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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8 Synthesis and Concluding Observations

This thesis has addressed two functions of the bond of nationality in international criminal law: the active personality principle and the non-extradition of nationals. This chapter seeks to synthesize the findings and propositions made in the previous chapters regarding these phenomena in relation to the questions posed in the introduction, namely:

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

The following sections answer these questions, first in relation to the active personality principle, and secondly, in respect of the nationality exception. The chapter ends with general observations that emerge from the study.

1. Active Personality

1.1. Impact on International Criminal Justice

The chapters that focussed or touched upon the application of the nationality principle provide ample evidence that the principle is of crucial importance to international criminal justice today. Its overall impact is undeniably positive: it extends the reach of international criminal law to crimes and criminals who could otherwise escape justice due, *inter alia*, to the non-extradition of nationals.[1] Its indirect recognition and inclusion in the ICC Statute,[2] constitutes a clearly justified transposition of the principle to international criminal jurisdiction.[3] It is a welcome step towards maximizing the legitimate reach of the Court's jurisdiction.

In addition, case-law, domestic statutes,[4] international conventions[5] and scholarly writings reviewed in this study show that the utility of the active

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1 On active personality and its functions, see Chapter 1 at 6-7; Chapter 2 at 25, Chapter 3 at 55.

2 See Chapter 2 at 22-23.

3 Chapter 2 at 26-27.

4 Even states with a common law tradition increasingly permit application of the principle under, *e.g.,* war crimes acts. Some evidence of this is provided in Chapter 2 at 30.

5 Chapter 7 at 203, note 87 and accompanying text.

personality principle and its contribution to international criminal justice are internationally recognized. The legitimacy of the principle is seldom questioned[6] and resort to it is extensive and still expanding.

It is thus somewhat surprising that succeeding prosecutors of the ICTR have not made use of the possibility to indict Rwandan nationals for crimes committed abroad as permitted under Article 1 of the ICTR Statute.[7] It can only be hoped that the ICC Prosecutor will not shy away from initiating prosecutions based on Article 12(2)(b) of the Rome Statute.[8]

Whereas active personality is commonly seen as the cure to the problems created by the non-extradition of nationals, it is unlikely to have a similar role before the ICC. In situations where a state – in spite of the unambiguous obligation to surrender its nationals – fails to act upon the Court's request, it is improbable that domestic prosecution will provide an effective option. The case of self-referrals[9] aside, requests for surrender are likely to be made following the failure of domestic prosecution. The study of relevant constitutional challenges related to the European Arrest Warrant and their application to the ICC regime indicates that, on many occasions, surrender requests *will* be turned down by national authorities due to constitutional prohibitions on the extradition of nationals.[10] It is therefore desirable that steps be undertaken as soon as feasible to amend applicable constitutional prohibitions in order to facilitate future cooperation with the Court.[11] Only then can prosecution by the ICC based on active personality fulfill its purpose, *i.e.* to substitute for domestic prosecution.

1.2. Problems and Proposed Responses and Adaptations

Active personality is not capable of providing a comprehensive solution to *all* cases of impunity caused by the non-extradition of nationals. It is relatively costly and in spite of all good intentions, in many cases prosecution does not succeed due to the lack or unavailability of evidence, witnesses, *etc*. present in another jurisdiction.[12] In addition, extradition agreements and even international conventions outlawing international crimes seldom establish an unequivocal obligation to prosecute a person (often a national) who is not extradited.[13] While a pattern of reliance on a conventional *aut dedere aut judicare*

6 *Sed contra* Fitzgerald cited in Chapter 7 at 189, text accompanying note 25.
7 For the relevant part of this provision, see Chapter 1 at 7, note 23. *Cf.* Chapter 1 at 11, note 32 on this issue.
8 For the relevant part of this provision, see Chapter 2 at 22.
9 See Chapter 6 at 162, note 20.
10 Chapter 6.
11 Chapter 6 at 179-180. *Cf.* Chapter 1 at 8, note 25 on the inability of the ICC to prosecute suspects *in absentia*.
12 Chapter 4 at 71, text accompanying note 6; Chapter 3 at 58.
13 Chapter 3 at 55-56, 57. Chapter 4 at 75-80, *cf*. 80-86.

obligation may be observed,[14] it is unlikely to crystallize into a customary rule in the coming decades. Moreover, the principle of compulsory prosecution is known to few legal systems.[15] The large degree of discretion thus left to domestic authorities often results in a failure to initiate prosecution of (non-extraditable) nationals for their crimes committed abroad.[16]

The application of the principle of active personality may, however, be made more effective in several ways. One of these could be to make the obligation to prosecute in the absence of extradition more categorical. Secondly, improving avenues for international cooperation in criminal matters related, *inter alia*, to the transfer of files and evidence, exchange of witnesses, *etc.* could make a significant difference.

In our global village, another frequent challenge in applying the nationality principle before domestic courts and the ICC is likely to concern the definition of nationality or the identification of the relevant link of nationality to be applied for the purposes of determining the applicability of the principle. Chapter 2 has identified four types of problematic cases, namely the attempted exercise of jurisdiction based on active personality over multiple nationals (possessing among others the nationality of the forum wishing to prosecute), persons who changed nationality around the time of the commission of the crime or around that of prosecution (thereby acquiring or losing the nationality of the forum wishing to prosecute), stateless persons and refugees. Based on extensive research from available sources, and having reached the conclusion that international law is at best indeterminate on these issues, the following rules have been proposed:

With regard to dual nationals, each state of which the offender is a national should have the right to extend its penal jurisdiction to such persons based on the active personality principle. In relation to persons who have changed nationality it was proposed that the state of which the person is a national at the time of the commission of the crime as well as the one whose nationality (s)he bears at the time of prosecution should both be permitted to exercise such jurisdiction. In turn, the state of permanent residence should have jurisdiction over stateless persons as far as crimes committed after their having acquired such a status are concerned, even if they subsequently abandon that residence. Finally, the state of asylum should be entitled to active personality jurisdiction over crimes committed by the refugee – only – after he had acquired that status. Conversely, crimes committed after the person has fled that state should not fall under the jurisdiction of the state of origin under the nationality principle, but the former state could exercise jurisdiction over crimes committed prior to the refugee seeking asylum elsewhere.

14 Chapter 3 at 55-57.
15 Chapter 3 at 58.
16 Chapter 3 at 57.

The same rules were proposed in relation to the exercise of jurisdiction based on Article 12(2)(b) by the ICC Statute.[17] However, it is recognized that, at least with regard to the rules proposed to be applied to stateless persons and refugees, this could not be accomplished by means of clarification of the meaning of the concept 'state of nationality' as understood by the Court. The proposed solutions would require amendment of the Statute.[18]

The debate surrounding the adoption of Article 12(2)(b) of the ICC Statute[19] raises another problem that may arise in relation to the application of the principle: its adaptation to international criminal jurisdiction, *i.e.* its very applicability by the ICC. The fact that the Rome Conference approved this provision in spite of voices against it indicates, however, a conviction on the part of an overwhelming majority of states that the principle is directly transferable to international jurisdictions, or at least to the ICC.[20]

1.3. Alternatives

In Chapter 7, the possibility of extending the application of active personality to residents was examined in connection with the question whether a state refusing extradition of its residents is obliged and/or entitled to prosecute the crimes concerned relying, *inter alia*, on active personality. Public international law and the rights of the accused do not seem to prevent such an extension of active personality.[21] However, in order to maximize its legitimacy, the exercise of jurisdiction should be subject to certain limits related to the material date, equal treatment and immigration law. In addition, it should preferably only be applied to permanent residents. In all other cases, residents should rather be extradited for prosecution abroad.

Even more importantly, in the overwhelming majority of these cases, states would be under no international obligation to prosecute non-extradited residents. In addition, even where they have voluntarily accepted such an international obligation, domestic legislation (or lack thereof) may prevent states from living up to that commitment.[22] In conclusion, this alternative would not always be capable of mending the hole in the framework of international criminal justice caused by the failure to extradite.

A radical but effective alternative is clearly prosecution on another basis. The relative (cost-)effectiveness of prosecution in the territorial state, due to

17 As noted in Chapter 2 at 31, note 61, the operation of these rules may be subject – at least for domestic crimes – to restrictions imposed by the principle of *nullum crimen sine lege*. *Cf.* R. O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', 2 *Journal of International Criminal Justice* (2004) 735 at 743-744 on the problem of non-retroactivity in relation to persons naturalized after commission of the offence in question.

18 Chapter 2 at 34, 38, 39.

19 Chapter 2, at 26-27, note 32.

20 Chapter 2, note 32 at 26-27.

21 The *nullum crimen sine lege* principle may, however, impose some valid limits.

22 Chapter 7 at 203. *Cf.* 200-203.

the availability of evidence and witnesses, have been emphasized.[23] This solution would, admittedly also necessitate extradition of the person in most cases,[24] but it could be combined with a transfer of the sentenced person back to his or her state of nationality for the enforcement of the resulting custodial sentence.[25] Alternatively, although this would mean losing at least some of the advantages of the application of the territorial principle, the transfer of proceedings to the state of nationality may be considered.[26]

2. Non-extradition of Nationals

2.1. Impact on International Criminal Justice

In contrast to active personality, the non-extradition of nationals is commonly seen in a negative light. It is considered to be one of the most widely utilized legitimate sources of impunity. Its negative evaluation is elevated by the fact that its main traditional justifications relate to what may be seen as xenophobic sentiments.[27]

As noted in the Introduction, the actual impact of the phenomenon is probably much more limited than is commonly presumed. The overall compensation through the exercise of active personality jurisdiction has been explored in detail above.[28] In addition, it is only a part of the international community – primarily states with a (predominantly) civil law tradition – that resort to the nationality exception as a standard measure to protect their nationals from foreign jurisdiction.[29] However, common law states too often deny extradition of their nationals to civil law jurisdictions today, invoking the absence of reciprocity.[30]

On the other hand, the recent expansion of extraterritorial jurisdiction,[31] with a potential to lead to unfair situations,[32] renders the nationality exception in the eyes of many a necessary safeguard to protect nationals from overly intrusive exercise of foreign criminal jurisdiction. Accordingly, adopting a broad view on international criminal justice, as encompassing fair trial rights and the protection of individuals from jurisdictional overreach, the non-extradition of nationals may be assessed more positively.

In addition, assuming successful prosecution in the state of nationality following a refusal to extradite, the nationality exception may in fact prove bene-

23 *Supra* note 12; Chapter 7 at 212; Chapter 4 at 71, text accompanying note 6.
24 See Chapter 1, Section 2.2. on the growing unpopularity of prosecution *in absentia*.
25 Chapter 7 at 212.
26 Chapter 7 at 212.
27 Chapter 4 at 71.
28 Section 1.1., *supra*.
29 Chapter 2 at 44; Chapter 7 at 187.
30 See Oehler, cited in Chapter 7, note 20 at 187.
31 See Introduction, Section 2.1.
32 See Chapter 4 at 72.

ficial to international criminal justice.[33] In many cases, this solution may contribute to a more successful rehabilitation of the accused than extradition followed by enforcement of the sentence in the requesting state.[34]

Yet, if states are forced by constitutional rules[35] to refuse extradition/surrender of their nationals under the EAW or to the ICC,[36] the negative impact of such decisions on international criminal justice may be considerable. In the context of the EAW, the abolition of the requirement of double criminality may render domestic prosecution – or enforcement of a sentence passed abroad – impossible. The failure to regulate the obligation of states in such cases with sufficient clarity renders such situations prone to friction, reducing in turn chances of friendly and effective cooperation in criminal matters in the EU.[37]

Although the nature and scope of the obligation to surrender individuals – including nationals – to the ICC is somewhat different than under the EAW,[38] the failure to surrender nationals to the ICC is expected to have similar consequences. The effectiveness of the Court would be jeopardized. Moreover, due to the Court's inability to enforce the obligation to surrender, the failure to surrender could affect the ICC's credibility,[39] with a severe negative impact on international criminal justice.

2.2. *Problems and Proposed Responses and Adaptations*

The first problem addressed in this dissertation relates to the application of the nationality exception to naturalized persons. Whereas successful fraud or *mala fide* naturalization for the purpose of gaining impunity – and cooperation by state authorities therein[40] – cannot be ruled out, it is likely to be insignificantly infrequent. In addition, states have found various means to compensate for the negative impact of naturalization on international criminal justice in this context.[41]

As indicated by the *Bikker* case,[42] the nationality exception may also lead to injustice in the case of extradition requests for the enforcement of sentences. However, the problems observed in this case appear to be the result of a combination of various negative factors.[43] In most cases, prosecution in the state of

33 See Chapter 7 at 183.
34 See, however, Section 2.3. *infra* on alternatives.
35 See Chapters 5 and 6 on the commonly underestimated role of constitutional provisions in forcing the authorities of a state to deny extradition of nationals.
36 On the obligation on states parties to surrender nationals, see Chapter 1, Section 3.2.; Chapter 6 at 156-159.
37 On these problems, see Chapter 4.
38 For a comparison, see Chapter 6.
39 Chapter 6 at 179-180.
40 A possible case at point is that of *Nevzlin*, described in Chapter 3 at 45.
41 See Chapter 3 at 52-59.
42 Chapter 3 at 44-45.
43 See Chapter 3 at 58-59.

nationality or the enforcement of the foreign sentence in the state of nationality may provide viable options.

Turning to international criminal jurisdiction, it must be noted at the outset that the ICC Statute does not address this problem. However, following the solutions proposed in Chapter 2 in relation to persons who have changed nationality, no problems are expected in respect of the act of surrender of a naturalized person other than those that could arise in relation to persons whose nationality status is uncontroversial.

Real problems are more likely to surface in relation to attempts to *abolish* the nationality exception. Recall, for instance, the consequences of doing away with double criminality together with circumscribing the extradition of nationals under the EAW.[44] A temporary solution to this problem could be to amend domestic implementing statutes.[45]

In addition, the attempts to circumvent the operation of the principle – under the EAW and the ICC Statute – through a semantic distinction is of highly questionable utility.[46] The assumption that courts would interpret the constitution in harmony with the obligation to surrender may have been based on little more than wishful thinking and/or a lack of recognition of the fact that the non-extradition of nationals is intertwined with strong national sentiments, and that constitutional prohibitions should not be taken lightly. An effective solution requires imposing an obligation, corollary to the general duty to extradite, to amend relevant prohibitions along the lines suggested in Chapter 6.

2.3. *Alternatives*

Domestic prosecution in the state of nationality, preferably in cooperation with the prosecutorial authorities of the requesting state, offers a reasonable but imperfect option.[47]

Another alternative that has been considered in detail in this study relates to extending the exception to residents.[48] Admittedly, this option would not affect the problems discussed in relation to the non-surrender of nationals under the EAW or to the ICC. In fact, the EAW provisions on non-surrender already treat residents as nationals. The advantage of this option lies rather in the adaptation of the nationality exception to perceptions of fairness of the twenty-first century: it is commonly seen as better serving justice through its contribution to successful resocialization of the convict.

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44 Section 2.1., *supra*.
45 Chapter 4 at 92.
46 See Chapters 5 and 6.
47 See Section 1, *supra*.
48 See Chapter 7.

Yet, it was observed that the extension of the exception to residents while not similarly expanding the application of the active personality principle would imply a clear deterioration from the perspective of international criminal justice.[49] There are, however, no general legal obstacles to such a reform.[50]

Transfer of proceedings in criminal matters, or even better, a combination of the nationality/residence exception with the transfer of the sentenced person (back to his state of nationality and/or residence following his prosecution abroad) are, however, of a more convincing utility to the problems at hand.[51] The first alternative is admittedly inhibited by some of the same shortcomings as non-extradition followed by domestic prosecution would be exposed to: costliness and the difficulties concerning obtaining sufficient evidence. Yet, involving the state (often the territorial state) that requested extradition, this option would considerably improve chances of successful prosecution. On the other hand, while remaining subject to national sentiments, temporary extradition for prosecution on condition of enforcement of the resulting custodial sentence in the state of nationality offers better chances of prosecution – if in the state where the evidence is present. Incompatibilities in terms of the severity of sentences and other factors may,[52] nonetheless, impede the popularity of this option.[53]

3. General Observations

Beyond these specific proposals, the main conclusions of this study may be summarized as follows:

Globalization and the establishment of international criminal jurisdiction have a profound impact on the way the active personality principle and the non-extradition of nationals are perceived and the manner in which they are to be applied. It is time to recognize the pertinence of these changes to evaluating these phenomena, and the impact of these developments through their effect on the concept of nationality.

In addition, the following specific observations emerge:

The functions of nationality addressed in this thesis and their relation to international criminal justice cannot be treated in isolation. Any reforms of the non-extradition of nationals and active personality are likely to succeed in improving international criminal justice only if they recognize the complementarity of these two functions of nationality in international criminal law.

Admittedly, their complementarity is imperfect. Yet, the combined overall impact of the two principles on international criminal justice is arguably not too grave. Resort to the positive factor, active personality is expanding.

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49 Chapter 7 at 211.
50 See, however, note 21, *supra*.
51 Chapter 7 at 212-213.
52 See Chapter 4, Section 3.2.4.
53 Chapter 7 at 213.

Whereas its operation invokes vibrant questions, solutions are often readily available.

The non-extradition of nationals, commonly perceived as constituting the negative side of the balance, is more controversial. It is increasingly subject to attack. In fact, most problems addressed in this study relate not to its operation but to attempts to abolish it.

Albeit other alternatives (*e.g.* the non-extradition of residents and the combination of the nationality exception with the transfer of sentenced persons) are gaining popularity, the non-extradition of nationals is not likely to be abandoned in the decades to come. Due to its long history and the strength of sentiments attached to it, it would be naive to assume that its operation can be circumvented through the use of little more than semantics. Most success can be expected from combining it with the transfer of sentenced persons.

Another alternative, the new '(permanent) residence exception' together with a similar modification of the scope of active personality, would arguably be subject to many of the same shortcomings. Yet, modern criminal law theory, underlining the importance of rehabilitation over punishment, supports such a development.

In conclusion, in spite of what the relatively little scholarly attention devoted to these issues in particular and to horizontal international criminal law in general might suggest, recent developments related to the active personality principle of criminal jurisdiction and the non-extradition of nationals do raise questions of fundamental importance. These phenomena are far from anachronistic. Admittedly, they may require some dusting-off. In addition, with regard to the non-extradition of nationals, it is possible to discern an ongoing search for alternatives. Yet, this study confirms that the active personality principle and the non-extradition of nationals remain central to international criminal law and international criminal justice at the dawn of the twenty-first century. They deserve renewed attention.