanctuary. Against this background, this article reviews the laws and practice of states related to the non-extradition of (naturalized) nationals, and considers the impact of this phenomenon on criminal justice at the domestic level and before the International Criminal Court (ICC). To this end, the author evaluates common (legislative) constructions which could – directly or indirectly – reduce the effect of the extensive freedom of states to refuse extradition of their nationals. She concludes that, whereas the ICC Statute contains sufficient safeguards and non-extradition of nationals might seldom lead to impunity, even in the interstate context, a comprehensive international solution to legal problems related to extradition and mutual assistance would better facilitate criminal justice.

1 INTRODUCTION

In September 2003, Herbertus Bikker's trial commenced in Germany for crimes that he committed in the Netherlands during World War II. Bikker had been sentenced to death in the Netherlands in 1949 – subsequently commuted to life imprisonment – for the acts concerned in the 2003 German proceedings, and for additional war crimes. He managed to flee from his Dutch prison to West Germany in 1952. There, he claimed and was granted German nationality, based on prior membership in the Waffen-SS. Requests for Bikker's extradition to the Netherlands were repeatedly refused due to his German nationality.

The affair sank into oblivion until 1993, when Bikker was discovered by a Dutch news reporter. The case received wide publicity. Demonstrations, followed by Dutch extradition requests and diplomatic pressure to at least prosecute locally if extradition [45] was refused, bore fruit in 2003. After 50 years' living the quiet life of an average German citizen – time which should have been served imprisoned in the Netherlands, given his conviction there – the 'Executioner of Ommen' was to stand trial in Hagen, Germany.¹ However, Bikker did not

¹ 'Der Nazikriegsverbrecher Herbertus Bikker vor Gericht', 1 September 2003, available online at <http://www.linkeseite.de/Texte/2003/august/26-1.htm?q=null> (visited 30 April 2004); 'Nazi SS defendant silent as war-crimes charges read', 26 September 2003, available online at <http://www.wiesenthal.com/social/press/>

end up in jail and was even spared the prospect of spending the rest of his days in court, the threat of a prison sentence hanging over his head. On 2 February 2004, the Hagen court declared the defendant, due to his old age and poor health, unfit to stand trial.²

Four of the other five convicted Dutch war criminals (all of them sentenced to death or life imprisonment), known to have fled to Germany shortly after the War, are still alive. It is likely that most of these fugitive criminals (all in their 80s and some also in bad health) will neither serve their Dutch prison sentences nor be retried in Germany.³

With proceedings just under way in Germany against Herbertus Bikker, news surfaced in November 2003 that Russian Jew, Leonid B. Nevzlin, had been granted Israeli citizenship with extraordinary speed. Nevzlin is a close associate of Mikhail Khodorkovsky, the former head of the Russian oil company, Yukos, who is presently under pre-trial arrest in Moscow on charges of fraud and tax evasion.⁴ The chairperson of the Knesset's Immigration, Absorption and the Diaspora Committee, Colette Avital, voiced concerns that friendly Israeli officials may have expedited Nevzlin's naturalization in order to shield him from prosecution in Russia.⁵ In response, Israeli authorities quickly assured the international press that Nevzlin's naturalization would not necessarily prevent his extradition, should Russian authorities indict him.⁶ Yet, it is uncertain at the time of writing whether Israel will extradite Nevzlin to Russia⁷ following the January 2004 indictment by the Russian [46] General Prosecutor's Office and the international arrest warrant circulated by Interpol.⁸

pr_item.cfm?ItemID=8252 (visited 30 October 2003).

² 'Former SS Guard's Murder Trial Collapses'. *Associated Press (AP)*, 2 February 2004, available online at <http://www.cnn.com/2004/WORLD/europe/02/02/germany.nazi.trial.ap/> (visited 30 April 2004).

³ 'Oorlogsmisdadigers houden zich verstopt in buitenland' [War Criminals Hide Abroad]. *De Volkskrant*, 25 September 2003: I. Oñorbe Genovesi, 'SS'ers?', *De Volkskrant*. 16 August 2003.

⁴ R. Plushnick-Masti, 'Israel Grants Russian Tycoon Citizenship', AP, 7 November 2003, available online at <http://www.nytimes.com/aponline/international/AP-Israel-Russian-Tycoon.html> (visited 7 November 2003). See also 'Key YUKOS Shareholder Granted Israel Citizenship', *Reuters*, 5 November 2003, available online at <http://www.Reuters.com/newsArticle.jhtml?type=topNews&storyID=3758612> (visited 7 November 2003).

⁵ See C. McGregor, 'Nevzlin Wins Israeli Citizenship', *The Moscow Times*, 6 November 2003, available online at <http://www.rusnet.nl/news/2003/11/07/currentaffairs01.shtml> (visited 30 April 2004); S. Kedmi, 'Questions in Knesset on Citizenship for Yukos Executive Nevzlin', *Globes Online*, 4 November 2003, available online at <http://www.globes.co.il/serveen/globes/docview.asp?did=738584&fid=942> (visited 30 April 2004).

⁶ Plushnick-Masti, *supra* note 4.

⁷ The Extradition Law of Israel, available online at <http://www.coe.int/T/E/Legal-Affairs/Legal-cooperation/Transnational-criminal-justice/Information/OC-INF-55E.asp> (visited 30 April 2004) does not prohibit the extradition of nationals for crimes committed before obtaining Israeli nationality. Under this legislation, Nevzlin could be extradited. On the other hand, it has been observed that the Israeli Supreme Court seldom authorizes the extradition of nationals. 'Yukos Owners Offer Their Stake to Free Khodorkovsky', *Bloomberg.com*, 16 February 2004, available online at <http://quote.bloomberg.com/apps/news?pid=10000085&sid=aUTjGbhNS1YQ&refer=europe> (visited 30 April 2004). It is not clear if this submission reflects decisions before the amendment of the Extradition Law in 1999 and 2001, limiting the non-extradition of nationals. In any case, it would appear that the considerable discretion enjoyed by the Israeli Minister of Justice in matters of extradition may prevent Nevzlin's return to Moscow. See M. Dennis Gouldman. 'Extradition from Israel', *Michigan Yearbook of International Legal Studies* (1983) 173-207, at 192-194. See also *ibid.* at 197-199 on potential obstacles to prosecution in Israel. More importantly, beside the laws of Israel, extradition in this case would also be subject to the 1957 European Convention on Extradition (359 *United Nations Treaty Series (UNTS)* 274) to which both Israel and Russia are parties. Article 6 of this Convention confirms the right of the contracting parties to refuse extradition and declares the date of the decision concerning extradition as the material moment for the determination of nationality. Accordingly, it is not unlikely that the sole right that Russia will end up having under international law is to request Israel to 'submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate', Art. 6(2) of the European Convention on Extradition, emphasis added. On a similar naturalization case in Israel, see 'Russian Tycoon Flees to Israel', *BBC*, 25 April 2001, available online at <http://news.bbc.co.uk/2/hi/europe/1295963.stm> (visited 30 April 2004); 'Moscow Demands Tycoon's Extradition', *BBC*, 25 September 2003 (referring to extradition

These examples paint a gloomy picture of the ease with which a person can avoid punishment by changing nationality, provided that the local authorities of the new state of nationality are reluctant or unable to enforce the sentence already handed down abroad, or to initiate prosecutions (due, for instance, to the lack of domestic statute, the *ne bis in idem* principle,⁹ the lack of willingness due to political considerations or thanks to influential friends) while refusing extradition. Despite the exceptional ease of obtaining a new nationality in these cases, experience has shown that these sorts of loopholes may also be available to people for whom the change of nationality is more burdensome.¹⁰ There are, nonetheless, certain legislative measures available to states which could help circumvent such abuse and/or limit the negative impact of the non-extradition of nationals on criminal justice.

The present article evaluates problems with extradition and surrender that may [47] arise because of changes of nationality.¹¹ The first section examines the effects of naturalization on criminal justice from the perspective of the widespread practice of non-extradition of nationals, and considers methods adopted by states to counterbalance its negative impact. The second part reviews what are the consequences of changes in nationality for surrender to the International Criminal Court (ICC). The article concludes with an assessment of the likelihood that a criminal could successfully avoid prosecution by obtaining a new nationality, given how rules on extradition and surrender work, and calls for increased state cooperation in criminal matters to prevent any such eventualities.

2 CHANGES OF NATIONALITY AND THE PROSPECTS OF CRIMINAL JUSTICE

2.1 *The Non-extradition of Nationals*

Many countries – mainly those with a civil-law tradition – generally do not extradite their own nationals.¹² While the status of the nationality exception is still unsettled in customary

from Greece), available online at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/3130416.stm> (visited 30 April 2004).

⁸ S.L. Myers, 'Russia Issues International Wanted List in Oil Case', *The New York Times*, 28 January 2004: E.E. Arvedlund, 'Russia Levels New Charge of Theft against Yukos Oil Stockholder', *The New York Times*, 18 February 2004.

⁹ According to this principle, a person cannot be tried and punished twice for the same conduct. While many states (including Germany) adhere to this rule only in a domestic context, others recognize foreign penal judgments and refrain from retrial of persons tried and convicted abroad as well. See, e.g. C. van den Wyngaert and T. Ongena. 'Ne bis in idem Principle. Including the Issue of Amnesty', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds). *The Rome Statute of the International Criminal Court* (Oxford: Oxford University Press, 2002) 705-729, at 707 and 711-712.

¹⁰ As Indicated by the fact that a few extradition treaties make it an express requirement of non-extradition of nationals that 'nationality was not acquired for the fraudulent purpose of preventing extradition' (see references in *infra* note 22), such attempts occur more than sporadically.

¹¹ The question of personal jurisdiction of national courts and the International Criminal Court in such cases has been dealt with by the author elsewhere. See Zs. Deen-Racsmany. 'The Nationality of the Offender and the Jurisdiction of the International Criminal Court', 95 *American Journal of International Law (AJIL)* (2001) 606-623.

¹² M.M. Whiteman, *Digest of International Law*, Vol. 6 (Washington, DC: Department of State Publications, 1968) 865-884; I.A. Shearer, *Extradition in International Law* (Manchester: Manchester University Press, 1971) 94-132; M.Ch. Bassiouni. *International Extradition: United States Law and Practice* (4th edn. Dobbs Ferry, NY: Oceana Publications, 2002) 682-689; S.A. Williams, 'Article 12', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes. Article by Article* (Baden-Baden: Nomos, 1999) 329, at 340-341.

international law,¹³ most extradition treaties at least permit states to refuse handing over their own nationals.¹⁴ However, the relevant provisions seldom specify the material moment for the determination of nationality, and the issue is not regulated with sufficient clarity under international law.

Whereas nearly all extradition treaties published in the *United Nations Treaty Series* provide for a right or obligation to refuse delivering up one's own nationals to a foreign state, the position varies widely with regard to the material moment for the [48] determination of nationality.¹⁵ Some agreements have attempted to regulate this question by stating that the nationality of the accused shall be considered to be the one that he or she possessed on the date of the commission of the alleged offence.¹⁶ Others specify the material moment as the date of the charges,¹⁷ the date of (the reception of) the request,¹⁸ the date of the decision on extradition,¹⁹ or the date of extradition,²⁰ or specify that '[s]tatus of nationality shall be

¹³ D. Poncet and P. Gully-Hart, 'Extradition: The European Model', in M.Ch. Bassiouni (ed.), *International Criminal Law*, Vol. 2 (1st edn. Dobbs Ferry, NY: Transnational Publications, 1986), 461 at 468 and 489. *Sed contra* (confirming the customary status of the rule) Declaration of Acting President Oda, in *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (hereinafter, *Lockerbie case*) (Libya v United Kingdom). Order on Provisional Matters, 1992 International Court of Justice Reports (*ICJ Rep.*) 17, at 19. Dissenting Opinion of Judge Bedjaoui in *ibid.* 33, at 39, para. 12; Dissenting Opinion of Judge El-Koshi in *ibid.* 94, at 109, para. 55.

¹⁴ This fact may be explained by the lack of any general obligation under customary international law to extradite persons apprehended by a state on its territory. See, e.g. R.Y. Jennings and A. Watts (eds), *Oppenheim's International Law* (9th edn, London: Longman, 1996) 950. Consequently, the limits of extradition arrangements are freely determined by the parties themselves and many states do not extradite in the absence of a treaty obligation.

¹⁵ It should be noted that the majority of extradition treaties which do provide for the nationality exception fail to specify the material moment.

¹⁶ 996 UNTS 374 (France-Romania), Art. 19; 930 UNTS 112 (France-Tunisia), Art. 23(1); 812 UNTS 52 (France-Yugoslavia), Art. 3; 805 UNTS 271 (France-Israel), Art. 3; 746 UNTS 247 (France-Morocco), Art. 28; 550 UNTS 249 (Israel-Luxembourg), Art. 3; 448 UNTS 184 (Israel-Austria), Art. 2; 373 UNTS 57 (South Africa-Israel), Art. 2; 316 UNTS 126 (Israel-Italy), Art. 3; 1945 UNTS 82 (Australia-Brazil), Art. 5: *ibid.*, 44 (Australia-Chile), Art. V; 1891 UNTS 324 (Mexico-France), Art. 6; 1861 UNTS 161 (Spain-Republic of Korea), Art. 6; 1559 UNTS 222 (France-Canada), Art. 3; 1482 UNTS 82 (Greece-Egypt), Art. 3; 1306 UNTS 432 (Hungary-France), Art. 48; 1031 UNTS 266 (Brazil-Uruguay), Art. 2; 2113 UNTS 124 (Republic of Korea-Paraguay), Art. 3; *ibid.* 46 (Republic of Korea-Mexico), Art. 6; 2032 UNTS 300 (Republic of Korea-Philippines), Art. 6; 1324 UNTS 337 (France-UK), Art. 2; 1589 UNTS 288 (Mexico-Canada), Art. III. See also examples cited in Whiteman. *supra* note 12, at 871.

¹⁷ 1041 UNTS 98 (USA-Australia), Art. V.

¹⁸ 1021 UNTS 49 (Israel-Australia), Art. VIII(3); 1020 UNTS 72 (Australia-Italy), Art. IV (3); 1904 UNTS 71 (Brazil-Italy), Art. 6; 1486 UNTS 108 (Greece-Lebanon), Art. 15; 1467 UNTS 4 (Canada-Italy), Art. III; 1343 UNTS 260 (Hungary-Italy), Art. 3; 1579 UNTS 217 (Spain-Canada), Art. IV; London Scheme for Extradition within the Commonwealth (as amended in 2002), Art. 15. available online at <http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=36808> (visited 30 April 2004). See also 2125 UNTS 218 (Treaty on the transfer of sentenced persons, Spain-Costa Rica), Art. 4.

¹⁹ European Convention on Extradition (1957), *supra* note 7, Art. 6 (see, however, declarations attached by parties to Art. 6 on their understanding of the material moment, available online at <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=024&CM=7&DF=&CL=ENG&VL=1>) (visited 30 April 2004); 1854 UNTS 122 (Spain-Chile), Art. 7; 1058 UNTS 216 (Spain-Italy), Art. 25; 1764 UNTS 86 (Spain-Peru), Art. 7; 1570 UNTS 58 (Brazil-Spain), Art. III; 1505 UNTS 11 (Spain-Australia), Art. III; 1498 UNTS 348 (Spain-Hungary), Art. 3; 1433 UNTS 48 (Spain-UK), Art. 7; 1182 UNTS 232 (Spain-Mexico), Art. 7; 1761 UNTS 192 (France-Monaco), Art. 6.

²⁰ 616 UNTS 120 (Belgium, Luxembourg, Netherlands), Art. 5; 390 UNTS 277 (Belgium-Morocco), Art. 4; 328 UNTS 210 (Belgium-Federal Republic of Germany (FRG)), Art. 4; 1326 UNTS 228 (Belgium-Norway), Art. 5; 539 UNTS 335 (Belgium-Lebanon), Art. 12; 1579 UNTS 162 (Spain-Argentina), Art. 7.

determined by the laws of the requested Party'.²¹ In addition, a few treaties directly address the possibility of fraud in the acquisition of nationality.²²

[49] Even though each state tends to follow a certain pattern in its extradition practices, as indicated by the treaties that it has concluded, in the absence of strict domestic laws on the subject, they sometimes deviate from that pattern to accommodate the conditions of the other party. In this sense, extradition practices are flexible.²³

Domestic laws are equally diverse on this point. In a significant number of states, domestic legislation (often of a constitutional rank) prevents the authorities from extraditing nationals. In the absence of any further specifications, it would appear that such provisions refer to nationality at the time of extradition. This assumption is especially easy to justify in the case of provisions which merely lay down the right of nationals to remain in the state, or not be deported.²⁴ As this is a nationality-related privilege, it clearly does not apply to persons who attempt to defy extradition based on their nationality at the time of the offence which they have since lost.

However, most constitutions fail to specify whether nationality at the time of the extradition request or decision will be taken into account.²⁵ Similarly, where they provide for the non-extradition of nationals, domestic criminal codes, codes of [50] criminal procedure

²¹ 953 UNTS 20 (USA-Paraguay), Art. 4. See also 937 UNTS 112 (USA-Argentina), Art. 4; 1381 UNTS 271 (Spain-Dominican Republic), Art. 7.

²² The most straightforward way of dealing with the issue is by making the nationality exception conditional upon the requirement that 'nationality was not acquired for the fraudulent purpose of preventing extradition' (1854 UNTS 122 (Spain-Chile), Art. 7). See also 1764 UNTS 86 (Spain-Peru), Art. 7; 1579 UNTS 162 (Spain-Argentina), Art. 7; 1570 UNTS 58 (Brazil-Spain), Art. III. Another type of agreements provides that '[t]he requested state shall suspend any proceedings for naturalization of the person claimed until a decision on the request for extradition has been reached and, if extradition is granted, until his surrender' (1242 UNTS 308 (FRG-Canada), Art. V(2)). See also 1220 UNTS 270 (USA-FRG), Art. 7(2); 994 UNTS 115 (FRG-Yugoslavia), Art. 6(2). It may be noted that these provisions imply that the material moment is considered to be that of the decision on extradition (otherwise the change of nationality between the extradition request and decision would not be of any significance). Yet other agreements stipulate merely that '[t]he competent authorities of the requested state shall be advised of a request for extradition, where the person claimed or may be seeking naturalization in the requested State' (1413 UNTS 228 (Finland-Canada), Art. 3). In contrast, Art. 6(1)(c) of the European Convention on Extradition (1957), *supra* note 7, provides that '[i]f the person claimed is first recognised as a national of the requested Party during the period between the time of the decision and the time contemplated for surrender, the requested Party may avail itself of the [right to refuse extradition of its nationals]'. Regrettably, the provision, as presently formulated, appears to invite abuse.

²³ Australia has, for instance, agreed to consider the date of the decision on extradition as a material moment with Spain (*supra* note 19) but the date of commission of the offence with Brazil (*supra* note 16). Similarly, Hungary accepted the date of extradition decision in its relations with Spain (*supra* note 19), but that of the commission of the offence with France (*supra* note 16).

²⁴ *E.g.* Albanian Constitution, Art. 39 ('No Albanian citizen may be expelled from the territory of the state.'): Egyptian Constitution, Art. 51 ('No citizen may be deported from the country [...]'). See also text accompanying notes 76-78, *infra*.

²⁵ To the author's knowledge, only Brazil's constitution – out of 50 providing for non-extradition of nationals – addresses this question, specifying, in Art. 5(LI), that 'no Brazilian may be extradited, except for naturalized Brazilians in the case of a common crime committed before naturalization [...]'. In addition to the 37 instruments mentioned in H. Duffy and J. Huston, 'Implementation of the ICC Statute: International Obligations and Constitutional Considerations', in C. Kreß and F. Lattanzi (eds), *The Rome Statute and Domestic Legal Orders*, Vol. 1 (Baden-Baden: Nomos, 2000) 29-49, at 43-44, note 68, the Constitutions of Algeria (Art. 27). Argentina (Section 14). Costa Rica (Art. 32). Egypt (Art. 51), Haiti (Art. 41), Hungary (Art. 69). Jordan (Art. 9). Mozambique (Art. 103). South Africa (Section 21). Sweden (Art. 7). Tunisia (Art. 10). Venezuela (Art. 64), and the 1982 Canadian Constitution Act, Part I (Canadian Charter of Rights and Freedoms. Section 6) were found to contain some form of prohibition on the extradition of nationals.

and extradition acts generally fail to specify the material date for the determination of nationality.²⁶

State practice is very limited and internationally reported decisions differ widely on the issue. Three distinct positions are discernible. Some municipal decisions indicate that nationality either at the time of the decision²⁷ on extradition or at the time of the offence is sufficient.²⁸ Others consider that the nationality of the accused at the time of the extradition request should be decisive.²⁹ Finally, it is often held that the material [51] moment for the

²⁶ E.g. Bolivian Penal Code (Art. 3); Colombian Penal Code (Art. 9); Polish Penal Code (Art. 118); Hungarian Criminal Code (Art. 9(1)); Extradition of Criminals and Other Assistance in Criminal Proceedings Act (1984) of Iceland, Art. 2. Exceptionally, Art. 5(1) of the 1927 French Extradition Law specifies the date of the commission of the offence as the material moment (See *In re A*, *infra* note 30) and Section 1A(a) of the 1954 Extradition Law of Israel, as amended in 2001 (*supra* note 7), provides that ‘A person who has committed an extradition offense under this Law and at the time of the commission of the offense, was an Israeli national and an Israeli resident, shall not be extradited [...]’.

²⁷ As indicated above, some extradition treaties specify the date of charges, the date of the extradition request or the date of surrender as the material moment. See *supra* notes 17-19 and 21. A distinction between these dates and the date of the extradition decision cannot always be distilled from the judgments. However, such a distinction is of no practical relevance for the analysis of the consequence of the change of nationality in the context of extradition and surrender.

²⁸ In a case that is very similar to that of Herbertus Bikker, the accused, a Bulgarian national, was prosecuted in Bulgaria for crimes committed there but subsequently escaped to Greece and acquired Greek nationality. Two years after his escape, Bulgaria asked for his extradition under the Greco-Bulgarian Extradition Treaty. Greece denied the request on the basis of the person’s Greek nationality at the time of the extradition request, arguing that as the Treaty did not specify the meaning of nationality, it could refuse extradition based on nationality at the time of the offence or acquired after the offence (*In re D.G.D.*, Greece, Court of Thrace, Chambre du Conseil, 1933, reprinted in 7 *Annual Digest*, Years 1933-1934, 335).

²⁹ A Czech request for the extradition of a person who was considered by Czechoslovakia as its own national was denied by Hungary under the nationality exception. The Hungarian Minister of Interior considered that the person resumed his Hungarian nationality when he was repatriated from Rumania to Hungary. He argued that even though the person was not a Hungarian national at the time of the commission of the offence, he was such at the time of the extradition request and, accordingly, could not be extradited to Czechoslovakia (*Extradition (Czechoslovak Request)*, Resolution of the Minister of Justice of Hungary (No. 25659/1926), reprinted in 3 *Annual Digest*, Years 1925-1926, 303). It should be noted that it is unclear from the report whether Hungary accepted the Czechoslovakian nationality of the accused (*i.e.* that he was a dual or multiple national), and, if so, whether this fact was taken into consideration at all in refusing the extradition request. The case has, nevertheless, been interpreted as one involving a dual national (Shearer, *supra* note 12, at 131).

A Swiss court interpreted the words ‘citizen’ and ‘subject’ in an extradition treaty (in provisions confirming the rule of non-extradition of nationals) to cover only individuals 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 (*In re Del Porto*, Switzerland. Federal Court. 6 March 1931, reprinted in 6 *Annual Digest*, Years 1931-1932, 257-258. It should be noted that the Court came to this conclusion following 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). Dutch practice follows the same principle (see B. Swart, ‘Extradition’, in B. Swart and A. Klip (eds), *International Criminal Law in the Netherlands* (Freiburg im Breisgau: Edition Iuscrim, 1997) 85-122, at 107).

The US Department of State also has refused the extradition of José Luis Segimón de Plandolit, born in Spain, naturalized citizen of the USA at the time of the request (but not yet so at the time of the commission of the offence with which he was charged), to Spain, based on an extradition treaty that allowed for the nationality exception. (Advice sent by the Department of State to the Spanish Embassy, reprinted in Whiteman, *supra* note 12, at 869.) It should, however, be noted that, in the absence of a discussion of the material moment for the determination of the suspect’s nationality, it is unclear whether the same position would have been taken regarding persons who were US citizens at the time at which the criminal act was committed, but who subsequently lost his or her citizenship before the extradition proceedings. The Mexican Ministry of Foreign Affairs rejected a US request for the extradition of Francis Xavier Fernandez. Fernandez lost his original Mexican citizenship when he became a naturalized US citizen, but then recovered his Mexican nationality after having committed the offence for which his extradition was requested. The Mexican Ministry of Foreign Affairs argued that it:

determination of nationality is that of the commission of the crime.³⁰ In contrast, the possession of the nationality of the requested state between or prior to these two dates, but not valid on any of the two, does not appear sufficient to refuse extradition.³¹

[52] However, due to the limited number of internationally reported cases, it is very difficult to discern any conclusive evidence of customary international law. Moreover, states'

[could] not recognize [as suggested by the USA] that its obligation to extradite a person becomes fixed at the moment when he enters the national territory, because at that time it does not know whether the case concerns a person accused of one of the crimes foreseen in the [US-Mexican Extradition] Convention. Such obligation arises only when the Mexican Government is requested by the Government of the United States (to extradite) within the terms of the Treaty.

Therefore, if, at the moment when the obligation to extradite is fixed, the person in question is a Mexican, the application of Article 4 of the Treaty [on the right to refuse extradition of nationals] can not be avoided, regardless of the United States nationality previously held, through naturalization, by the accused.' (Mexican note to the US Embassy, reprinted in *ibid.*, at 869-870.)

³⁰ As is apparent from the above, the USA (requesting state) debated the issue of the material moment at which nationality should be determined in the case of Francis Xavier Fernandez (*supra* note 29), holding, unlike in the case of José Luis Segimón de Plandolit (*supra* note 29) (where it was the requested state), that the material moment was the time at which the offence was committed. See Whiteman, *supra* note 12, at 869-870. Similarly, a French court has approved the surrender of a French citizen to Italy for crimes committed there prior to his naturalization in France. In the absence of guidelines in the treaty, the provisions of the 1927 Extradition Law were referred to, which identify the date of the offence as the material date (*In re A*, Court of Appeals of Aix-en-Provence [1951], reprinted in 18 *International Law Reports (ILR)* 324.) Based on Section 1A of the Extradition Law of Israel at the time (32 LSI 63, similar to the current provision quoted in *supra* note 26), the District Court of Jerusalem held that Israeli nationality acquired subsequent to the commission of the crime by a person sought by the French authorities would not bar his extradition (*Attorney General v Azen*, unpublished decision discussed in Gouldman, *supra* note 7, at 197). The Israeli High Court of Justice passed a similar decision in *Engel and Friedman v Minister of the Interior* 34(4). PD 329 (1980), discussed in *ibid.* 197. Finally, in *Re Federal Republic of Germany and Rauca*, 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. (Canada Ontario Court of Appeal, 12 April 1983, reprinted in 88 *ILR* 278. See also note 78, *infra* and accompanying text.)

³¹ A German court considered that an originally Austrian national who became German due to the annexation of Austria lost his German nationality upon return to Austria in 1948; hence, he was not a German national at the time of the commission of the crime (1953-1954), nor at the time of the extradition request. Accordingly, the request for his extradition was granted (*Austro-German Extradition case*, German Federal Republic, Federal Supreme Court. 18 January 1956, reprinted in 23 *ILR* 364). Similarly, the District Court for the Eastern District of New York approved the extradition of Hermine Braunsteiner-Ryan to Germany in 1973. Ryan, a formerly Austrian national war criminal who became a naturalized US citizen in 1962, had fraudulently concealed her role (as an SS supervisory warden) in a women's concentration camp in Poland and her conviction in Austria for war crimes committed in that capacity. Her US citizenship was revoked with her consent, based on this fraud, in 1971. Two years later, when Germany requested her extradition for several counts of murder in the concentration camp. Ryan contested her denaturalization and argued, *inter alia*, that as the 1930 US-German extradition treaty, in force at the time, prohibited the extradition of nationals, she could not be extradited. However, in subsequent decisions, the Court confirmed her denaturalization and rejected out of hand the argument that her extradition should be denied based on the nationality exception stated in the treaty (*Ryan v United States*, 360 F. Supp. 264 (EDNY 1973); *United States v Ryan*, 360 F. Supp. 265 (EDNY 1973). *In re* the Extradition of Hermine Ryan, 360 F. Supp. 270 (EDNY 1973). It is very likely that the *Austrian Nationality case* (German Federal Republic, Federal Constitutional Court, 9 November 1955, reprinted in 22 *ILR* 430) and *In re Feiner* (German Federal Republic, Federal Supreme Court, 18 January 1956, reprinted in *ibid.* 367) also fall in this category. In these proceedings, German courts granted extradition requests by Austria. The accused persons had originally been Austrian nationals but had become German upon the Annexation of Austria by Germany. It was argued by both states that the accused had lost their German nationality and reverted to that of Austria upon its de-annexation. Accordingly, the Courts based their decision on the fact that the requested persons were not German nationals at the time of the extradition request. It is, however, unclear in both cases what the nationality of the accused was on the date of the commission of the crime. Hence, these two cases may fall under the category in which the material moment was that of the extradition.

opinions on the applicable rules appear to be greatly influenced by their position (*i.e.* whether they are the requesting or requested state) in a particular case.³² However, there is little, if any, evidence that states would object to the domestic legislation of others related to the non-extradition of nationals.

Accordingly, it can be concluded, based on the above overview of treaties, domestic legislation and case law, that while no rules of international law explicitly recognize the right of states to deny extradition of their nationals (nationality being based on whatever *bona fide* criteria consistent with international law),³³ it does not prohibit them from doing so, and it does not restrict the application of the nationality exception. The impact of such a liberal regime of the non-extradition of nationals on the possibilities of prosecution is, however, not as devastating as it might appear at first glance. In fact, in practice, the effect of the nationality exemption is mitigated in several ways.

2.1 Mitigating Factors

A few states introduced limits to the nationality exception recently under a somewhat novel legislative construction, permitting extradition of their nationals:

... if extradition of a [...] national is requested for the purpose of prosecuting him and [...] [53] there is an adequate guarantee that, if he is sentenced to a custodial sentence other than a suspended sentence in the requesting state for offences for which his extradition may be permitted, he will be allowed to serve this sentence in the [requested State].³⁴

Encouragingly, this limitation appears to gain support internationally, at least within groups of states with a relatively high degree of integration.³⁵

Secondly, nearly all states require several years of residence on its territory as a precondition for naturalization, making this option undesirably lengthy for abuse. Moreover, it is not uncommon for immigration laws to deny a residence permit if the person has committed or commits a serious crime,³⁶ making the fulfilment of the residence condition even more difficult in such cases.

³² See disputes involving US nationality, cited in *supra* note 30.

³³ There is a considerable degree of consensus in international law that states may object to the validity of a person's nationality and international tribunals shall not recognize it where sufficient connection between the state and individual is missing or where nationality has been conferred or withdrawn in an improper manner (*e.g.* by forced (de)naturalization, (de)naturalization in violation of international law or treaty obligations or for illegal purposes). See, *e.g.* J. Dugard, Diplomatic Protection, First Report to the International Law Commission, UN doc. A/CN.4/506, paras 97 et seq. In the present context, these principles may be taken to imply that nationality acquired or conferred with the aim of obstructing the exercise of foreign criminal jurisdiction – being *mala fide* and/or not based on sufficient connection – should not be recognized under international law. However, as the conferment of nationality is to be presumed valid in the first place, such fraud would need to be manifest (Jennings and Watts, *supra* note 14, at 855-856).

³⁴ Art. 4(2) of the Dutch Extradition Act (last amended in 1995), reproduced in Swart and Klip, *supra* note 29, at 268. See too Art. 1A(a) of the Extradition Law of Israel, *supra* note 7. Notably, the Netherlands attached a declaration to the same effect to the European Convention on Extradition in October 1987 (*supra* note 19). This one is, to date, the only such declaration attached to the Convention.

³⁵ See, *e.g.* London Scheme for Extradition within the Commonwealth. Art. 16(2)(b), *supra* note 18; European Arrest Warrant, Art. 5(3) (2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *Official Journal of the European Communities* L 190, 18/07/2002, 1-18).

³⁶ *E.g.* Section 212(2)(A)(i) (8 USC 1182) of the US Immigration and Nationality Act: Arts 34-37 of the Canadian Immigration and Refugee Protection Act (2001). available online at <http://www.cic.gc.ca/english/pdf/pub/C-11-4.pdf> (visited 30 April 2004); Art. 10(2) of the Danish Aliens Consolidation Act, available online at [http://www.inm.dk/imagesUpload/dokument/Aliens%20\(Consolidation\)%20Act%20685.pdf](http://www.inm.dk/imagesUpload/dokument/Aliens%20(Consolidation)%20Act%20685.pdf) (visited 30 April 2004); Section 29(a)(3) of the Philippine Immigration Act, available online at <http://www.chanrobles.com/commonwealthactno613.htm> (visited 30 April 2004).

Thirdly, many countries require a certain standard of ‘good moral character’ as a condition of the grant of nationality.³⁷ However, this requirement frequently relates to the lack of criminal record during a certain number of years preceding naturalization, and is often limited to behaviour within that state, or to the perceived threat that the person poses to that state.³⁸ Hence, this requirement is less helpful in preventing the type of abuse dealt with in this study.

Fourthly, provision is often made for denaturalization if the nationality was acquired fraudulently, ‘particularly through the statement of false data, or through [54] misleading the authorities by omitting data or facts’.³⁹ Fraudulent purpose (to avoid extradition and, hence, prosecution) or the concealment of the fact that the person might be wanted for prosecution of a serious crime abroad has been considered sufficient to qualify under this title.⁴⁰ Unfortunately, such loss of acquired citizenship is often subject to further conditions (*i.e.* residence outside of the country, lapse of right to denaturalize after a certain period of time, etc.),⁴¹ limiting the utility of such provisions in the present context.

More pertinently, certain countries deny naturalization if the person has committed (serious) crimes prior to naturalization.⁴² Alternatively, the acquired nationality may be revoked if the person had concealed such prior criminal acts from the immigration authorities.⁴³ Denaturalization, in turn, would prevent any advantage from being gained from the operation of the principle of non-extradition of nationals. Unfortunately, this legislative solution is seldom resorted to at present, even with regard to serious international crimes. Nevertheless, it is encouraging to note that this option received increasing attention in recent years, although mainly in the context of war crimes.⁴⁴ It will hopefully be resorted to more

³⁷ *E.g.* Law (2001: 82) on Swedish Citizenship, Art. 11(5), available online at <http://www.immi.se/lagar/200182.htm> (in Swedish) (visited 30 April 2004); Art. 26(2) of the Citizenship Law of Georgia, available online at <http://www.legislationline.org/view.php?document=58976> (visited 30 April 2004); Section 316(a) of the US Immigration and Nationality Act (8 USC 1427(a)).

³⁸ *E.g.* Art. 4(1)(b) of 1993 Act on Hungarian Citizenship, available online at <http://www.complex.hu/external.php?url=3> (in Hungarian) (visited 30 April 2004); Art. 8(3)(c) of the Citizenship Law of Cyprus, available online at <http://www.legislationline.org/view.php?document=54570> (visited 30 April 2004); Art. 9(1)(a) of the Dutch Nationality Act, available online at <http://www.wetten.overheid.nl> (in Dutch) (visited 30 April 2004); Sections 19 and 20 of the Canadian Citizenship Act, available online at <http://laws.justice.gc.ca/en/C-29/> (visited 30 April 2004).

³⁹ *E.g.* Art. 9(1) of the Act on Hungarian Citizenship, *supra* note 38; Art. 13 of the Law on Albanian Citizenship, available online at <http://www.legislationline.org/view.php?document=59000> (visited 30 April 2004); Art. 14 of the Dutch Nationality Act, *supra* note 38; Art. 8(2) of the Citizenship Law of Cyprus, *supra* note 38; Art. 21(1)(c). Belize, available at <http://www.cicad.oas.org/OID/TDG/Belize/NationalityAct.pdf> (visited 30 April 2004); Section 10 of the Canadian Citizenship Act, *supra* note 38.

⁴⁰ See, *e.g.* *Ryan v United States*, *supra* note 31; *US v Demjanjuk*, 518 F. Supp. 1362 (D.C. Ohio, 1981), *Fedorenko v US*, 449 United States Reports 490, 101 Supreme Court 737 (1981). See also ‘Canada’s War Crimes’ Program’, 3rd Annual Report, 1999-2000, at 15-16, available online at <http://www.cic.gc.ca/english/pdf/pub/war2000e.pdf> on similar Canadian cases (visited 30 April 2004).

⁴¹ *E.g.* Art. 9(1) of the 1993 Act on Hungarian Citizenship, *supra* note 38; Art. 14 of the Dutch Nationality Act, *supra* note 38.

⁴² *E.g.* Art. 10(3)(b) of the Belizean Nationality Act, *supra* note 39.

⁴³ *E.g.* Art. 14 of the Dutch Nationality Act, *supra* note 38; Section 21(1)(ii) of the Australian Citizenship Act 1948, available online at <http://www.austlii.edu.au/au/legis/cth/consol-act/aca1948254/> (visited 30 April 2004).

⁴⁴ Notably, the Simon Wiesenthal Center proposed such a solution with regard to persons like Bikker who were protected by the German nationality that Hitler granted them in 1943. See ‘Wiesenthal Center Urges Germany to Revoke Citizenship Granted by Adolf Hitler in 1943 to Foreign Waffen-SS Veterans’, Press Release, 8 October 2003, available online at <http://www.wiesenthal.com/social/press/pr-item.cfm?itemID=8300> (visited 30 April 2004). Moreover, the USA and the UK have discussed further legislative reform to this effect. See the Anti-Atrocity Alien Deportation Act, available online at <http://thomas.loc.gov/cgi-bin/query/z?c106:S.1375> (visited 30 April 2004); ‘Straw Targets Nazi Suspects’, *BBC*, 15 January 2001, available online at <http://news.bbc.co.uk/1/hi/uk/1117814.stm> (visited 30 April 2004). It should be noted that while the USA, UK and Canada do not guarantee the non-extradition of nationals in their domestic law, it is not uncommon that they

frequently and widely. At the moment, the solutions discussed in the preceding paragraphs which – directly or indirectly – restrict the nationality exception are of limited utility. They offer few readily available concrete and effective safeguards which can be applied more widely and comprehensively.

[55] Extradition is, however, not the sole means of bringing fugitive criminal nationals to justice. Domestic prosecution may offer an effective alternative. Notably:

... [m]any of the legal systems that prohibit the extradition of nationals also have legislation that enables them to exercise jurisdiction over their nationals for crimes committed anywhere in the world.

This legislative practice provides further support for the view that it was never the objective of the prohibition on the extradition of nationals to guarantee impunity for these egregious crimes, and thus the provision should not be interpreted to have such an effect.⁴⁵

It is, however, widely recognized that a state is under no general obligation under international law to prosecute a person for common crimes where his extradition is refused.⁴⁶ On the other hand, it is clear that such a duty may be established in treaty regimes. In fact, a significant number of multilateral conventions aiming at the suppression of certain international crimes establish an *aut dedere aut judicare* obligation.⁴⁷ Commonly, the relevant provisions make it crystal clear that if extradition is (for whatever reason) refused, then domestic prosecution must take place under the legislation adopted in accordance with the convention.⁴⁸

However, in some cases, the formulation is not unambiguous. Under the 1949 Geneva Conventions,⁴⁹ the parties have indeed accepted the *aut dedere aut judicare* [56] obligation

refuse extradition of nationals under an extradition treaty. See, e.g. Ryan, *supra* note 21, extradition treaties listed *supra* notes 16-20.

⁴⁵ H. Duffy. 'National Constitutional Compatibility and the International Criminal Court', 11 *Duke Journal of International Law* (2001) 5- 38, at 25-26. See also Whiteman, *supra* note 12, at 876; Shearer, *supra* note 12, at 106-107 and 114-115. See, however, Deen-Racsmany (*supra* note 11) on the limits of the utility of active personality jurisdiction in the case of naturalized persons.

⁴⁶ See, e.g. M.Ch. Bassiouni and E.M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht: Nijhoff, 1995), 23.

⁴⁷ E.g. the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 UNTS 5, Art. 7) and the Convention on the Safety of United Nations and Associated Personnel (2051 UNTS 363, Arts 14-15). Most treaties prohibiting terrorist offences also contain this obligation. In contrast, other international criminal law instruments, such as the Convention on the Prevention and Punishment of the Crime of Genocide (78 UNTS 277, see Arts VI and VII), the Convention for the Protection of Cultural Property in the Event of Armed Conflict (249 UNTS 240) and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (UN doc. A/RES/54/263), do not contain such a(n unconditional) rule. For an extensive review of international criminal law conventions from the perspective of the *aut dedere aut judicare* principle, see Bassiouni and Wise, *supra* note 46, at 75-287.

⁴⁸ In many cases, the status of such conventional rules is strengthened by the fact that their violation can be raised in proceedings before the ICJ. See, e.g. *Lockerbie case* (Libya v United Kingdom), *supra* note 13; *Lockerbie case* (Libya v United States of America), 1992 *ICJ Rep.*, at 114, brought by Libya under Art. 14 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (974 UNTS 178). Whereas this case was initiated by the state that was claimed to be in violation of the Convention's unconditional *aut dedere aut judicare* rule (Art. 7), it indicates the existence of a possibility open to states to bring cases of claimed violations of this principle to the ICJ.

⁴⁹ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) 71 UNTS 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949) 75 UNTS 85; Convention relative to the Treatment of Prisoners of War (1949) 75 UNTS 135 and Convention relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287.

with regard to grave breaches of the relevant Convention.⁵⁰ The provision common to all four Conventions provides that:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and *in accordance with the provisions of its own legislation*, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.⁵¹

While the italicized part of the provision could be taken to indicate that domestic legislation may justify denial of extradition, the authoritative commentary of the Geneva Conventions denies the validity of such a reading:

Most national laws and international treaties on the subject preclude the extradition of accused who are nationals of the State detaining them. In such cases, [this provision] quite clearly implies that the State detaining the accused person must bring him before its own courts.⁵²

This interpretation is supported by the purpose of such provisions and the conventions themselves.

Accordingly, individuals charged with offences covered by such treaties, in principle, cannot avoid international criminal responsibility by changing nationality. Yet, by acquiring the nationality of a non-party state that refuses to extradite its nationals and continuing to reside in that state, even persons accused of crimes under such conventions could gain impunity unless an unconditional *aut dedere aut judicare* principle is established in customary international law regarding that specific conduct.

Prominent scholars of international criminal law have argued that such an obligation exists under customary international law with regard to international crimes.⁵³ With respect, the lack of coherent state practice renders such arguments [57] unconvincing.⁵⁴ In any case,

⁵⁰ Grave breaches are defined in Arts 50, 51, 130 and 147 of the Conventions (*supra* note 49), respectively. With regard to other violations, the Conventions do not establish any obligation to extradite the suspect in the absence of domestic prosecution.

⁵¹ Arts 49(2), 50(2), 129(2) and 146(2) of the respective Conventions (*supra* note 49) (emphasis added). See also Art. 88 of the First Additional Protocol relating to the Protection of Victims of International Armed Conflict (UN doc. A/32/144 (1977)).

⁵² Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. III (Geneva: International Committee of Red Cross, 1960), 623. See also *ibid.*, Vol. I (1952), 366; Vol. II (1961), 265; Vol. IV (1958), 593 for similar statements.

⁵³ See, e.g. Bassiouni and Wise, *supra* note 46, at 22-26 (it should be noted that one of the authors (Wise) disagrees with the conclusion that there exists such an obligation under customary international law. See *ibid.*, at xiv. 25 and 68); Bassiouni, *supra* note 12, at 35-37; J. Paust, 'Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals', 11 *Houston Journal of International Law* (1989), at 337. At any rate, there are convincing arguments in favour of the view that due to the widespread ratification of the Geneva Conventions, (most of) their provisions have become customary international law: hence, the *aut dedere aut judicare* obligation could arguably apply even to non-State Parties, as a matter of customary international law. This conclusion is supported by the near universal acceptance of the Conventions (192 states are parties to the Conventions: see <http://www.icrc.org/ihl.nsf/NORM?OpenView> (visited 30 April 2004)). See also Partial Award, Prisoners of War, Eritrea's Claim 17, Part III, para. 41, available online at <http://www.pca-cpa.org/ENGLISH/RPC/Eritrea-Ethiopia%20Claims%20Commission> (visited 30 April 2004).). *Sed contra* Bassiouni and Wise, *ibid.*, at 44 for a more sceptical view.

⁵⁴ See, e.g. K.C. Randall, 'Universal Jurisdiction under International Law'. 66 *Texas Law Review* (1988) 785-841, at 832-834; G. Gilbert, *Transnational Fugitive Offenders in International Law* (Hague: Nijhoff, 1998), 322; M. Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes', 59 *Law & Contemporary Problems* (1996) 41-61, at 55 and 59; C. van den Wijngaert, 'War Crimes, Genocide and Crimes Against Humanity - Are States Taking National Prosecutions Seriously?', in M.Ch. Bassiouni (ed.), *International Criminal Law: Enforcement*, Vol. 3 (2nd edn, Ardsley, NY: Transnational, 1999) 227-239, at 229-230. It is sometimes claimed that a strong *opinio juris* shared by the international community is sufficient to establish the existence of an obligation, even where it is not unequivocally supported by state practice (*Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v USA), Merits. 1986 *ICJ*

considering the amount of deviation from the proposed customary *aut dedere aut judicare* rule, even if such a duty existed, it would be difficult to consider it a *jus cogens* norm, hence non-derogable. On the other hand, trends which may result in such a rule are observable, and it is possible that they will crystallize into a rule of customary international law in the near future, possibly of a *jus cogens* nature. Until then, however, an obligation to extradite or prosecute exists only between States Parties to conventions explicitly stipulating it, and may be subject to exceptions.

In many cases, no treaty providing for an unconditional obligation to try the person whose extradition is rejected will apply. However, conventions criminalizing certain acts are not the sole source of such an obligation. Most extradition treaties require that if extradition is refused based on the nationality of the offender, then the case should be submitted to the authorities of the requested state for the purposes of prosecution.⁵⁵

However, the obligation to prosecute laid down in extradition treaties is frequently not an absolute one. Moreover, the duty is often limited to the submission of the case to the local authorities upon request of the state that has sought the extradition and/or is at the discretion of the requested state.⁵⁶ Accordingly, in many cases, prosecution will not take place for reasons of domestic law or policy of the latter. Consequently, [58] offenders could – in cases of successful acquisition of a foreign nationality in a state which does not extradite its nationals and bases such decisions on nationality at the time of extradition – successfully avoid punishment. The lack of binding treaty obligations to prosecute may increase chances of impunity in such instances.⁵⁷

It is nonetheless encouraging to note that continental criminal justice systems (most of which do not extradite their own nationals) traditionally rely on the principle of compulsory prosecution. Under this rule, the public prosecutor is obliged (within certain limits) to initiate investigations and prosecutions if there is a sufficient basis on which to believe that a crime has been committed.⁵⁸ While the scope of the principle is increasingly subjected to limitations

Rep. 14 at 101-102, paras 191-192 and at 106-109, paras 202-208); F.L. Kirgis, Jr, 'Custom on A Sliding Scale'. 81 *AJIL* (1987) 147-151. For a criticism of too ready an application of this approach to identifying custom in international criminal law, see R. Kolb, 'Selected Problems in the Theory of Customary International Law', 50 *Netherlands International Law Review* (2003) 119-150, at 124-125. It is unclear how much stronger and more uniform *opinio juris* is required to establish the existence of a customary rule in the face of extensive contrary state practice than in the absence thereof. However, it is submitted that even the existence of a sufficiently widely held and uniform belief concerning the existence of an 'extradite or prosecute' obligation to justify such a rule, irrespective of its factual violations, has not been conclusively demonstrated.

⁵⁵ See *supra* note 45 on the coincidence of the nationality exception to extradition and the active personality principle of jurisdiction. Universal and passive personality jurisdiction may provide further bases of jurisdiction over extraterritorial international crimes. On these principles, see, e.g. A. Cassese, *International Criminal Law* (New York: Oxford University Press, 2003), 282-301.

⁵⁶ See, e.g. 1433 *UNTS* 48 (Spain-UK), Art. 7(2); 1413 *UNTS* 228 (Finland-Canada), Art. 3(3); European Convention on Extradition, Art. 6(2), *supra* note 7.

⁵⁷ It is, however, conceivable that in the new state of nationality, the act in question (possibly even an international crime) was not yet criminalized at the time of its commission. Accordingly, the operation of the *nullum crimen sine lege* principle and the frequent requirement of double criminality as a condition of extradition might lead to the refusal of extradition even of non-nationals.

⁵⁸ The principle (often mistakenly referred to – by literal translation from the German *Legalitätsprinzip* – as the principle of legality) is the opposite of the principle of discretion known in common-law jurisdictions. Its perhaps best known example is codified in Section 152(2) of the German Code of Criminal Procedure (StPO): '2) Except as otherwise provided by law, the public prosecution office shall be obliged to take action in the case of all criminal offences which may be prosecuted, provided there are sufficient factual indications.' (available online at <http://www.iuscomp.org/gla/statutes/StPO.htm>152 (visited 30 April 2004). See also *ibid.*, Art. 160; T. Weigend, 'Prosecution: Comparative Aspects', in J. Drassler *et al.* (eds), *Encyclopedia of Crime and Justice*, Vol. 3 (2nd edn, New York: MacMillan, 2002) 1232-1242, at 1237-1238.

as criminal justice systems become overloaded due to the operation of the rule,⁵⁹ it still provides substantial guarantees of prosecution.

In cases where the requested state is able and willing to try the accused, prosecution could be facilitated by the transfer of files, exhibits and other relevant information.⁶⁰ Regrettably, requesting states are, in practice, often reluctant to provide such assistance. In fact, the Dutch resistance to transfer evidence to Germany arguably contributed to the German failure to convict Bikker in the 1957 proceedings.⁶¹ However, the Dutch reluctance to supply information was not merely rooted in pride. The exceptionally broad version of the *ne bis in idem* principle incorporated in Dutch law may have prevented authorities from providing assistance.⁶²

Whereas the *ne bis in idem* principle may prevent the prosecution of convicted [59] fugitive criminals in a few cases,⁶³ the increasing realization in the world of the necessity for the recognition and enforcement of foreign sentences may provide an effective alternative.⁶⁴

In conclusion, even though each option has its drawbacks and weaknesses, it nonetheless appears that the successful avoidance of prosecution and punishment through fraudulent naturalization will be the exception rather than the rule, at least with regard to treaty crimes. While it might be easier to avoid trial through naturalization for crimes not covered by widely ratified treaties containing the *aut dedere aut judicare* rule, successful abuse will be rather infrequent due, *inter alia*, to the strict conditions to which acquisition of nationality is commonly subjected. Other options, including domestic prosecution and enforcement of sentences, will further decrease chances of impunity. Nevertheless, each of these options has its respective limitations and may be of use only in a limited number of cases. In the long term, coordinated action of the kind undertaken presently in the European Union⁶⁵ is needed to ensure that calculated *mala fide* changes of nationality do not occur and that naturalization (even *bona fide*) will not help to avoid justice.

3 CONSEQUENCES FOR THE INTERNATIONAL CRIMINAL COURT

The provisions of the ICC Statute relating to the Court's jurisdiction attribute a central role to the nationality of the accused⁶⁶ while failing to clarify the meaning of the terms 'national' or 'state of nationality'.⁶⁷ This omission may lead to potentially serious ambiguities related to

⁵⁹ *Ibid.*, at 1237-1238. Note that the Austrian exception relating to extraterritorial crimes (cited in *ibid.*, at 1237) requires that the case has been prosecuted or otherwise dealt with abroad (Art. 34 of the Austrian Code of Criminal Procedure, available online at <http://www.sbg.ac.at/ssk/docs/stpo/stpo-index.htm> (in German) (visited 30 April 2004), thus not limiting the application of the principle in this context.

⁶⁰ This possibility is stipulated in the majority of extradition treaties that provide for the nationality exception. See, e.g. 1823 UNTS 178 (Chile–Mexico), Art. 6; 1394 UNTS 4 (Thailand–Philippines), Art. 2; 1486 UNTS 108 (Greece–Lebanon), Art. 15; 1579 UNTS 217 (Spain–Canada), Art. IV; 930 UNTS 112 (France–Tunisia), Art. 23; 872 UNTS 24 (Belgium–Yugoslavia), Art. 3; 1957 European Convention on Extradition, *supra* note 7, Art. 6.

⁶¹ 'Former SS Guard's Murder Trial Collapses', *supra* note 2.

⁶² P. Baauw. 'Ne Bis in Idem', in Swart and Klip, *supra* note 29, 75-84 at 83.

⁶³ It should, however, be noted that while some states apply the principle more broadly, it is generally held to be valid within one legal system only. See, e.g. van den Wyngaert and Ongena, *supra* note 9, at 707.

⁶⁴ See, e.g. 'Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters', *Official Journal of the European Communities* C 12, 15/01/2001, at 10-22.

⁶⁵ See *ibid.*

⁶⁶ One of the three jurisdictional bases mentioned in the Statute requires the consent of the 'State of which the person accused of the crime is a national' (Art. 12(2) of the Statute of the International Criminal Court (ICCSt.). Emphasis added.)

⁶⁷ The Court's Rules of Procedure and Evidence (RPE) do not contain any specifications in this regard either, and no reference to this issue was made during the *travaux préparatoires* of the Statute or in the subsequent

changes of nationality in the context of the jurisdiction of the ICC.⁶⁸ In contrast, the provisions on securing the Court's custody over offenders⁶⁹ do not expressly relate to the nationality of the accused. Yet, the question arises of whether state cooperation may be subjected to the nationality exception.

3.1 Surrender Obligations

As the Court cannot prosecute suspects in absentia, states' cooperation in obtaining custody over the accused is of crucial importance for the operation of the ICC.⁷⁰ [60] Pertinently, the issue of extradition of nationals attracted a considerable amount of controversy during the preparatory work. The majority of the drafters believed that, due to its international character, the ICC should obtain custody over the accused through the *sui generis* approach (surrender) applied in the context of the Yugoslavia and Rwanda Tribunals⁷¹ rather than through the procedures and rules commonly relied on in state-to-state extradition. They proposed to remove any ambiguity related to the applicability of domestic obstacles to extradition by using the term 'surrender' rather than 'extradition', suggesting the applicability of a distinct legal regime to such transfer, hence the irrelevance of the nationality exception. This solution was eventually adopted in spite of the objections of some delegations⁷¹ that feared that ratifying the Statute would thus impose obligations (*i.e.* to hand over their nationals to the ICC) on them which are inconsistent with their domestic rules, often of a constitutional rank. At any rate, Article 102 clearly distinguishes surrender from extradition.⁷²

A second debate on non-extradition (or non-surrender) of nationals took place in the context of the provision on the limits of States Parties' obligation to cooperate with the Court. Here, the central question was whether the prohibition of extradition of nationals under domestic legislation could justify an exception to the general obligation to cooperate with the Court. Amidst strong reservations by a few delegations, the reference to the right to refuse handing over one's own nationals was finally removed from the text, at the last minute, on 15 July 1998.⁷³ One of the arguments raised in favour of deleting this basis for non-cooperation was the consideration that constitutional provisions on the non-extradition of nationals could be interpreted as not applying to surrender to the ICC (as opposed to extradition to states).⁷⁴

Admittedly, some constitutions contain obligations which are difficult to limit to extradition. The Constitution of Costa Rica, for instance, posits that 'no Costa Rican may be compelled to abandon the national territory'.⁷⁵ Similarly, Canada's Charter of Rights and Freedoms recognizes, *inter alia*, the right of its citizens to remain in Canada.⁷⁶ Such

work of the Preparatory Commission for the International Criminal Court. International criminal law is similarly unclear on this point.

⁶⁸ See Deen-Racsmány, *supra* note 11.

⁶⁹ See Part 9 (International Cooperation and Judicial Assistance) ICCSt.

⁷⁰ Art. 63(1) ICCSt.

⁷¹ See P. Mochochoko, 'International Cooperation and Judicial Assistance', in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute; Issues, Negotiations, Results* (The Hague: Kluwer, 1999) 305-317, at 309.

⁷² Art. 102 ICCSt.

⁷³ The ICC Statute was adopted by the Rome Conference two days later, on 17 July 1998. On further details of the *travaux préparatoires* related to this provision, see Mochochoko, *supra* note 72, at 311-312. See also note 84, *infra*, on Art. 89 ICCSt.

⁷⁴ H.-P. Kaul and C. Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises', *2 Yearbook of International Humanitarian Law* (1999) 143-175, at 167-168.

⁷⁵ Art. 32 of the Constitution of Costa Rica. It should be noted that despite this provision, Costa Rica has ratified the Rome Statute without a constitutional amendment. See Duffy, *supra* note 45, at 21.

⁷⁶ *Supra* note 25. Section 6(1).

provisions would, arguably, conflict even with an obligation to surrender to the ICC. However, the Ontario Court of Appeals considered the [61] infringement of this right through extradition ‘a reasonable [limit on the right to remain in Canada] demonstrably justified in a free and democratic society’.⁷⁷ Other states could follow this example.

Where such interpretation is not possible, States Parties will have to amend their conflicting domestic legislation. If they fail to do so and are, therefore, compelled to deny cooperation and surrender requests, then the Court can ‘refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council’.⁷⁸ Should a dispute arise between States Parties concerning a violation of the obligation to cooperate with the Court, the Assembly of States Parties (ASP) could recommend referral of the matter to the ICJ.⁷⁹ Under the well established rule of international law that a state may not invoke its domestic legislation as a justification for its failure to comply with its obligations under a treaty, it cannot escape international responsibility by referring to its obligations under its internal laws.⁸⁰

However, no factual conflict will arise under these provisions if states faced with similar constitutional provisions are able and willing to prosecute the accused in accordance with their primary responsibility under the ICC Statute.⁸¹

Given that many of the crimes within the Court’s jurisdiction are crimes for which international law mandates state investigation, states should be able to meet these obligations and prosecute their own nationals.

[...] [The adoption of the active personality principle in states that do not extradite their nationals] ensures that they will be able to avail themselves of the complementarity route, wherever the crime was committed.⁸²

In any case, as is clear from Articles 86, 89⁸³ and 102, the ICC Statute does not permit reliance by States Parties on substantive constitutional rules on the non-extradition of nationals as an excuse for a failure to cooperate with the Court’s request for surrender. Accordingly, in order to enable compliance with the obligation to surrender the suspect when they are unable to prosecute domestically, States [62] Parties would have to amend their constitution or other legislation prohibiting the extradition/surrender of their nationals or interpret the relevant provisions as inapplicable to surrender to the ICC.⁸⁴ In that case, no problems related to changes of nationality of the accused whose transfer has been requested should arise in this context.

⁷⁷ *Rauca case, supra* note 30, at 298. See also M. Plachta, ‘(Non)- Extradition of Nationals: A Never-ending Story?’, 13 *Emory International Law Review* (1999) 77-159, at 110-111.

⁷⁸ Art. 87(7) ICCSt. See also Art. 112(2)(f) on the competence of the ASP to discuss such matters and C. Kreß and K. Prost, ‘Article 87’, in Triffterer, *supra* note 12, 1055-1068, at 1065-1068 on possible consequences of such referrals.

⁷⁹ Art. 119(2) ICCSt.

⁸⁰ Vienna Convention on the Law of Treaties. 1155 *UNTS* 331, Art. 27. See also Art. 3 of the ‘Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts’, adopted by the International Law Commission at its 53rd session (2001). See also ‘Text of Draft Articles with Commentaries Thereto’, Commentary to Art. 3, at 74-80, available online at <http://www.un.org/law/ilc/texts/State-responsibility/responsibilityfra.htm> (visited 30 April 2004); *Polish Nationals in Danzig*, 1931 Permanent Court of International Justice, Series A/B, No. 44, at 24.

⁸¹ The ICC’s jurisdiction is based on the principle of complementarity, in other words, the primacy of national jurisdiction. See preambular para. 10 and Arts 1, 17 and 18 ICCSt.

⁸² Duffy, *supra* note 45, at 25-26.

⁸³ Significantly, this provision refers merely to the applicability of domestic extradition procedures, failing to approve of substantive rules. See Swart, *supra* note 71, at 1680.

⁸⁴ On these options, see Duffy and Huston, *supra* note 25, at 44-46; Kaul and Kreß, *supra* note 75, at 160 (including references in note 83).

In contrast, non-party states are clearly under no obligation to surrender their nationals (or non-nationals, for that matter) to the ICC.⁸⁵ Accordingly, they may deny the Court's request to hand over persons without legal consequences. Yet, offenders may considerably improve their chances of impunity by obtaining the nationality of a state, not party to the Statute, which does not extradite/surrender its (naturalized) nationals or prosecute them, and continuing to reside on its territory.

It is, however, foreseen in the ICC Statute that the Court could expect cooperation from non-party states based on 'an *ad hoc* agreement, an agreement with such State or any other appropriate basis'.⁸⁶ Arguably, unless stated otherwise in such an agreement, the exception regarding nationals would be automatically waived through the acceptance of a general obligation to cooperate or through, for instance, a Security Council (SC) resolution to this effect.⁸⁷ The violation of such self-assumed or SC-imposed obligations may be reported to the ASP or to the SC.⁸⁸

In sum, in most cases involving cooperation by States Parties, no legal controversy would arise before the Court out of the acquisition of a new nationality by a suspect. Should a State Party fail to surrender the accused national (former or current), it would be violating its international obligations. On the other hand, as non-party states may refuse to surrender nationals as well as non-nationals, changes of nationality would not become relevant in this context either, save in the exceptional case of naturalization in a non-party state that does not extradite its (naturalized) nationals and is unable or unwilling to prosecute them.

3.2 Article 98 and Agreements Covered by It

While the impact of the role of naturalization on state cooperation appears to have been minimized by the drafters of the Statute, unforeseen difficulties are on the rise. Article 98 of the Statute has led to a great deal of controversy during the past years. It provides, *inter alia*, that:

[63] The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which consent of the sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for surrender.⁸⁹

Status of Forces Agreements (SOFAs) are frequently cited as relevant to this provision, as they commonly provide for exclusive or primary jurisdiction by the sending state over its forces, at least with regard to certain crimes.⁹⁰ It is widely acknowledged that,

⁸⁵ See, e.g. Swart, *supra* note 71, at 1686-1688; A. Ciampi, 'The Obligation to Cooperate', in Cassese et al., *supra* note 9, at 1607-1638. A possible limitation of their freedom may, however, be imposed by the *aut dedere aut judicare* rule, if applicable.

⁸⁶ Art. 87(5) ICCSt.

⁸⁷ A SC resolution, adopted under Chapter VII of the UN Charter, could clearly fall under 'any other appropriate basis' (see, e.g. Ciampi, *supra* note 86, at 1611). Whereas such resolutions are binding on UN members and could be very effective in increasing state cooperation, they require not only the agreement of the five permanent members of the SC (including the USA), but also a determination that the situation constitutes a threat to the peace, justifying such measures. The fulfilment of this criterion is very unlikely for individual cases.

⁸⁸ On this matter, see Kreß and Prost, *supra* note 79, at 1062-1064.

⁸⁹ Art. 98(2) ICCSt.

⁹⁰ See, e.g. Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, 1951, available online at <http://www.nato.int/docu/basicxt/b510619a.htm> (visited 30 April 2004); UN Model Status of Forces Agreement, UN doc. A/45/594, 1990. On the difference between SOFAs and extradition treaties, see Bassiouni, *supra* note 12, at 95-96. It should, however, be noted that some extradition treaties limit

under such provisions, the host state (*i.e.* the state on whose territory the force is stationed) is not only prevented from exercising jurisdiction itself. It similarly lacks the authority, without the consent of the sending state, to extradite or surrender such persons for prosecution in a third state, possibly even to an international court or tribunal.⁹¹ However, such treaties frequently refer to ‘members of the force’ and ‘sending state’, rather than ‘nationals’ and ‘state of nationality’, rendering the concept of nationality irrelevant.

Extradition treaties are also covered by Article 98 inasmuch as they often deal specifically with re-extradition of the accused to a third state.⁹² In such cases, the grant of a request is conditional upon the consent (or lack of protest) of the state that originally agreed to extradition. The scope of such re-extradition rules is not limited to nationals of the first requested state: hence, changes of nationality would not lead to problems under those provisions.⁹³

[64] In addition, extradition treaties frequently establish a possibility for temporarily surrendering persons serving prison sentences in the requested state for trial in the requesting state, on condition of return.⁹⁴ In such cases, re-extradition is generally not permitted unless consent has been obtained from the state which initially had custody over the person. However, as this possibility is not limited to nationals, changes of nationality of the accused cannot lead to controversy in this context either.

Similarly, where the extradition of nationals is not permitted or may be refused, arrangements are often envisaged for ensuring trial by granting ‘temporary extradition of the person to stand trial in the requesting country on condition that, following trial and sentence, the person is returned to the requested country to serve his or her sentence’.⁹⁵ In other cases where extradition of nationals may not be refused, it may be made ‘subject to the condition that the person, after being heard, is returned to the [requested] State to serve the custodial sentence or detention order passed against him in the issuing [State]’.⁹⁶ Again, re-extradition would require prior consent from the sending state. Irrespective of the question of whether surrender to international judicial bodies could qualify as re-extradition in this sense, the nationality of the accused (and changes thereof) become irrelevant after the initial transfer.

the power of the requested state to extradite (or grant it a discretion not to hand over) ‘a fugitive criminal who is a member of the armed forces of a third state stationed on [its] territory’ (385 *UNTS* 40 (UK-FRG), Art. IV).

⁹¹ *Sed contra*, D. Fleck, ‘Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?’, 1 *Journal of International Criminal Justice (JICJ)* (2003) 651-670, at 657 (denying that the NATO SOFA, in particular, and similar agreements are covered by Art. 98(2)); J.J. Paust, ‘The Reach of ICC Jurisdiction Over Non-Signatory Nationals’, 33 *Vanderbilt Journal of Transnational Law* (2000) 1-15 (denying that any existing agreements would be covered by Art. 98(2)).

⁹² See, e.g. J. Crawford, P. Sands and R. Wilde. ‘In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought By the United States under Article 98(2) of the Statute’, Joint Opinion, available online at <http://www.lchr.org/international-justice/Art98-061403.pdf>, paras 40-43; K. Prost and A. Schlunk, ‘Article 98’, in Triffterer, *supra* note 12.1131-1133, at 1133; S. Wirth, ‘Immunities, Related Problems, and Article 98 of the Rome Statute’, 12 *Criminal Law Forum* (2001) 429-458, at 455; D. Akande, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’. 1 *JICJ* 618-650, at 645.

⁹³ In contrast, certain extradition treaties subject the extradition of nationals of third states to the consent of the state of nationality of the accused. Alternatively, the state of nationality may be given an opportunity by the parties to prosecute the suspect itself. See Whiteman, *supra* note 12. at 884; H.F. van Panhuys, *The Role of Nationality in International Law: An Outline* (Leiden: Sijthoff, 1959), 136. In this context, the change of nationality of the accused may become of significance. However, as such provisions regulate extradition solely as between the treaty partners, they are of no relevance for surrender to the ICC.

⁹⁴ See, e.g. European Convention on Extradition, *supra* note 7. Art. 19; 448 *UNTS* 184 (Israel–Austria), Art. 15; 930 *UNTS* 374 (France–Romania), Art. 32; 1182 *UNTS* (Spain–Mexico), Art. 22; 1764 *UNTS* 86 (Spain–Peru), Art. 19; 1981 *UNTS* 324 (Mexico–France); 1904 *UNTS* 261 (Brazil–Portugal); 1945 *UNTS* 82 (Australia–Brazil), Art. 13. See also UN Model Treaty on Extradition, (UN doc. A/45/49 (1990). Art. 12(2)).

⁹⁵ London Scheme for Extradition within the Commonwealth. Art. 16(2)(b), *supra* note 18.

⁹⁶ European Arrest Warrant, Art. 5(3), *supra* note 35.

The applicability of the provision and whether it is subject to the condition of return would be determined, at the latest, at the moment of the extradition decision. Subsequent changes of nationality are therefore immaterial regarding the operation of this rule, with the consequence that naturalization would be irrelevant from the perspective of re-surrender to the ICC.

Albeit seldom mentioned in commentaries on Article 98, mutual assistance agreements may constitute another type of treaties covered by the provision.⁹⁷ These instruments generally address the temporary transfer of persons, in the custody of the requested state, to the requesting state, in order to testify there.⁹⁸ The provisions do not distinguish between nationals and non-nationals. Accordingly, the nationality of the individual concerned and changes thereof are unlikely to become relevant in this context.

Changes of nationality may, however, induce legal disputes in the context of the bilateral agreements (Article 98 or bilateral immunity agreements (BIAs)) that the United States seeks to conclude with other states.⁹⁹ In the version originally proposed by the United States, the contracting states' obligation not to extradite or surrender persons to the ICC extends to nationals of the other party and is reciprocal. In contrast, [65] in the text developed for States Parties to the Rome Statute after initial discussions of the controversial legality of such provisions, the obligation not to extradite or surrender US citizens is unilaterally assumed by one state, whereas the United States does not renounce its right to extradite or surrender to the ICC nationals of the other contracting party.¹⁰⁰ As these agreements prohibit the surrender of 'nationals' to the ICC, they may give rise to controversies in the context of surrender of naturalized persons.¹⁰¹

While the United States has displayed a less than constructive attitude to the ICC in the past years, it is unlikely that it would go so far as to fraudulently naturalize persons accused of core crimes in its attempt to boycott the Court. Assuming, however, for the sake of argument, that US authorities (or, in the case of those states which signed and ratified a reciprocal treaty, the authorities of the other contracting state) opt for a fraudulent or bad-faith grant of nationality to prevent the person's prosecution, this might not be the end of the story for the ICC.

First, the legitimacy – and, hence, validity – of such treaties has attracted a great deal of criticism. It is often claimed that they are inconsistent with the object and purpose of the Rome Statute; hence, their conclusion by ICC State Parties is illegal and they are not covered by Article 98. Moreover, it is commonly argued that the purpose of Article 98 was to cover agreements existing at the time of the entry into force of the Statute, or possibly even new agreements modelled on such existing treaties (*e.g.* SOFAs concluded with new NATO members could be invoked under this provision, in spite of their not being in force on the day on which the relevant states became parties to the Statute). In contrast, it has been submitted that as the agreements proposed by the United States are completely novel and not foreseen by the drafters, the teleological interpretation of the provision denies the validity of the US contention that the BIAs fall under Article 98.¹⁰² As it will be up to the ICC to decide on the

⁹⁷ This may be implied by analogy from arguments presented in the studies cited in *supra* note 93.

⁹⁸ See, *e.g.* 2026 *UNTS* 506 (Canada–Hungary), Art. 10; 1735 *UNTS* 338 (Australia–Argentina), Art. 11.

⁹⁹ See 'List of Signatures/Ratifications of Bilateral Immunity Agreements, by Region' (as of 7 April 2004), available online at <http://www.iccnw.org/documents/USandICC/BIAs.html> (visited 30 April 2004).

¹⁰⁰ See Crawford et al., *supra* note 93, at 4-5.

¹⁰¹ Swart correctly observes, however, that '[i]n this respect, it may matter whether or not the third State whose rights would be infringed by surrender of a person to the Court is itself a party to the Statute', *supra* note 71, at 1681.

¹⁰² For an overview and legal analysis of such criticisms see, *e.g.* Crawford et al., *supra* note 93; Amnesty International, 'US Efforts to Obtain Impunity for Genocide, Crimes against Humanity and War Crime'. AI Index IOR 40/025/2002 (August 2002); 'ICC-Supportive Interpretation of and Commentary on the EU General Affairs

validity and pertinence of such agreements for the purposes of deciding whether it can proceed with requests for extradition,¹⁰³ there is a considerable chance that BIAs will be disregarded, at least to the extent that they deal with nationals rather than persons ‘sent’ by a state.

Moreover, should the Court accept the validity of at least some of those agreements, [66] it would still not need to recognize the relevance of BIAs in the case of fraudulently acquired nationality. The Court could refer to the fact that international law limits to the freedom of states to determine who their nationals are, one such limit being that the grant of nationality should be *bona fide* and based on a factual connection. Accordingly, should the Court find that the acquisition or grant of nationality violated norms of international law, it may consider that the requested state is not obliged to reject the surrender of the suspect under the terms of the Agreement and it may proceed with a request for his or her surrender.

In conclusion, while BIAs are bound to lead to legal disputes, it is unlikely that the change of nationality would cause any serious impediments to surrender to the ICC under Article 98 of its Statute.

4 A RE-EVALUATION

This study has identified and evaluated problems caused by changes of nationality in the contexts of state-to-state extradition and surrender of suspects to the ICC. It was observed that the utility of naturalization for avoiding punishment due to the operation of the non-extradition of nationals is not as high as might be expected, given the tone of newspaper reports recounting recent incidents. Considering that the change of nationality is, in general, a rather cumbersome process, cases of a calculated avoidance of punishment this way will be rare.

Yet, where naturalization offers a chance of circumventing punishment, it will be attractive to offenders, encouraging fraud. It may, moreover, contribute to impunity, even in *bona fide* cases. However, this effect can be limited by various forms of legislation, including a limited application of the nationality exception, threat of denaturalization in case of fraud or the prior commission of serious crimes, or by domestic prosecution or enforcement of a sentence already handed down.

The impact of non-extradition of nationals alone and in combination with naturalization will, presumably, be even less severe for international crimes covered by the ICC Statute. The principle of complementarity is often seen as an incentive for states (arguably, not only those parties to the Statute) to prosecute domestically. Should they fail to do so, the Court may request States Parties to surrender the suspect, unless this would conflict with existing obligations of the state under international law. Such requests are binding, even with regard to the states’ own nationals. However, non-party states are under no obligation to cooperate with the Court, unless voluntarily assumed or imposed by the UNSC. Accordingly, the offender may improve his chances of escaping punishment by obtaining the nationality of a state not party to the Statute that is prevented, by domestic legislation, from extraditing naturalized nationals and continues to reside on its territory. Article 98 agreements may provide further incentives for fraudulent naturalization, even though the effectiveness of this legal construction is presently uncertain.

Council Conclusions on the International Criminal Court of 30 September 2002’ (24 October 2002), both available online at <http://www.iccnw.org/documents/USandICC/BIA.html> (visited 30 April 2004).

¹⁰³ Arts 17-19 and 119 ICCSt. For this determination, the Court may refer to its Statute and other basic documents, applicable treaties, customary international law and general principles of law, as well as the relevant national laws (Art. 21 ICCSt.).

It is a positive sign that increased cooperation and trust between states in the fields of investigation and prosecution of crimes appears to lead to decreased reliance on the [67] nationality exception.¹⁰⁴ Through its indirect impact on the harmonization of national legislation, the ICC's existence may accelerate the process of confidence building. Moreover, it is expected to increase state-to-state cooperation as a result of the wish of states to prosecute criminals domestically. These factors, coupled with other developments described above, limiting the nationality exception, or the *aut dedere aut judicare* principle, could make a significant contribution towards eradicating any negative impact of changes of nationality on criminal justice, for common crimes as well as international ones.

In order to fight the problem of impunity in a more effective manner, it is nonetheless important that states consider the adoption of a more comprehensive strategy to deal with these problems. Such an approach could indirectly enhance worldwide justice on a broader scale, even in cases not aggravated by naturalization. Unfortunately, the prospects that large-scale coordinated efforts, such as those being undertaken in Europe to improve the mutual assistance and recognition regime, will be reproduced in other parts of the world are poor at the moment, due, *inter alia*, to the lack of trust by states in each other's legal systems. However, the ICC, together with globalization of daily life and crime, may have the positive side effect of raising awareness of the need to agree on a common framework to fight crime more efficiently, through a combined effort, rather than in the presently prevalent piecemeal fashion.

ⁱ On this new approach, see, *e.g.* B. Swart, 'Arrest and Surrender', in Cassese et al., *supra* note 9, 1639-1703, at 1664-1668.

¹⁰⁴ Duffy, *supra* note 45 at 26; Plachta, *supra* note 78 at 99-109.