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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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## **Modernizing the Nationality Exception: Is the Non-Extradition of Residents a Better Rule?**

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### ABSTRACT

The equation of residents with nationals as recently envisaged under the European Arrest Warrant is – at least on paper – no novelty in international extradition. In addition, its predicted positive influence on the chances of rehabilitation of offenders provides strong moral-theoretical support for further modernizing the non-extradition of nationals in this manner. Yet, before this solution can be followed – explicitly or by implication – in other contexts, it must be considered whether international law permits states to expand the nationality exception commonly provided for in extradition treaties in this manner.

The author assumes this task. She first reviews international precedents in search of a rule of customary international law on the extension of this exemption to residents. Subsequently, she identifies the norms of international law against which the limits of such a new rule must be set. She concludes with suggestions for appropriate ways to modernize the nationality exception along the lines of the rehabilitation argument.

### 1 INTRODUCTION

The fact that the requested person possesses the nationality of the requested state is one of the oldest yet most controversial exemptions from the general obligation assumed in treaties to extradite (suspected) criminals. The traditional justifications of this frequently invoked exception<sup>1</sup> are that

(1) the fugitive ought not be withdrawn from his natural judges; (2) the state owes its subjects the protection of its laws; (3) it is impossible to have complete confidence in the justice meted out by [183] a foreign state, especially with regard to a foreigner; and (4) it is disadvantageous to be tried in a foreign language, separated from friends, resources and character witnesses.<sup>2</sup>

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<sup>1</sup> The term ‘the nationality exception’ which is used in the present article – consistently with the terminology of a number of authoritative studies on extradition – as a synonym for the ‘non-extradition of nationals’ should not be read to imply the existence of a general duty to extradite under international law. It merely signifies the exclusion of nationals from the scope of a voluntarily assumed obligation (e.g. under an extradition treaty) to hand over (suspected) criminals found on one’s territory. Cf. *infra* notes 15–16 and accompanying text.

<sup>2</sup> S. A. Williams, ‘Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extradition’, 62 *International Review of Penal Law* (1991) pp. 260–261, summarizing the arguments cited – and rejected – by the 1878 British Royal Commission chaired by Lord Cockburn. Cf. I. A. Shearer, *Extradition in*

Following the shift in criminal law theory from deterrence and punishment towards rehabilitation as the main purpose of criminal law, critics of the non-extradition of nationals advocated reformulating this exception. They argued that the offender is better prosecuted and the sentence is better served in the community into which the person must be reintegrated after having served the sentence. This will not always be the state of his nationality. Accordingly, they proposed focusing for the purposes of the exemption from extradition on a status that better reflects the interest of the relevant society in rehabilitation, namely domicile or (permanent) residence.<sup>3</sup>

The suggested rule, novel at first sight, is not unprecedented in modern extradition. Scandinavian states are claimed to have a tradition of (reserving themselves the right of) not extraditing their permanent residents.<sup>4</sup> Nordic states have indeed concluded several bilateral extradition treaties containing this exception, at least in relation to nationals of other Nordic states residing in their jurisdiction.<sup>5</sup>

**[184]** In addition, in declarations attached to the 1957 European Convention on Extradition (ECE)<sup>6</sup> they – together with a few other states – defined the term ‘nationals’ for the purposes of the application of the nationality exception extending its scope to permanent resident aliens.<sup>7</sup> The declarations raised no protests at the time.

However, in the face of later objections, the Scandinavian states had to relax their insistence on retaining this discretion in 1996, at least in the context of extradition within the European Union.<sup>8</sup> This time, the rehabilitation argument failed to ensure support for a solution similar to the one agreed upon under the ECE.

*International Law* (Manchester University Press, Manchester, 1971) pp. 118–125 for a discussion of the most commonly voiced reasons for and against the extradition of nationals.

<sup>3</sup> See e.g., H. F. van Panhuys, ‘Uitlevering van eigen onderdanen: Schijnwerpers op een oud vraagstuk’, 70 *Tijdschrift voor Strafrecht* (1961) p. 22 (Beyond arguing that residence rather than nationality should be looked at for the purposes of the rehabilitation argument, van Panhuys foresaw a regime of transfer of sentenced persons as an attractive alternative. He noted that it is not the place of prosecution that is key to rehabilitation but the place of enforcement of the sentence and that the two are separable. *Ibid.*, p. 29, 33, 35–36.); A. H. J. Swart, ‘Refusal of Extradition and the United Nations Model Treaty on Extradition’, 23 *Netherlands Yearbook of International Law* (1992) pp. 195–196; W. Duk, ‘Principles Underlying the European Convention on Extradition’, in *Legal Aspects of Extradition Among European States* (Council of Europe, Strasbourg, 1970) p. 33, submitting that ‘[t]he nationality may be taken as a starting point, but if it appears that the person claimed is really rooted in another country than that of which he is a national, the right to refuse extradition should be reserved for (or at least, extended to) that other country.’

<sup>4</sup> See e.g., Van Panhuys, *supra* note 3, p. 29 (see quotation accompanying *infra* note 108); Swart, *supra* note 3, p. 195 (noting that ‘the practice of not extraditing resident aliens is mainly limited to Scandinavian countries’).

<sup>5</sup> E.g., Australia-Norway (1459 *UNTS* 71), Article 5(2); Sweden-Israel (516 *UNTS* 16) Article 2; Denmark-USA (952 *UNTS* 37), Article 5; Finland-UK (1025 *UNTS* 177), Article 4. However, these provisions should arguably be seen as flowing from the equal treatment of all Nordic nationals in conformity with Article 2 of the Treaty of Cooperation between Denmark, Finland, Iceland, Norway and Sweden (434 *UNTS* 145; <[http://www.norden.org/avtal/helsingfors/uk/helsinki\\_agreement.pdf](http://www.norden.org/avtal/helsingfors/uk/helsinki_agreement.pdf)> (updated version), visited on 11 October 2005) rather than of concerns with rehabilitation. In contrast, it is clear that the rehabilitation argument has motivated Article 5(2) of the extradition agreement between Belgium and Norway which provides that ‘[t]he requested party may refuse to extradite persons who have had their place of normal residence in its territory for the three years preceding receipt of the request for extradition, except in the case of nationals of the requesting Party.’ (1326 *UNTS* 228). Cf. *infra* note 26 and accompanying text.

<sup>6</sup> ETS No. 24. While concluded within the Council of Europe, this instrument is open for accession also by states outside Europe.

<sup>7</sup> These declarations (see text accompanying *infra* notes 30–35) evidence an intention to facilitate rehabilitation.

<sup>8</sup> See Convention relating to extradition between the Member States of the European Union – Explanatory Report (Text approved by the Council on 26 May 1997), 1997 *Official Journal* C 191, pp. 20–21:

[the declarations attached to the European Convention on Extradition] have been found to be too far-reaching. Therefore, within the context of this Convention, Denmark, Finland and Sweden, confirm, through the declaration annexed to the Convention that, in their relations with other Member States which ensure equal treatment, they will not invoke the definition of

Yet, the EU Council Framework Decision on the European Arrest Warrant<sup>9</sup> adopted in 2002 explicitly equates residents with nationals for the purposes of the (non-)execution of a European arrest warrant (i.e. surrender). The Framework Decision provides for a conditional exemption related to nationality and residency under ‘Grounds for optional non-execution of the European arrest warrant’:

The executing judicial authority may refuse to execute the European arrest warrant . . .

6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the [185] requested person is *staying in*, or is a *national or a resident* of the executing Member State and *that State undertakes to execute the sentence or detention order in accordance with its domestic law*.<sup>10</sup>

In addition, the provision on ‘Guarantees to be given by the issuing Member State in particular cases’ suggests another possible exemption related to nationality and residence:

The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions: . . .

3. where a person who is the subject of a European arrest warrant for the purposes of prosecution is a *national or resident* of the executing Member State, surrender *may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State*.<sup>11</sup>

Based on these innovative provisions, the EAW has been commended for eliminating the nationality exception in European extradition.<sup>12</sup> Conversely, however, it appears to extend protection traditionally reserved to nationals to *residents* of the requested state, and in the case of warrants for the enforcement of a sentence even to persons *staying in* the executing state. It thereby in fact considerably broadens the scope of the exception.

In the light of the rehabilitation-argument, this first direct application of the extended nationality exception in Europe appears an overdue, welcome development. It is, however, not clear that a widespread international acceptance (customary international law rule) would underlie this solution. Admittedly, its adoption in an EU Council framework decision may not raise controversies.<sup>13</sup> However, the legality of the extended exception must further [186] be

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nationals made under the European Convention as a ground for refusal of extradition of residents from non-Nordic States.

See also Council Act of 27 September 1996 drawing up the Convention relating to extradition between Member States of the European Union, *Official Journal* C313, 23.10.1996, <<http://ue.eu.int/accords/default.asp?lang=en>>, visited on 11 October 2005.

<sup>9</sup> Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States ((2002/584/JHA), *Official Journal* L 190, 18.7.2002, p.1 (hereinafter EAW or Framework Decision)).

<sup>10</sup> *Ibid.*, Article 4, emphasis added. It should be noted that, in contrast to traditional extradition terminology, the EAW refers to ‘executing state’ where extradition treaties refer to ‘requested state’ and to ‘surrender’ or ‘execution’ (of the warrant) instead of ‘extradition’. Moreover, the ‘executing judicial authority’ is equal to ‘the authorities of the requested State’ in classical extradition terminology.

<sup>11</sup> *Ibid.*, Article 5, emphasis added. Cf. Zs. Deen-Racsmány and Judge R. Blekxtoon, ‘The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-)Surrender of Nationals and Dual Criminality under the European Arrest Warrant’, 13 *European Journal of Crime, Criminal Law and Criminal Justice* (2005) p. 317 on potential problems related to the application of these conditions.

<sup>12</sup> See e.g., comments to this effect at <[http://europa.eu.int/comm/justice\\_home/fsj/criminal/extradition/printer/fsj\\_criminal\\_extradition\\_en.htm](http://europa.eu.int/comm/justice_home/fsj/criminal/extradition/printer/fsj_criminal_extradition_en.htm)>, visited on 11 October 2005.

<sup>13</sup> The legal status of EU Council framework decisions is not unambiguous. However, they are arguably comparable to international agreements and could fall under the definition of a ‘treaty’ contained in Article 1(a) of the Vienna Convention on the Law of Treaties (1155 UNTS 331). In fact, the EAW even provides that it is to replace certain multilateral extradition treaties (Article 31 EAW), strengthening this conclusion. Cf. Advice W03.01.0523/I/A of the Dutch *Raad van State* (Privy Council) on the obligations flowing from the (draft) EAW for the Netherlands (<<http://www.europapoort.nl/9294000/modules/vgbwr4k8ocw2/f=/vg44khhhehwe.doc>>,

considered in the light of applicable rules of international law before the EAW provisions can be invoked as a precedent for a similar extension of the nationality exception in other contexts.

The legality of the non-extradition of residents has not received much attention in legal scholarship. Accordingly, the ‘extended nationality’ and/or residency exception<sup>14</sup> needs to be considered in more detail from the perspective of their legality and/or desirability. The present study assumes this task. It seeks to identify the basis for and reasons and justifications behind the extension of the nationality exception to (permanent) residents (or substitution of the latter for the former) and to evaluate the legality and utility of such a solution from the perspective of criminal justice and public international law. First, to place the problem in context, it will describe the practice which could form the basis of the new rules regarding residents, namely the non-extradition of nationals. Then it will look at the scale of this suggested change and will try to answer the question whether one can speak of a trend or even a custom of non-extradition of residents in international or at least in European extradition law. Next, the ‘extended nationality’ and/or residency exception will be evaluated from the perspectives of their legality, legitimacy and desirability. The study concludes with a summary of the major findings and suggestions for a suitable way to modernize the nationality exception.

## 2 THE ORIGINAL SCOPE OF THE PHENOMENON: NATIONALITY

It should be noted at the outset that customary international law does not impose a duty on states to extradite persons apprehended on their own territory.<sup>15</sup> In fact, many states do not extradite at all in the absence of a self-assumed (conventional) obligation. Consequently, within the confines of *jus cogens*, the scope of extradition arrangements is freely determined by the parties themselves.

**[187]** Customary international law thus leaves states a substantial measure of freedom to refuse the extradition of their nationals.<sup>16</sup> In fact, nationality<sup>17</sup> has for centuries been one of the most widely recognized bases on which a state could refuse extradition of a person wanted for prosecution abroad.<sup>18</sup> Extradition treaties presently in force commonly contain provisions

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visited on 11 October 2005) confirming the view that the EAW would bind both the requested and the requesting states.

<sup>14</sup> This study refers to the former when residence is added to the traditional nationality exception and to the latter in relation to an exception that relates solely to residents (*i.e.* one that permits the extradition of nationals if those have established their residence in the requesting state.)

<sup>15</sup> See, *e.g.*, R. Y. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9<sup>th</sup> ed., Longman, London, 1996) p. 950.

<sup>16</sup> Conversely, customary international law does not impose any *obligations* on states to refuse extradition of their nationals.

<sup>17</sup> The term ‘nationality’ is used in this study in the politico-legal sense (as opposed to its historic-biological aspect) to denote membership of a state, emphasizing its international aspect. (See P. Weis, *Nationality and Statelessness in International Law* (2nd ed., Sijthoff & Noordhoff, Alphen aan den Rijn, 1979) pp. 3–7). Whereas the term ‘subject’ is used in English as a synonym to ‘national’, there is, in fact a significant difference. As explained by Weis, ‘subject’ reflects the Anglo-Saxon perception of a ‘*territorially* determined relationship between subject and Sovereign’, whereas the Roman conception where the term ‘nationality’ originates from sees nationality as a ‘*purely personal* relationship . . . membership of the state’ (*ibid.*, p. 4, emphasis added). Moreover, ‘subject’ is often used in a broader sense than ‘nationality’, in connection with persons born in overseas possessions (*e.g.* of the Netherlands or Great Britain).

<sup>18</sup> See *e.g.*, Shearer, *supra* note 2, pp. 94–132; M. Ch. Bassiouni, *International Extradition: United States Law and Practice* (4th ed., Oceana Publications, Dobbs Ferry, N.Y., 2002) pp. 682–689.

that present the non-extradition of nationals as an optional or mandatory ground for refusing cooperation.<sup>19</sup>

However, the non-extradition of nationals is not a universal phenomenon. Mainly civil law legal systems resort to this measure to protect their nationals from foreign prosecution and/or enforcement of a sentence rendered abroad. They compensate for its negative effects by providing for jurisdiction over crimes committed by their nationals abroad. In contrast, in common law systems the primary basis of jurisdiction is territoriality. These states generally do not establish jurisdiction over extraterritorial acts of their nationals, confine it to serious offenses or impose a dual criminality requirement. To facilitate justice, they usually permit the extradition of nationals.<sup>20</sup> Due to these [188] fundamental differences of approach, the non-extradition of nationals often leads to friction between states. In addition, there is increasing criticism – not only from common law – concerning the basic premises of the exception and its impact on international criminal justice.

While dating back to ancient Greece, the modern form of this phenomenon originates from a medieval continental European legal tradition that considered that individuals brought with themselves the laws of their ruler wherever they went.<sup>21</sup> States sharing this perception had a strong preference for domestically prosecuting extraterritorial criminal conduct of their nationals rather than extraditing them.

Central to the modern form of the phenomenon is the bond of allegiance between the sovereign and his subjects.<sup>22</sup> In return for subjecting themselves to his authority and paying taxes, the ruler offered protection to the inhabitants of his lands. In the absence of comprehensive population registers, ID-cards and passports, it would appear that the traditional determining factor for such protection must have been residence or domicile rather than the later developed romanticized notion of nationality.<sup>23</sup> Yet, the criterion of nationality was carried on in practice. Under the currently dominant approach, the exception clearly relates to nationals in the politico-legal sense of the word.

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<sup>19</sup> The precise scope and formulation of the exception is in each case influenced by constitutional rules and other domestic legislative provisions or traditions of the parties. A number of states adhering to the continental legal tradition namely recognize an individual right of nationals – often laid down in the constitution – to remain in the territory of the state of nationality, not to be extradited or expelled. (See Zs. Deen-Racsmany, ‘A New Passport to Impunity? Non-Extradition of Naturalized Citizens *versus* Criminal Justice’, 2 *Journal of International Criminal Justice* (2004) p. 766, notes 24-25 for an overview.) These states cannot consent to a general obligation to extradite nationals.

<sup>20</sup> See e.g., Ch. L. Blakesley, ‘The Law of International Extradition: A Comparative Study’, 62 *International Review of Penal Law* (1991) pp. 451–459; M. Plachta, ‘(Non)-Extradition of Nationals: A Neverending Story?’, 13 *Emory International Law Review* (1999) pp. 118–122. It should, however, be noted that not infrequently common law states too deny extradition of their nationals, invoking reciprocity. In this regard, it has been observed that

[c]ountries which will extradite their own subjects, such as Great Britain or the U.S., on the basis of reciprocal treaty obligations, will, however, refuse to extradite their own subjects in the absence of reciprocity by the requesting state. These latter states do not usually prosecute for offences committed abroad; therefore, the danger that such offenses will go unprosecuted is increased.

(D. Oehler, ‘Recognition of Foreign Penal Judgments: The European System’, in M.Ch. Bassiouni (ed.), *International Criminal Law* (2nd ed., Transnational, Ardsley, NY, 1999) Vol. 2, p. 611.)

<sup>21</sup> Plachta, *supra* note 20, p. 82.

<sup>22</sup> See e.g., S. Oeter, ‘Effect of Nationality and Dual Nationality on Judicial Cooperation, Including Treaty Regimes Such As Extradition’, in D. A. Martin and K. Hailbronner (eds.), *Rights and Duties of Dual Nationals: Evolution and Prospects*, (Kluwer Law International, The Hague, 2003) pp. 58–59.

<sup>23</sup> For instance, Chapter 1, Article 6 of the 1811 Convention between Prussia and Westphalia concerning Extradition of Criminals and Vagabonds (on file with the author) refers to *Untertan* [subject] rather than *Staatsbürger* [national] in the context of the ‘nationality’ exception. Cf. *supra* note 17 on the difference between these concepts.

Conversely, there is little full-hearted reference to the fiction of allegiance or membership of the state by supporters of the nationality exception in contemporary legal discourse. What is frequently emphasized instead is on the one hand the capacity of the accused to conduct an effective defense facilitated, *inter alia*, by the use of a language he comprehends, the availability of character witnesses, the closeness of family and friends, and his successful reintegration into society on the other. In addition, the legitimate interest of the community where the offender lives and where he will return to protect its *ordre public* is often invoked. These justifications apply equally to domiciled aliens. As Swart put it, '[i]f there are valid reasons not to extradite a national on occasion, the same objections might be relevant to aliens who have their ordinary residence in the requested State.'<sup>24</sup>

[189] Even the scope of the corresponding jurisdictional basis, the active personality principle has been subjected to criticism for relying exclusively on the objective but not always significant link of nationality:

what is the justification for society's claim to discipline its members? Surely, the only justification is that members who break the rules are a danger to society, either because rule breaking done at home harms society and its members or because rule breaking done abroad makes the breaker a potential danger when he returns. A man who commits murder abroad may well do the same at home, but this justification has nothing whatever to do with nationality. This justification, which has much to commend it, would license a state's punishment of any individual living within it for committing a violent crime abroad regardless of the individual's citizenship. But it would not license the punishment by a state of its national for a violent crime committed abroad if the national did not live in, had not returned to, and had no intention of ever returning to that state. As in many other areas the link of nationality here is a vastly overrated and inflated concept.<sup>25</sup>

Yet, presently nationality – rather than residence - remains the dominant factor invoked to reject extradition as well as the most widely accepted basis of extraterritorial jurisdiction.

Before we turn to the question whether it would be justifiable to do away with this 'inflated concept' of nationality in favor of residence in the field of extradition, let us look at relevant international precedents.

### 3 THE RESIDENCY AND EXTENDED NATIONALITY EXCEPTION IN TREATIES AND STATE PRACTICE

No universal treaty provision regulates the non-extradition of residents. In addition, there is no agreement concerning the existence of a rule of customary international law on the subject. It is therefore necessary to look for the sources of a relevant customary rule (permissive or mandatory), if any, in international agreements and other instruments, extradition acts and other relevant domestic legislation and cases decided by domestic courts.

Let us first turn to international treaty regimes and other relevant international documents. Whereas the nationality exception in its traditional form is a common feature, reference to the non-extradition of residents is nearly [190] unprecedented in modern bilateral extradition treaties.<sup>26</sup> Similarly, multilateral extradition arrangements seldom contain an express stipulation freeing the contracting parties of the general obligation assumed thereunder to extradite if the request concerns a resident of the requested state. The only

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<sup>24</sup> Swart, *supra* note 3, p. 195.

<sup>25</sup> P. J. Fitzgerald, 'The Territorial Principle in Penal Law: An Attempted Justification', 1 *Georgia Journal of International and Comparative Law* (1970) pp. 42–43.

<sup>26</sup> See, however, Italy-Hungary (1343 UNTS 260), Article 3 (providing that the parties shall not extradite their nationals and resident aliens); Belgium-Norway, Article 5(2), *supra* note 5.

example – limited to *permanent* residents – appears to be the London Scheme for Extradition within the Commonwealth which provides that:

[a] request for extradition may be refused on the basis that the person sought is a *national or permanent resident* of the requested country.<sup>27</sup>

However, the European Convention on Extradition concluded under the auspices of the Council of Europe offers an interesting solution that made the accommodation of the interest of states to protect their residents in this manner possible. It provides that

(a) A Contracting Party shall have the right to refuse extradition of its nationals

but

(b) Each Contracting Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term ‘nationals’ within the meaning of this Convention.<sup>28</sup>

Admittedly, the purpose of the latter paragraph was not the extension of the nationality exception to residents or the utilization of the declarations to this end – an issue not even considered at the time of drafting.<sup>29</sup> Yet, eleven of the thirty-three states that have attached such documents declared their intention to treat (certain categories of) residents as nationals for the application of this provision.<sup>30</sup>

[191] These declarations fall into four categories.<sup>31</sup> Luxembourg and the Netherlands exempt from extradition foreigners integrated in their respective society provided they can be prosecuted domestically for the act(s) which the extradition request concerns.<sup>32</sup> The declarations by the Nordic states (Denmark, Finland, Iceland, Norway and Sweden) are significantly broader. These consider in nearly identical terms that ‘national’ means nationals of the country concerned, *as well as those of the other Nordic states, or persons domiciled in one of the five countries*. The Norwegian declaration differs slightly due to the insertion of the proviso ‘if extradition is requested by States other than those mentioned’.<sup>33</sup> Hungary, in turn, has reserved itself the right ‘to refuse extradition of persons settled definitively in Hungary’.<sup>34</sup> Finally, Poland and Romania have declared their intention to treat persons who enjoy asylum there as nationals for the purposes of Article 6 ECE.<sup>35</sup> Due to their scarcity and diversity these declarations can hardly be taken as evidence of an established rule of customary international law on the equation of residents to nationals for the purposes of the nationality exception.

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<sup>27</sup> Clause 15(3), <[http:// www.thecommonwealth.org](http://www.thecommonwealth.org)>, visited on 11 October 2005. It should be noted that technically speaking, the Scheme does not constitute a treaty but a mere mutual agreement between the Commonwealth states.

The following multilateral extradition agreements provide for the nationality exception in its classical form: Economic Community of West African States Convention on Extradition, Article 10 (<<http://www.iss.co.za/AF/RegOrg/UnitytoUnion/pdfs/ecowas/4ConExtradition.pdf>>, visited on 11 October 2005); Inter-American Convention on Extradition, Article 7 (<[http://www.oas.org/juridico/english/treaties/b-47\(1\).html](http://www.oas.org/juridico/english/treaties/b-47(1).html)>, visited on 11 October 2005); Extradition Agreement adopted by the Council of the League of Arab States, Article VII, 159 *British Foreign and State Papers* 606).

<sup>28</sup> *Supra* note 6, Article 6(1).

<sup>29</sup> Duk, *supra* note 3, p. 34.

<sup>30</sup> The declarations are available online at <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=024&CM=1&DF=05/09/2005&CL=ENG&VL=1>>, visited on 11 October 2005.

<sup>31</sup> The Latvian declaration, relating to non-citizens subject to the Law on the Status of the Former USSR Citizens, is not relevant for our purposes.

<sup>32</sup> Luxembourg declaration at the time of deposit of the instrument of ratification, on 18 November 1976; Dutch declaration dated 14 October 1987, registered at the Secretariat General on 15 October 1987. See also, text accompanying *infra* note 113.

<sup>33</sup> Declaration made at the time of signature, on 13 December 1957.

<sup>34</sup> Reservation at the time of deposit of the instrument of ratification, on 13 July 1993.

<sup>35</sup> Polish declaration contained in the instrument of ratification, deposited on 15 June 1993; Romanian declaration contained in the instrument of ratification, deposited on 10 September 1997.



However, these declarations have attracted little protest.<sup>36</sup> Somewhat intriguingly, Germany and Austria have expressed concerns about the consistency of the Polish declaration with the object and purpose of the ECE,<sup>37</sup> but not about the similar Romanian exemption or the much more elusive declarations by, for instance, Hungary and the Nordic countries. No other states objected.

In contrast, the possibility of extending the nationality exception to residents within the EU was explicitly rejected during the adoption of the Convention relating to extradition between the Member States of the European Union.<sup>38</sup> Moreover, the UN Model Treaty on Extradition<sup>39</sup> adopted [192] by the General Assembly in 1990 does not – explicitly – recognize the ‘extended nationality exception’.<sup>40</sup>

Conventions dealing with the suppression of certain international crimes constitute another category of relevant international instruments. These agreements frequently provide – in nearly identical terms – that extradition shall be ‘subject to the conditions provided by the law of the requested State’.<sup>41</sup> Read literally, this provision arguably permits the invocation of the nationality exception, in its traditional or even extended form.

The equation of residents to nationals is more explicit in treaties regulating certain forms of international cooperation in criminal matters. The consideration of these instruments helps better understand the status of the residency exception in extradition law. Conventions regulating transfer of proceedings in criminal matters are a case at point. The European Convention on the Transfer of Proceedings in Criminal Matters,<sup>42</sup> the Agreement between the Member States on the Transfer of Proceedings in Criminal Matters concluded within the EU<sup>43</sup> and the UN Model Treaty on the Transfer of Proceedings in Criminal Matters<sup>44</sup> all consider ‘ordinary’ residence and nationality as equally valid conditions justifying the transfer of proceedings. The Explanatory Report to the European Convention emphasizes the rehabilitative aim of the provision:

The expression ‘ordinarily resident’ has already been accepted and used in other European conventions . . . It does not include persons who are visitors in the requested State. *The*

<sup>36</sup> See, text accompanying *infra* note 82 for a possible explanation.

<sup>37</sup> German declaration dated 11 October 1993 registered at the Secretariat General on 13 October 1993; Austrian declaration dated 7 January 1994, registered at the Secretariat General on 11 January 1994.

<sup>38</sup> See *supra* note 8. It should be noted that due to the French and Italian failure to ratify the Convention, it has not entered into force but was provisionally applied between certain Member states. (See <<http://ue.eu.int/accords/default.asp?lang=en>>, visited on 11 October 2005.) As of 1 January 2004, the EAW superseded this Convention in accordance with Article 31(1)(d) of the Framework Decision, *supra* note 9.

<sup>39</sup> UN Doc. A/RES/45/116 (14 December 1990). This instrument, like other UN model treaties, is not an actual international agreement and is not binding. It is rather meant to serve as a framework on which states can model relevant bilateral agreements. However, its provisions are deduced from widespread international practice, hence they reflect customary international law to a large extent.

<sup>40</sup> See, however, Swart, *supra* note 3, p.196, suggesting that ‘this may be due to the fact that [the Model Treaty] contains a general exception with regard to refusal of extradition for humanitarian reasons in Article 4(h)’.

<sup>41</sup> *E.g.*, Convention for the Suppression of Unlawful Seizure of Aircraft (10 *ILM* (1971), 133), Article 8(2)–(3); International Convention against the Recruitment, Use, Financing and Training of Mercenaries (29 *ILM* (1990), 89), Article 15(2)–(3); International Convention against the Taking of Hostages (18 *ILM* (1979), 1456), Article 10(2)–(3); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (13 *ILM* (1974), 41), Article 8(2)–(3); Convention on the Safety of United Nations and Associated Personnel (UN Doc. A/49/742), Article 15(2)–(3); Convention on the Physical Protection of Nuclear Material (18 *ILM* (1979), 1422) Article 11(2)–(3); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (27 *ILM* (1988), 668) Article 11(2)–(3); International Convention for the Suppression of Terrorist Bombings (UN Doc. A/52/653), Article 9; International Convention for the Suppression of the Financing of Terrorism (UN Doc. A/54/49), Article 11(2)–(3).

<sup>42</sup> *ETS* No. 073.

<sup>43</sup> <[http://ue.eu.int/ueDocs/cms\\_Data/docs/PolJu/EN/EJN233.pdf](http://ue.eu.int/ueDocs/cms_Data/docs/PolJu/EN/EJN233.pdf)>, visited on 11 October 2005, Article 2. This agreement has not yet entered into force.

<sup>44</sup> *ILM* 1991, 1435, Article 7(a). See *supra* note 39 on the status of UN model agreements.

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*inclusion of this sub-paragraph in the article is in line with the aims of modern criminal law: to enforce the sanction – in the event of conviction – with an eye to the social rehabilitation of the person concerned. Rehabilitation is [193] greatly facilitated if the convicted person is permitted, while undergoing his sentence, to live in national and cultural surroundings which are familiar to him and to remain in contact with his family.*<sup>45</sup>

Another relevant field of cooperation concerns the recognition of foreign judgments. Here too, the underlying motive is rehabilitation and the instruments commonly accept (some form of) residency as equal to nationality. However, there is less uniformity in this field. The Convention on the International Validity of Criminal Judgments adopted by the Council of Europe in 1970<sup>46</sup> lists, *inter alia*, the following situations wherein a ‘State may request another Contracting State to enforce the sanction’:

- (a) if the person sentenced is *ordinarily resident* in the other State;
- (b) if the enforcement of the sanction in the other State is *likely to improve the prospects for the social rehabilitation* of the person sentenced;
- ...
- (d) if the other State is the *State of origin* of the person sentenced and has declared itself willing to accept responsibility for the enforcement of that sanction.<sup>47</sup>

In relation to this provision, the explanatory report stresses the rehabilitative aim of the Convention (referring to familiarity with the environment, social contacts, etc.).<sup>48</sup>

The 1991 Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences<sup>49</sup> is somewhat more restrictive. It provides as one of the eventualities under which the enforcement of the custodial sentence by another state may be requested that

the sentenced person *is in the territory* of the administering State *and* is a *national* of this State *or is permanently resident* in its territory.<sup>50</sup>

[194] Following the rehabilitation argument, and considering that these conventions originate at least in part therefrom, we can expect a clear-cut, uniform regime in the case of agreements concerning transfer of sentenced persons. Yet, solutions differ widely.

At the outset, Article 3 of the Convention on the Transfer of Sentenced Persons adopted within the Council of Europe requires, *inter alia*, that the person is a *national* of the administering state as one of the conditions that must be fulfilled for transfer.<sup>51</sup> However, like the ECE, it permits contracting parties to define ‘national’ for the purposes of the application of the Convention. The explanatory report clarifies that reference to nationality (instead of to ordinary residence, state of origin, etc.) was preferred for reasons of simplicity. However, the report emphasizes the broad discretion to attach declarations defining the term ‘nationals’:

This possibility, corresponding with that provided in Article 6.1.b of the European Convention on Extradition, is to be interpreted in a wide sense: *the provision is intended to enable Contracting States to extend the application of the convention to persons other than ‘nationals’*

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<sup>45</sup> Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters, <<http://conventions.coe.int/Treaty/en/Reports/Html/073.htm>>, visited on 11 October 2005. Comment on Article 8. Emphasis added.

<sup>46</sup> ETS No. 70. The Convention entitles the contracting states to enforce penal sanctions imposed in another contracting party, if the sanction would be enforceable in the latter and if that state requests the transfer of enforcement (Article 3). Requests may, however, be refused, *inter alia*, if enforcement would violate fundamental principles of one’s own legal system (*ordre public*), or if the state would be unable to enforce the sanction (Article 6(a) and (h)).

<sup>47</sup> *Ibid.* Article 5(b). Emphasis added.

<sup>48</sup> <<http://conventions.coe.int/Treaty/en/Reports/Html/070.htm>>, visited on 11 October 2005. See also, preambular para. 4 of the Convention, *supra* note 46.

<sup>49</sup> <[http://ue.eu.int/ueDocs/cms\\_Data/docs/PolJu/EN/EJN319.pdf](http://ue.eu.int/ueDocs/cms_Data/docs/PolJu/EN/EJN319.pdf)>, visited on 11 October 2005.

<sup>50</sup> *Ibid.* Article 3(a). Emphasis added.

<sup>51</sup> ETS No. 112, Article 3(1)(a).

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*within the strict meaning of their nationality legislation as, for instance, stateless persons or citizens of other States who have established roots in the country through permanent residence.*<sup>52</sup>

Several states have indeed opted to treat – certain categories of – domiciled aliens under this exception.<sup>53</sup>

The Agreement on the Application Among the Member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons provides that:

[f]or the purpose of applying Article 3(1)(a) of the Convention on Transfer, each Member State shall regard as its own nationals the *nationals of another Member State* whose transfer is deemed to be [195] appropriate and in the interest of the persons concerned, *taking into account their habitual and lawful residence in its territory.*<sup>54</sup>

In contrast, the Convention implementing the Schengen Agreement,<sup>55</sup> while confirming the applicability of the provisions of the above Council of Europe convention, refers exclusively to nationals. It is unclear if it leaves the possibility open under the latter to define the term for the purposes of this section.

The Scheme for the Transfer of Convicted Offenders within the Commonwealth provides, next to nationality, a purely subjective criterion to be determined by the administering state. In relevant provisions it requires that the person concerned

- (i) is a *national* of the administering country, notwithstanding that he may also be a national of any other country, including the sentencing country, or
- (ii) *has close ties with the administering country of a kind that may be recognized by that country* for the purposes of this Scheme.<sup>56</sup>

The UN Model Agreement on the Transfer of Foreign Prisoners offers yet another solution. It opens with the statement of the following general principle: '[t]he social resettlement of offenders should be promoted by facilitating the return of persons convicted of crime abroad

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<sup>52</sup> Explanatory Report, <<http://conventions.coe.int/Treaty/en/Reports/Html/112.htm>>, visited on 11 October 2005. Emphasis added.

<sup>53</sup> Albania (stateless permanent residents); Bahamas (permanent resident spouse of a citizen); Denmark (permanent resident aliens); Finland (permanent resident aliens); Georgia (permanent resident aliens); Hungary (aliens settled definitively in the executing state); Iceland (permanent resident aliens); Ireland (persons with close ties with Ireland); Italy (stateless residents); Moldova (resident aliens); Netherlands (aliens or stateless persons with a sole ordinary residence in the Netherlands); Norway (resident aliens, based on close ties with Norway); Portugal (foreigners and stateless persons usually resident in the administering state); Slovakia (permanent resident aliens); Sweden (aliens domiciled in the administering state); United Kingdom (any person having close ties with the UK). List of Declarations made with respect to treaty No. 112, <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=112&CM=8&DF=21/07/2005&CL=ENG&VL=1>>, visited on 11 October 2005.

<sup>54</sup> <[http://ue.eu.int/cms3\\_applications/Applications/accords/search.asp?lang=EN&cmsid=297](http://ue.eu.int/cms3_applications/Applications/accords/search.asp?lang=EN&cmsid=297)>, visited on 11 October 2005, Article 2. Emphasis added. This agreement was adopted by the EC in 1987 with the aim of broadening the application of the Council of Europe Convention named therein and to improve its operation. It has not yet been ratified by all states that were EC members at the time of its opening for signature. Hence it has not entered into force.

<sup>55</sup> 1990 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, published as part of the Schengen *Acquis*, *Official Journal* L 239 22.9.2000 1 at 19, Article 68, <[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0922\(02\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0922(02)&model=guichett)>, visited on 11 October 2005.

<sup>56</sup> <<http://www.commonwealth.org>>, visited on 11 October 2005, Article 4(1)(a). Emphasis added. The London Scheme for Extradition within the Commonwealth (*supra* note 27) also envisages the transfer of prisoners as an alternative to extradition, with reference to nationals as well as permanent residents. (See *infra* notes 83–84 and accompanying text.)

to their *country of nationality or of residence* to serve their sentence at the earliest possible stage.<sup>57</sup>

In January 2005, the Austrian, Finnish and Swedish delegations to the EU initiated work on a Draft Council Framework Decision on the European Enforcement order and the transfer of sentenced persons between Member States of the EU.<sup>58</sup> As put forward by these delegations, the FD would bind [196] Member States, if requested by the sentencing state (another EU member), to take over the enforcement of custodial sentences. Beside nationals, the scope of persons covered would also include individuals with a *permanent legal residence* in the requested state or those with *close links* therewith.<sup>59</sup>

Is it then arguable that European – in the case of Council of Europe conventions often ratified also by states situated outside Europe – and other multilateral agreements have expanded the scope of the term nationality in the field of cooperation in criminal matters in general and extradition in particular? At first glance, the above overview may be seen as favorable to such an interpretation, with Europe constituting the strongest case due mainly to the Nordic influence and lack of protests by others.<sup>60</sup> However, a closer look reveals the lack of a sufficient degree of uniformity in terms of the legal categories and solutions opted for in various instruments. Moreover, it is striking how limited the possibilities to equate residents to nationals in the field of extradition are in comparison with other fields of cooperation in criminal matters.<sup>61</sup> We can accordingly conclude that whereas there in fact are some indications of change in the suggested direction, it is too early to speak of a new custom.

A review of the domestic legislation of states also denies any suggestions related to an established or even an emerging customary rule to such an effect with regard to extradition. Whereas a few states do equate permanent resident aliens to nationals for the purposes of extradition,<sup>62</sup> this seems to be [197] the exception rather than the rule. In fact, even states that have attached declarations to the ECE to this effect do not always treat domiciled foreigners

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<sup>57</sup> UN Doc. A/Res/40/32 (1985), Article 1. See *supra* note 39 on the status of UN model agreements. Emphasis added.

<sup>58</sup> *Official Journal C* 150/1, 21.6.2005.

<sup>59</sup> *Ibid.*, Article 4.

<sup>60</sup> A question arises as to the effect of a possibly emerging customary international law equating residents with nationals on the interpretation of existing extradition treaties permitting the nationality of the accused to be invoked as a mandatory or optional ground for refusal. It may be argued that – *lex posterior derogat legi priori* – these provisions would have to be interpreted as permitting the equation of (permanent) resident aliens with nationals for this purpose. However, the role of subsequent custom in the interpretation of existing treaties is not uncontroversial. Assuming that customary law and treaties constitute autonomous sources of equal rank (See *e.g.*, M. E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (2nd ed., Kluwer Law International, The Hague, 1997) pp. 57–59.), there may be valid arguments in favor of interpreting a treaty in the light of newly emerging custom – it constituting a modification –, at least if all parties to the treaty have participated in its evolution. However, the question is at best unsettled when it comes to the interpretation, for instance, of a bilateral treaty between two states that have not themselves contributed to the development of such a new rule, nor assented to it. (See H. Thirlway, ‘The Sources of International Law’, in M. D. Evans (ed.), *International Law* (Oxford University Press, Oxford, 2003) pp.136–137.)

<sup>61</sup> *Cf. supra* note 8 for evidence of *opinio juris* against such a rule.

<sup>62</sup> *E.g.*, the 1974 Extradition Act of Sierra Leone, <<http://www.sierra-leone.org/Laws/1974-11.pdf>>, visited on 11 October 2005, Article 20: ‘No extradition shall be granted without the consent of the Attorney-General if the fugitive criminal whose return is requested is a citizen or permanent resident of Sierra Leone, unless the fugitive criminal is also a national of that part of the Commonwealth to which his return is requested’. The Polish Code of Criminal Procedure (in force since 1 September 1998) provides for a mandatory refusal to extradite Polish nationals and persons enjoying asylum in Poland, but it also specifies as an optional ground for refusal the fact that ‘the requested person is domiciled in the Republic of Poland’ (Section 604(2)(1), see also *ibid.*, Section 604(1)(1); M. Plachta, ‘Recent Developments in the Extradition Law Within the European Union, and the New Polish Domestic Legislation’, 2 *Yearbook of Polish European Studies* (1998) pp. 93–116.

like nationals in their respective extradition act or other relevant domestic statutes.<sup>63</sup> Judicial decisions accordingly suggest that in spite of such reservations, a domiciled alien may be extradited and has no enforceable rights in this regard, even under domestic law.<sup>64</sup> Indeed, instances of actual non-extradition of resident aliens appear extremely rare.<sup>65</sup>

[198] Can we then expect the European Arrest Warrant<sup>66</sup> to contribute to an increase in the occurrence of such cases and to the crystallization of a (European) custom? The relevant provisions of the implementing legislation<sup>67</sup> adopted by EU Members show remarkable diversity. Only a slight majority of them have implemented the above provisions literally, extending the nationality exception to (certain categories of) residents. Some of these

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<sup>63</sup> See e.g., Extradition for Criminal Offences Act (Sweden), <<http://www.sweden.gov.se/sb/d/2710/a/15435>>, visited on 11 October 2005; Finnish Extradition Act, <<http://www.finlex.fi/sv/laki/ajantasa/1970/19700456>> (in Finnish and Swedish), visited on 11 October 2005; Dutch Extradition Act, reproduced in English in A. H. J. Swart and A. Klip (eds.), *International Criminal Law in the Netherlands* (Edition Iuscrim, Freiburg im Breisgau, 1997) p. 268.

<sup>64</sup> See *MY v. Public Prosecutor*, 100 ILR 401. This case concerned a request under the ECE (*supra* note 6) by Israel for the extradition of Y, an Israeli national. Y argued, relying on the Dutch reservation to the ECE (*supra* note 32), that as he was ‘an alien integrated into the Dutch community’, the request for his extradition could not be granted. However, the Dutch Supreme Court held that whereas the Dutch reservation in fact equates ‘foreigners integrated into the Dutch community’ with nationals for the purposes of the application of the ECE, the right to refuse extradition of nationals laid down in Article 6 of the Convention has been exercised by the legislature only in respect of Dutch nationals in the form of a statutory prohibition on extradition in the sense that the Extradition Act imposes an obligation on the courts to declare extradition inadmissible where Dutch nationals are concerned.

Accordingly, the Court confirmed the view taken in the Memorandum of Reply to the bill resulting in the relevant Act that ‘the question of whether the person claimed is a foreigner ‘integrated’ into the Dutch community does not arise in the judicial decision on the admissibility of the extradition.’ It found the Minister of Justice competent to decide on this matter.

<sup>65</sup> The author has not been able to find any cases where extradition was refused based on the fact that the requested person was a (permanent) resident of the requested state. Moreover, a Swedish government proposal refers in connection with the extradition of domiciled aliens to the fact that the reservation to the ECE (see text accompanying *supra* note 33) has not been invoked in relation to aliens residing in the Nordic countries. It adds that the declaration made by Sweden upon signing the 1996 EU extradition convention that it will not deny extradition of non-Nordic nationals residing in Sweden to states that guarantee reciprocity ‘would not mean any factual change of the practice that has been followed by Sweden’ [the author’s translation] (Regeringens proposition 2000/01:83, Sveriges tillträde till 1996 års EU-konvention om utlämning, <<http://www.riksdagen.se>>, visited on 11 October 2005) p. 35). It is also stated in more general terms that as far as it is known, declarations concerning the equation of domiciled aliens with nationals for the purposes of extradition have not been invoked in the last decades. (*Ibid.*) In turn, Swart has noted with regard to the similar Dutch declaration to the ECE (*supra* note 32) that

[t]he importance of this declaration is rather limited where persons not possessing Dutch nationality are concerned. This is due to the fact that the Penal Code does not, as a general rule, apply the active personality principle to them. For acts committed by them outside the territory of the Netherlands the courts have jurisdiction in a limited number of cases only. On the other hand, Articles 7 and 8 of the European Convention already enable the Netherlands to refuse extradition for offences committed within Dutch territory . . . Case law has consistently refused to equate [aliens other than Moluccans to whom a special statute applies, equating them with nationals for the purposes of active personality] with Dutch nationals within the meaning of Article 4 of the Extradition Act.

(A. H. J. Swart, ‘Extradition’ in Swart and Klip, *supra* note 63, pp. 108–109.)

<sup>66</sup> *Supra* note 9. It should be noted that the EAW combines the traditional regimes of extradition and transfer of sentenced persons. See text accompanying *supra* notes 10–11 for the wording of the relevant provisions.

<sup>67</sup> All implementing statutes are available – at least in the original language – online at <<http://www.euowarrant.net>>, visited on 11 October 2005.

require permanent residency.<sup>68</sup> In others simple residency or even a mere stay in the executing member State may suffice in certain cases for protection from surrender.<sup>69</sup>

Most<sup>70</sup> of these States do not make any distinctions between nationals and other residents in terms of the obligation imposed on their authorities or rights reserved to those to refuse surrender under a European arrest warrant. Others provide for a more limited exception from surrender with regard to (permanent) resident aliens than in connection with their own nationals.<sup>71</sup>

**[199]** It should, moreover, be noted that many of the member States that address the specific case of non-surrender of residents have implemented this, in line with the EAW, as an optional ground for refusal.<sup>72</sup> However, the following Member States have provided for the residency exception, inconsistently with the relevant EAW provisions, as a mandatory ground for refusal: Czech Republic, Germany, Lithuania, Luxembourg and the Netherlands.<sup>73</sup>

In addition, some of the states that did not implement the residency exception but retain reference to nationals further require for the application of the exception that the national whose surrender is requested has his or her residence or domicile in the state of nationality at the moment and preceding the request.<sup>74</sup>

This diversity evidences the lack of a clear understanding, even within the EU, of what the status of (permanent, habitual, etc.) residents is in this context and what the rights and obligations of states are related to their extradition. The EAW is not likely to bring uniformity into this picture in the short term. The above overview thus clearly denies the existence of a rule of customary international law on the subject.

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<sup>68</sup> Denmark (Sections 10b(1) and 10b(2)); Finland (Sections 6(6) and 8(2)); Lithuania (Article 9(4) and 9(7)); Netherlands (Article 6(5), subject to certain conditions).

<sup>69</sup> See the implementing acts of Belgium (Articles 6, 8); Luxembourg (Articles 5(5)–(6), 20(1)–(2)); Greece (Articles 11(f), 12(e), 13(3)); Cyprus (Articles 13(e)–(f), 14(g), 15(3)); Portugal (Articles 12(1)(g), 13(c)); Slovenia (Articles 13(c), 14(c)); Poland (Article 607(t)(1), 607(s)(1)); Czech Republic (Sections 411(6)(e), 411(7), 393(1)(a)–(b)); and Germany (Article 80(1)–(3)). It should be noted that the Polish Constitutional Tribunal found Article 607(t)(1) of the Polish act unconstitutional for permitting extradition of nationals (Judgment of the Polish Constitutional Tribunal concerning the European Arrest Warrant, release of 27 April 2005, <<http://www.eurowarrant.net>>, visited on 11 October 2005), and the entire German act was declared null and void by the *Bunderverfassungsgericht* for similar reasons. (BVerfG, 2 BvR 2236/04 of 18 July 2005, (in German) <<http://www.bundesverfassungsgericht.de/entscheidungen>>, visited on 11 October 2005.)

Although of undeniable relevance for the interpretation and application of these provisions, the author has not been able to research the existence of any definitions in the domestic legislation – other than the EAW implementing acts – of the relevant States of the legal categories (*i.e.* resident, permanent resident, persons living in the State, *etc.*) referred to in these provisions.

<sup>70</sup> Belgium (Articles 6 and 8); Czech Republic (Section 411(6)(e)–411(7)); Denmark (Articles 10(b)(1)–(2)); Lithuania (Articles 9(4), 9(7)); Portugal (Articles 12(1)(g), 13(c)); Slovenia (Articles 13(c); 14(1)(c)).

<sup>71</sup> The implementing statute of Finland provides, for instance, for mandatory refusal of surrender for the purpose of the enforcement of a custodial sentence in another member state if the requested person is a Finnish citizen but for an optional refusal in similar cases if the person is a permanent resident alien. (Sections 5(4) and 6(7).) In turn, it specifies as an automatic condition of surrender for the purposes of prosecution abroad that the person will return to serve the sentence in Finland if the person is a Finnish citizen but limits this condition to prior request by the person to such effect if the arrest warrant concerns an alien with a permanent residence in Finland. (Sections 8(1)–(2).) See too the relevant provisions of the implementing statutes adopted by Greece and Cyprus.

<sup>72</sup> See the implementing statutes of Belgium, Denmark, Cyprus, Greece, Finland and Portugal.

<sup>73</sup> In addition, the Polish act implements residency as an optional ground for refusal in the case of warrants concerning prosecution but as mandatory in case of enforcement. Conversely, the Slovenian statute implements it as an optional ground in case of warrants concerning enforcement but as mandatory in case of requests concerning prosecution.

<sup>74</sup> See Hungarian and Swedish implementing acts.

## 4 IS RESIDENCE A BETTER CRITERION?

In spite of the lack of overwhelming support in international agreements and the practice and opinions of states, some authorities do favor the extension of the nationality exception to domiciled foreigners. Swart, for instance, has forcefully advocated for this solution:

The traditional objections against extradition of nationals that I personally would consider valid, are not so much based on nationality in the legal sense. Rather, the emphasis is on the fact that a person has his social roots and residence in a given society, that his social rehabilitation seems best ensured there and that he will have to continue his life within that society after having stood trial and served his sentence. If there are valid reasons not to extradite a national on occasion, the same objections might be relevant to aliens who have their ordinary residence in the requested state. Why, for the purpose of international co-operation, not treat them on the same footing as nationals along the lines suggested above?

[200] In the field of the transfer of execution, there is indeed a tendency to accept equality of treatment . . .

This tendency is far less pronounced in extradition law. In most extradition treaties and most extradition laws, domicile in the requested state is not, in itself, a reason for refusing extradition . . . Meanwhile, the practice of not extraditing resident aliens is mainly limited to Scandinavian countries. It corresponds with an extension of the active personality principle to this group of persons.

One may argue that, in view of the development of new forms of co-operation, especially the transfer of execution of penal sentences, the Scandinavian example deserves to be followed by other states.<sup>75</sup>

While this approach appears attractive at first sight from the perspective in which it has been put forward, some aspects of the matter deserve further consideration before a judgment can be made of the legality of such a solution and/or its desirability from the perspective of international criminal justice.

#### 4.1 *Related Jurisdictional Competence – an Obligation?*

One of the most important questions to consider relates to the legal consequences, if any, in terms of jurisdictional competence that may attach to such non-extradition provisions. An often raised concern with the nationality exception itself is that individuals may escape justice thanks to their possession of the nationality of a state that adheres to the exception. With regard to the non-extradition of nationals in its classical form, this criticism is in many instances groundless due to the simultaneous operation of the active personality principle in the relevant jurisdictions.<sup>76</sup>

This raises the question: is there a similar jurisdictional corollary to the exception covering residents? Do and must states that do not extradite domiciled aliens establish, in the interest of justice, jurisdiction over extraterritorial acts of persons domiciled in their territory?

On this matter, Cameron submits that

[a]s regards the extensive application of the [active personality] principle, i.e. to domiciled aliens, it can be said that, with the exception [201] of the Nordic states, most other Western European states do not exercise this kind of jurisdiction. But although an extensive application may appear to be overly expansive, the intention is good: namely to allow, for humanitarian reasons, the punishment in the state of domicile of an alien who committed offences abroad

<sup>75</sup> Swart, *supra* note 3, p. 195.

<sup>76</sup> It should, however, be noted that even the operation of the active personality principle is not a panacea for the problem. Its operation is namely often limited to certain (categories of) offences, by the lack of criminalization of the offence in the state of nationality, the lack of availability of evidence, *etc.* Cf Oehler, *supra* note 20, p. 611 on the problem in relation to common law jurisdictions.

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rather than extraditing him. An alien may have closer links with his state of domicile rather than his state of nationality, or he may run the risk of being punished for political crimes or subject to the death penalty.<sup>77</sup>

Indeed, few states assume jurisdictional competence over extraterritorial acts of permanent resident aliens based on active personality.<sup>78</sup> On the other hand, albeit this jurisdiction is often not quite as broad as the one over nationals, it does extend beyond the cases covered by the traditional grounds of extraterritorial jurisdiction recognized under international law.<sup>79</sup>

From a moral point of view it is, in any case, clearly desirable that states that extend the nationality exception to these persons, establish jurisdiction over long-term residents and their extraterritorial criminal conduct. This should however be subject to the dual criminality requirement, *i.e.* that the act is criminal in both the state of commission *and* the state of residence. This qualification is necessary in order to prevent a situation – frequently cited by proponents of the non-extradition of nationals – wherein a person is sentenced for acts of which (s)he did not know and could not reasonably have known were criminal.

From the legal point of view the answer is somewhat more complicated. Not only are states not obliged by international law to extradite (suspected) fugitive criminals found in their territory, there is also no *aut dedere aut judicare* obligation for common crimes, possibly not even for international crimes, as a matter of customary international law.<sup>80</sup> Accordingly, in the absence of self-imposed [202] conflicting obligations, international law cannot be invoked to prevent states wishing to deny the extradition of permanent or habitual residents, while not prosecuting them, from doing so.

The ever increasing network of bi- and multilateral treaties on extradition, mutual assistance in criminal matters and on the suppression of certain international crimes has admittedly brought a change to this legal picture: where treaties provide for the nationality exception, they frequently establish an obligation on the requested party to submit the case to its authorities for the purposes of local prosecution.<sup>81</sup>

If nationals are not extradited, the ECE, for instance, requires the requested state at the request of the requesting Party [to] submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the

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<sup>77</sup> I. Cameron, *The Protective Principle of International Criminal Jurisdiction* (Aldershot, Dartmouth, 1994) p. 73, footnote omitted.

<sup>78</sup> The only well-known example other than the Scandinavian countries is Liberia. (*Cf.* Swart, *supra* note 65, related to the Netherlands.) In addition, states are increasingly willing to extend the application of certain statutes dealing with international crimes to residents. Other than to crimes committed during World War II, such legislation commonly relates to crimes covered by the ICC Statute. (See *e.g.* A. Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2003) p. 282.) Such legislative practices are readily justifiable as invocations of universal jurisdiction, rather than the extended application of active personality.

<sup>79</sup> See text accompanying *infra* note 89.

<sup>80</sup> See *e.g.*, 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* (2nd ed., Transnational, Ardsley, NY, 1999), Vol. 3 pp. 229–230; K.C. Randall, 'Universal Jurisdiction under International Law', 66 *Texas Law Review* (1988) p. 834; G. Gilbert, *Transnational Fugitive Offenders in International Law* (Nijhoff, The Hague, 1998) p. 322; M. Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes', 59 *Law and Contemporary Problems* (Autumn 1996) pp. 55, 59. *Cf.* M.Ch. Bassiouni and E. M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Nijhoff, Dordrecht, 1995) pp. xiv, 25, 68, where Wise disagrees with the view that there exists such an obligation under customary international law.

<sup>81</sup> *Cf.* United Nations Office on Drugs and Crime, Report of the Informal Expert Working Group on Effective Extradition Casework Practice, Vienna 2004, <[http://www.unodc.org/pdf/lap\\_mlaeg\\_report\\_final.pdf](http://www.unodc.org/pdf/lap_mlaeg_report_final.pdf)>, visited on 11 October 2005, paras. 48–50 on the practical limits of this obligation.



## Chapter 7

means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request.<sup>82</sup>

Similarly, the Commonwealth Scheme provides that

[f]or the purpose of ensuring that a Commonwealth county cannot be used as a haven from justice, each country which reserves the right to refuse to extradite nationals or permanent residents . . . will take, subject to its constitution, such legislative action and other steps as may be necessary or expedient in the circumstances to facilitate the trial or punishment of a person whose extradition is refused on that ground.<sup>83</sup>

Such action may include providing that the case be submitted for prosecution in the requested state, temporary extradition subject to a condition of return [203] to serve the sentence in the requested state, transfer of convicted offenders, or asking the requesting state to submit any evidence and other materials to facilitate trial in the requested state.<sup>84</sup>

However, the obligation to submit the case to the local authorities for prosecution, often conditioned upon a request by the requesting state, is worth little unless domestic legislation establishes a competence to exercise criminal jurisdiction over the case.<sup>85</sup> As the Swiss Federal Tribunal correctly observed in *Kaiser and Attenhofer v. Basle*,  
the demand of a foreign State to prosecute and punish on its behalf would not alone confer the *jus puniendi* on the Swiss State. Swiss law must authorize the Swiss authorities to try and punish . . . The *jus puniendi* can only be based on the legal order of the State which inflicts the punishment.<sup>86</sup>

The legal situation is somewhat different in the case of conventions aiming at the suppression of international crimes. These too commonly require requested parties to extradite or prosecute. Admittedly, in many cases, the relevant obligation to establish jurisdiction over the crimes mentioned in the convention is limited to *nationals* of that state, whereas it is often provided that a state party *may* establish (extraterritorial) jurisdiction over the offence when committed by a *stateless person habitually residing on its territory*.<sup>87</sup> On the other hand, these treaty regimes commonly oblige contracting parties to *establish jurisdiction* over offenders found within their jurisdiction if those are not extradited, irrespective of nationality or residence.

Yet, in a significant number of cases states are under no international legal obligation to extradite any persons present on their territory (as a (permanent) resident, national or just a tourist), nor to prosecute them locally. Even where they have voluntarily assumed such obligations, they might be prevented from doing so by, for instance, the lack of a suitable jurisdictional basis in domestic criminal law.

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<sup>82</sup> Article 6(2) ECE, *supra* note 6.

<sup>83</sup> *Supra* note 27, Clause 16 (1). This provision was introduced in 2002 to render the old London Scheme for Rendition of Fugitive Offenders conform international practice. See Communiqué of the Law Ministers' Meeting, Kingstown, St Vincent and the Grenadines, 18–21 November 2002, para. 15, pp. 3–4, <[http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/%7B848FB421-E170-4071-A19D-BB3B5CDDEA50%7D\\_Final%20Communique.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B848FB421-E170-4071-A19D-BB3B5CDDEA50%7D_Final%20Communique.pdf)>, visited on 11 October 2005.

<sup>84</sup> *Ibid.*, Clause 16(2).

<sup>85</sup> The requested state may not have jurisdiction to try the person, the act may not be a criminal offence in that state, it may be subject to an already expired statute of limitations, *etc.*, or prosecution may not lead to conviction due, for instance, to the lack of available witnesses and evidence.

<sup>86</sup> *ILR* 1950, pp. 189–190.

<sup>87</sup> *E.g.*, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (*supra* note 41) Article 6; International Convention for the Suppression of Terrorist Bombings (*supra* note 41), Article 6; International Convention for the Suppression of the Financing of Terrorism (*supra* note 41), Article 7.

## 4.2 *Related Jurisdictional Competence – A Right?*

### 4.2.1 Public International Law

A related question that must be considered is to what extent states are *entitled* under customary international law to exercise jurisdiction over acts committed by persons other than their nationals.

International law recognizes, subject to a limited number of exemptions (e.g. rules on immunities), the right of the state on whose territory the crime has been committed to prosecute the accused. Accordingly, if the crime was committed on the territory of the state of which the person is a resident, that state may prosecute the accused, irrespective of his or her status as a resident.<sup>88</sup> In addition to this, customary international law recognizes a state's right to exercise extraterritorial criminal jurisdiction in a limited number of cases:

- a) where the acts harm vital interests of the state or those protected by the state (protective principle);
- b) (at least in cases where the gravity of the crime or the scale of persons affected so justifies) where the acts harm nationals of the state concerned (passive personality);
- c) where, by its gravity, the act offends the conscience of humanity (universal jurisdiction).<sup>89</sup>

These principles clearly do not apply in a considerable amount of cases. Are there any other circumstances under which international law permits or does not prohibit the assumption of jurisdiction by a state over extraterritorial acts of aliens – habitually or permanently – residing within its borders?

The seminal – but ever so controversial – statement of the general competence of states under international law to exercise extraterritorial criminal jurisdiction is a dictum by the Permanent Court of International Justice in the *Lotus* case. Here, the PCIJ first indicated that jurisdiction to enforce criminal law is territorial. However, it added that

[i]t does not . . . follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot [205] rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.<sup>90</sup>

The Court thus unhesitatingly took the position that states are not prevented from exercising extraterritorial jurisdiction unless they are prohibited by a specific rule (implying that the burden of proof is on those objecting to the assumption of jurisdictional competence in a

<sup>88</sup> It should be noted that the fact that the crime has been committed on the territory of the requested state is a common – independent – ground provided for in extradition agreements for refusing extradition. See e.g., European Convention on Extradition (*supra* note 6), Article 7(1); ECOWAS Convention on Extradition (*supra* note 27), Article 11(1); LAS Extradition Agreement (*supra* note 27), Article II (implying this exception); UN Model Treaty on Extradition (*supra* note 39), Article 4(f).

<sup>89</sup> On the bases of extraterritorial criminal jurisdiction in international law, see e.g., Bassiouni, *International Extradition*, *supra* note 18, pp. 367–443; I. Brownlie, *Principles of Public International Law* (6th ed., Oxford University Press, Oxford, 2003) pp. 301–303; V. Lowe, 'Jurisdiction', in Evans, *supra* note 60, pp. 336–347; Cassese, *supra* note 78, pp. 277–300.

<sup>90</sup> *Lotus* (Turkey v. France), Judgement No. 9, 1927, PCIJ Ser. A, No. 10, pp. 18–19.

given case). Yet, the better view – one supported by state practice and authorities – appears to be that international law requires some justification, for instance, in the form of a link (‘meaningful contact’) between the state wishing to exercise jurisdiction and the conduct in question<sup>91</sup> or ‘the protection of common values’.<sup>92</sup> In most cases concerning residents’ extraterritorial criminal conduct, a link is arguably present due to the genuine interest of the state to protect its *ordre public* by the force of deterrence through the application of its criminal laws to offenders residing on its territory. The wish to contribute to their successful rehabilitation and reintegration into that society will provide another connecting factor. In addition, the protection of common values test is arguably almost always satisfied, as a fair prosecution will promote international justice.

Yet, the drafters of the 1937 Harvard Draft Convention on Jurisdiction with Respect to Crime did not consider it necessary and/or justified by the limited amount of state practice available at the time to assimilate domiciled or resident aliens to nationals for the application of the active personality principle. They unhesitatingly submitted that

it seems clear in principle that domicile alone does not afford an adequate basis for the unrestricted competence which this article [206] recognizes. In view of the jurisdiction over crime committed by aliens abroad which is recognized in other articles of this Convention, it seems wholly undesirable to attempt an assimilation of domiciled aliens to the position of nationals. The one case in which such an assimilation would be most plausible is the case of persons who are ‘stateless’ . . . However, such provisions 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.<sup>93</sup>

It must be pointed out that the drafters saw it as a given that ‘[e]xtradition may of course be granted to the State where the crime was committed’.<sup>94</sup> However, due to the operation of nationality, residency or another exception, this is often still not the case.

Admittedly, much has changed in international (criminal) law in general and in the specific field of cooperation in criminal matters in particular since the 1930s. In contrast to the views adopted then, a 1991 study conducted by the Council of Europe on *Extraterritorial Criminal Jurisdiction* observed again the existence of a limited body of practice to this effect but did not find it objectionable to extend the application of the active personality principle to residents.<sup>95</sup> It lends support to this conclusion that there is little evidence of protests by the state of the offender’s nationality in such cases.

In sum, customary international law (i.e. the existence of some state practice and *opinio juris* in favor and lack of both components against such a rule) appears in any case not to prohibit states from exercising such jurisdiction.<sup>96</sup>

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<sup>91</sup> See e.g., F. A. P. Mann, ‘The doctrine of jurisdiction in international law’, 111 *Recueil des cours* (1964-I) p. 39; Lowe, *supra* note 89, pp. 335–336; R. Higgins, *Problems & Processes: International Law and How We Use It* (Oxford University Press, Oxford, 1994) p. 135; Cameron, *supra* note 77, p. 33.

<sup>92</sup> J. Dugard, *International Law: A South African Perspective* (2nd ed., Juta, Kenwyn, 2000) p. 77; Cameron, *supra* note 77, p. 333; European Committee on Crime Problems, Council of Europe, *Extraterritorial Criminal Jurisdiction* (1990) p. 27.

<sup>93</sup> 29 *AJIL* 1935, Supplement, pp. 533–534.

<sup>94</sup> *Ibid.*, p. 534.

<sup>95</sup> *Supra* note 92, pp. 11, 25.

<sup>96</sup> See *contra*, M. Sahović and W. W. Bishop, ‘The Authority of the State: Its Range with Respect to Persons and Places’ in Max Sørensen (ed.), *Manual of Public International Law* (1968) pp. 360–361 arguing that

[a] few states, such as Denmark, Liberia and Norway, apparently assimilate domiciled aliens to nationals, and assert jurisdiction over them for crimes committed abroad. Although there does not appear to be available evidence of objection by the state of the domiciled alien’s nationality, jurisdiction based solely on domicile would seem hard to justify. An exception might be in the case of domiciled stateless persons, who might well be treated as assimilated to nationals for purposes of jurisdiction; the Soviet and the Italian Penal codes do so declare.

[207] Yet, in case of concurrent jurisdiction, the *ordre public* claim together with the availability of evidence and witnesses constitute an equally strong or even prevalent link with the state on whose territory the crime took place. Moreover, it has been argued that the rehabilitative model is failing.<sup>97</sup> The new tendency in criminal justice, moving away from punishment and rehabilitation towards victim participation, advocates prosecution in the territorial state where the victim lives. Shared language and familiarity with the legal tradition would, in turn, weigh in favor of prosecution in the state of nationality. These considerations could arguably decide any conflict in favor of trial in the territorial state or state of nationality (where those differ from the state of residence), strengthening the case for extradition.<sup>98</sup> Rehabilitation and reintegration could then be promoted by requiring that the person be returned for the enforcement of his sentence to his state of residence.<sup>99</sup>

#### 4.2.2 The Rights of the Accused

What about principles of criminal law, such as legal certainty? Do they impose any restraints on the right of states to extend the nationality exception and the active personality principle to non-nationals? It has been raised for the sake of argument that

[a]lthough in some cases, citizenship constitutes merely a formal bond – the delinquent may be born and brought up in another country, where he feels more at home – the objective criterion of nationality is, in a legal instrument, better than a subjective one, because of the need for legal security. A criterion referring to the country where the person claimed feels at home, or where he is rooted, is rather vague, and so, perhaps, less fit for practical purposes.<sup>100</sup>

[208] The principle of – reasonable or maximum – legal certainty is well established in modern legal systems. It requires the law to be sufficiently precise to enable one to predict the legal consequences of his or her acts with a reasonable degree of certainty. It is arguable that, by stating a highly subjective criterion the declarations made, for instance, by the Netherlands and Luxembourg to the ECE,<sup>101</sup> referring to foreigners ‘integrated’ in the respective societies could be seen as inconsistent with this principle. Nonetheless, as noted above, these declarations have not given rise to similar domestic legislation granting enforceable individual rights.

The principle of legal certainty does not require full certainty, only reasonable or the maximum possible level of security and clarity permitted by the circumstances. In addition, the more elusive the concept, the more offenders might be protected by it. It is therefore unlikely that requested persons – whose right to legal certainty may or may not be violated by

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Others have, however, objectively and without objection observed the existence of such a practice in some states (M. Akehurst, ‘Jurisdiction in International Law’, 46 *British Yearbook of International Law* (1974) p. 156; H. F. van Panhuys, *The Role of Nationality in International Law: An Outline* (Sythoff, Leyden, 1959) p. 127.

<sup>97</sup> See e.g., B. P. Archibald, ‘Co-ordinating Canada’s Restorative and Inclusionary Models of Criminal Justice: The Legal Profession and the Exercise of Discretion under the Reflexive Rule of Law’ (Revised Version of a Presentation at the Colloquium on the Legal Profession Organized by the Chief Justice of Ontario’s Advisory Committee on Professionalism, 5 March 2004, Toronto, Ontario), pp. 10–11 (in general), 13 (with specific reference to Canada), <[www.lsuc.on.ca/media/archibald\\_models\\_criminal\\_justice\\_mar0504.pdf](http://www.lsuc.on.ca/media/archibald_models_criminal_justice_mar0504.pdf)>, visited on 11 October 2005; ‘Rehabilitation’ in J. Dressler (ed.), *Encyclopedia of Crime and Justice* (2nd ed., Macmillan Reference USA, New York, NY, 2002) p. 1314.

<sup>98</sup> Cameron (*supra* note 77, p. 336) has concluded that ‘[o]bliging state organs (particularly the legislature, the prosecutor and the courts) to balance interests and make only reasonable assertions of jurisdiction, even if this cannot be said to be a requirement *de lege lata*, is undoubtedly a good idea *de lege ferenda*.’

<sup>99</sup> See Section 4.4., *infra*.

<sup>100</sup> Duk, *supra* note 3, p. 33.

<sup>101</sup> See *supra* note 32 and accompanying text.

the choice of this subjective criterion – would object to the broader formulation of the extradition exception referring to permanent residents, habitual residents or domiciled or resident aliens.

The principle of legal certainty might, however, be raised by an accused where the sole jurisdictional link over an extraterritorial common crime he stands accused of is his loosely defined status as a resident. Not only are there enormous differences in how various states define ‘residence’, it is defined differently by the same state for different purposes. For example, the requirements are often much less strict for the application of tax regulations than for eligibility to apply for social benefits. In the absence of a clear and previously established definition of ‘residence’ applicable to extradition and criminal jurisdiction, one can hardly speak of legal certainty.<sup>102</sup> These problems could be avoided by requiring clearer and more permanent legal categories, such as permanent residency<sup>103</sup> – even though definitions and requirements vary by state to some extent even related to this concept.

**[209]** In addition, legal certainty is often impeded by other factors. Should a state grant (certain well-defined categories of) its residents and individual legal right against extradition, even this could be circumvented in practice. As Duk noted:

[w]hat happens if a foreign visitor is wanted by the police of his home country for an (alleged) offence that cannot lead to his extradition? In many cases he will be promptly regarded as an undesired alien, and treated as such; which may result in his expulsion and (informal) surrender to that police.<sup>104</sup>

It should not be forgotten either that there is a large degree of executive discretion in matters of extradition. The opinion expressed by courts on the permissibility of extradition under the laws of the requested state is not always binding. This fact renders extradition a process prone to subjectivity and legal uncertainty irrespective of the clarity of the law.

Moreover, even nationality is not always unproblematic in this context. The application of the concept in criminal law gives rise to problems in cases of dual nationals and naturalized persons. Such problems are exacerbated by the lack of uniformity in state practice as to whether nationality at the time of the commission of the alleged crime, at the time of the request for extradition or at any other point in time should be considered. Due to increasing globalization and movement of persons, these cases are becoming more and more common.<sup>105</sup> These problems may give rise to arguments related to legal certainty similar to those that arise in the context of the (non)-extradition of residents. Yet, as far as the author is aware, these have not been invoked by critics of the non-extradition of nationals in the context of legal certainty.

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<sup>102</sup> Arguably, ‘habitual residence’ or ‘domicile’ are also too vague and subjective terms to be applied as legal criteria in criminal law. Cf., e.g., P. Kaye, ‘The Meaning of Domicile under United Kingdom Law for the Purposes of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters’, 35 *Netherlands International Law Review* (1988) pp. 183–184; P. Rogerson, ‘Habitual Residence: The New Domicile?’, 49 *International and Comparative Law Quarterly* (2000) pp. 99–101.

<sup>103</sup> Reference to ‘permanent residents’ or persons continuously residing in the state for a certain amount of years (constituting clearer legal categories) is preferable, not only from the perspective of legal certainty but also in order to limit the scope of persons protected by the exception to those in whose case it is most justified by closeness of ties.

<sup>104</sup> Duk, *supra* note 3, p. 34. The validity of this argument is, however, limited to situations where the requested state is the state of nationality of the requested person. The person will usually have to return to his state of nationality unless granted asylum elsewhere.

<sup>105</sup> See e.g., D. A. Martin, ‘Introduction: The Trend Toward Dual Nationality’, in Martin and Hailbronner, *supra* note 22, p. 3; Oeter in *ibid.*; Zs. Deen-Racsmany, ‘The Nationality of the Offender and the Jurisdiction of the International Criminal Court’, 95 *American Journal of International Law* (2001) p. 606.

### 4.3 *Limits Related to the Rehabilitation Argument*

#### 4.3.1 The Material Date

The above comparison with the problems related to the nationality criterion highlights a further problem, one related to the validity of the rehabilitation argument and its application: for the exception to be credible it must be limited [210] to persons whose (permanent) residence is in the requested state at the moment the request is received.<sup>106</sup> The whereabouts of one's residence prior to or at the time of the commission of the offence or following the offence but prior to the extradition request have no bearing on the question of rehabilitation.

However, focusing on residence at the time of the request for extradition makes the non-extradition of (permanent) residents a practice even more prone to abuse than the nationality exception: a criminal with a lot at stake and aware of the practice of a state not to extradite its residents may be inclined to establish his or her residence in that state. This is much less burdensome and time-consuming than naturalization and the inconvenience may weigh up against a long term or life imprisonment.<sup>107</sup> On the other hand, chances of abuse may be reduced by requiring permanent residence and by not laying down a corresponding individual right in one's domestic legal system but leaving the authorities of the state a considerable degree of discretion in such cases.

#### 4.3.2 Equal Treatment

Another aspect of fairness or justifiability relates to equal treatment and the application of the same justification to all categories of individuals. Van Panhuys critically noted in 1961 that

[i]n Sweden, there is a tendency of excluding on this ground [i.e. the drastic consequences of the extradition for the individual] the extradition of aliens settled there. Its complement, namely the extradition of Swedish subjects to the foreign country where they are settled, they have not dared risk.<sup>108</sup>

However, the Swedish Law concerning Extradition for Crime was amended in 2001, allowing extradition of Swedes to member states of the European Union, *inter alia*, if the requested person has continuously resided in the requesting state for at least two years at the time of the commission of the crime. Whereas the Act previously required in general terms that any sentence pronounced following extradition of a Swedish national be enforced in Sweden, this condition too was lifted in cases where the extradited Swede [211] had been residing in the requesting (sentencing) state for at least two years prior to the extradition request.<sup>109</sup>

The uniform Nordic extradition laws that regulate extradition in relation to other Nordic states subject the non-extradition of nationals to the same limitation concerning

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<sup>106</sup> Relevantly, Cameron (*supra* note 77, p. 73) observed in connection with the application of the active personality principle to domiciled aliens that, for reasons of closeness of ties and the risk of prosecution for political offences or being subjected to the death penalty, 'most of the Nordic states regard the alien's place of domicile at the time of the trial as being decisive, not his or her domicile at the time of the offence'.

<sup>107</sup> Cf. Deen-Racsmány, 'A New Passport to Impunity?', *supra* note 19 on such abuse through naturalization.

<sup>108</sup> Van Panhuys, *supra* note 3, p. 29. The author's translation.

<sup>109</sup> Article 3 (another reason for extraditing nationals relates to the gravity of the crime). (*Svensk författningssamling* 2001:612.) It should, however, be noted that this provision was deleted from the extradition act by its 2003 amendment (*Svensk författningssamling* 2003:1158). The principle is now incorporated in the act implementing the European Arrest Warrant (*supra* note 74), which regulates extradition from Sweden to EU members at present.

residence abroad.<sup>110</sup> These states have thus truly opted for the humanitarian justification of non-extradition (i.e. closeness of family and friends at the place of enforcement, reintegration), and applied that consistently not only to deny extradition of residents but also to grant the extradition of their own nationals living abroad, at least to certain other states.

In fact, it appears that in practice residence is invoked by courts and granting authorities of these states more frequently to permit the extradition of nationals (due to their residence abroad) rather than to deny extradition of (integrated) resident aliens.<sup>111</sup>

The author has not been able to identify legislation outside of the Nordic region permitting the extradition of nationals domiciled elsewhere as an exception to the non-extradition of nationals. Without such a counterpart, the extension of the non-extradition of nationals to residents means a broadening of the widely criticized exception rather than a modernization thereof. The failure to apply it equally to one's own citizens, while not necessarily influencing the legality of the solution under international law, would at least considerably reduce the credibility of its justification, the rehabilitation argument.

### 4.3.3 Immigration Laws

Immigration laws, too, may render the reintegration argument problematic in relation to the prosecution and non-extradition of (permanent) residents, as well as the requirement of return and the transfer of sentenced persons.<sup>112</sup> [212] For example, many states terminate an alien's right to reside on their territory if he commits certain crimes. In such cases, the person will be expelled after having completed his sentence, and neither he nor the society will benefit from his successful reintegration. It is for this reason that the Dutch declaration to Article 6 of the ECE relating to residents imposes the condition 'and insofar as such foreigners are not expected to lose their right of residence in the Kingdom as a result of the imposition of a penalty or measure subsequent to their extradition'.<sup>113</sup>

## 4.4 Alternatives

An important aspect of the desirability and utility of the extended nationality exception concerns the question of alternatives. Are there other – better – avenues to facilitate rehabilitation while not further expanding the already so controversial nationality exception? One way to avoid lawlessness could be the transfer of proceedings in criminal matters to the jurisdiction where the offender lives. This solution would satisfy the advocates of the rehabilitation argument. Moreover, requiring the cooperation of the state on whose territory

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<sup>110</sup> See e.g., Article 2 of the Swedish Law on Extradition to Denmark, Finland, Iceland or Norway (*Svensk författningssamling* 1959:254, (in Swedish) <<http://lagen.nu/1959:254>>, visited on 11 October 2005, with modifications up to present); Article 2 of the Finnish Law on Extradition between Finland and the Other Nordic States (in Finnish and Swedish, <<http://www.finlex.fi/sv/laki/ajantasa/1960/19600270?search%5Btype%5D=pika&search%5Bpika%5D=utl%C3%A4mning>>, visited on 11 October 2005).

It should be noted that work is presently underway in the Nordic Council on a new Nordic extradition agreement that would go beyond the liberal regime adopted within the EU under the EAW. ('Nordic extradition convention', Press release of 21 June 2005, <<http://www.norden.org/webb/news/news.asp?id=5201>>, visited on 11 October 2005.

<sup>111</sup> See *supra* note 65.

<sup>112</sup> See Dutch Extradition Act, *supra* note 63; Act on the transfer of enforcement of criminal judgments (reproduced in English in Swart and Klip, *supra* note 63, p. 289).

<sup>113</sup> *Supra* note 32.

the crime took place (if other than the state of residence) and where the evidence is concentrated, it would provide satisfactory chances of a successful prosecution.

The combination of the nationality/residence exception with the modern regime of transfer of sentenced persons offers an even more effective option. Under this alternative, extradition of nationals and/or residents could be granted on condition that the person will be returned to the extraditing state for the enforcement of any custodial sentence or detention order pronounced in the requesting state. Such a regime has been adopted by, for instance, the Netherlands,<sup>114</sup> and under the EAW.<sup>115</sup> This solution is capable of effectively combining the interests of rehabilitation, victim participation, and the availability of evidence in the territorial state. By ensuring to a reasonable degree prosecution and the enforcement of the sentence passed, it has the further advantage of being less prone to abuse than the non-extradition of nationals or residents would be, and less open to criticism related to ‘legal xenophobia’.<sup>116</sup>

Such a regime has, in fact, been foreseen by, *inter alia*, van Panhuys and Shearer.<sup>117</sup> Whereas even this system is not free from controversy and [213] shortcomings, the problems it gives rise to (i.e. inequality of sentences,<sup>118</sup> lack of jurisdiction to enforce due, e.g., to the lack of dual criminality, that the offence is classified as a military or political offence in the requested state or due to different statutory limitations in the requested state) would arise in precisely the same cases if the offender’s extradition were refused for reasons of his residence and the requested state attempted to prosecute him or her domestically. However, in the case of non-extradition, prosecution could even be hindered by the lack of evidence and witnesses.

## 5 CONCLUSION

The present study addresses recent developments related to the non-extradition of nationals, namely its extension to or replacement with a more flexible status: residency. While the nationality exception is clearly compatible with customary international law, its use today is not uncontroversial. Criticism relates primarily to ‘legal xenophobia’ and the adverse effect of the principle on criminal justice. Without entering into the merits of such a criticism, the study looked at the origins of this still frequently invoked exception and found that in its initial form it probably related to subjects in the sense of inhabitants of the territory rather than nationals in the politico-legal meaning. Nonetheless, where states do deny extradition on this ground today, they commonly do so in relation to nationals in the latter sense.

Albeit other fields of international cooperation in criminal matters are more favorable to substituting residence for nationality, the traditional regime of extradition lags behind in this respect. Here, precedents for expanding the scope of the nationality exception to residents

<sup>114</sup> Act on the transfer of enforcement of criminal judgments (*supra* note 112) permits extradition of nationals for prosecution on the condition that any resulting sentence must be enforced in the Netherlands. No similar conditions are, however, imposed on the extradition of residents.

<sup>115</sup> *Supra* note 8.

<sup>116</sup> *Cf.*, e.g., Williams, *supra* note 2, p. 261 considering that the nationality exception is ‘a form of legal xenophobia that is not warranted, especially if the treaties contain the requisite safeguards’.

<sup>117</sup> Van Panhuys, ‘Uitlevering’, *supra* note 3, pp. 35–36; Shearer, *supra* note 2, pp. 125–127.

<sup>118</sup> The most widely ratified applicable multilateral treaty, the Convention on the Transfer of Sentenced Persons (*supra* note 51) permits states parties to opt for one of two models: direct enforcement (Article 10) or conversion of the sentence to a sanction prescribed by the law of the enforcing state (Article 11). The latter frequently leads to the reduction of the sentence to be served. Chapter III of the UN Model Agreement on the Transfer of Foreign Prisoners (*supra* note 37) envisages a similar regime. See also reference to claimed US frustration with the Dutch practice of converting sentences of Dutch nationals who have been extradited to the US and subsequently returned to the Netherlands for the enforcement of the sentence in Deen-Racsmány and Blekxtoon, *supra* note 11, p. 357.



constitute the exception rather than the rule. The few treaties that – implicitly or explicitly – do so commonly require prosecution if the exception is invoked, thereby attempting to reduce chances of impunity. It is perhaps for this reason that there has been little if any criticism of this approach. In addition, the author has found little direct evidence (e.g. in the form of protests, failure to recognize relevant declarations, etc.) of an *opinio juris* against such a possibly emerging new rule.<sup>119</sup>

[214] On the other hand, legal scholarship has raised convincing arguments in favor of a rule concerning the non-extradition of residents. The interest of successful rehabilitation and reintegration of criminals – central to the approach to criminal justice that gained ground in the mid-twentieth century – provides a strong justification for the suggested regime. The proposed new exception is not only desirable, within certain limits it is even in conformity with public international law. As customary international law does not oblige states in the absence of a self-assumed duty to extradite criminals found on their territory, states have the capacity to conclude treaties establishing this exception.

Whereas the extension of the exception to residents while not similarly extending the scope of the active personality principle of criminal jurisdiction is clearly disadvantageous from the point of view of criminal justice, states are under no general *aut dedere aut judicare* obligation under international law. On the other hand, there is little in international law to prohibit states wishing to do so from extending their criminal laws to residents in well-defined cases.

Even the criminal law principle of maximum legal certainty does not prevent states from modifying the nationality exception, replacing nationality with residence. A condition of permanent or at least long-term residence would however better correspond with this principle. Moreover, a *bona fide* extension of the rule would take residence at the moment of the extradition request into account, and would be reciprocal in the sense that it would permit the extradition of a national who has established his or her permanent or long-term residence in another state. The exception should also reflect the limits imposed by immigration laws on the right of offenders to continue residing in the requested state.

However, rather than merely adopting an extended nationality or residency exception in extradition, the better approach would be to resort as often as possible to established models of transfer of sentenced persons, in connection with nationals as well as long term residents. This regime favors rehabilitation in the state to which the person will return after the sentence. At the same time it could facilitate successful prosecution (in the territorial state); a double gain for criminal justice. The agreement adopted under the auspices of the Council of Europe but open to accession by states outside the region or agreements concluded in conformity with the UN Model Agreement on the Transfer of Sentenced Persons could be utilized for this purpose.<sup>120</sup>

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<sup>119</sup> See *supra* note 8.

<sup>120</sup> For several reasons, the Draft FD on the European Enforcement Order (*supra* note 58) has been predicted to be counterproductive to international cooperation in criminal matters. See Judge R. Blekxtoon, 'The draft framework decision on the European enforcement order', <<http://www.eurowarrant.net>>, visited on 12 December 2005.