This study has proposed the acceptance of the principle of equality, and not the principle of dominant nationality, in relation to the application of active personality jurisdiction over multiple nationals. Admittedly, many of the sources and precedents cited in favor of the equality principle originate from the first half of the twentieth century. It may thus be asked whether developments relating to the dominant nationality doctrine may have a bearing on the rules proposed in this study for dealing with the competence of any one of two or more states of nationality to exercise criminal jurisdiction over an individual.

This question can clearly be answered in the negative, for several reasons. The doctrine of dominant nationality, which is central to the admissibility of diplomatic protection by a state of its national against another state whose nationality that person also holds, was recognized and widely referred to by arbitral commissions in the first decades of the twentieth century. Many arbitral decisions rejected the claim for diplomatic protection on the ground that the individual’s dominant nationality was that of the claimant state. Such decisions were available at the time scholarly works such as the Harvard Draft Convention on Jurisdiction with respect to Crime, and judgments and extradition decisions cited in this study, were drafted.

The dominant nationality theory developed in a fundamentally different context: to deal with the opposability of a claim by one state of nationality on behalf of the individual against another state of which the person was also a national. Central to this was the element of opposability (i.e. of opposing and weighing the two links of nationality against each other). In contrast, the theory has never been unequivocally supported in relation to claims by any of the states of nationality against third states (i.e. those of which the individual in question was not a national). The position against the dominant nationality requirement in relation to third states is in fact reflected also in Article 6(1) of the International Law Commission’s Draft Articles on Diplomatic Protection, adopted in 2006.

There is clearly a much stronger parallel between the right to exercise criminal jurisdiction and the rules concerning claims against third states than there is with the opposability of a claim by two states of nationality against one another. In the context of criminal jurisdiction, the question is hardly that of opposability or of a conflict of laws. A state may clearly establish jurisdiction over extraterritorial acts of its nationals. Correspondingly, individuals bearing the nationality of a state that establishes criminal jurisdiction over extraterritorial acts of its nationals must accept responsibility for violating its laws. Moreover, it is widely accepted today that the exercise of criminal jurisdiction on new jurisdictional bases is permissible unless expressly prohibited by international law, provided that there is a substantial connection with the forum exercising jurisdiction. Accordingly, it would appear that even viewing the matter as a question of opposability, the state of dominant nationality would have to prove the lack of a significant connecting factor

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1 For a definition, see Chapter 2, notes 24 and 30-31, supra, and accompanying text.
3 See ibid. 54-75, paras. 161-173.
5 There should, however, be room for deviation from this rule where the law of one of the states of nationality does not permit losing its nationality, and the person has clearly dissociated himself or herself from that state.
6 See Chapter 7, at 200-201, infra.
with the other state of nationality – a rather difficult task in the face of an existing link of nationality.

In any case, the relevance of the application of dominant nationality principle in diplomatic protection to determining the power of a state to exercise criminal jurisdiction over a national – or even to its right to refuse his or her extradition – is very limited. Firstly, it originates from and operates in a distinct field of law. Secondly, the prohibition of analogy known to most criminal law systems of the world would in any case prevent the direct translation of principles of diplomatic protection to criminal law.

The most powerful argument against attributing any relevance to the developments in the past decades related to the dominant nationality theory is, however, that criminal codes, extradition laws or even extradition treaties fail to deal with this issue. It thus appears that they do not attribute any role to the question of dominance or effectiveness of the nationality of the accused or requested person.7

In conclusion, the increasing support for the principle of dominant nationality in a specific, limited field of diplomatic protection does not appear relevant to determining the right of a state whose nationality an individual possesses to prescribe extraterritorial criminal conduct and exercise criminal jurisdiction over that individual. In turn, accepting the view that the jurisdiction of the ICC rests on the sum of jurisdiction delegated by individual states parties to its statute,8 it is argued that ICC jurisdiction based even on the acceptance of jurisdiction by the state of the individual’s non-dominant nationality should suffice for his or her prosecution before the ICC.

7 In contrast, it is not uncommon that they do specify that nationality either at the time of the commission of the act or of prosecution will be decisive. This fact seems to effectively counter the argument that the lack of attention to the dominant nationality requirement or lack thereof is a result of a conviction that such matters are dealt with under nationality legislation or international law with sufficient clarity.

8 Note 32, supra, and accompanying text. In contrast, the competing view that legislative jurisdiction in the case of the ICC is vested in the international community (rather than originating from states parties to the Statute) may lead to a general conclusion denying ICC jurisdiction over non-party nationals if the crime in question has not been recognized as such under customary international law. Yet, as it appears to be beyond controversy that the source of the ICC’s adjudicative jurisdiction is the delegated adjudicative jurisdiction of states parties, under the principle of equality, the ICC would nonetheless have adjudicative jurisdiction in accordance with its Statute over a multiple national provided that one of the states of which (s)he is a national is a party to the Rome Statute. (On related problems and arguments, see K. S. Gallant, “Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts”, 48 Villanova Law Review (2003) 763.)