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## **Dual Nationality and International Criminal Court Jurisdiction**

Andrew Wolman\*

Abstract: The International Criminal Court can exercise jurisdiction over nationals of state parties. However, it has never been clear whether the Court will automatically recognise a nationality that has been conferred by a state party under its domestic law, nor what criteria it would use to evaluate that nationality should it not be automatically accepted. In December 2019, the Office of the Prosecutor made its first formal pronouncement on the question, finding that the ICC does not have jurisdiction over North Koreans, despite their being South Korean nationals under South Korean law, because North Koreans are not able to exercise their rights as South Koreans until accepted as such by application, and on occasion their applications might be refused. In this article, I reject the Prosecutor's analysis as misguided. I also reject the other main approaches to nationality recognition suggested by scholars, namely a 'genuine link' requirement, a deferral to municipal law, and a deferral to municipal law except where a conferral of nationality violates international law. Instead, I propose a functional approach, that would respect municipal conferral of nationality unless that conferral unreasonably interferes with the sovereign interests of a non-state party.

### **1. Introduction**

The International Criminal Court ('ICC') Statute asserts that the ICC may exercise its jurisdiction where the accused is a national of a state party.<sup>1</sup> However, the term 'nationality' is not defined. The Rules of Procedure and Evidence do not provide further guidance on the meaning of 'nationality', nor do the *travaux préparatoires* of the ICC Statute or the subsequent work of the Preparatory Commission for the ICC.<sup>2</sup> An obvious question thus arises: when a state party attributes nationality to a suspect under its own system of municipal law, how should the ICC decide whether to recognise that nationality for the purposes of establishing 'nationality' jurisdiction? The question would most

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<sup>1</sup> Art. 12(2)(b) ICCSt. Jurisdiction is also permissible where a crime takes place on the territory of a state party or where provided pursuant to a resolution of the UN Security Council.

<sup>2</sup> Z. Deen-Racsmany, 'The Nationality of the Offender and the Jurisdiction of the International Criminal Court', 95 *American Journal of International Law* (2001) 606, at 606.

frequently be relevant with respect to dual (or multiple) nationals, whose other nationality (or nationalities) is with a non-party state.<sup>3</sup>

It is an important question. Jurisdiction was probably the most hotly debated element of the ICC Statute during its negotiation, and has continued to spark controversies ever since.<sup>4</sup> Non-state parties have long professed a fear that their nationals could be brought up before the court. And dual nationality is hardly a fringe phenomenon; on the contrary it is a common status in many parts of the world, and rapidly becoming more common.<sup>5</sup> Nevertheless, it is a question that has received relatively little scholarly attention. Among those experts that have addressed the issue, a widely accepted answer has so far proved elusive.

Commentators have so far advocated three general approaches. Some, including William Schabas, rely on the International Court of Justice ('ICJ') *Nottebohm* decision to conclude that the accused must have a 'genuine link' to a state party to the ICC Statute to be considered a national for jurisdictional purposes.<sup>6</sup> Others, including Douglas Guilfoyle, argue that the ICC should have jurisdiction over a suspect whenever that person is considered a national of a state party under that state's domestic law.<sup>7</sup> Finally, Zsuzsanna

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<sup>3</sup> This paper will refer to 'dual nationality' for the sake of simplicity, but analysis of instances of more than two nationalities would be approached in the same way.

<sup>4</sup> See M. Newton, 'How the International Criminal Court Threatens Treaty Norms', 49 *Vanderbilt Journal of Transnational Law* (2016) 371, at 384; H.P. Kaul and C. Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises', 2 *Yearbook of International Humanitarian Law* (1999) 143, at 145.

<sup>5</sup> See T. Brøndsted Sejersen, "'I Vow to Thee My Countries'" – The Expansion of Dual Citizenship in the 21st Century', 42 *International Migration Review* (2008) 523.

<sup>6</sup> See, e.g., W. Schabas, *An Introduction to the International Criminal Court* (5th edn., Cambridge: Cambridge University Press, 2017), at 59; M. Wagner, 'The ICC and its Jurisdiction: Myths, Misperceptions and Realities', 7 *Max Planck Yearbook of United Nations Law* (2003) 409, at 483.

<sup>7</sup> See, e.g., D. Guilfoyle, *International Criminal Law* (Oxford: Oxford University Press, 2016), at 33; R. Rastan, 'Jurisdiction' in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015) 141, at 153-155.

Deen-Racsomány, who has produced the most detailed study of the topic to date, argues in favour of deference to municipal law nationality unless the attribution of that nationality runs counter to international law.<sup>8</sup>

Until recently, however, the issue was largely academic. Prior to November 2019, all situations investigated were located on the territory of state parties or authorised by the UN Security Council. The issue of recognition of nationality therefore was not (and still has not been) addressed judicially. During this period, questions of dual nationality arose in the public domain on only one occasion, in September 2009, when Prosecutor Moreno-Ocampo reportedly asserted that he would have jurisdiction to prosecute David Benjamin for crimes committed in Gaza while advising the Israeli army.<sup>9</sup> Benjamin possessed South African and Israeli nationality at the time; South Africa was a party to the ICC Statute, while Israel was not. This prospect led to some predictable criticism, but largely for being politically unwise, factually unwarranted, or failing the ‘gravity’ test, rather than on grounds of lack of jurisdiction.<sup>10</sup> In the end no such prosecution was brought.

In its December 2019 annual report, the Office of the Prosecutor (‘OTP’) finally provided the first indication of how it would address questions of nationality, in response to a communication urging prosecution of Kim Jong Un and other North Korean officials as South Korean nationals.<sup>11</sup> Unsurprisingly, the OTP’s rejected the request. The reasoning used, however, was surprising. Avoiding all three of the approaches suggested by scholars, the OTP rejected the petition based on the fact that North Koreans are unable to access their

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<sup>8</sup> Deen-Racsomány, *supra* note 2, at 611.

<sup>9</sup> K.J. Heller, ‘Would Moreno-Ocampo Actually Investigate Only an Israeli Officer’, *Opinio Juris*, 21 September 2009, available at <http://opiniojuris.org/2009/09/21/would-moreno-ocampo-be-dumb-enough-to-investigate-an-israeli-officer/> (visited 7 May 2020)

<sup>10</sup> See, eg, *ibid*; Y. Feldman, ‘ICC may Try IDF Officer in the Wake of the Goldstone Report’, *Haaretz* (24 September 2009).

<sup>11</sup> OTP, *Report on Preliminary Examination Activities*, 5 December 2019, §§ 28-35.

rights as South Korean citizens while in North Korea, and may not always be recognised as nationals upon application to South Korean authorities. In other words, they found South Korean nationality to be merely notional.

In the following section, I critically examine the OTP's approach, and dismiss it as misguided. I then address the possibility of a dominant nationality approach, whereby only one of a dual (or multiple) national's nationalities will be considered for jurisdictional purposes, before examining in more detail each of the three approaches suggested by scholars. I find each of these approaches also to be unsatisfactory. I conclude by arguing that the ICC should instead accept municipal attribution of nationality for jurisdictional purposes in cases of dual nationality unless doing so would constitute an unreasonable interference with non-state party interests. ICC jurisdiction would always be reasonable where an individual has accepted the (dual) nationality of a state party through voluntary naturalization or implicitly accepted it by voluntary maintenance of that nationality, if it was initially imposed involuntarily.

In rejecting the various approaches suggested to date, and in proposing my own solution, I am guided by Robert Sloane's functional conception of nationality. According to Sloane, nationality serves a range of diverse functions in modern international law, and the international regulation of nationality should therefore respond to the functions that nationality serves in a particular context, rather than requiring a one size fits all approach.<sup>12</sup> In addition to being normatively desirable, Sloane argues that the functional approach is consistent with international law precedent (including the *Nottebohm* case) and increasingly reflects the way nationality is actually analysed by a range of different types of international

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<sup>12</sup> R. Sloane, 'Breaking the Genuine Link: The Contemporary International Regulation of Nationality', 50 *Harvard International Law Journal* (2009) 1, at 57; 62.

tribunals.<sup>13</sup> The correct principles to use for determining nationality will therefore vary depending on the function nationality serves.<sup>14</sup>

In fact, the functional approach to nationality has already entered the field of international criminal law through a series of judgments of the International Criminal Tribunal for the Former Yugoslavia interpreting the term ‘nationality’ in the section of Geneva Convention IV that protects civilians who find themselves ‘in the hands of a Party to the conflict or Occupying Power of which they are not nationals’.<sup>15</sup> Instead of relying on ‘formal nationality’, which would arguably have been Yugoslav for both the defendants and victims, the ICTY considered that the protective function of the Geneva Convention suggested that nationality be interpreted as akin to ethnicity, which had become the common grounds for allegiance in the former Yugoslavia.<sup>16</sup> Although the ICC has not yet engaged in a functional discussion of nationality, the Court has accepted teleological interpretations of the ICC Statute in other contexts,<sup>17</sup> and the basic idea that an important term may be defined differently for ICC jurisdictional purposes than elsewhere in the corpus of international law has been recently embraced by the OTP with respect to the term ‘state’.<sup>18</sup>

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<sup>13</sup> *Ibid*, at 66 (‘contemporary international law in many areas appears to be moving away from a single theory and toward the kind of functional analysis and commensurate regulation of nationality’)

<sup>14</sup> *Ibid*, at 65.

<sup>15</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War (GC IV), Geneva, 12 August 1949, art. 4.

<sup>16</sup> Judgment, *Delalić* (IT-96-21-A), Appeals Chamber, 20 February 2001, § 56-84; Judgment, *Aleksovski* (IT-95-14/1), Appeals Chamber, 24 March 2000, §§ 151-152; Judgment, *Tadić* (IT-94-1), Appeals Chamber, 15 July 1999 §§ 163-169.

<sup>17</sup> M. Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge: Cambridge University Press, 2014), at 63.

<sup>18</sup> Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine (ICC-01/18), 22 January 2020, § 42 (arguing that the Pre-Trial Chamber should

As will be discussed further below, a functional approach to nationality shows that while the jurisdictional provisions of article 12 of the ICC Statute are intended to broaden the scope of the Court's authority in order to 'end impunity', they are also importantly intended to ensure that the Court does not unreasonably infringe upon the sovereignty of non-state parties, by prosecuting non-state party nationals without their (implied) consent.

## **2. The OTP Decision on North Korea: 'Notional' Nationality**

In December 2016, two Korean NGOs submitted a communication to the OTP requesting the prosecution of Kim Jong Un and his associates for Crimes Against Humanity.<sup>19</sup> While North Korea is not a party to the ICC Statute, the submission alleged that Kim Jong Un was also a national of South Korea, which is a state party. In December 2019, the OTP issued its formal response to this communication in its annual report, asserting that the Court would lack jurisdiction to proceed on this basis.<sup>20</sup>

As a starting point, the OTP acknowledged that under the South Korean Nationality Act, 'North Koreans are recognised as being South Korean nationals from birth'.<sup>21</sup> This conclusion is largely uncontroversial, and has been recognised by the Korean Supreme Court and Constitutional Court.<sup>22</sup> It reflects the strongly held sentiment that there is one Korean nation, which has been artificially divided.

The OTP then went on to explore the effectiveness of this de jure South Korean nationality. While the language used by the OTP was imprecise in places, it eventually

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rule on whether Palestine is a state for ICC Statute jurisdictional purposes only, without considering its potential statehood under public international law more generally).

<sup>19</sup> NK Watch, Press Release, 'ICC & Kim Jong Un' (10 December 2019), available at <http://www.nkwatch.org/?p=17287&lang=en> (visited 7 August 2020).

<sup>20</sup> OTP, *supra* note 11, §§ 28-35.

<sup>21</sup> *Ibid*, § 30.

<sup>22</sup> *Yi Yongsun Case* [Sup Ct], 12 November 1996, 96nu1221 (S Kor); *Nationality Act Case* [Const Ct], 97Heonga12, Aug. 31, 2000 (S Kor). See generally, C. Lee, 'The Law and Politics of Citizenship in Divided Korea' 6 *Yonsei Law Journal* (2015) 3.

concluded that South Korean nationality was merely ‘notional’ and thus not entitled to OTP recognition because it represented an entitlement to recognition of South Korean nationality (upon application at a South Korean embassy or consulate or otherwise taking legal action while in South Korea) rather than the current enjoyment of any rights or protection, such as diplomatic protection or the right to enter South Korea.<sup>23</sup> In addition, the OTP found that not all North Koreans would necessarily be recognised by the South Korean authorities as citizens if, for example, they have certain types of criminal histories or have spent a considerable amount of time in a third country.<sup>24</sup>

The first of these justifications – that prior to official recognition of their nationality by South Korean authorities, North Koreans obtain no benefits of citizenship and thus should therefore have their de jure South Korean nationality disregarded – is clearly misguided. It is normal for individuals to be required to prove their nationality in order to obtain benefits stemming from it. There is no conceptual difference between a North Korean applying to be recognised as a South Korean national at the South Korean embassy and a person whose parents are South Korean nationals applying to be recognised upon losing their identification documents or without having yet obtained them. Each have been South Korean citizens since birth, but will need to have their application accepted in order to have that nationality recognised. Recognition of an existing nationality should not be confused with naturalization.

I have previously argued that a form of the second justification – that in rare circumstances a North Korean individual may not be entitled to have their existing South Korean nationality recognised, and therefore will lack the right to enter South Korea – may justify de jure South Korean nationality being disregarded in the context of refugee status

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<sup>23</sup> OTP, *supra* note 11, § 31

<sup>24</sup> *Ibid*, § 32.

determination.<sup>25</sup> In short, the Refugee Convention states that in order to qualify for refugee status, a dual national asylum seeker must show a well-founded fear of persecution in both states of nationality.<sup>26</sup> However, it would be counter-productive to the protective function of the Refugee Convention to require a North Korean escapee to show a fear of persecution in South Korea if they are unable to enter South Korea, despite possessing de jure South Korean nationality and applying reasonable efforts.<sup>27</sup> This ‘effective nationality’ test (as it is somewhat confusingly termed in the refuge context) has detractors as well as supporters in the refugee context, and has seldom been used by courts.<sup>28</sup> However, regardless of its applicability for refugee determination, it surely has no place in the ICC Statute regime. After all, why should it matter to the ICC whether the accused has the right to enter their country of nationality? In functional terms, the ICC Statute is not concerned with home state protection. If entry rights were a deciding factor, then South Korea could simply issue a passport to Kim Jong Un (or patch up the legislative exceptions that in rare cases could bar entry to North Koreans) and thus create ICC jurisdiction. But surely that would not affect the legitimacy of ICC prosecution.

### **3. Dominant Nationality**

How, then, should the OTP have reasoned their decision? There are a number of possibilities. To start with, a theoretically plausible alternative would have been to recognise only one ‘dominant’ nationality for jurisdictional purposes. This either-or approach has been used by international tribunals to determine whether one state of

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<sup>25</sup> A. Wolman, ‘North Korean Asylum Seekers and Dual Nationality’, 24 *International Journal of Refugee Law* (2012) 793.

<sup>26</sup> Convention relating to the Status of Refugees, 28 July 1951, art. 1A(2).

<sup>27</sup> J. Bauer, ‘Multiple Nationality and Refugees’, 47 *Vanderbilt Journal of Transnational Law* (2014) 905, at 925-926 (‘in the [Refugee] Convention’s multiple nationality provision, [nationality’s function] is a marker for the availability of protection against persecution.’)

<sup>28</sup> *Ibid*, at 923-925.

nationality can espouse a claim for its national against that individual's other state of nationality. The evaluation of dominant nationality could be based upon general 'genuine link' factors, such as those proposed by the Iran Claims Tribunal in *Case No. A/18*: 'habitual residence, center of interests, family ties, participation in public life and other evidence of attachment.'<sup>29</sup>

This 'dominant nationality' solution could make some sense, as a way of limiting the scope of jurisdiction over non-state party nationals. However, it would not necessarily reflect state practice at the domestic level. In her review of the field, Deen-Racsmany concludes that in the few cases where there was a question of whether either state of nationality could assert criminal jurisdiction over a suspect or only the state of 'dominant' nationality could do so, available sources 'generally support the application of the principle of equality above that of dominant nationality'.<sup>30</sup> If one goes back to 1935, the Harvard Draft Convention on Jurisdiction with Respect to Crime states that in case of double or multiple nationality, nationality in the prosecuting state 'is a question to be determined by reference to such principles of international law as govern nationality. If international law permits the State to regard the accused as its national, its competence is not impaired or limited by the fact that he is also a national of another State'.<sup>31</sup> While not binding as a treaty, this provides some evidence for state acceptance of the equality principle at the time.

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<sup>29</sup> *Iran v. United States, Case No. A/18*, 5 Iran-US Claims Tribunal Reporter 251, 265 (1984).

<sup>30</sup> Deen-Racsmany, *supra* note 2, at 612. See also, S. Oeter, 'Effect of Nationality and Dual Nationality on Judicial Cooperation Including Treaty Regimes such as Extradition' in D. Martin and K. Hailbronner (eds), *Rights and Duties of Dual Nationals: Evolution and Prospects* (The Hague: Kluwer, 2003) 55, at 58-59 ('[q]uestions of the dominant or effective nationality have never been raised internationally in cases of extradition, it seems').

<sup>31</sup> Harvard Draft Convention on Jurisdiction with Respect to Crime, with Comment, art. 5, reprinted in 29 *AJIL Supp.* (1935) 439.

The greater problem with this approach, however, is that there is nothing within the plain language of article 12, nor the negotiating history of it, that supports this view.<sup>32</sup> The weakness of a ‘dominant nationality’ approach is reinforced by the interpretative principle that a negative inference may be drawn from the exclusion of language in one clause that is included in another clause of the same treaty. Article 36(7) of the ICC Statute, which prohibits the appointment of two judges of the same nationality, is followed by a statement that multiple nationals ‘shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights’.<sup>33</sup> If only one nationality was to be recognised for jurisdictional purposes, then a similar clause could have easily been included in article 12. As such, the ‘dominant nationality’ approach has been dismissed by a range of scholars.<sup>34</sup>

#### **4. Genuine Link**

On the other hand, a number of scholars have supported a test for jurisdictional nationality whereby a municipally granted nationality should be recognised when there is a ‘genuine link’ between the accused and the state party of which he or she is a national. Unlike the dominant nationality test previously described, this would allow for multiple nationalities to be recognised for any individual, as long as that person possesses genuine links to each of those states.

The ‘genuine link’ test is famously derived from the ICJ decision in the *Nottebohm* case.<sup>35</sup> In short, Nottebohm was a long-time resident of Guatemala who had been a German

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<sup>32</sup> Art. 12 ICCSt (‘[t]he State of which the person accused of the crime is a national’).

<sup>33</sup> Art. 36(7) ICCSt.

<sup>34</sup> Deen-Racsmány, *supra* note 2; Iain Cameron, ‘Jurisdiction and Admissibility Issues under the ICC Statute’, in D. McGoldrick (ed), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart, 2004) 65, at 74; V. Tsilonis, *The Jurisdiction of the International Criminal Court* (The Hague: Springer, 2019), at 69.

<sup>35</sup> ICJ, *Nottebohm* (Liechtenstein v Guatemala), ICJ Rep 4 et seq (1955).

national until 1939, when he applied for and was granted Liechtenstein nationality (thereby losing his German nationality) after a short visit, payment of a substantial fee, and agreeing to pay an annual tax. Nottebohm's presumed intention in doing so was to avoid being treated as an enemy national should Guatemala declare war against Germany. Unfortunately for him, the Guatemalan authorities still viewed him as German, and when Guatemala declared war on Germany, Nottebohm's property was seized and he was sent to the United States for internment. Subsequent to his release, Liechtenstein brought a claim against Guatemala, alleging that Guatemala's treatment of Nottebohm during World War II had been contrary to international law.

The ICJ rejected Liechtenstein's right to espouse Nottebohm's claim. It found that Nottebohm's naturalization should not be recognised for the purposes of diplomatic protection, notably holding that 'nationality is a legal bond having as its basis a social fact of attachment', which comprised 'a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.<sup>36</sup> It found no such connection for Nottebohm at the time of his naturalization, when his links with Liechtenstein were 'extremely tenuous'.<sup>37</sup> The Court claimed that Nottebohm had no 'real prior connection with Liechtenstein' and his naturalization was thus 'lacking in the genuineness requisite to an act of such importance'.<sup>38</sup> Notably, the Court did not pass judgment on the international legality of Liechtenstein's grant of nationality to Nottebohm, nor whether such a grant should be recognised for purposes other than diplomatic protection.<sup>39</sup>

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<sup>36</sup> *Ibid*, at 23-24.

<sup>37</sup> *Ibid*, at 25.

<sup>38</sup> *Ibid*, at 26.

<sup>39</sup> *Ibid*, at 20.

There are in principle three ways in which one could argue that the ‘genuine link’ theory applies to ICC recognition of nationality for jurisdictional purposes. The first of these is to hold that *Nottebohm* comprises a rule of general public international law, thus applicable to nationality determinations in the ICC Statute.<sup>40</sup> This is the claim made by Schabas and Christopher Blakesley.<sup>41</sup> The position is untenable. Such breadth was never claimed in *Nottebohm* itself, nor has it been evident in the post-*Nottebohm* case law, apart from one finding to that effect by the Iran-US Claims Tribunal in *Case No. A/18*.<sup>42</sup> In fact, *Nottebohm* has been rarely followed since the judgment was handed down, either within or outside the realm of diplomatic protection.<sup>43</sup> There are an abundance of international cases that apply different approaches to recognition of nationality.<sup>44</sup> Scholars are largely in

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<sup>40</sup> General principles and rules of international law are explicitly applicable to judicial decisions through article 21(1)(b) of the ICC Statute. The Vienna Convention on the Law of Treaties also states that ‘relevant rules of international law applicable in the relations between the parties’ shall be taken into account in treaty interpretation. Art. 21(1)(b), Vienna Convention on the Law of Treaties (‘VCLT’).

<sup>41</sup> Schabas, *supra* note 6, at 59 (‘In accordance with general principles of public international law, the Court should look at whether a person’s links with a given state are genuine and substantial, rather than it being governed by some formal and perhaps even fraudulent grant of citizenship.’); C. Blakesley, ‘Jurisdiction *Ratione Personae*, or the Personal Reach of the Court’s Jurisdiction’ in J. Doria et al. (eds), *The Legal Regime of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009) 423, at 426 (‘As a matter of general international law, of course, a person’s nationality must be based on his or her genuine and substantial links to the state in question.’).

<sup>42</sup> Sloane, *supra* note 12, at 21; M. Casas, ‘Nationalities of Convenience, Personal Jurisdiction, and Access to Investor-State Dispute Settlement’, 49 *NYU Journal of International Law and Politics* (2016) 63, at 77 (‘Most relevant international rulings after *Nottebohm* rejected its holding.’)

<sup>43</sup> P. Spiro, ‘*Nottebohm* and ‘Genuine Link’: Anatomy of a Jurisprudential Illusion’ (2019) Investment Migration Working Papers IMC-RP 2019/1, at 12; K. Hailbronner, ‘Nationality in Public International Law and European law’, in R. Bauböck et al. (eds), *Acquisition and Loss of Nationality: Policies and trends in 15 European countries, volume 1* (Amsterdam University Press 2006) 35, at 60.

<sup>44</sup> See e.g., *Flegenheimer Claim*, 20 September 1958 (Italian-United States Conciliation Commission) International Law Reports (1958) 91, 150; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, ICJ Reports 1969, p. 150; *Case C-369/90, Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, ECLI:EU:C:1992:295, § 5.

agreement that there is no general ‘genuine link’ rule.<sup>45</sup> This was confirmed by the International Law Commission in its commentary to the Draft Articles on Diplomatic Protection.<sup>46</sup> As Peter Spiro puts it, ‘[t]here is simply no credible argument that *Nottebohm* and “genuine link” have risen to the level of customary international law or of a general principle of law relating to nationality’.<sup>47</sup> Some would go a step further to argue that the ‘genuine link’ principle lacks force even in the narrow area of diplomatic protection.<sup>48</sup> *Nottebohm*’s ‘romantic’ take on nationality as adherence to a state’s traditions, interests, and way of life is commonly seen as an aberration in nationality law which was normatively undesirable at the time, and is even more so today.<sup>49</sup>

The second possible argument in favour of a ‘genuine link’ test relies on the theory of delegated jurisdiction, which in brief holds that when ICC member states ratified the ICC Statute, they delegated to the Court their pre-existing rights to exercise jurisdiction over crimes through the territory or nationality principles. If the scope of nationality jurisdiction when used by the states is restricted by the ‘genuine link’ test under customary international law, then it stands to reason that states’ delegation of that jurisdiction would be similarly

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<sup>45</sup> See P. Weis, *Nationality and Statelessness in International Law* (Brill 1979), at 201 (*Nottebohm* approach ‘can hardly ... be regarded as forming part of customary international law’); I. Shearer and B. Opeskin, ‘Nationality and Statelessness’ in B. Opeskin et al. (eds), *Foundations of International Migration Law* (Cambridge: Cambridge University Press, 2012) 93, at 97-98; A.M. Boll, *Multiple Nationality and International Law* (Leiden: Martinus Nijhoff, 2007), at 110-113; V. Lowe and C. Staker, ‘Jurisdiction’ in M. Evans (ed) *International Law* (3d edn., Oxford: Oxford University Press, 2010) 313, at 324.

<sup>46</sup> ILC Draft Articles on Diplomatic Protection, UN Doc. A/CN.4/L.684 (2000), commentary to art. 4, § 5.

<sup>47</sup> Spiro, *supra* note 43, at 16.

<sup>48</sup> *Ibid*, at 2 (‘‘genuine link’ is not and never was a requirement for international recognition of the attribution of nationality’); Audrey Macklin, ‘Is It Time to Retire *Nottebohm*?’, 111 *AJIL Unbound* (2018) 492.

<sup>49</sup> See Sloane n 13, at 20.

restricted, regardless of whether the ‘genuine link’ requirement constitutes a general rule of customary international law or not.

The theory of delegated jurisdiction is widely accepted by scholars,<sup>50</sup> and has seemingly been accepted by the OTP itself.<sup>51</sup> It has its critics, however, with other scholars claiming that ICC jurisdiction is instead based on a broader entitlement of states and international institutions to prosecute perpetrators of the core crimes, all of which are at least arguably subject to universal jurisdiction under customary international law.<sup>52</sup> The main weakness to this argument, however, is that there is no evidence that the ‘genuine link’ requirement exists as a customary international law limitation to state exercise of nationality jurisdiction.

It is true that some scholars have speculated that the ‘genuine link’ principle may apply to the domestic exercise of nationality jurisdiction. For example, Dapo Akande tentatively asserts that ‘it may well be that nationality conferred by a state may not be opposable to another state where there is no genuine link with the former state.’<sup>53</sup> Danielle Ireland-Piper comes to a similar tentative conclusion.<sup>54</sup> In an early edition of their textbook,

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<sup>50</sup> See W. Schabas, ‘The International Criminal Court and Non-Party States’, 28 *Windsor Yearbook of Access to Justice* (2010) 1, at 3; D. Akande, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’, 1 *Journal of International Criminal Justice* (2003) 618, at 621; K. Schmalenbach, ‘International Criminal Jurisdiction’ in S. Allen et al. (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford: Oxford University Press, 2019) 504, at 507.

<sup>51</sup> OTP Request for Authorisation of an Investigation Pursuant to Article 15, *Situation in the Islamic Republic of Afghanistan*, ICC.02/17, 20 November 2017, § 45.

<sup>52</sup> See generally, C. Stahn, ‘The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the limits of the *Nemo Dat Quod Non Habet* Doctrine - A Reply to Michael Newton’, 49 *Vanderbilt Journal of Transnational Law* (2016) 447.

<sup>53</sup> D. Akande, ‘Active Personality Principle’ in A. Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 228, at 229.

<sup>54</sup> D. Ireland-Piper, *Accountability in Extraterritoriality: A Comparative and International Law Perspective* (Cheltenham: Edward Elgar, 2017), at 42 (‘[a] State may not be able to exercise nationality jurisdiction over persons with whom it has no genuine connection’).

Robert Cryer et al. stated that the extent to which other states are required to accept an exercise of nationality jurisdiction is ‘probably governed by the test enunciated in the *Nottebohm* case’.<sup>55</sup> However, in a more recent edition they simply assert that some commentators doubt the *Nottebohm* test is appropriate in the criminal law context, while others assert that it is.<sup>56</sup> Other scholars argue more broadly that there must be a genuine connection between the criminal offence and the state asserting jurisdiction.<sup>57</sup>

In fact, none of these commentators cite cases implementing a ‘genuine link’ test, nor legislation codifying it. Piper-Ireland justifies her assertion that the ‘genuine link’ rule may apply simply by asserting that the genuine link rule represents a general rule of customary international law, which, as discussed above, is an untenable proposition.<sup>58</sup> In short, the argument in favour of a genuine link requirement at the domestic level is not convincing. A number of other scholars have accordingly concluded that international law does not require states to engage in a ‘genuine link’ analysis in the context of active personality jurisdiction. Guilfoyle justifies this position by concluding that the ‘genuine link’ test is inapplicable to the law of individual (as opposed to state) liability.<sup>59</sup> Rod Rastan also concludes that *Nottebohm* is inapplicable, making the functional argument that ‘there

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<sup>55</sup> R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (1st edn., Cambridge: Cambridge University Press, 2007), at 41.

<sup>56</sup> R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (3rd edn., Cambridge: Cambridge University Press, 2014), at 54.

<sup>57</sup> According to this argument, nationality of the accused, nationality of the victim, location of the crime, and other accepted jurisdictional grounds represent genuine connections. The question of whether a suspect must have a genuine link to their state of nationality is conceptually separate and not explicitly addressed in this literature, although one would assume that such a link would be required by those who advocate this position. See, eg, Restatement (Third) of the Foreign Relations Law of the United States § 407 (2018); K. Ambos, *Treatise on International Criminal Law. Vol. 3* (Oxford: Oxford University Press, 2016), at 210.

<sup>58</sup> Ireland-Piper, *supra* note 54, at 42.

<sup>59</sup> Guilfoyle, *supra* note 7, at 33.

appears no reason why a person should be able to rely on the effective nationality test in order to avoid criminal responsibility'.<sup>60</sup>

Finally, one could argue that even though states may possess the right to prosecute nationals absent a 'genuine link', they did not delegate the full scope of that jurisdiction to the ICC, and for policy (or other) reasons the ICC Statute should be interpreted so as to require a genuine link. In theory, this is certainly possible. It is generally accepted that states are permitted to exercise universal jurisdiction with respect to some or all international crimes, but they did not delegate this form of jurisdiction to the Court. There are, however, no indications of any such limitations in the treaty text or its *travaux préparatoires*.<sup>61</sup> Nor would any limitations make sense from a functional perspective. As will be discussed further below, the purpose of the jurisdictional provisions of the ICC are to end impunity while ensuring that the nationals of non-state parties would not be prosecuted without their (implied) consent. Neither of these goals would be furthered by a genuine links requirement that normally functions to ensure that the benefits (rather than responsibilities) of nationality are not unfairly claimed. Surely, few would find it objectionable if a modern-day Nottebohm, who eagerly acquired Liechtenstein's nationality (in addition, let us posit, to possessing a prior non-state party nationality), were then prosecuted by the ICC upon committing an international crime while Liechtenstein was party to the ICC Statute?<sup>62</sup> On

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<sup>60</sup> Rastan, *supra* note 7, at 154-155.

<sup>61</sup> Deen-Racsomány, *supra* note 2, at 606. With respect to territorial jurisdiction, the Pre-Trial Chamber has held that in the absence of evidence that parties explicitly restricted their delegation of the territorial principle, they must be presumed to have delegated the full extent of that jurisdiction which they possessed under international law. Decision Pursuant to Art. 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (ICC-01/19-27), Pre-Trial Chamber III, 14 November 2019, § 60.

<sup>62</sup> In fact, the historic Nottebohm was not a dual national, but the 'genuine link' principle has since then been utilised primarily in the context of multiple nationality. R. Thwaites, 'The Life

the other hand, recognising Kim Jong Un's South Korean nationality for jurisdictional purposes would strike many as absurd, but it is far from clear that doing so would violate the *Nottebohm* rule. After all, unlike *Nottebohm*, Kim Jong Un was not naturalized, but rather possessed South Korean nationality through *jus sanguinis*, as a descendant of nationals of the pre-division Korean state.<sup>63</sup>

## 5. Deference to Domestic Nationality Law

If the 'genuine link' rule does not apply, then one potential approach to dual nationality would simply be for the ICC to defer to the nationality determinations made under municipal law. This is the solution advocated by Guilfoyle and, more methodically, by Rastan, who uses the commentary to the Harvard Draft Convention on Jurisdiction with Respect to Crime to show that international law does not restrict recognition of nationality for the purposes of 'active personality' jurisdiction.<sup>64</sup>

The principal objection to full deference, however, is that it could lead to ICC jurisdiction in circumstances that would certainly not have been desired by the drafters of the ICC Statute or consistent with the rest of the Statute's jurisdictional framework. Kim Jong Un would be subject to prosecution as a South Korean national, and an enterprising state could subject Xi Jinping or Donald Trump (for example) to the Court's jurisdiction, simply by naturalizing them without their consent. In theory, acceptance of this type of

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and Times of the Genuine Link', 49 *Victoria University of Wellington Law Review* (2018) 645, at 657.

<sup>63</sup> Ancestral links have consistently been upheld by international courts. See, Bauer, *supra* note 27, at 926; A. Peters, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction', 53 *German Yearbook of International Law* (2010) 623, at 708. On the other hand, there is dicta implying that such links cannot last indefinitely. See *Champion Trading Co v Egypt*, ICSID (W Bank) Case No. ARB/02/9 (21 October 2003) (Decision on Jurisdiction) 288 (questioning whether nationality should be recognised for the third or fourth foreign born generation that lacks any connection with the ancestral home).

<sup>64</sup> Guilfoyle, *supra* note 7, at 33; Rastan, *supra* note 7, at 154-155.

expansive nationality would open up the doors to something akin to universal jurisdiction without a Security Council referral, which was of course rejected by negotiators.<sup>65</sup>

The illegitimacy of that result would be compounded by the fact that jurisdiction was such a hotly debated matter in the International Law Commission, in the Preparatory Committees, and at the Rome Conference.<sup>66</sup> According to Hans-Peter Kaul and Claus Kreß ‘[l]ooking back to Rome, jurisdiction appears to have been the most important, politically the most difficult and therefore the most contentious question of the negotiations as a whole, in short: the 'question of questions' of the entire project.’<sup>67</sup> Opening a backdoor to the prosecution of non-state nationals would not merely involve a minor progressive interpretation to the Statute. It would challenge the core assumptions upon which agreement was achieved. Surely that is a result that should only be accepted if no other reasonable alternative approach is available.<sup>68</sup> In fact, however, other possible limitations are available.

## **6. Deference to Municipal Nationality Determinations that are Consistent with International Law**

In Deen-Racsmány’s study of nationality jurisdiction at the ICC, she adds one limitation: namely, that ICC exercise of nationality-based jurisdiction should be limited to

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<sup>65</sup> See generally, Schmalenbach, *supra* note 50, at 525 (affirming that the majority of negotiating states were anxious to prevent any notion of transferred universal jurisdiction); E. Wilmshurst, ‘Jurisdiction of the Court’ in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* (The Hague: Kluwer, 1999) 127, at 132–39.

<sup>66</sup> Newton, *supra* note 4, at 384.

<sup>67</sup> Kaul and Kreß, *supra* note 4, at 145. According to the Chinese delegation, ‘article 12 concerning the issue of jurisdiction was the most important article in the whole Statute’. L. Daqun (China), in UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Records of the 42d Meeting of the Committee of the Whole’ 362, § 28.

<sup>68</sup> See VCLT, *supra* note 40, at art. 32(2) (allowing recourse to supplementary means of interpretation where the ordinary meaning of treaty terms ‘leads to a result which is manifestly absurd or unreasonable’).

instances where a state party ‘under international law can validly consider the offender its national’.<sup>69</sup> While simply put, this assertion in fact edges into an area of quite significant uncertainty and complexity in the law, and could lead to outcomes that would be inconsistent with the jurisdictional objectives of the ICC Statute.

The basic principle of nationality law is that determination of nationality generally lies with the ‘reserved domain’ of municipal law.<sup>70</sup> This principle was affirmed by the Permanent Court of International Justice in the *Tunis and Morocco Nationality Decrees* Opinion.<sup>71</sup> It was later set forth most prominently in the 1930 Hague Convention, which states in the first clause of article 1 that ‘[i]t is for each State to determine under its own law who are its nationals.’<sup>72</sup> It is also clear, however, that a particular conferral of nationality need not be recognised by other states if it violates international standards.<sup>73</sup> This part of the equation is laid out in the second clause of article 1 of the Hague Convention, namely that ‘[t]his law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law

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<sup>69</sup> Deen-Racsmany, *supra* note 2, at 611 (requiring ‘the consent of any state that under international law can validly consider the offender its national is a sufficient basis for the court’s jurisdiction.’)

<sup>70</sup> See e.g., R. Donner, *The Regulation of Nationality in International Law*, (2d edn., Irvington on Hudson: Transnational Pub., 1994), at 29; O. Dörr, ‘Nationality’ in *Max Planck Encyclopedia of Public International Law* (online edn., Oxford: Oxford University Press, 2015), at § 4; Sloane, *supra* note 12, at 52 (‘Today, as in the pre-*Nottebohm* era, the right to confer nationality remains in a domain reserved to each state’s internal legal competence.’)

<sup>71</sup> *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921*, 1923 P.C.I.J. (Ser. B) Advisory Opinion No. 4, at 24 (noting that nationality is in principle not regulated by international law but can be restricted by treaty obligations). Also see *Question Concerning the Acquisition of Polish Nationality, 1923 P.C.I.J. (Ser. B)*, Advisory Opinion No. 7, at 16.

<sup>72</sup> Convention Concerning Certain Questions Related to the Conflict of Nationality Laws, 12 April 1930, art. 1 (‘Hague Convention’).

<sup>73</sup> See, eg, Dörr, *supra* note 70, at § 11 (‘traditional rule is that States are obliged to recognize the conferment of another State’s nationality only if it is based on a generally accepted criterion’).

generally recognised with regard to nationality.’<sup>74</sup> These two basic elements of nationality law were repeated more recently in the European Convention on Nationality.<sup>75</sup>

While there is broad agreement among commentators that the Hague Convention principles remains a proper characterization of the international law of nationality, considerable disagreement has arisen on two main points. First, there is disagreement as to whether there are any exceptional instances when a state’s conferral of nationality may constitute a violation of international law, thereby incurring state responsibility (as well as the content of those international law standards, should they exist).<sup>76</sup> Some scholars argue that no such restrictions exist under customary international law (although certain limitations may apply through treaty law),<sup>77</sup> or that if they exist, then such restrictions are vague and only rarely relevant.<sup>78</sup> On the other hand, in his influential text on nationality law, Paul Weis considered that customary international law does limit state freedom to confer nationality, although the only concrete rule that he discusses is that conferrals of nationality should not be compulsory.<sup>79</sup> Oliver Dörr likewise claims that forced

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<sup>74</sup> Hague Convention, *supra* note 72, at art. 1.

<sup>75</sup> European Convention on Nationality, 6 November 1997, art. 3. See also, *Case No. A/18*, *supra* note 29, at 497 (‘International law does not determine who is a national, but rather sets forth the conditions under which that determination must be recognized by other States.’)

<sup>76</sup> See generally Weis, *supra* note 45, at 66.

<sup>77</sup> See, eg, A. Randelzhofer, ‘Nationality’ in R. Bernhardt (ed), *Encyclopaedia of Public International Law*, vol. III (1997) 501, at 503 (‘The validity of the conferment of nationality in municipal law is in no way limited by international law’); Boll, *supra* note 45, at 101; K. Natoli, ‘Weaponizing Nationality: An Analysis of Russia’s Passport Policy in Georgia’, 28 *Boston University International Law Journal* (2010) 393, at 415 (‘even the exhaustive and impressive research undertaken by treatise writers in this field has been unable to identify, within the framework of internationality nationality law, an express, or even implied, prohibition on a state’s power to confer its nationality extraterritorially’).

<sup>78</sup> Sloane, *supra* note 12, at 8 (‘international law still does not, with few and vague exceptions, seek to regulate the sovereign competence of states to designate national or juridical persons as their nationals’).

<sup>79</sup> Weis, *supra* note 45, at 88; 110-112. Weis derives this rule from the general law of state responsibility rather than human rights law. *Ibid*, at 112 (‘It is not the freedom of the individual

naturalization may in certain circumstances be unlawful, as may be certain large-scale collective (voluntary) naturalizations.<sup>80</sup>

Second, there is disagreement as to when, precisely, a state conferral of nationality would be inconsistent with international law, such that other countries and international organizations would no longer be obliged to recognise that nationality. A number of scholars have argued that there are no concrete rules as to when a conferral would or would not be internationally lawful. Weis notes that '[p]ositivists are evidently inclined to deny the existence of such rules and principles'.<sup>81</sup> The reference to 'international custom' in article 1 of the Hague Convention does not imply that such custom necessarily exists.<sup>82</sup> Sloane simply asserts that 'it has proved difficult to specify the general limits, if any, on state competence to confer nationality.'<sup>83</sup> Some courts and commentators affirm the existence of such rules, but have resorted to far-fetched or absurd hypothetical conferrals of nationality when citing examples.<sup>84</sup>

Other scholars have traditionally posited that non-consensual naturalizations are contrary to the standards of international law, and thus need not be recognised by other

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whose nationality is at issue, but the rights of the State of which he is a national, that are the primary considerations of international law').

<sup>80</sup> Dörr, *supra* note 70, at § 20 (basing unlawfulness of compulsory naturalization on provisions of human rights law).

<sup>81</sup> Weis, *supra* note 45, at 85.

<sup>82</sup> Hague Convention, *supra* note 72, at art. 1.

<sup>83</sup> Sloane, *supra* note 12, at 4.

<sup>84</sup> See e.g., *US ex rel Schwarzkopf v Uhl*, 137 F.2d 898 (1943) (state that worships the moon goddess may grant nationality to all members of said faith wherever they live, but said conferrals need not be recognised by other states); J.H.W. Verzijl, *International Law in Historical Perspective, Vol. 2* (Leyden: Sijthoff, 1969), at 21 (citing examples of a state conferring nationality on everyone who flies over its territory, or visits it as a tourist).

countries.<sup>85</sup> These scholars tend to cite to a series of non-consensual nationalization laws in Latin America during the late nineteenth and early twentieth centuries, along with Germany's policy of forced naturalizations during the Second World War, as indicative of policies contrary to international law.<sup>86</sup> However, the breadth of this category is also controversial, with debate surrounding which actions (such as marriage, adoption, etc) implicitly signify consent to naturalize, such that an imposed nationality would not violate international standards.<sup>87</sup> Some scholars also claim that non-consensual naturalizations are potentially unlawful only when the individual being naturalized already has the nationality of another country.<sup>88</sup>

A third group of scholars have posited a more considerable list of potentially unlawful conferrals of nationality. Anne Peters asserts that mass voluntary naturalization of neighbouring territories would violate international law.<sup>89</sup> Dörr suggests that a conferral of nationality would be contrary to international law and need not be recognised when it is imposed on individuals who are nationals of another state and have no connection with the naturalizing state; when it is conferred on the basis of race, sex, language, religion, or sexual

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<sup>85</sup> See, eg, M. McDougal et al., 'Nationality and Human Rights: The Protection of Individual in External Arenas', 83 *Yale Law Journal* (1974) 900, at 920; Verzijl, *supra* note 84, at 36; Spiro, *supra* note 43, at 4.

<sup>86</sup> Weis, *supra* note 45, at 103; Donner, *supra* note 70, at 130-136; Casas, *supra* note 42, at 73.

<sup>87</sup> McDougal et al., *supra* note 85, at 919-920; P. Spiro, 'Citizenship Overreach', 38 *Michigan Journal of International Law* (2017) 167, at 176.

<sup>88</sup> M. Foster and H. Lambert, *International Refugee Law and the Protection of Stateless Persons* (Oxford: Oxford University Press, 2019), at 121-122.

<sup>89</sup> Peters, *supra* note 63, at 699. Peters goes on to assert that Russia's mass naturalisation of residents of South Ossetia and Abkhazia was unlawful, even if done voluntarily. *Ibid*, at 705. See also Independent International Fact-Finding Mission on the Conflict in Georgia established by the Council of Europe, *Report: Vol. 1* (2009) 18, §12 ('The vast majority of purportedly naturalised persons from South Ossetia and Abkhazia are not Russian nationals in terms of international law').

or political preference, and when it is conferred by the occupier upon the inhabitants of occupied territory.<sup>90</sup>

Finally, some scholars have asserted that the *Nottebohm* ‘genuine link’ test forms a general rule of international law, and that any nationality conferred without a genuine link need not be recognised by a third state or international organization.<sup>91</sup> As discussed in the previous section, this position is now dismissed by most scholars.

Given this legal background, there are three reasons why it would be unsatisfactory for the ICC to base its decision on whether to recognise a state party jurisdiction simply on whether or not that conferral of nationality was consistent with international law. First, there would be significant uncertainty as to whether a given prosecutor or judge would find jurisdiction in arguably unlawful cases, such as where there has been a non-consensual imposition of nationality, a large-scale voluntary conferral, or a conferral based on racial discrimination. Such uncertainty is, in principle, undesirable in the criminal law context, both from the perspective of the principle of legality and because conflicting views of the law would be more likely to lead to cases being overturned on appeal.

Second, from a functional perspective, the universe of potentially invalid nationalities seems at once over and under-inclusive. It is over-inclusive because there is no good reason why the ICC should decline jurisdiction over individuals who have voluntarily naturalized to a state party pursuant to a racist nationality policy or a mass

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<sup>90</sup> Dörr, *supra* note 70, at § 17. See also Randelzhofer, *supra* note 77, at 419; Manuel Galvis Martinez, ‘The Historical Evolution of Allegiance During Occupation’, 60 *American Journal of Legal History* (2020) 76, at 98 (concluding that Geneva Convention IV effectively closes the door to voluntary naturalization by the population of an occupied territory). Martinez cites the adoption of Israeli nationality by Palestinians in East Jerusalem and the adoption of Russian nationality by Ukrainians in Crimea as examples of naturalization under occupation. *Ibid*, at 97.

<sup>91</sup> See, e.g., H.F. Van Panhuys, *The Role of Nationality in International Law: An Outline* (Leiden: Sijthoff, 1959), at 156; Natoli, *supra* note 77, at 410.

naturalization, or who have consensually accepted the nationality of the occupying power of an occupied territory. Rejecting jurisdiction in such cases would not serve the purpose of ending impunity, nor that of avoiding prosecution of nationals of non-state parties without their (implied) consent. On the other hand, it could also be under-inclusive with respect to the situation already addressed by the OTP. South Korea's conferral of nationality to North Koreans arguably does not constitute an involuntary nationalization because it is a form of nationality by descent, and its validity has not been challenged at the international level.<sup>92</sup> However, prosecuting Kim Jong Un as a South Korean national would run counter to the objective of avoiding prosecutions of nationals of non-state parties.

Third, by focusing on the general legality of a conferral of nationality, the Court would be forced to engage in politically fraught judgments of the type that international courts – and especially the ICC – like to avoid. It is one thing to say that a particular nationality law should not be recognised in the context of ICC jurisdiction, but it is quite another to say that it violates international law. This would be an especially controversial conclusion in contexts such as South Korea's peninsula-wide nationality law, which serves to symbolically preserve the unitary nature of the Korean state. In practice, its greatest impact is to facilitate the integration of North Korean escapees who wish to live in South Korea on an equal footing to locals. ICC judges may be understandably reluctant to declare that such a law violates international law.

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<sup>92</sup> The Irish nationality of Northern Ireland residents was also universally regarded as internationally valid between 1956 and 1999, during which time it was automatically conferred at birth to those born anywhere on the island. A. Heatley, 'Diplomatic Protection of Northern Irish Residents by the Republic of Ireland in Reliance upon the *Irish Nationality and Citizenship Act, 1956*', 3 *Irish Yearbook of International Law* (2008) 45, at 68. While the details differ in each case, a number of other jurisdictions have set forth similarly expansive nationality laws in response to a division perceived as illegitimate. See Choo Chin Low, 'The Politics of Citizenship in Divided Nations: Policies and Trends in Germany and China', 49 *Communist and Post-Communist Studies* (2016) 123, at 125 (noting that the People's Republic of China and Taiwan each consider all Chinese as their citizens, while East and West Germany likewise considered all Germans as their citizens during the period of German division).

Rather than attempting to pin down elusive (and inapt) general standards, I argue in the next section that a functional view of nationality provides a more appropriate framework for addressing recognition of nationality in the context of ICC jurisdiction.

## 7. The Functional Approach

How should the ICC approach the question of recognition of nationality in the jurisdictional context? Where there is no particular guidance in the terms of a particular treaty, as in the case in the ICC Statute, then Sloane argues that nationality should be interpreted so as to further the function that nationality serves in the particular context that it is being used.<sup>93</sup> Attempts to find a consistent approach to recognition of nationality throughout the corpus of international law, whether reliant on the *Nottebohm* judgment or other principles, are misguided.

What is the function of nationality jurisdiction in article 12 of the ICC Statute? A cursory examination of the drafting history of the ICC Statute shows that there were two principal (and often conflicting) negotiating objectives at play, resulting in the eventual jurisdictional compromise. On the one hand, the clear goal of the ICC project was to end impunity for the perpetrators of the most serious crimes of concern to the international community, as famously spelled out in the Statute's preamble.<sup>94</sup> Accomplishment of this overall goal would require that the Court actually have jurisdiction over those accused of crimes covered in the ICC Statute. States that were supportive of a broad scope of jurisdiction initially coalesced around a German proposal for universal jurisdiction.<sup>95</sup>

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<sup>93</sup> Sloane, *supra* note 12, at 57.

<sup>94</sup> Preamble ICCSt.

<sup>95</sup> Supporters included Sweden, Czech Republic, Latvia, Costa Rica, Albania, Ghana, Namibia, Italy, Hungary, Azerbaijan, Belgium, Ireland, Netherlands, Luxembourg, Bosnia and Herzegovina and Ecuador. D. Zimmerman, 'Article 12: Preconditions to the Exercise of Jurisdiction' in M. Klamberg (ed), *Commentary on the Law of the International Criminal Court* (Brussels: TOAP, 2017) 169, at 169.

On the other hand, a number of other states argued that the jurisdictional provisions of the ICC Statute must also respect the principle of state consent by avoiding illegitimate interference with the rights and interests of non-state parties.<sup>96</sup> State consent was most markedly at the heart of an early French draft statute, that would have required the consent of the territorial state, the state of nationality of the suspect, the state of nationality of the victim, and if relevant the custodial state and the state applying for extradition in order for any case to move forward.<sup>97</sup> By the time of the Rome Conference, the French proposal had been dismissed as unworkable, but one element of state consent remained very significant throughout negotiations (and indeed until today): the insistence of some states, led most vocally by the United States, that the jurisdictional scope of the Court should not infringe on the sovereignty of states who do not join the ICC by subjecting their nationals to prosecution.<sup>98</sup> As the US delegate stated at the time, ‘the fundamental question is this, will the Court be able to prosecute even the officials and personnel of a government without that government having joined the treaty or otherwise submitted to the jurisdiction of the Court?’<sup>99</sup>

With these positions as the starting points, efforts were made to find an acceptable compromise position, that preserved the role of state consent while still maintaining a wide enough jurisdiction to satisfy the Court’s strongest proponents. When it became clear that most states would reject universal jurisdiction, proponents of a broad jurisdictional scope

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<sup>96</sup> See Y. Kitano, ‘The Legal Basis for the Exercise of Jurisdiction by the International Criminal Court and the Preparatory Work of the Rome Statute (V)’ 18 *Journal of International Relations and Comparative Culture* (2019) 37, at 63.

<sup>97</sup> H.P. Kaul, in A. Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 583, at 585.

<sup>98</sup> *Ibid.* Similar positions were also expressed by delegations from India, Indonesia, Gabon, Russia, Jamaica, Nigeria, Vietnam, Algeria, Egypt, Israel, Sri Lanka, Pakistan, Afghanistan, Iran and China. Zimmerman, *supra* note 95, at 169.

<sup>99</sup> US Delegation, Bureau Discussion Paper, UN Doc. A/CONF.183/C.1/L.53, 9 July 1998.

shifted support to a South Korean proposal that would have given the ICC jurisdiction when any of the territorial state, state of nationality of the suspect, state of nationality of the victim, or state of custody of the accused were parties to the ICC Statute.<sup>100</sup> Although in theory this stopped short of universal jurisdiction, in practice there would have been little difference. Jurisdiction would have been possible with the consent of the custodial state (and without it no trial would be feasible in any case, as trials *in absentia* are not allowed at the ICC).<sup>101</sup> The Korean proposal received the support of a majority of states, but not that of the United States and certain other powerful states such as China and India.<sup>102</sup> As the Rome Conference wound down, the final draft was set forth as a further compromise, allowing the Court to act based on territorial and nationality jurisdiction, as per now-article 12. The compromise was not enough to satisfy all delegations: prosecution of non-state party nationals was still possible if they committed the relevant crime on the territory of a state party, and this was in fact the principal reason given for the US decision not to vote in favour of adoption the ICC Statute.<sup>103</sup> From a functional perspective, however, the important thing to note is that the final text was indeed a compromise, representing a desire to both expand jurisdiction and at the same time avoid interfering with the sovereign interests of non-state parties by prosecuting their nationals (unless they committed crimes on the territory of state parties).<sup>104</sup> This double objective has been acknowledged by the

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<sup>100</sup> O. Bekou and R. Cryer, ‘The International Criminal Court and Universal Jurisdiction: A Close Encounter?’, 56 *International & Comparative Law Quarterly* (2007) 49, at 51.

<sup>101</sup> W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., Oxford: Oxford University Press, 2016).

<sup>102</sup> Kaul, *supra* note 97, at 601.

<sup>103</sup> Schabas, *supra* note 50, at 4. China likewise claimed that article 12 ‘imposed an obligation upon non-parties and constituted interference in the judicial independence of sovereignty of States.’ Summary Record of the 9th Plenary Meeting, UN Doc. A/CONF.183/SR.9, § 37.

<sup>104</sup> See S. Bourgon, in A. Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 543, at 560 (Article 12 is the result of a ‘compromise between State sovereignty and the needs of international justice’).

OTP, which recently stated that ‘the object and purpose of the Rome Statute [is] to end impunity *and* ensure that the Court’s jurisdiction is triggered responsibly and lawfully’.<sup>105</sup>

Decisions on recognition of nationality for ICC jurisdictional purposes should therefore take both these functions into account: ending impunity by subjecting perpetrators to the Court’s jurisdiction, and avoiding unreasonable interference in the sovereign interests of non-party states. Broadly speaking, the need to curtail excessive jurisdictional claims that impinge on other states’ interests is quite familiar to discussions of jurisdiction in international (and domestic) law. It is often characterized as a principle of ‘reasonableness’.<sup>106</sup> The argument in favour of ‘reasonable’ limits to extraterritorial exercise of jurisdiction is most associated with Frederick Mann, who wrote that ‘not every close contact will be legally accepted...to support international jurisdiction’, rather ‘it must be possible to point to a reasonable relation, that is to say, to the absence of abuse of rights or of arbitrariness’.<sup>107</sup> Sometimes the principles of sovereignty<sup>108</sup> or non-intervention<sup>109</sup> or

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<sup>105</sup> Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine, ICC-01/18, § 29 (emphasis added).

<sup>106</sup> See generally, W. Dodge, ‘Jurisdictional Reasonableness under Customary International Law: The Approach of the Restatement (Fourth) of US Foreign Relations Law’, 62 *QIL, Zoom-in* (2019) 5.

<sup>107</sup> F. Mann, ‘The Doctrine of Jurisdiction of International Law’, 111 *Recueil des Cours* (1964) 1, at 46–48. See also, *F Hoffman La Roche Ltd v Empagran SA*, 542 US 155, 164-165 (2004) (interpretation of extraterritoriality of laws should ‘avoid unreasonable interference with the sovereign authority of other nations’).

<sup>108</sup> N. Dobson, ‘Reflections on ‘Reasonableness’ in the Restatement (Fourth) of US Foreign Relations Law’, 62 *QIL, Zoom-in* (2019) 19, at 26 (‘where a jurisdictional assertion may interfere with the legitimate sovereign interests of other states, [the principle of sovereignty] requires that consideration be given to these interests as matter of international law’).

<sup>109</sup> C. Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2015), at 43 (principle of non-intervention ‘requires States to take the legitimate interests of other States into account when they exercise jurisdiction’).

abuse of rights<sup>110</sup> are invoked instead, with largely the same result.<sup>111</sup> The need to limit jurisdiction where it impinges on other states' interests also derives support from Justice Fitzmaurice's statement in *Barcelona Traction*, that 'every State [has] an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by another State'.<sup>112</sup> Thus while the principle of jurisdictional reasonableness may not be binding as customary international law, it does provide a familiar and readily available framework with which to interpret nationality in the ICC context.

What, then, would constitute an unreasonable interference into non-state party interests for the purposes of ICC nationality jurisdiction? I would suggest that an unreasonable exercise of jurisdiction would be one that subjects the national of a non-state party to prosecution without that person's implied consent to the Court's jurisdiction. In the case of a non-state national who commits an atrocity on the territory of a state party, that consent can be implied through the act of travelling to that state's territory.<sup>113</sup> In the case

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<sup>110</sup> *Ibid*, at 43 (abuse of rights principle 'requires that States do not exercise their jurisdictional rights in a way that disproportionately harms other States' regulatory interests and goals').

<sup>111</sup> *Ambos*, *supra* note 57, at 211 (positing that reasonableness acts 'as a limitation based on the argument that an unreasonable jurisdictional claim amounts to an unlawful intervention, an abuse of rights, or even a due process violation').

<sup>112</sup> ICJ. *Barcelona Traction, Light and Power Co, LTD (Belgium v Spain)*, ICJ Rep 3, 105 (1970), sep. op. Fitzmaurice (in context of corporate nationality).

<sup>113</sup> It should be noted, however, that the Pre-Trial Chamber decisions on jurisdiction over the situation in Myanmar are in tension with the idea of implied consent to territorial jurisdiction. Pre-Trial Chamber I determined that the Court would have territorial jurisdiction over the crime against humanity of deportation (and possibly other crimes) where the crime was initiated in a non-state party and the victims subsequently fled to the territory of a state party. Decision on the 'Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute', Request Under Regulation 46(3) of the Regulations of the Court (ICC-RoC46(3)-01/ 18-37), Pre-Trial Chamber I, 6 September 2018. The ruling on this point was later confirmed by Pre-Trial Chamber III. Decision Pursuant to Art. 15 of the Rome Statute, *supra* note 61. The Myanmar jurisdictional determination has been subject to criticism, and may yet be reviewed

of a dual national, that consent can be implied through 1) voluntary naturalization to the nationality of a state party or 2) voluntary maintenance of the nationality of a state party, if that nationality was assigned involuntarily. This implied consent standard would, in theory, assuage the concerns of non-party states that their citizens could be dragged before the court unwillingly.<sup>114</sup>

In practice, this would mean that most dual nationals would face the possibility of ICC prosecution if one of their states of nationality is party to the ICC Statute.<sup>115</sup> David Benjamin's South African nationality would be recognised, and he could be prosecuted. It would not matter whether an accused had genuine links with the state party or had the capacity to enter or exercise any particular rights pursuant to their nationality. Nor would one have to engage in any analysis of whether the state party nationality was in fact permissible under international law (or required recognition under international law). If an individual voluntarily naturalizes while residing in an occupied territory or pursuant to a

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by the Appeals Chamber. See, e.g., Caleb Wheeler, 'Human Rights Enforcement at the Borders: International Criminal Court Jurisdiction over the Rohingya Situation', 17 *Journal of International Criminal Justice* (2019) 609, at 627 ('no reason to believe, despite the insistence of the Office of the Prosecutor to the contrary, that objective territoriality should also act to confer jurisdiction to the ICC').

<sup>114</sup> I would posit that states lack any legitimate reason to object to their nationals *willingly* subjecting themselves to the jurisdiction of the ICC. Interpreting legitimate state interests as supportive of individual liberty is reflective of a human-centred conception of sovereignty. As Tomuschat notes, 'states are no more than instruments whose inherent function it is to serve the interests of their citizens' Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des Cours* (1999) 9, at 237. See also Anne Peters, 'Humanity as the A and Ω of Sovereignty', 20 *European Journal of International Law* (2009) 513, at 514 ('the normative status of sovereignty is derived from humanity, understood as the legal principle that human rights, interests, needs, and security must be respected and promoted, and that this humanistic principle is also the *telos* of the international legal system.')

<sup>115</sup> While the issue is not addressed in depth in this paper, this approach would also logically imply that municipal nationality should always be recognised in cases (such as *Nottebohm*) where an individual has only one potential nationality. The recognition of even an involuntary nationality in such a case would not adversely affect the interests of any non-state parties, while it would further the objective of ending impunity.

neighbouring country's policy of mass naturalization, then the resultant nationality would be recognised for the purposes of ICC jurisdiction, despite being arguably unlawful.<sup>116</sup>

On the other hand, if a state party naturalized Donald Trump or Xi Jinping without their consent, this nationality would not be recognised. This would also hold true if a state imposed its nationality on a particular group of individuals, without giving them a reasonably accessible procedure to reject the new nationality.<sup>117</sup> Kim Jong Un and his associates were not naturalized; they had South Korean nationality from birth under South Korean law. However, it is clear that there was no implied consent in this case because maintenance of South Korean nationality was not voluntary. There has never been a procedure available to inform North Koreans of their South Korean nationality or allow them to repudiate it. ICC recognition of this nationality should thus also be considered an unreasonable interference on the legitimate interest of a non-state party (North Korea) that its nationals not be prosecuted by the Court without having (implicitly) consented to its jurisdiction. That is the approach that the OTP should have used in its December 2019 report.

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<sup>116</sup> Of course, it may be questionable in some cases whether naturalization has been truly voluntary. See e.g., Peters, *supra* note 63, at 636-637 (describing allegations of intimidation and pressure for residents of Abkhazia and South Ossetia to accept Russian citizenship)

<sup>117</sup> This was arguably the case for some residents of Crimea, who were involuntarily assigned Russian nationality in 2014, subject to a formal one-month term for refusal that was in many cases impractical or inaccessible to potential applicants. O. Dubinska and G. Nuridzhanian, *Crimean Precedent: Forced Displacement from Crimea and its Human Rights Aspects*, Regional Centre for Human Rights, December 2019, at 24-25.