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OVERVIEW

The Journal of International Criminal Law (*JICL*) is a scientific, online, peer-reviewed journal, first edited in 2020 by Prof. Dr. Heybatollah Najandimanesh, mainly focusing on international criminal law issues.

Since 2023 JICL has been co-managed by Prof. Dr. Anna Oriolo as General Editor and published semiannually in collaboration with the International and European Criminal Law Observatory (IECLO) staff.

JICL Boards are powered by academics, scholars and higher education experts from a variety of colleges, universities, and institutions from all over the world, active in the fields of criminal law and criminal justice at the international, regional, and national level.

The aims of the JICL, *inter alia*, are as follow:

- to promote international peace and justice through scientific research and publication;
- to foster study of international criminal law in a spirit of partnership and cooperation with the researchers from different countries;
- to encourage multi-perspectives of international criminal law; and
- to support young researchers to study and disseminate international criminal law.

Due to the serious interdependence among political sciences, philosophy, criminal law, criminology, ethics and human rights, the scopes of JICL are focused on international criminal law, but not limited to it. In particular, the Journal welcomes high-quality submissions of manuscripts, essays, editorial comments, current developments, and book reviews by scholars and practitioners from around the world addressing both traditional and emerging themes, topics such as

- the substantive and procedural aspects of international criminal law;
- the jurisprudence of international criminal courts/tribunals;
- mutual effects of public international law, international relations, and international criminal law;
- relevant case-law from national criminal jurisdictions;
- criminal law and international human rights;
- European Union or EU criminal law (which includes financial violations and transnational crimes);
- domestic policy that affects international criminal law and international criminal justice;
- new technologies and international criminal justice;
- different country-specific approaches toward international criminal law and international criminal justice;
- historical accounts that address the international, regional, and national levels; and
- holistic research that makes use of political science, sociology, criminology, philosophy of law, ethics, and other disciplines that can inform the knowledge basis for scholarly dialogue.



The dynamic evolution of international criminal law, as an area that intersects various branches and levels of law and other disciplines, requires careful examination and interpretation. The need to scrutinize the origins, nature, and purpose of international criminal law is also evident in the light of its interdisciplinary characteristics. International criminal law norms and practices are shaped by various factors that further challenge any claims about the law's distinctiveness. The crime vocabulary too may reflect interdisciplinary synergies that draw on domains that often have been separated from law, according to legal doctrine. Talk about “ecocide” is just one example of such a trend that necessitates a rigorous analysis of law *per se* as well as open-minded assessment informed by other sources, e.g., political science, philosophy, and ethics. Yet other emerging developments concern international criminal justice, especially through innovative contributions to enforcement strategies and restorative justice.

The tensions that arise from a description of preferences and priorities made it appropriate to create, improve and disseminate the JICL as a platform for research and dialogue across different cultures, in particular, as a consequence of the United Nations push for universal imperatives, e.g., the fight against impunity for crimes of global concern (core international crimes, transboundary crimes, and transnational organized crimes).

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Breaking the Genuine Link? Dual Nationality under the Jurisdiction of the International Criminal Court

by Kunyang Li *

ABSTRACT: Nationality sits at the heart of the International Criminal Court’s jurisdiction under Article 12(2)(b) of the Rome Statute, yet the Statute offers no settled definition of the term. In case involving dual nationals, the Office of the Prosecutor has not grounded its analysis in any settled rule of international law, and has instead looked to the practical rights nationality is thought to provide. In fact, traditional doctrines such as the “genuine link” and “dominant nationality” tests provide only limited guidance: originating in the context of diplomatic protection, they do not translate neatly to international criminal jurisdiction. Treaty interpretation, by contrast, supports the exercise of active nationality jurisdiction whenever an accused with multiple nationalities holds the nationality of a State Party. However, in practice, it remains necessary for the Court to adopt a functional approach to assess which nationalities can properly ground its jurisdiction. Individual consent is not a workable criterion, whereas nationality conferred or revoked on discriminatory grounds cannot be recognized under international law and should not provide a basis for the jurisdiction of the International Criminal Court. It proposes a functional approach that balances respect for state sovereignty with the imperative to prevent impunity, keeping the Court’s treatment of dual nationals both legally sound and operationally effective.

KEYWORDS: Dual Nationality; Genuine Link; International Criminal Court; Jurisdiction.

I. Introduction

The Rome Statute of the International Criminal Court (Rome Statute) places the nationality of the accused at the very nexus of establishing *ratione personae* jurisdiction.¹ Pursuant to Article 12(2)(b) of the Statute, the Court may exercise jurisdiction if the person accused of the crime is a national of a State Party. However, despite the pivotal function of “nationality” in determining jurisdictional reach, the Rome Statute itself remains silent on the definition of this core concept.² Furthermore, the Rules of Procedure and Evidence provide no further guidance on the meaning of “nationality”, nor do the *travaux préparatoires* of the Rome Statute or the

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¹ Zsuzsanna Deen-Racsmány, *The Nationality of the Offender and the Jurisdiction of the International Criminal Court*, 95(3) AMERICAN JOURNAL OF INTERNATIONAL LAW 606 (2001), at 606.

² Andrew Wolman, *Dual Nationality and International Criminal Court Jurisdiction*, 18(5) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1081 (2020), at 1081-1082.

subsequent work of the Preparatory Commission for the International Criminal Court (ICC) shed light on this issue.³

This gap in the statutory framework poses concrete challenges for the Court in practice. In the absence of clear standards, when a State Party asserts - under its domestic law - that a suspect holds its nationality, the ICC has no established criteria to assess the validity of such a claim for the purpose of exercising *ratione personae* jurisdiction.

These challenges are further heightened in an era of intense global mobility. As cross-border migration, long-term residence, and the pluralization of legal identities have become structural features of contemporary society, dual nationality is no longer exceptional but widespread. The debates surrounding the ICC's potential jurisdiction over members of the so-called "Islamic State" provide a concrete illustration of this problem. Although the core crimes were primarily committed on the territory of non-States Parties such as Syria and Iraq, a significant number of Islamic State fighters possessed dual nationality, including the nationality of a State Party such as the United Kingdom, France, Germany, Belgium, Australia, Tunisia, and the Netherlands.⁴ In principle, these nationality links could enable the Court to exercise jurisdiction under Article 12(2)(b) of the Rome Statute.

Within this context, a critical question arises when an accused possesses multiple nationalities, including those of a State Party and a non-State Party: can the ICC exercise jurisdiction under Article 12 over such an individual?

II. The OTP's Decision on North Korea

For a considerable period, questions concerning the international recognition of nationality remained largely doctrinal and did not generate substantive controversy in international criminal practice. Before November 2019, the International Criminal Court had not been required to address the exercise of jurisdiction over individuals holding dual nationality, including the nationality of a non-State Party.

This situation changed in December 2019, when the Office of the Prosecutor (OTP) addressed the issue of nationality for the first time in its Annual Report, in response to a communication seeking to prosecute Kim Jong-un and other senior North Korean officials on the basis of alleged South Korean nationality. Although North Korea is not a State Party to the Rome Statute, the submitters argued that the individuals also held South Korean nationality, and as South Korea is a State Party, the Court could therefore exercise jurisdiction on that basis. In its Annual Report, the OTP formally responded by concluding that the Court lacked jurisdiction on this ground.⁵

As a starting point, the OTP acknowledged that, under South Korean nationality law, North Koreans are considered South Korean nationals from birth.⁶ However, upon further examination, the OTP concluded that this nationality is purely nominal and should not be recognized, as it neither confers any immediate rights or protections nor guarantees that all North Koreans would be acknowledged as South Korean nationals. In practice, recognition requires a formal application, either at a South Korean consulate or through legal proceedings

³ Deen-Racsmany, *supra* note 1, at 606.

⁴ Katarína Šmigová, *Dual Nationals at the International Criminal Court: Is the Genuine Link Relevant?*, in THE CENTRE FOR STUDIES AND RESEARCH IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS ONLINE (Brill ed., 2023), at 31.

⁵ ICC, Office of the Prosecutor, *Report on Preliminary Examination Activities* (Dec. 5, 2019), paras. 28–35.

⁶ *Id.*, para. 30.

within South Korea.⁷ Even then, some individuals, such as those with criminal records or who have lived long-term in a third country, might still not be recognized.⁸

The OTP's approach reflects a careful effort to prevent *de facto* expansion of ICC jurisdiction over non-State Parties based solely on domestic-law nationality, thereby preserving state consent and sovereignty. However, this approach raises concerns, as it effectively subjects nationality to a *de facto* substantive review: the OTP did not rely on any established rule of international law, but assessed nationality based on the practical rights it confers, thereby weakening its certainty as a formal legal status. In fact, nationality may exist independently of the ability to exercise its associated rights, since individuals can possess nationality from birth yet still need to complete procedural steps to enjoy related entitlements (e.g., applying for identity cards or passports), just as North Koreans must apply to South Korean consulates to confirm nationality.⁹ Moreover, nationality cannot be judged based on entry rights, since doing so would allow States to manipulate jurisdiction (e.g., through passports or admission policies).¹⁰

Ultimately, the OTP assessed the practical exercise of rights when considering the South Korean nationality of North Koreans, rather than relying solely on a formal legal determination. In doing so, it did not follow the international law rules that are typically applied to resolve nationality disputes - such as the “genuine link” test or the “dominant nationality” principle. This leaves the Court's jurisdiction over dual nationals still unresolved: when an individual holds nationality of both a State Party and a non-State Party, how should the Court determine its jurisdiction?

III. Rethinking the Genuine Link in ICC Jurisdiction

A. The Limits of the Genuine Link Principle in International Criminal Jurisdiction

Scholarly discussions of the complexities surrounding dual nationality and jurisdictional recognition often begin with the *Nottebohm* case, a landmark proceeding in which the International Court of Justice (ICJ) developed the “genuine link” principle. This doctrine remains the primary reference point for assessing whether a state's grant of nationality should be recognized by international tribunals.¹¹

Friedrich Nottebohm, a German national who had long resided in Guatemala, obtained Liechtenstein nationality in 1939, losing his German citizenship.¹² His main motive was to avoid being treated as a German national when Guatemala entered the war against Germany. Despite his new nationality, Guatemala continued to regard him as German, confiscating his property and interning him in the United States. Liechtenstein brought a claim before the ICJ, which rejected it, holding that Nottebohm's Liechtenstein nationality could not be recognized for diplomatic protection. The Court explained that nationality is a legal bond based on social facts of attachment, a genuine connection of existence, interests and sentiments, together with

⁷ *Id.*, para. 31.

⁸ *Id.*, para. 32.

⁹ Wolman, *supra* note 2, at 1085.

¹⁰ *Id.*, at 1085-1086.

¹¹ Seline Trevisanut, *Nationality Cases before International Courts and Tribunals*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (May 2011), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e853>.

¹² ICJ, *Nottebohm Case (Liechtenstein v. Guatemala) (Second Phase)*, Judgment (Apr. 6, 1955), pp. 4, 15, 55.

reciprocal rights and duties.¹³ It found that Nottebohm had no real prior connection with Liechtenstein, and that his naturalization therefore lacked the genuineness requisite for an act of such importance.¹⁴

To reach this conclusion, the Court devised a test to determine whether a person is, in fact, more closely connected with the population of the State conferring nationality than with that of any other State. The decisive aspect was the social fact of attachment to the State, proven by factors such as settled abode or intention to settle, prolonged residence, family ties, economic interests, and cultivating the country's traditions; this criterion has come to be known as the "genuine link test".¹⁵ Notably, the Court did not rule on the international legality of Liechtenstein's grant of nationality, nor did it address whether that nationality should be recognized for purposes other than diplomatic protection.¹⁶

Another important case is the *Mergé Claim* case, decided shortly after the *Nottebohm* judgment. In this case, the Italo-American Mixed Claims Commission dealt with nationality issues in the context of state immunity and diplomatic protection. The Commission applied the "dominant nationality principle", holding that a claimant with multiple nationalities could still receive diplomatic protection if a genuine and effective connection to the state asserting the claim could be demonstrated.¹⁷ Although the Tribunal referenced the *Nottebohm* case, its reasoning differed: the claimant in *Mergé* was an individual rather than a state. Similarly, the Iran–United States Claims Tribunal, in the *Malek* case, accepted that where an individual possesses multiple nationalities, jurisdiction may be grounded on the identification of a dominant or effective nationality. In assessing the dominant nationality, the Tribunal considered factors such as the claimant's life history, family and economic ties, and evidence of sincere allegiance.¹⁸

While some distinguished scholars, notably Schabas¹⁹ and Blakesley²⁰, argue that the genuine link principle established in the *Nottebohm* case constitutes a universally applicable rule of international law that should govern nationality determinations under the Rome Statute. Some scholars have also advanced a further line of reasoning based on the theory of delegated jurisdiction.²¹ According to this account, by ratifying the Rome Statute, States are understood to have delegated to the ICC the territorial and personal jurisdiction they originally possessed.²² If the exercise of personal jurisdiction by States is constrained by a "genuine link" requirement under customary international law, then the jurisdiction transferred to the Court would likewise be subject to that constraint.

¹³ *Id.*, at 24-25.

¹⁴ *Id.*, at 25-26.

¹⁵ *Id.*, at 24-25.

¹⁶ *Id.*, at 20.

¹⁷ Iran-U.S. Claims Tribunal, *Reza Said Malek v. Government of the Islamic Republic of Iran*, Case No. 193, Interlocutory Award No. ITL 68-193-3 (June 23, 1988), para. 19, reprinted in 19 Iran-U.S. Claims Tribunal Reports 48, at 53.

¹⁸ Iran-U.S. Claims Tribunal, *Iran v. United States*, Case No. A/18, Decision (Apr. 6, 1984), 5 Iran-U.S. Claims Tribunal Reports 251, at 260 *et seq.*

¹⁹ WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2017), at 59.

²⁰ Christopher Blakesley, *Jurisdiction Ratione Personae, or the Personal Reach of the Court's Jurisdiction*, in THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT (Jose Doria *et al.* eds., 2009), at 426.

²¹ Wolman, *supra* note 2, at 1089-1090.

²² ICC, Request for Authorisation of an Investigation Pursuant to Article 15, Situation in the Islamic Republic of Afghanistan, ICC-02/17, Pre-Trial Chamber III, Decision (Nov. 20, 2017), para. 45; Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1(1) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 618 (2003), at 621.

However, neither the claim of universality nor the delegated-jurisdiction argument withstands closer scrutiny. Contemporary state practice and international jurisprudence do not support the existence of a generally applicable “genuine link” requirement, nor is there a convincing basis for extending a doctrine developed in the context of diplomatic protection to the exercise of international criminal jurisdiction by the ICC.

First, the claim that the “genuine link” requirement is universally applicable is not supported by international jurisprudence. Far from being an established customary rule, the principle has been consistently confined to its specific facts.²³ For instance, in the *Micheletti* case, the European Court of Justice expressly declined to apply the genuine link test when determining the nationality of a Member State’s citizens.²⁴ In the field of international investment law, International Centre For Settlement Of Investment Disputes (ICSID) tribunals have likewise approached the doctrine with caution. In *Micula v. Romania*²⁵ and *Saba Fakes v. Turkey*²⁶, the tribunals explicitly refrained from treating the genuine link requirement as a general rule of international law. Similarly, the International Law Commission, after surveying contemporary State practice, also rejected the characterization of the genuine link as a rule of general application and confined its relevance strictly to the exceptional factual circumstances of the *Nottebohm* case.²⁷

Second, there exists a fundamental teleological distinction between diplomatic protection and international criminal jurisdiction. The genuine link requirement was articulated within the framework of diplomatic protection, rather than in the context of criminal jurisdiction over international crimes. Diplomatic protection refers to remedial procedures by which a State raises the claims of its nationals against another State.²⁸ In that setting, the genuine link functions as a constraint designed to prevent the abusive invocation of diplomatic protection.²⁹ By contrast, the jurisdiction of the ICC extends to the most serious crimes of concern to the international community as a whole and is explicitly aimed at ending impunity.³⁰ Therefore, even assuming that the genuine link requirement constitutes customary international law, it operates solely within the context of diplomatic protection and does not constitute a jurisdictional limitation under the ICC framework.

B. Nationality without a Genuine Link under Article 12(2)(b)

Article 31 of the Vienna Convention on the Law of Treaties requires that a treaty be interpreted in good faith in accordance with the ordinary meaning of its terms, read in their context and in light of the treaty’s object and purpose.³¹ International criminal tribunals have consistently

²³ Christopher Staker, *Jurisdiction*, in INTERNATIONAL LAW (Malcolm D. Evans ed., 2010), at 324.

²⁴ ECJ, *Micheletti v. Delegación del Gobierno de Cantabria*, C-369/90, Opinion of advocate general tesauo (30 Jan. 1992), para. 5.

²⁵ ICSID, *Micula et al. v. Romania*, ARB/05/20, Decision on jurisdiction and admissibility (24 Sep. 2008), para. 99.

²⁶ ICSID, *Saba Fakes v. Republic of Turkey*, ARB/07/20, Award (14 Jul. 2010), paras. 76-78.

²⁷ United Nations, International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries* (2006), art. 4.

²⁸ John R. Dugard, UN General Assembly, UN Doc A/CN.4/506, First Report on Diplomatic Protection (7 Mar. 2000), paras. 40, 68.

²⁹ Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARVARD INTERNATIONAL LAW JOURNAL 1 (2009), at 4; Javier García Olmedo, *Nottebohm Under Attack (Again): Is it Time for Reconciliation?*, EJIL: Talk! (10 Dec. 2021), <https://www.ejiltalk.org/nottebohm-under-attack-again-is-it-time-for-reconciliation/>.

³⁰ ICC, Rome Statute of the International Criminal Court, preamble.

³¹ United Nations, Vienna Convention on the Law of Treaties (23 May. 1969), art. 31.

relied on this interpretative framework when construing the notion of “nationality.”³² From this perspective, nationality, when understood merely as a formal legal bond, does not serve as a decisive criterion. Rather, the concept is treated with interpretive flexibility, allowing its meaning to be shaped by the particular legal and factual context in which it is applied.³³

From a systemic perspective, Article 36(7) of the Rome Statute expressly provides that no two judges of the same nationality may be appointed and further specifies that, in the case of dual nationality, a judge shall be considered a national of the State in which he or she ordinarily exercises civil and political rights.³⁴ This provision thus articulates a precise rule for the determination of nationality in a specific institutional context. As a general principle of treaty and statutory interpretation, where one provision of a legal instrument expressly sets out a particular rule, while another related provision remains silent on that rule, such silence is ordinarily understood as deliberate rather than inadvertent, reflecting an intention to exclude the application of that rule in the latter context.³⁵ Applying this reasoning to questions of jurisdiction, if a dual-national defendant were legally capable of being regarded only as a national of a single State, Article 12(2)(b) of the Statute would be expected to mirror the formulation of Article 36(7) so as to reflect the same approach to nationality determination. Yet Article 12(2)(b) contains no such qualifying language. It follows, therefore, that under a systemic interpretation of the Statute, the term “State of nationality” in Article 12(2)(b) should be understood broadly as encompassing any State of which the accused holds nationality, rather than a single, dominant nationality.

From a teleological perspective, Article 1 of the Rome Statute provides that the Court is established to exercise its jurisdiction over persons for the most serious crimes of international concern.³⁶ The Preamble further underscores the Court’s firm commitment to ending impunity and thereby contributing to the prevention of such crimes.³⁷ Moreover, the ICC has affirmed that the fundamental object and purpose of Article 12 of the Statute lies in preventing perpetrators of serious international crimes from evading accountability through jurisdictional gaps.³⁸ Accordingly, in order to achieve the objective of combating impunity, the interpretation of nationality should encompass all nationalities held by the accused.

This approach finds support in established international instruments, most notably the 1935 Harvard Draft Convention on Jurisdiction with Respect to Crime, which is among the few documents to explicitly address the exercise of criminal jurisdiction over defendants with multiple nationalities.³⁹ The ICC has previously treated the Draft Convention as an authoritative reference in its jurisdictional analysis.⁴⁰ Driven by the objective of combating impunity, the Draft Convention endorses the right of any State of nationality to institute criminal proceedings against the accused, and makes clear that where international law permits a State to regard an

³² ICTY, *Delalić et al.*, IT-96-21-A, Appeals Chamber, Judgement (20 Feb. 2001), para. 67.

³³ *Id.*, para. 57.

³⁴ ICC, *supra* note 30, art. 36(7).

³⁵ LARRY M. EIG, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2014), at 16.

³⁶ ICC, *supra* note 30, art. 1.

³⁷ *Id.*, preamble.

³⁸ ICC, Situation in the State of Palestine, ICC-01/18, Pre-Trial Chamber, Decision on the “Prosecution request pursuant to Article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine” (5 Feb. 2021), para. 104.

³⁹ Šmigová, *supra* note 4, at 27.

⁴⁰ ICC, Office of the Prosecutor, ICC-RoC46(3)-01/18-1, Application under Regulation 46(3), Prosecution’s request for a ruling on jurisdiction under Article 19(3) of the Statute (9 Apr. 2018), paras. 34–36.

individual as its national, that State's jurisdiction is not restricted by the individual's concurrent nationality of another State.⁴¹

This provision embodies what has been described as the principle of equality of nationalities, according to which all States of an individual's nationality stand on an equal legal footing. Irrespective of the varying degrees of factual connection between the individual and each State, every State of nationality enjoys equivalent rights flowing from that bond, including the right to exercise criminal jurisdiction over offences committed by that individual.⁴²

It follows that, in cases of dual or multiple nationality, the determination of the ICC's personal jurisdiction should rest on equality of nationality, rather than on a test of genuine or effective links.⁴³ Since all States of nationality are legally equal, the rights derived from the nationality bond - including the right to exercise criminal jurisdiction - are likewise equal, regardless of the intensity of the individual's connection to each State.

Moreover, under the theory of delegated jurisdiction, the Court's jurisdiction derives from the jurisdiction conferred upon it by the States Parties.⁴⁴ Because all States Parties possess equal jurisdictional rights over their nationals, the ICC's exercise of jurisdiction should similarly respect this principle of equality.⁴⁵

IV. Active Nationality Jurisdiction at the International Criminal Court: A Functional Approach

As the Rome Statute is silent on the criteria for recognizing nationality for jurisdictional purposes, nationality should be interpreted in light of the function it serves within the specific legal context.⁴⁶ Following this functional approach, it is first necessary to clarify the role of nationality jurisdiction under Article 12 of the Rome Statute. Nationality jurisdiction under the ICC serves a dual function: it enables the Court to exercise jurisdiction over alleged perpetrators so as to combat impunity, while preventing unreasonable interference with the sovereign interests of non-States Parties.⁴⁷

Moreover, a functional interpretation of nationality requires careful attention to its meaning under Article 12. Although international law generally recognizes States' authority to determine who their nationals are,⁴⁸ this authority is not absolute. Nationality conferred solely under domestic law does not automatically bind international courts and may be disregarded where it violates international law.⁴⁹ Other States are under no obligation to recognize nationality grants that violate international law.⁵⁰ This limitation was already reflected in the

⁴¹ *Harvard Draft Convention on Jurisdiction with Respect to Crime*, 29(S1) AMERICAN JOURNAL OF INTERNATIONAL LAW 439 (1935), art. 5.

⁴² ZSUZSANNA DEEN-RACSMÁNY, *ACTIVE PERSONALITY AND NON-EXTRADITION OF NATIONALS IN INTERNATIONAL CRIMINAL LAW AT THE DAWN OF THE TWENTY-FIRST CENTURY* (2007), at 26.

⁴³ *Id.*

⁴⁴ Akande, *supra* note 22, at 621.

⁴⁵ Šmigová, *supra* note 4, at 26-27.

⁴⁶ Sloane, *supra* note 29, at 57; Wolman, *supra* note 2, at 1107.

⁴⁷ ICC, *supra* note 38, para. 29.

⁴⁸ Oliver Dörr, *Nationality*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (August 2019), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e852>, para. 4; PCIJ, *Question Concerning the Acquisition of Polish Nationality*, Advisory Opinion No. 7 (1923), at 16.

⁴⁹ PCIJ, *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, Advisory Opinion No. 4 (Nov. 8, 1921), at 24.

⁵⁰ Dörr, *supra* note 48, para. 11.

second sentence of Article 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which states that domestic nationality law “[t]his law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.”⁵¹ This limitation applies not only to nationality conferred at birth, but also to the conditions for naturalization and loss of nationality.⁵²

Building on this principle, Deen-Racsmány emphasizes a key limitation on nationality-based jurisdiction: the ICC’s authority should extend only to situations in which a State Party can, under international law, legitimately treat an individual as its national.⁵³ She notes that if an individual’s link to a State is insufficient, or if nationality is granted or revoked in violation of international law, such as through forced naturalization or deprivation, other States may challenge it, and the Court should not recognize it.⁵⁴ In other words, where the grant or renunciation of nationality is intended to secure or obstruct the Court’s jurisdiction over the individual, such actions are considered *mala fide*. Under international law, the nationality conferred or revoked in these circumstances should not be acknowledged.⁵⁵

However, Wolman challenges this approach, arguing that grounding nationality-based jurisdiction in an assessment of the international lawfulness of nationality conferral gives rise to serious practical and normative difficulties. First, it would create significant uncertainty as to whether a prosecutor or judge would assert jurisdiction in cases involving arguably unlawful nationality grants, including non-consensual imposition, large-scale voluntary conferral, or racially discriminatory policies. Such uncertainty is inherently undesirable in criminal law, as it undermines the principle of legality and increases the risk of divergent interpretations leading to reversal on appeal.⁵⁶

Second, from a functional perspective, this approach renders the category of invalid nationality both over- and under-inclusive. It is over-inclusive because there is no compelling reason for the ICC to decline jurisdiction over individuals who have voluntarily acquired the nationality of a State Party, whether under a discriminatory nationality regime, a mass naturalization programme, or through the consensual acceptance of an occupying power’s nationality in occupied territory.⁵⁷ Refusing jurisdiction in such cases would neither advance the goal of ending impunity nor serve the objective of preventing the prosecution of nationals of non-States Parties without their implied consent. At the same time, the approach is under-inclusive in relation to situations already contemplated by the Office of the Prosecutor.⁵⁸ South Korea’s conferral of nationality on North Koreans may plausibly be understood as *jus sanguinis* rather than involuntary naturalization, yet treating Kim Jong Un as a South Korean national for jurisdictional purposes would undermine the objective of preventing unreasonable interference with the sovereign interests of non-States Parties.⁵⁹

Accordingly, rather than focusing on the international law validity of nationality, Wolman advances a different limiting criterion for determining when the ICC’s exercise of active nationality jurisdiction constitutes an impermissible interference with the interests of non-States

⁵¹ League of Nations, No. 4137, Convention on Certain Questions Relating to the Conflict of Nationality Law (Apr. 13, 1930), art. 1.

⁵² Deen-Racsmány, *supra* note 1, at 608.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*, at 609.

⁵⁶ Wolman, *supra* note 2, at 1103.

⁵⁷ *Id.*, at 1104.

⁵⁸ *Id.*

⁵⁹ *Id.*

Parties, namely whether the Court asserts jurisdiction over their nationals in the absence of express or implied consent.⁶⁰ For dual nationals, such consent may be implied in two situations: where the individual has voluntarily acquired the nationality of a State Party, or where that nationality was initially imposed but subsequently maintained by choice.⁶¹ From this perspective, there is no need to inquire into whether the nationality is fully lawful under international law. Consequently, where an individual voluntarily acquires the nationality of a State Party, including through naturalization in occupied territory or pursuant to a neighbouring State's mass naturalization policy, the ICC should recognize that nationality for jurisdictional purposes even if it may be legally contested.⁶² By contrast, where nationality is imposed on a group without offering a genuine and practicable opportunity to refuse it, such nationality cannot serve as a valid basis for the exercise of the Court's jurisdiction.⁶³

However, Wolman's objections to Deen-Racsmány's framework are not entirely convincing, since her points on uncertainty and functional misalignment can be questioned. First, Wolman contends that assessing whether the conferral of nationality complies with international law as a basis for jurisdiction would generate unacceptable uncertainty in practice. Yet this claim is not entirely accurate. In fact, in certain circumstances, it is neither difficult nor indeterminate to ascertain whether a State's grant of nationality violates international law. As Oliver Dörr notes, if a State attempts to confer or revoke nationality on the basis of race, sex, language, religion, sexual orientation, or political affiliation, such measures not only contravene certain human rights treaties but also rely on criteria that international law does not recognize as legitimate grounds for nationality.⁶⁴ By contrast, grounding jurisdictional validity on an individual's "voluntary" acceptance of nationality introduces far greater uncertainty.⁶⁵ As Peters observes, in Abkhazia and South Ossetia, allegations have been made that residents experienced intimidation and coercion when accepting Russian nationality, casting serious doubt on the voluntariness of such naturalizations.⁶⁶ Accordingly, compared with a normative review of the legality of nationality conferral, centering the assessment on individual consent is more unstable.

Second, Wolman's claim that Deen-Racsmány's framework is both over- and under-inclusive is also contestable. On the one hand, the framework cannot be considered "over-inclusive," because the legitimacy of ICC jurisdiction is not dependent on individual consent. Rather, ICC jurisdiction is fundamentally derived from State sovereignty and its voluntary delegation, not from private choice or personal acquiescence.⁶⁷ Within the traditional international law framework, criminal jurisdiction is a core expression of State sovereignty.⁶⁸

⁶⁰ *Id.*, pp. 1109-1110.

⁶¹ *Id.*

⁶² *Id.*, pp. 1109-1110.

⁶³ *Id.*, pp. 1110-1111.

⁶⁴ Dörr, *supra* note 48, para. 17.

⁶⁵ The concept of voluntariness is inherently subjective: in situations of occupation, does the individual genuinely possess the practical ability to refuse the nationality offered? Under racially discriminatory or coercive regimes, can a superficially voluntary acceptance mask structural pressures that effectively constitute forced consent?

⁶⁶ Anne 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 636-637.

⁶⁷ William Schabas, *The International Criminal Court and Non-Party States*, 28 WINDSOR YEARBOOK OF ACCESS TO JUSTICE (2010) 1, at 3; Kristen Schmalenbach, *International Criminal Jurisdiction*, in THE OXFORD HANDBOOK OF JURISDICTION IN INTERNATIONAL LAW (Stephen Allen *et al.* eds., 2019), at 507.

⁶⁸ JAMES CRAWFORD, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2019), at 440; MALCOLM N. SHAW, INTERNATIONAL LAW (2017), at 483; Cedric Ryngaert, *The Concept of Jurisdiction in International Law*, in RESEARCH HANDBOOK ON JURISDICTION AND IMMUNITIES IN INTERNATIONAL LAW (Alexander Orakhelashvili ed., 2015), at 51.

While the Rome Statute establishes the ICC and represents a significant institutional innovation, it does not grant the Court inherent or independent criminal jurisdiction beyond the authority States confer. ICC jurisdiction is entirely contingent on the limited authority States yield through ratification of the Statute. Accordingly, whether exercising jurisdiction under the territorial or nationality principle, the Court's authority presupposes that the relevant State has lawful jurisdiction over the person or conduct under international law. The decisive question is thus not whether an individual has subjectively "voluntarily" acquired a nationality, but whether the State is entitled under international law to treat that individual as its national and thereby delegate the corresponding criminal jurisdiction to the Court.

Allowing individual consent to serve as the decisive trigger for ICC nationality jurisdiction would effectively permit States to expand the scope of their delegated authority through private acts of choice. Such a model risks obscuring the legal distinction between States and individuals under international law, while also weakening the principle of State consent that Article 12 of the Rome Statute aims to safeguard. Thus, prioritizing individual consent in determining jurisdiction does not address concerns of over-inclusiveness; instead, it may undermine the sovereignty-based foundations of ICC jurisdiction.

On the other hand, the framework cannot be considered under-inclusive. Take Wolman's example of South Korea conferring nationality on residents of North Korea. While this may be understood as a form of *jus sanguinis* nationality acquisition rather than involuntary naturalization, it does not automatically render such nationality legally sufficient to support ICC jurisdiction. The grant of nationality by South Korea is predicated on its claim of sovereignty over North Korean territory, a claim that has not received broad recognition under international law.⁶⁹ As a result, the conferral of nationality may exceed the internationally recognized limits of a State's authority to determine nationality. Accordingly, while Kim Jong Un's conduct might fall within the ICC's jurisdiction in the interest of combating impunity, South Korea's grant of nationality does not constitute a nationality broadly recognized under international law. In this context, the ICC cannot rely on such a grant as a basis for exercising nationality-based jurisdiction over him.

V. Conclusion

Nationality lies at the core of the International Criminal Court's jurisdiction under Article 12(2)(b) of the Rome Statute, yet the Statute itself offers no precise definition of this concept. In addressing case involving dual nationals, the OTP has not relied on any established rule of international law, instead assessing nationality based on the practical rights it confers. Traditional principles such as the "genuine link" or "dominant nationality" tests may offer some guidance, but they originate in the context of diplomatic protection and are not fully applicable to international criminal jurisdiction. Treaty interpretation further suggests that the Court may exercise active nationality jurisdiction whenever an accused holds the nationality of a State Party.

However, it remains necessary to clarify which nationalities may serve as a basis for the Court's jurisdiction. Wolman's proposal to rely on individual consent as the determining criterion is flawed; a more appropriate limit arises when nationality is conferred or revoked on the basis of race, sex, language, religion, sexual orientation, or political affiliation, in which

⁶⁹ Both South Korea and North Korea are United Nations member states, demonstrating that South Korea's claim of sovereignty over North Korean territory lacks broad international recognition under international law.

case it cannot be recognized under international law and should not justify the Court's exercise of jurisdiction. In sum, the ICC should adopt a functional approach to determining nationality, balancing respect for state sovereignty with the imperative to prevent impunity, thereby ensuring that its jurisdiction over dual nationals is both legally sound and operationally effective.