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Dual Nationality and International Prosecution; Positive Approach

Tohid Raeisi*

Abstract

Conflict of laws has led to that the matter of changing nationality considers as a trick amid some officials for the escape of justice. Despite the negative beliefs to the impact of this phenomenon, this article proves that a person with more than one nationality can be put under international prosecution easier than a person with single nationality; Firstly, due to latter nationalities and Secondly, through the doctrine of joint criminal enterprise.

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* LL.M in International Law, law and political Science, Science and Research Branch, Islamic Azad University, tohid.raeisi.tr@gmail.com

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Introduction

Dual nationality refers to the situation when an individual has the citizenship of two countries at the same time. Because of this advantage, some people acquire a new nationality without relinquishing of prior nationality. As a result of it, dual nationality has turned to a controversial topic in many countries; specifically, this phenomenon has become prevalent among the number of Iranian officials and celebrities, also it has established a host of problems.

The first drawback can observe in the conflict of laws between the nations since Dual nationality has forbidden in some countries, while it allowed in the rest of them. These conflicts have old back grand, which went back to approximately eighty years ago when the League of Nations passed the Convention on Certain Questions Relating to the Conflict of Nationality Laws.[1] But, after many attempts to resolve these tensions, this problem has moved from nineteen to twenty century. For example, the Islamic Republic of Iran argues that dual nationality is illegal.[2] According to The Iranian Civil Code: 'any Iranian subject acquired foreign nationality…without the observance of the legal stipulation, his foreign nationality will be considered null and avoid, and he will be regarded as an Iranian object [.]'.[3] Based on this Article, in 2016, Nazanin Zaghari–Ratcliffe, A woman with Iranian-Britain citizenship arrested at the Iranian international airport for charging of spying. Therefore, she convicted to five years of jail under Iranian criminal code. This case has been established many political controversies between both countries because dual nationality is allowed in under UK national law.

The second problem arises from the different practice of governments to this group of people. Seemingly, the approach of the court in the case of Nazanin Zaghari–Ratcliffe is not suitable with prior

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[1] Article 3 the Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) noted that:

> Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.

[2] *See generally*, M Milanovic, *UK's Position on the Diplomatic Protection of Dual Nationals*, EJIL Analysis (Mar, 8. 2019), available at https://www.ejiltalk.org/uks-position-on-the-diplomatic-protection-of-dual-nationals/.

[3] The Civil Code of the Islamic Republic of Iran, Art 989.

cases. For instance, in the case of Mohamad Reza Khavari, the practice of the judicial system was Confusing, because he was the managing director of one of the most important banks in Iran (namely Melli Bank), and He had the citizenship of Canada and Iran simultaneously. After the historical embezzlement in the times of his manager, fled from Iran to Canada through his Canadian nationality.[4] Surprisingly, after leaving Iran, one of the Iranian courts convicted him to thirty years of jail (judgment in absentia) which was similar to a Funny theatre.[5] Until this moment, he lives in Canada without even a day punishment.

Apart from domestic crimes which mentioned in cases above, Presume an official, commits Crime against Humanity such as forcible transfer,[6] directly or by other manners. (i.e., aider, abetted, etc.) Afterwards, the offender changes his nationality to other countries in order to flee of justice; but, will this trick negates his international responsibilities?

As a general rule, the majority of international crimes have been recognized as *Jus Cogens*;[7] so, there is a requirement for international prosecution via international criminal court (ICC). But, many countries such as Iran, China, Russia and United States have not ratified the statute of ICC; in these conditions, only one solution will remain; namely, refer the situation to ICC through the U.N. Security Council.[8] Nevertheless, despite the situations of Darfur and Libya, the referring

[4] Erdbrink, *Top Iranian Banker Flees amid Embezzlement Scandal*, Washington Post (Sep, 28. 2011), available at https://www.washingtonpost.com/world/middle-east/top-iranian-banker-flees-amid-embezzlement-scandal/2011/09/28/gIQAhhK14K_story.html?noredirect=on&utm_term=.8cfbe65dbcb0.

[5] *See*, Tasnim News Agency, *Iranian Fugitive Banker Sentenced to 30 Years in Jail*, (Dec, 9. 2017), available at https://www.tasnimnews.com/en/news/2017/12/09/1596389/iranian-fugitive-banker-sentenced-to-30-years-in-jail-official.

[6] This crime recognized as crime against humanity in International Criminal Tribunal for the former Yugoslavia (ICTY) which was considered as 'the other inhuman act'. *See, e.g.*, Prosecutor v. Radislav Krastic, Case No. IT-98-33-T, Judgement, (Aug, 02. 2001), Paras 520-21; Prosecutor v. kupre [ki], Case No. IT-95-16-T, Judgement, (Jan, 14. 2000), Paras 562-65.

[7] *See*, M. Bassiouni, *Crimes against Humanity Historical Evolution and Contemporary Application*, Cambridge University Press (2011), at 263.

[8] *See*, Rome Statute of the International Criminal Court, July17, 1998, 2187UNTS3, Art. 13(b).

of new cases to the ICC by the Security Council, have been impossible because of political considerations.[9] By these events, a general belief has emerged that criminals can easily escape from individual criminal responsibility through changing their nationalities to a country which is not a party to the statute of ICC.[10] Sadly, this defect has been held steady in many drafts of conventions[11] without any progress.

Contrary to the negative effects, I believe that there is a positive relationship between changing nationality and international prosecution. This conjunction may perform a fundamental role in referring to similar situations to ICC. In this essay at the first step, I argue how dual nationality can deem as golden evidence to referring a situation to ICC. Secondly, I discuss that there is a close connection between joint criminal enterprise (JCE), dual nationality, and jurisdiction of ICC.

1. Refer A Situation To ICC Due To Dual Nationality

As a whole, there is a serious criticism which since the enactment of each convention related to international crimes, the commitment of them significantly increase.[12] Even, when states promised that "[T]he most serious crimes … must not go unpunished [.]".[13] The reasons for this answerless question are countless; But, I believe that dual nationality can assist national or international courts for the execution of justice.

By cause of the recognition the principle of dual nationality in developed countries,[14] usually, changing nationality occur from developing countries which are not a party to the statute of ICC, to developed countries which they are. In this circumstance, if an

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[9] *See, e.g.*, U.N. SC Draft Res S/2014/348, May, 22. 2014.

[10] *See*, Z Deen-Racsmany, *the Nationality of the Offender and the Jurisdiction of the International Criminal Court*, 95 *AJIL* (2001) 3, at 606.

[11] First, second and third report of special Rapporteur to topic of crime against humanity. *See*, UN Doc: A/CN.4/680 (Feb. 17, 2015); UN Doc A/CN.4/690 (Jan. 21, 2016); UN Doc A/CN.4/704 (Jan. 23, 2017)

[12] *See*, D M. Greenfield, *The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got It Wrong, and Why It Matters*, 98 *JCLC* (1973) 3, at 922; Leila Nadiya Sadat, *Crime against Humanity in Modern Age*, 107 AJIL (2013) 2, at 334.

[13] Rome Statute, *supra* note 8, preamble.

[14] *See, e.g.*, the European Convention on Nationality (Nov. 6, 1997), Arts 14, 17.

individual with two nationalities commits an international crime, firstly, development country it-self will have direct responsibility for the prosecution of accuser. Under Article 12 the statute of ICC:

> A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court ...the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute ...The State of which the person accused of the crime is a national[.][15]

Secondly, by cause of ratification of statute of ICC, the majority of developed countries have independent national law related to international crimes.[16] For example, in 2000, Canada passed a national law called "Crimes against Humanity and War Crimes Act", according to Article 4 of this document:

> Every person is guilty of an indictable offence who commits (a) genocide; (b) a crime against humanity; or (c) a war crime…Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence…Every person who commits an offence under subsection (1) or (1.1) (a) shall be sentenced to imprisonment for life, if an intentional killing forms the basis of the offence[.][17]

In other words, the national courts in these countries can initiate a prosecution because, in the first place, they are responsible for action against criminals.[18] For example, in 2002, Maher Arar, a person with Canadian- Syrian nationality arrested in the U.S for charging of membership in Al-Qaeda. Hence, he was sent to Syria. Finally, he went

[15] *See,* Rome Statute, *supra* note 8, Art. 12.
[16] For example, Canada and Germany have been party to statute of ICC. In addition, both of them have laws related to international crimes. See, Crimes against Humanity and War Crimes Act (S.C. 2000, c. 24) 2019-06-0; Code of Crimes against International Law (2002).
[17] *Id*, Crimes against Humanity and War Crimes Act, Art 12.
[18] *See,* Rome Statute, *supra* note 6, Art. 1.

back to Canada (his second nationality) and acquitted from all the charges.[19]

Finally, if the national courts were unwilling or unable to the prosecution of accuser for any reasons, the ICC would begin the prosecution process.[20]

2. Dual Nationality, JCE, And Jurisdiction Of ICC

The Prosecutions in international, hybrid and ad hoc tribunals have proved that usually, an international crime performs by more than one person and in the form of a common purpose. In this position, accusers can convict under participation in the joint criminal enterprise (JCE). This doctrine considers as a powerful tool in the hands of the prosecutors from past to present.

The first judicial pronouncement of JCE, occurred in the International Criminal Tribunal for the former Yugoslavia (ICTY) and it continued to other international criminal documents. Today throughout the world, there have many cases which the accusers convicted to jail or imprisonment via this doctrine.[21]

Under international law, three forms of JCE have recognized. The first category is "a basic", the second is a "systemic", the third is an "extended". In the case of the dual nationality, the first category will be practical because, to establish this kind of responsibility, two elements are needed, which can describe as follows:

1- Co-Perpetrators

2- Common purpose, and possess the same criminal intention

Assume again, an executive commits an international crime with other members, in the form of a joint plan. For instance, A and B decide on evacuation a rural area where a refinery exists. For this aim, A (with dual nationality) orders to Empty refiner industrial pollutants

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[19] C Forcese, *The Capacity to Protect: Diplomatic Protection of Dual Nationals in the 'War on Terror'*, 17 EJIL (2006) 2, at 372-3. http://www.ejil.org/pdfs/17/2/79.pdf.

[20] *See*, Rome Statute, *supra* note 6, Art. 17 1(a).

[21] *See, e.g.*, Co-Prosecutor v. Nuon Chea and Khieu Samphan, Case No. 002/19-09-2007/ECCC/TC, judgment, (Aug, 7. 2014).

in water. As a result, water will not be Usable for drinking and agriculture. At the same time, B prevents the hire of the rural dwellers in the refinery. Hence, unemployment rate in the area will drop to the lowest percentage and finally lead to the immigration of all dwellers. This action can be considered as crime against humanity (forcible transfer) in the circumstances.[22] To analysis this situation the actus reus and mens rea of crime in forms of JCE, has established as follows:

A and B = Co-Perpetrators

Action to contaminate water

Prevents the hire of dwellers in the refinery

= *Actus Reus*

Evacuation a rural area

= *Mens Rea*

Conclusion

These assumptions which mentioned above are as a part of a harsh fact our world, and these brutalities increase day-to-day. Regarding this, criminals have tried to escape justice in different method such as obtaining more than one nationalities. But, According to the analysis above, aside from negative aspects of dual nationality, it concludes that at the minimum, there are two advantages between changing nationality and achievement to justice.

Firstly, if an offender gained nationality of a law-abiding country, at least two courts would have qualification to the prosecution of accused; initially by national courts, then via the international criminal court as an international organization, therefore, Possibility of prosecution of these individuals is more accessible than a person with one nationality. Secondly, the prosecution of this person reveals an oral or written evidence which the judge can issue a decision for other members who participate in the crime.

[22] *See*, Prosecutor v. Popović et al., Case No. IT-05-88-T, judgment, (Jan, 10. 2010), paras 1023-26; Prosecutor v.Yussuf Munyakazi, Case No. ICTR-97-36A-A, Appeal chamber, (Sep, 28. 2011), para 160.

References

Bassiouni, M. C, Crimes against Humanity Historical Evolution and Contemporary Application, Cambridge University Press, 2011, p. 263.

Co-Prosecutor v. Nuon Chea and Khieu Samphan, Case No. 002/19-09-2007/ECCC/TC, judgment, (Aug, 7. 2014).

Crimes against Humanity and War Crimes Act (S.C. 2000, c. 24).

Deen-Racsmany, Z., the Nationality of the Offender and the Jurisdiction of the International Criminal Court, AJIL, 95(3), 2001, p. 606.

Forcese, C., The Capacity to Protect: Diplomatic Protection of Dual Nationals in the 'War on Terror', EJIL, 17 (2), 2006, pp. 372-373. http://www.ejil.org/pdfs/17/2/79.pdf.

Germany's Code of Crimes against International Law (2002).

Greenfield, D. M. , The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got It Wrong, and Why It Matters, JCLC , 98(3), 1973, p. 922; https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7298&context=jclc

International Law Commission, First Report on Crimes against Humanity, UN, Doc:

A/CN.4/680 (Feb. 17, 2015).

International Law Commission, Second Report on Crimes against Humanity, UN Doc A/CN.4/690 (Jan. 21, 2016).

International Law Commission, Third Report on Crimes against Humanity UN Doc A/CN.4/704 (Jan. 23, 2017).

Milanovic, M, UK's Position on the Diplomatic Protection of Dual Nationals, EJIL Analysis (Mar, 8. 2019), available at https://www.ejiltalk.org/uks-position-on-the-diplomatic-protection-of-dual-nationals/.

Nadiya Sadat, L, Crime against Humanity in Modern Age, AJIL, 107(2), (2013) 2, p. 334.

Prosecutor v. kupre [ki], Case No. IT-95-16-T, Judgement, (Jan, 14. 2000), Paras 562-65.

Prosecutor v. Popović et al., Case No. IT-05-88-T, judgment, (Jan, 10. 2010), paras 1023-26.

Prosecutor v. Radislav Krastic, Case No. IT-98-33-T, Judgement, (Aug, 02. 2001), Paras 520-21.

Prosecutor v.Yussuf Munyakazi, Case No. ICTR-97-36A-A, Appeal chamber, (Sep, 28. 2011).

Rome Statute of the International Criminal Court, July17, 1998, 2187UNTS3.

Tasnim News Agency, Iranian Fugitive Banker Sentenced to 30 Years in Jail, (Dec, 9. 2017), available at https://www.tasnimnews.com/en/news/2017/12/09/1596389/iranian-fugitive-banker-sentenced-to-30-years-in-jail-official.

The Civil Code of the Islamic Republic of Iran, Art 989.

The Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930), Art, 3.

The European Convention on Nationality (Nov. 6, 1997), Arts 14, 17.

U.N. Security Council, Draft Res S/2014/348, (May, 22. 2014).

Washington Post, Top Iranian Banker Flees amid Embezzlement Scandal, (Sep, 28. 2011), available at https://www.washingtonpost.com/world/middle-east/top-iranian-banker-flees-amid-embezzlement-scandal/2011/09/28/gIQAhhK14K_story.html?noredirect=on&utm_term=.8cfbe65dbcb0.