DOUBLE CRIMINALITY IN INTERNATIONAL EXTRADITION LAW

BY

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DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

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OPSOMMING

Die oogmerk van hierdie tesis is om die inhoud en status van die beginsel van dubbelkriminaliteit in internasionale uitleweringsreg te ondersoek. Hierdie beginsel behels dat die handeling ten opsigte waarvan die uitlewering versoek is, misdade in beide die staat wat uitlewering versoek as die staat waarvan uitlewering versoek word, is. Die metode wat hierdie tesis onderlê is 'n literatuurstudie van bronne in die internasionale en nasionale reg.

Die dubbelkriminaliteitsbeginsel het oor etlike eeue ontwikkel. Dit word gevind in die meeste regstelsels. Die beginsel dien verskeie oogmerke, waarvan staatsoewereiniteit sekerlik die belangrikste is. State pas die beginsel op verskillende maniere toe weens die verskeie bestaansredes vir die beginsel. Regsliteratuur tref 'n onderskeid tussen twee belangrike metodes van interpretasie, naamlik die *in abstracto* en *in concreto* benaderings. Terwyl die *in abstracto* metode op die teoretiese strafbaarheid van die handeling fokus, plaas die *in concreto* benadering klem op die feitelike, persoonlike en konkrete regsaspekte. Daar is kombinasies van hierdie metodes. Meeste state kan geklassifiseer word volgens die twee benaderings, maar tog pas state hierdie benaderings by hul besondere behoeftes aan. Daar is dus geen uniforme metode van interpretasie in internasionale uitleweringsreg nie.

Hierdie tesis poog om te bepaal of die dubbelkriminaliteitsbeginsel 'n reël van gemeenregtelike internasionale reg geword het. Alhoewel meeste wetgewing op die terrein van internasionale en nasionale uitleweringsreg die beginsel van dubbelkriminalitiet insluit, is daar sterk meningsverskil onder regsgeleerdes tov die status van die beinsel. Die gevolgtrekking is dat die beginsel nie 'n algemene reël van die internasionale reg is nie.

Ten slotte word daar gekyk of die dubbelkriminaliteitsbeginsel as 'n beginsel van internasionale menseregte geklassifiseer kan word. Alhoewel die beginsel ooreemste met menseregtenorme toon – veral die beskerming van die individu in uitleweringsaangeleenthede – is daar 'n aantal aspekte wat dit van menseregte onderskei. Internasionale uitleweringsreg en internasionale menseregte deel nie dieselfde ontwikkelingsgeskiedenis nie. Die gevolgtrekking is dus dat die dubbelkriminaliteitsbeginsel nie deel vorm van internasionale menseregte nie.

ABSTRACT

The object of the thesis is to examine the content and status of the double criminality principle in international extradition law. The double criminality principle says a fugitive cannot be extradited unless the conduct for which his extradition is sought is criminal in both the requesting state and the requested state. This thesis is based on a study of sources of international law and domestic law and ideas presented in legal literature.

The double criminality principle has developed over several centuries and it has been embraced by most states in one form or the other. The principle serves several purposes, of which the most dominant is the notion of state sovereignty. States apply the double criminality principle differently due to its multiple rationale. Legal literature has distinguished two main methods of interpretation, called interpretation *in abstracto* and *in concreto*. Whereas the *in abstracto* method focuses on the theoretical punishability of the conduct, the *in concreto* method attaches importance to all factual, personal and legal aspects. There are also ways of interpretation that are a combination of these two methods. Most states can be classified into one of the two main groups of interpretation, but in general most states have adopted a specific method of interpretation that is unique to each particular state. There is thus no uniform method of interpretation in international extradition law.

This thesis attempts to determine whether the double criminality principle has become a rule of customary international law. Though most instruments on international or domestic extradition law include the double criminality principle, the strong disagreement among legal scholars as to the legal status of the principle leads to the conclusion that the double criminality principle is not a rule of international law today.

This thesis contains an examination of whether the principle of double criminality can be classified as an international human rights norm. Though the principle of double criminality has striking similarities with human rights as it partly aims at protecting individuals facing extradition, there are also a number of aspects that distinguish the principle from traditional human rights. This is partly attributable to the fact that international extradition law is not the arena where general international human rights have developed. It is therefore concluded that the double criminality principle does not form part of international human rights law.

TABLE OF CONTENTS

DOUBLE CRIMINALITY IN INTERNATIONAL EXTRADITION LAW

1 Double Criminality in Context

1 1 The Principle of Double Criminality

Double criminality means, in short, that an act or omission must be considered criminal in two states, one of which is the state where the crime is prosecuted.[1] When conduct is criminal in two states, its "criminality" is "double". A crime is an act with a penalty sanctioned by law.[2] The double criminality requirement is found in criminal proceedings with an international element and is one of the most common prerequisites for international co-operation in criminal matters. It is usually a condition to extraterritorial criminal jurisdiction and to various forms of international co-operation in criminal matters, such as extradition, judicial assistance, transfer of criminal proceedings, recognition and enforcement of foreign judgements, etc.[3] The requirement is, however, approached differently in these cases, as it serves different purposes. Originally the double criminality requirement developed in extradition law.[4] This thesis analyses the content and position of the double criminality principle in international extradition law.

For double criminality to be a condition of extradition, the offence must be criminal in the state that wants to prosecute the putative offender and thus requests his extradition (the requesting state) and in the custodian state to which the fugitive has fled (the requested state).[5]

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[1] Van den Wyngaert, "Double Criminality as a Requirement to Jurisdiction" in Jareborg (ed) *Double Criminality. Studies in International Criminal Law* (1989), 43.

[2] Bedi, *Extradition in International Law and Practice* (1966), 61. An administrative sanction does not qualify as a crime, Cornils, "The Use of Foreign Law in Domestic Adjudication" in Jareborg (ed) *Double Criminality. Studies in International Criminal Law* (1989), 73. The legality principle determines how conduct must be criminalised in law. See chapter 1 5 4.

[3] Plachta, "The Role of Double Criminality in International Cooperation in Penal Matters", in Jareborg (ed) *Double Criminality. Studies in International Criminal Law* (1989), 86-87. Double criminality is found for instance in the European Convention on Mutual Assistance in Criminal Matters, Article 5 on the search and seizure of property, which requires that the offence motivating the letters rogatory must be punishable under both the law of the requesting party and the law of the requested party. International cooperation could be divided into six modalities; extradition, mutual assistance in criminal matters, transfer of prisoners, seizure and forfeiture of illicit proceeds of crime, recognition of foreign judgments, and transfer of criminal proceedings, Kemp, "The United Nations Convention Against Transnational Organized Crime: A Milestone in International Criminal Law", *South African Journal of Criminal Justice* p. 152 (2001), 162.

[4] Plachta, 107.

[5] Joyner & Rothbaum, "Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?", *Michigan Journal of International Law* p. 222 (1993), 241, Aughterson, *Extradition. Australian Law and Procedure* (1995), 4, Hafen "International Extradition: Issues Arising Under the Dual Criminality Requirement", *Brigham Young University Law Review* p. 191 (1992), 194.

The law of the state of which the alleged perpetrator is a national or a resident is of no relevance. Where the crime was committed in neither the prosecuting nor the custodian state, but on the territory of a third state, the law of the latter will in principle not be relevant. This may seem awkward as criminal laws are predominantly territorial in the sense that the criminal statutes of a state normally apply to crimes committed within the territory of that state.

The requirement of double criminality has acquired many names[6] and formulations in statutes and treaties. When talking about this requirement in general, one usually refers to the "rule" or "principle" of double criminality.[7] Scholars use these terms as alternatives and there seems not to be any legal difference between them, despite attempts by some to point out a distinction between rules and principles in general. The dividing line is rather arbitrary, though principles are said to be more abstract, general and important than rules.[8]

For the purpose of this thesis, deciding on the correct terminology is not necessary, as it will not affect the interpretation or legal status of this requirement. Due to the vagueness of double criminality, the more general term "principle" will be preferred. This is also the most common term among scholars. However, where mention is made of a specific provision on double criminality in a statute or treaty, the more concrete term "rule" is preferred. The neutral term "requirement" of double criminality is used as well. This term is not directed at solving any legal problems of extradition law, but its role and significance lies in the limitation of the scope of extradition.[9]

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[6] The two most common denominations of this principle are double criminality and dual criminality. Other names are double punishability, double penalization, double prosecution, dual (criminal) liability, dual incrimination, dual culpability, equivalency of offences, reciprocity of offences, Plachta, 104-107; identity of rules, Duk, "Principles underlying the European Convention on Extradition", *Legal Aspects of Extradition among European States*, Council of Europe (1970), 37; identical norm, Schultz, "The Principles of the Traditional Law of Extradition", *Legal Aspects of Extradition among European States*, Council of Europe (1970), 12, and double extraditability. Denominations in German jurisprudence are *das Prinzip der identischen Norm*, Rintelen, *Die Grundsätze des Heutigen Völkerrechts über die Auslieferung von Verbrechern* (1909), 15, *das Prinzip der identischen Strafrechtsnorm, der Normenidentität, der zweiseitiger Strafbarkeit* and *der beiderseitiger Strafbarkeit*.

[7] Plachta, 106. The term "doctrine" is also used, for instance by Bedi, Aughterson and Hafen.

[8] Duk, 31.

1 2 Outline of the Thesis and Methodology

Double criminality is a widely practised and accepted rule of extradition law, yet it is a requirement that is difficult to understand and apply. Most states accept the propriety of this requirement, but its lack of clarity has led to a wide variety of interpretations amongst national courts.[10] The proliferation of additional requirements attached to double criminality also makes a generalisation of this principle difficult.[11]

The examination of double criminality in international extradition law will be conducted through international law and comparative domestic law. Bilateral and multilateral conventions, domestic statutes, domestic and international court decisions as well as legal literature will illustrate current interpretations.

Ideally, to establish how the rule of double criminality in international extradition law is to be interpreted, a strict comparative analysis of every state's law and practice should be undertaken. The criminal and constitutional law of each state as well as the relationship in each state between municipal and international law would have to be dealt with. That would be too comprehensive. The thesis sets out to describe the more general perceptions of double criminality in international extradition law and to evaluate its role in modern international extradition law, while municipal law will only be examined where it may shed some light on general approaches to double criminality in the international community.[12]

Chapter 1 of the thesis addresses some preliminary issues and draws the main lines of general international law that are relevant to the following discussion. Chapter 2 examines how the principle of double criminality in international extradition law is interpreted. Chapter 3 discusses whether the principle of double criminality has become part of customary international law or the general principles of international law. Chapter 4 examines double criminality in the light of international human rights law. And finally, Chapter 5 evaluates the

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[9] Plachta, 106.
[10] Aughterson, 60.
[11] Hafen, 195.
[12] Domestic statutes of the different states will not be interpreted thoroughly, as this is a venture that easily could lead to mistakes. Adler, "Translating and Interpreting Foreign Statutes", *Michigan Journal of International Law*, Vol 19 p. 37 (1997/98), 39-40, says research of foreign statutes can lead to naive interpretations as the interpreter does not know the values underlying foreign legal systems and thus unconsciously perceives foreign law as similar to domestic law. This thesis does not intend to find the complete content of foreign statutes on

principle *de lege ferenda.* Questions of re-extradition,[13] extradition from and rendition within federal states and commonwealth systems,[14] and extradition in the form of surrender/transfer to international tribunals[15] will not be examined in this thesis.

1 3 The International Law of Extradition

Extradition is generally defined as the formal surrender, for purposes of trial or punishment, by one state at the request of another of a person accused or convicted of a crime committed within the jurisdiction of the latter.[16] Jurisdiction here means the competence of the latter to try and punish the alleged offender, though it is interpreted by some states as the territory of the requesting state. A mere suspicion is not enough for extradition. The alleged offender must be formally charged with the crime. Extradition law has traditionally been seen as a means by which states promote states' interests, but it also offers protection to the individual.[17]

Scholars disagree on how to classify the extradition process within the legal system. It has been characterised as a civil process, a criminal process, or a blend of these two. Extradition is not an aim in itself, but a mechanism for surrendering criminals to stand trial. Because extradition does not involve a decision on guilt or innocence, some would argue it is not a criminal process. But as it forms part of the legal proceedings against an indicted person, it could be argued it is part of criminal procedure.[18]

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double criminality in extradition, but will use the statutes as illustations of the existence of such a principle. There will thus be no textual or contextual interpretations of the statutes at hand.

[13] Re-extradition means the requesting state, whose request was granted, extradites the person to a third state.

[14] In federal and commonwealth systems several criminal codes exist within one state, which may differ from each other. The question of which law shall be interpreted and related questions will not be examined in the thesis.

[15] The establishment of supra-national tribunals interferes with the traditional extradition system, and possibly also the practice of the double criminality principle, as domestic courts are given a subsidiary position. The international community has established several international criminal courts, starting with the International Criminal Tribunal for the former Yugoslavia, 1993, and the International Criminal Tribunal for Rwanda, 1994. As for these two tribunals, Gilbert, *Transnational Fugitive Offenders in International Law* (1998), 49, says "[n]ecessarily, the rules of extradition law are inapplicable in so far as they are not expressly incorporated within the Statutes, Rules or domestic implementing legislation, or are part of customary international law." A diplomatic conference in Rome 1998 adopted the Statute for the International Criminal Court, which according to article 126 will enter into force after 60 states have ratified it.

[16] Gilbert, 15, Shearer, *Extradition in International Law* (1971), 21, La Forest, *Extradition to and from Canada* 2 ed (1977), 16, Aughterson, 2, Henning, "Extradition Controversies: How Enthusiastic Prosecutions Can Lead to International Incidents", *Boston College International and Comparative Law Review* (1999) p. 347, 349.

[17] Bassiouni & Wise, 37, Plachta, 94.

[18] This view was taken in the Irish Supreme Court case of *Aamand v. Smithwick*, see chapter 2 3 6.

The ends of criminal law may be summarised as conditioning human conduct, compensating the victim and pacifying the offender.[19] Principles of criminal law, such as the legality principle and the requirement of criminal jurisdiction, have been transferred into the law of extradition. The general philosophy of criminal law and procedure and policy considerations have influenced extradition law. The basic aims of extradition and criminal procedure are concurrent, namely the protection of law and order. The object of extradition is thus retribution and deterrence.[20] Due to the international element in a criminal case involving extradition, the law of extradition has developed into a system for the protection of several interests. The purposes of extradition could be summarised as being to obtain the reciprocal return of fugitive offenders, to help promote justice in the requesting state, to avoid safe havens in the requested state, and to avoid international tension.[21]

The necessity of international co-operation in criminal matters becomes tangible due to the increasing number of criminal cases with a foreign element. States cannot act alone where the crime takes place or affects several states, or where the criminal flees abroad. An offence injuring values generally recognised by the society of a state may imperil similar interests in other states.[22] Extradition is in the interest of all states.[23] A person who commits a crime in one state today may commit a new crime in another state tomorrow.[24] Engaging in extradition shows solidarity with other countries.

In most states a request for extradition requires a court hearing, but the executive may have the final word.[25] A few states exercise pure administrative extradition. There is a wide variety of ways in which states regulate the process. It should be noted that wherever reference in this thesis is made to hypothetical examinations of the judiciary, this includes executive examinations as well.

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[19] Duk, 29-30.
[20] Bassiouni & Wise, "*Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*" 1995, 26, Aughterson, 38.
[21] Henning, 350.
[22] Plachta, 85.
[23] Bassiouni & Wise, 26.
[24] Plachta, 85.
[25] This is for instance the situation in the United States, Henning, 351. Gilbert says "the ususal procedure is for the executive to approve the issuing of an authority to proceed, then the request for extradition is dealt with through the courts, and, if the decision is to allow return, the executive has a final discretion as to whether to order the fugitive's surrender", 78.

1 3 1 The Nature of International Law

International extradition law is part of the field of public international law called international criminal law.[26] There have been many attempts at defining the term international law, which is the law between states, and the term international criminal law, which is the law regulating co-operation between states in criminal matters. For the purpose of this thesis, there is no need to give more thorough definitions of these terms.

Though legal philosophy gives various definitions of international law, its sources are nevertheless identical in article 38 of the Statute of the International Court of Justice, 1945. The three most important sources are treaties, international custom and general principles of law. Intended as a precept to the Court, the enumeration of legal sources also serves as a guideline for other courts deciding cases on international law. The enumeration is not exhaustive. Modern international law accepts that other factors that do not qualify as legally binding rules of law, such as "soft law",[27] may influence the interpretation of the sources listed in article 38.

Domestic legislation employs conflict rules, for instance, the principle of *lex superior*, where two or more sources of law contradict one another. *Lex superior* is not applicable to sources of international law. Though the legal sources listed in article 38 are not expressly stated to represent a hierarchical system, they are nevertheless expected to be applied successively.[28] It is common to first interpret existing treaties and then supply them with customary international law. General principles of law are mostly used as an argument supporting solutions found in treaties and customs and are rarely applied independently.[29] Nevertheless, international customary law and conventions are independent sources of law.

The International Court of Justice has developed guidelines on how to apply international law. Though treaty and custom are equal sources of law, a natural starting point is to interpret any existing conventions, whose very object is to create reciprocal obligations. Where the treaty

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[26] Gilbert, 3, 14, Rintelen, 15.
[27] Dugard, *International Law. A South African Perspective* (2000), describes soft law as "imprecise standards, generated by declarations adopted by diplomatic conferences or resolutions of international organizations, that are intended to serve as guidelines to states in their conduct, but which lack the status of 'law'", 36.
[28] Brownlie, *Principles of Public International Law* 5 ed (1998), 3.
[29] Ruud & Ulfstein, *Innføring i Folkerett* (1998), 54.

provisions are vague or silent on the pertinent issue, the courts examine customary law. In the absence of treaty and custom, the courts apply general principles of law.[30]

The existence of rules of *jus cogens* is presupposed in article 53 of the Vienna Convention on the Law of the Treaties, 1969.[31] Article 53 introduced a limit to states' freedom to conclude treaties where there had been no limits before.[32] These norms protect fundamental interests and values in the international community and have the highest position in international law, from which no derogation is permitted.[33] There is no general formula on how rules achieve *jus cogens* status, nor is there consensus on which rules have reached this status. Some authors define *jus cogens* as rules of customary international law or simply general principles of international law; others classify it as a set of rules separate from traditional sources of international law, based on the nature of the subject matter.[34] The latter seems to be the dominant view.[35] What constitutes *jus cogens* should be accepted and recognised as such by the international community as a whole and could be revealed by a study of state practice and international jurisprudence.[36]

The principle of sovereignty is a term of international law describing each state's

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[30] Dugard, 36. Article 38 d of the Statute of the International Court of Justice lists "general principles of law recognized by civilized nations" as one of the sources of international law. These are municipal principles of law common to many states that are applicable to international relations, Dugard, 36-37.

[31] The Vienna Convention on the Law of Treaties Article 53 on "Treaties conflicting with a peremptory norm of general international law (*jus cogens*)" declares "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988) says "norms of 'general international law' are of general applicability, i.e. they create obligations and/or rights for at least a great majority of states or other subjects of international law, and are thus not created as such by 'regional law'. On the other hand, there have been statements to the fact that norms of 'general international law' are 'universal'", 208. As to the phrase "accepted and recognized by the International Community as a whole" Hannikainen says the general view among scholars on this subject is that it would be "sufficient that all the essential components of the international community recognizes it. In practice that would mean *nearly all* states." This means that states cannot veto against a peremptory rule.

[32] De Hoogh, "The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective," *Austrian Journal of Public and Internaitonal Law* p. 183 (1991), 185.

[33] De Hoogh, 187, Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*", *Law and Contemporary Problems*, www.law.duke.edu/journals/lcp, reprinted in Joyner (ed), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights*" p. 133 (1998), 138. All references of this article will be made to the latter publication, hereinafter called "Bassiouni in Joyner (ed)".

[34] Bassiouni in Joyner (ed), 138-139, De Hoogh, 189, Steven, "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations", *Virginia Journal of International Law* p. 425 (1999), 448.

[35] Byers, "Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules," *Nordic Journal of International Law* p. 211 (1997), 211.

[36] De Hoogh, 190.

independence. It consists of the liberty to exercise absolute and exclusive legislative, administrative and judicial powers within its territory, irrespective of the will and opinions of other states. Sovereignty is a territorial concept, and all individuals and properties on the state's territory are under its authority.[37] Obviously, a state's authority ends at its border, and any foreign interference in the domestic affairs of another state is forbidden.[38] State sovereignty is naturally subject to self-imposed limitations.[39]

The freedom that states enjoy through the sovereignty principle has always been in conflict with international criminal law.[40] International criminal law requires that states give up some of their sovereignty in order to promote international co-operation in criminal matters. Extradition is only one element of the international community's scheme for assistance in criminal matters.[41] States have to a large extent waived their sovereign rights through extradition treaties that establish international obligations.

When interpreting conventions and customs, one must take into account the effectiveness of international law and the principle of sovereignty. State sovereignty is also reflected in the formal sources and substantive rules of international law. International extradition law is not void of provisions and principles that purport to protect state sovereignty. For instance, the newly adopted United Nations Convention Against Transnational Organized Crime 2000 ensures that state parties respect the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other states.[42]

1 3 2 Treaties and Domestic Statutes as Bases for Extradition

Each state decides on what legal grounds extradition can be granted. Usually a state has enacted a domestic extradition statute as well as concluded bilateral or multilateral extradition treaties. International law does not preclude extradition in the absence of a treaty,[43] but as

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[37] Bedi, 27, 62, Bassiouni & Wise, xi.
[38] Plachta, 84, Sieghart, *The International Law of Human Rights* (1983), 11, Fleischer, *Folkerett* 6 ed (1994), 71. The Charter of the United Nations article 2 paragraph 7 forbids intervention in matters which are essentially within the domestic jurisdiction of a state, but exceptions are listed in chapter VII.
[39] Bedi, 31, Henning, 350.
[40] Kemp, 154.
[41] Gilbert, 59, Aughterson, 7.
[42] Kemp, 154.
[43] Aughterson, 7.

there exists no general duty to extradite in international law,[44] states enter into extradition treaties in order to create reciprocal obligations.[45] Extradition thus takes place according to domestic legislation or self-executing treaties.[46]

The interaction between treaties and statutes also varies among states. For instance, in England and Australia treaties have to be implemented in domestic law to become operative. The treaties can then only be used to fill in gaps in the law or to improve the individual's rights.[47] Norway adheres to a strict dualistic system and only domestic law regulates extradition.[48] In France and Switzerland extradition treaties are self-executing and the domestic statute will fill in the gaps of the treaty, or stand in where no treaty exists.[49]

The domestic law of a few states demands an extradition treaty with the requested state in order to extradite. This prevents extradition agreements reached on an *ad hoc* basis. Common law countries in particular have required formalised agreements on an international level in order to extradite.[50] This is, for instance, the case with the United States[51] and Canada,[52] and was also practised by Australia up to 1974, when domestic law introduced the reciprocity system,[53] as was also done in the United Kingdom up to the Extradition Act of 1989.

Most states do not demand a treaty with the requested state to approve an extradition. Treaties are concluded nevertheless in order to establish reciprocal obligations and to ensure the return of fugitives who have fled to states that do require a treaty. Some states base their regional extradition system on mutual legislation instead of treaties. For instance, the Nordic states

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[44] See chapter 1 6.
[45] Bassiouni & Wise, 37.
[46] Gilbert, 2, Joyner & Rothbaum, 232. Schultz claims treaties and municipal law are the only sources of extradition law, 9. Bedi operates with a list of four bases for a claim of extradition, which are treateis, national laws, reciprocity and morality, 32-60.
[47] Aughterson, 2, Gilbert, 33.
[48] Fleischer, 18.
[49] Gilbert, 33, 47.
[50] Henning, 350. Acccording to Gilbert common law countries such as Canada, the United Kingdom and Australia traditionally required a formalised arrangement for extradition, but have now adopted legislation which opens for *ad hoc* extraditions, 48.
[51] In the United States this requirement is of particular importance as the only federal law on extradition deals with procedural questions. Substantive rights and duties of both state and fugitive must hence be deducted from the individual extradition treaties entered into by the United States and foreign states, Henning, 350-351.
[52] http://www.lawsmart.com/canada/criminal/extradition.htm, Williams, "The Double Criminality Rule and Extradition: A Comparative Analysis", *Nova Law Review* p. 581 (1991), 584. Gilbert however says Canada now allows for extradition on an *ad hoc* basis, 48.
[53] Rezek, "Reciprocity as a Basis of Extradition", *British Yearbook of International Law* p. 171 (1981), 173.

have adopted reciprocal legislation that regulates extradition within these five states;[54] the United Kingdom and the Republic of Ireland base extradition between them on reciprocal legislation rather than convention, and Australia and New Zealand have a similar system as well.[55]

As extradition treaties seek to achieve the same result and as states tend to enter into similar extradition treaties, treaty law has become relatively uniform.[56] States tend to conclude treaties with neighbouring states and states with whom they have close historical and socio-political ties, as the question of extradition is most likely to arise between them. One could thus distinguish the development of regional international extradition law, for instance, within Scandinavia. Multilateral treaties with a large number of state parties, such as the European Convention on Extradition 1957, can also create and develop regional extradition features.[57] Extradition treaties and domestic legislation on extradition mutually influence each other. Also this contributes to the development of similar domestic laws. Even civil law and common law jurisdictions, which traditionally have been ideologically separate in their views on extradition, are mutually influenced this way.[58]

When deciding on extradition, domestic courts not only look at the relevant treaty provisions and domestic statutes, but also seek guidance from decisions by foreign courts on the same matter.[59] Courts have at times defined the principle of double criminality by immediate resort to prior judicial authority.[60]

Domestic courts have shown that they base their judgements on domestic law and domestic jurisprudence rather than international law. Extradition is after all an international process carried out by domestic institutions. Extradition would not be granted if it does not comply with all the prerequisites stipulated in domestic statutes. Stanbrook & Stanbrook, for instance,

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[54] The Nordic Extradition Scheme between Iceland, Norway, Sweden, Finland and Denmark lays the foundation for reciprocal extradition statutes between these five countries. See for instance Norway's Act on Extradition to Denmark, Finland, Iceland and Sweden, March 3rd No.1 1961.
[55] Gilbert, 9, 45.
[56] Gilbert, 2.
[57] The Council of Europe's extradition convention had by the end of 1997 been ratified by 35 states and forms the procedural framework for more extraditions than any other treaty. By 1998 many former Soviet Bloc States joined the treaty as well. The convention represents the outer circle of a series of concentric and overlapping arrangements between smaller groups of European states, Gilbert, 36, 41.
[58] Gilbert, 2.
[59] Du Plessis, "The Pinochet Case and South African Extradition Law", *South African Journal on Human Rights* p. 669 (2000), 682, Gilbert, 2.

say that in applying double criminality courts in the United Kingdom are bound by its legislative expression rather than the abstract principle.[61] Where the reciprocity system is the basis for extradition, double criminality is obviously required.[62] In a pure *ad hoc* extradition, the principle of double criminality could possibly be ignored if it does not form part of domestic law. If, however, the principle is part of general international law, it must be complied with in any case.[63]

Though extradition is a case before a domestic institution applying predominantly domestic law, it is nevertheless possible to speak of an international law of extradition.[64] Extradition as a part of international criminal law relies on indirect enforcement through national authorities. International extradition law has developed into a blend of domestic and international law, even though domestic law as such is not a source of international law. The decision-maker has to comply with rules of both domestic and international law. The existence, scope and legal status of double criminality in international extradition law are determined by domestic statutes, international treaties and court decisions.[65]

1 3 3 Reciprocity as a Basis for Extradition

Reciprocity refers to identity or equivalence of rights and duties. It has always been a guiding principle of extradition treaties, where identical obligations are normally imposed upon all contracting parties.[66] Reciprocity is not peculiar to the law of extradition, but is a principle of general international law ensuring respect for state sovereignty.[67]

Reciprocity can be obtained by other means than conventions and mutual legislation. Many states extradite *ad hoc*, though in accordance with domestic law. This demands some form of guarantee of reciprocity in a potential, similar case where the requested state would seek extradition from the requesting state. This is, for instance, the present system in Germany and

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[60] Aughterson, 60.
[61] Stanbrook & Stanbrook, 21.
[62] Rezek, 184.
[63] This will be discussed in chapter 3.
[64] Gilbert, 2.
[65] Aughterson, 60.
[66] Rezek, 171.
[67] Schultz, 10.

Switzerland.[68] A similar case could mean that extradition would be sought of a person of the same personal qualities and for the same type of offence.[69] A strict *mutatis mutandis* scheme would, however, be too narrow in its object and probably become inoperative.[70] Such a scheme could, for instance, mean that extradition would only be granted for offenders who have committed the same type of offence, under similar circumstances and with similar motives, etc., as described in the affidavit ensuring reciprocity. Extradition would thus depend on how strictly the scheme is construed. Reciprocity as a basis for extradition would prove more advantageous if applied to the overall arrangement.[71]

The means of regulating extradition through a system of reciprocity has been apprehended by some authors as a legal source of extradition law,[72] but this view has been opposed by others.[73] Historically, extradition was granted as an act of comity and, by the end of the nineteenth century, some states introduced reciprocity as a sufficient basis for extradition.[74] An assurance of reciprocity establishes a relationship between two states with regard to future extradition requests, but cannot be equated with a bilateral treaty. The reciprocity system relies entirely on the content of municipal extradition law.[75] Double criminality is thus part of the reciprocity scheme on two levels. It is stipulated in domestic law and it is inherent in the system itself, as an extradition granted another state would always under the same circumstances be granted in return.

Today, the reciprocity scheme is generally losing ground in international criminal law as extradition is gradually transformed from an instrument of state power into an instrument of criminal justice. The general principle of reciprocity in international law has, however, played an important role in evolving general principles of extradition law and has particularly influenced the principle of double criminality.

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[68] Gilbert, 28-29.
[69] Schultz, 10.
[70] Rezek, 174.
[71] Gilbert, 32.
[72] Bedi, 48-53, Rezek 171-172, 176-177.
[73] Schultz, 11, Gilbert, 32.
[74] Bedi, 30, Rezek, 171.
[75] Rezek, 176, 183.

1 3 4 The Influence of Politics on Extradition

Law is a product of politics. This is also true for extradition law. For instance, the American rule of non-inquiry developed by the judiciary is probably motivated by a wish to avoid questions of foreign relations.[76] The political offence exemption is also a product of the same motive.[77] Not only the legal theory behind extradition law, but also its practice is influenced by politics.[78]

Bassiouni is reported to have said: "The whole history of extradition has been little more than a reflection of the political relations between the states in question."[79] There is a fine line between law and politics in international relations. Many cases of granted or denied extradition are believed to be motivated by a state's desire to obtain a favourable position in political terms and to foster international goodwill.[80] Returning a suspected criminal creates goodwill with the requesting state, which ultimately ensures reciprocity and benevolence in return. The procedure of extradition is thus not entirely regulated by law, though ideally it should be.[81] Granting or denying extradition as a political tool could easily lead to arbitrariness, injustice and infringement of human rights, or to impunity for criminals who clearly should have been put to trial.[82]

One of the most politically explosive extradition cases in recent times is a good illustration of the close ties between politics and extradition. The 1988 terrorist bombing of a Pan American flight over Lockerbie, Scotland, killing 270 people, lead to massive international investigations resulting in the extradition request of two Libyan nationals from Libya. Libya refused to extradite because domestic law forbade extradition of nationals and because Libya could prosecute the putative offenders herself according to the principle *aut dedere aut*

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[76] Gilbert, 78-79.

[77] This was not always so. In ancient times and up to eighteenth century liberalism in Europe extradition was a means of retrieving political enemies or persons accused of crimes against state and sovereign, a practice which today is normally expressly exempted, Aughterson, 4. A treaty from 1280 BC between Ramses II of Egypt and the Hittite prince Hattushilish III, which is believed to be the first extradition treaty in history, provided for the surrender of "great men", and not common criminals, Gilbert, 4, 17, Hafen, 192, Shearer, 5.

[78] Gilbert, 11-12.

[79] Hafen quoting Bassiouni in *International Extradition and World Public Order* 1 (1974), 192.

[80] Hafen, 192.

[81] Pyle, *Extradition, Politics, and Human Rights*, 2001, says "most of what has been written on extradition law has been relentlessly academic, full of repetitious expositions, and largely oblivious to the political forces that have driven the cases and the law," 2.

[82] There have been several cases where terrorists have escaped extradition because the authorities feared reprisals from other terrorists, Henning, 348, Joyner & Rothbaum, 249.

judicare. Despite Libya adhering to accepted principles of international extradition law, the United Nations Security Council in 1992 adopted a resolution urging co-operation by the Libyan government, basically meaning Libya was to hand over the two suspects. When Libya refused to comply, the Security Council adopted another resolution imposing sanctions on Libya.[83]

Whether or not notorious acts such as the Lockerbie bombing justify collective pressure through the United Nations on a state that exercises its legal rights in international law, one cannot avoid noticing the political flavour of such pressure. There is a certain danger in this kind of action, as instruments of international law may become tools of convenience only. Commentators have speculated on whether these resolutions now show a new trend in international extradition law. This question will not be addressed in this thesis. However, it is vital to note that these resolutions may be the first steps towards more collective decision-making in the development and execution of international law.[84]

Because the constituent units of the international community are sovereign and have adopted individual legal systems, international criminal law still contains large pockets of anarchy.[85] States are still reluctant to give up their sovereign power too widely. Some of these pockets have to do with considerations of foreign affairs. The lack of a universally accepted rule of law, leaving the law of extradition to treaties and acts of reciprocity and comity, means that states can interpret these self-created rules to suit their own needs.[86] When discussing the principle of double criminality, the political undercurrents must not be left out of consideration. Several extradition cases discussed in the thesis were most likely influenced by considerations of foreign relations.

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[83] The case is described by Joyner & Rothbaum, 222-227 and 247-253.
[84] It should be borne in mind that there were strong suspicions that the Libyan government itself was involved in the bombing, and according to the indictment the Libyan Minister of Justice had purchased the detonators for the bomb. A domestic prosecution of the suspects in Libya would most likely have been a mock trial, Joyner & Rothbaum, 248-256.
[85] Bassiouni & Wise, ix-x.
[86] Joyner & Rothbaum, 223-224.

1 3 5 Deportation

Extradition must be distinguished from deportation, which is an instrument of immigration law. The object of extradition is to send a person to a specific state for the specific purpose of prosecution, whereas the object of deportation is simply to expel from the state a person whose presence is undesirable;[87] this also applies in cases where deportation is attributable to criminal conduct on the behalf of the fugitive.[88] One of the most important differences between extradition and deportation is thus the purpose of the process.

Deportation is furthermore a unilateral act of the deporting state and is not based on a notion of reciprocity. The deporting state has little preference regarding the destination to which the deportee is deported as long as he is sent out of its territory. A deportation usually does not require a court hearing.[89] The executive usually has a broad discretion in deciding the country of destination of the deportation.[90] Natural destinations would be the state from which he crossed the border, the fugitive's native state or a state of the fugitive's wish.

As extradition and deportation serve two different purposes, they are subject to two different sets of legislation. The fugitive's rights differ. It is important that a deportation does not substitute for an extradition, as the special individuals' rights designed to protect the extraditee are violated. However, disguised extraditions in the shape of deportations are known to take place.[91]

1 4 The History of Double Criminality

To fully understand the double criminality principle one has to be familiar with its historical background. The principle originated at a time that was politically and socially very different from the present. It has survived and developed through different ideological eras, which have

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[87] Aughterson, 36, La Forest, 38.
[88] Nelson, "Swedish and Foreign Crimes in the Swedish Criminal Justice System" in Jareborg (ed) *Double Criminality. Studies in International Criminal Law* (1989), says expulsion may be ordered due to crime, grave antisocial behaviour and illegal stay in the realm, 34.
[89] http://www.lawsmart.com/canada/criminal/extradition.htm.
[90] Aughterson, 42, La Forest, 37.
[91] La Forest, 37-38. See chapter 4.

influenced its substance. Even its purposes have undergone changes.[92]

International extradition law as we know it today is the result of a development extending over two centuries. The present system of extradition and many of its principles developed in nineteenth-century continental Europe.[93] It has been claimed that the double criminality doctrine stems from eighteenth- and nineteenth-century liberalism.[94] Particularly after the French Revolution of 1789 the focus was put on the individual. One of the first instruments to deal with double criminality was the Anglo-American Jay Treaty of 1794, but the standardisation of double criminality began with Britain's Extradition Act of 1870.[95] Apparently, many states modelled their extradition legislation on this statute.

1 5 The Rationale of Double Criminality

International extradition law regulates the rights and duties of the three aspects involved in the process, namely the requesting state, the requested state and the fugitive. The rule of double criminality guards the interests of the latter two. The requesting state does not benefit from this rule.

The double criminality principle rests on a rationale with multiple dimensions. Different authors stress different elements of the rationale.[96] Aspects underlying the principle could be summed up as the principles of state sovereignty, reciprocity, legality and the protection of individual rights.

1 5 1 State Sovereignty

In earlier times states were mostly preoccupied with their own positions, eagerly guarding

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[92] See chapter 1 5.
[93] Gilbert, 32, Aughterson, 4, Schultz, 9.
[94] Aughterson, 4.
[95] Hafen, 194.
[96] For instance Van den Wyngaert in Jareborg (ed) says the rationale of double criminality is based on state sovereignty, international solidarity and the legality principle, 52-54, whereas Shearer claims double criminality derives from the principle of reciprocity and the principle of legality, 137. Plachta on the other hand says double criminality does not rest on the notion of equality of states, sovereignty or reciprocity, but solely on the legality principle, 107, and Hafen ascribes double criminality to the protection of fugitives from unjust punishment, 194.

their sovereignty.[97] Like many other principles of international extradition law, double criminality to a large extent owes its existence to the desire of states to affirm their sovereignty.[98]

A state will not allow its criminal process, including apprehension and incarceration of an individual, to be used for an act that it does not consider punishable.[99] Otherwise the state would be giving precedence to the conceptions of justice in the requesting state over its own. A state's social conscience should not be embarrassed by an obligation to extradite for something that is not criminal in its domestic statute.[100] This aspect has a practical side too. States most probably do not wish to initiate a costly extradition process for acts that are legal.[101]

1 5 2 Reciprocity

The principle of reciprocity is closely connected with the principle of sovereignty.[102] As the constituent subjects of international law are sovereign and equal states, international law must necessarily rely on reciprocity among states in order to function. Reciprocity as a rationale behind double criminality does not refer to the formalised reciprocity-based extradition system described above,[103] but to the abstract and idealistic principle lying behind that system and other extradition schemes. Double criminality secures reciprocity by ensuring that a state does not have to extradite a person of whom it could not ask for extradition itself.[104]

1 5 3 Individual Rights

Some argue the double criminality requirement was created in extradition law for purposes of

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[97] Bedi, 29, Blakesley & Lagodny, "Finding Harmony Amidst Disagreement over Extradition, Jurisdiction, the Role of Human Rights, and Issues of Extraterritoriality under International Criminal Law", *Vanderbilt Journal of Transnational Law* p. 1 (1991), 44. In ensuring their sovereignty states have even abstained from extraditing criminals where the requesting state has not granted them an assurance of reciprocity, even if it entailed the presence of a dangerous criminal on their territory, Schultz, 10.
[98] Van den Wyngaert in Jareborg (ed), 53.
[99] Aughterson, 60, Van den Wyngaert in Jareborg (ed), 52, Rintelen, 17.
[100] Shearer, 138.
[101] Palmer, *The Austrian Law on Extradition and Mutual Assistance in Criminal Matters* (1983), 39.
[102] Palmer, 39, Stanbrook & Stanbrook, *Extradition Law and Practice* 2 ed (2000), 21.
[103] Chapter 1 3 3.

protecting individual rights.[105] It is more likely that double criminality was created with notions of sovereignty and reciprocity in mind, but it nevertheless serves as a protection for the individual. Movements towards stronger protection of human rights in criminal procedure neutralise the original selfish rationale behind the double criminality rule.[106] As the procedure of extradition includes apprehension and incarceration of an individual, double criminality ensures that a person's liberty is not restricted for acts that are not criminal in the apprehending state.[107] Protection of the fugitive is the principle's main justification today.

1 5 4 Legality

An important individual right is represented by the legality principle in criminal law. It is generally acknowledged that the principles of double criminality and legality are related, but it is not clear how strongly.[108] Restrictions on freedom of action may only be established by law.[109] Both principles adhere to this well-established rule of law.

The legality principle's twin components – no crime and no punishment without law – are expressed in the maxim *nullum crimen nulla poena sine lege*, which establishes that crime and punishment need to be proclaimed by law.[110] Inherent in this principle lies a prohibition against retroactive punishment. People should always be able to predict their legal rights and duties by knowing in advance what conduct is punishable. It also follows from this that a heavier penalty than the penalty prescribed at the time the crime was committed, cannot be imposed. Another consequence is that the law must be accessible to the people, often interpreted to mean that the conduct must be criminalised in *domestic* law. The legality

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[104] Shearer, 138, Gilbert, 84.
[105] Hafen, 230, Aughterson, 5.
[106] See chapter 4.
[107] Shearer, 137.
[108] Williams, 582, Dugard & Van den Wyngaert, "Reconciling Extradition with Human Rights", *American Journal of International Law* p. 187 (1998), 188, Blakesley, "A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes", *Utah Law Review* p. 685 (1984), 739. Rezek says "[b]eing an application of the principle *nulla poena sin lege*, the double criminality rule bears all features of that principle," 187-188.
[109] Castberg, "Natural Law and Human Rights. An Idea-Historical Survey," *International Protection of Human Rigths*, Eide & Schou (eds) (1968), 19-29.
[110] According to Loucaides, *Essays on the Developing Law of Human Rights* (1995), the Latin expression of the legality principle was introduced by Feuerbach, a German jurist, at the beginning of the nineteenth century, 33. Burchell & Milton, *Principles of Criminal Law* 2 ed (1997), say Feuerbach's theory included "a competent legislature that announced in advance and with clarity and certainty the definition of crimes and the details of their punishments," 58.

principle thus says no one can be punished for an act that did not constitute a crime in domestic law at the time it was committed.

There are several aspects of legality and double criminality that differ fundamentally. They form part of legal examinations in two different situations. Some considerations behind the legality principle do not apply to double criminality. The right of individuals to become acquainted with the law in order to act in a law-abiding way does not motivate a rule of double criminality in extradition. A fugitive has already broken the law when the question of extradition arises. The rule of double criminality is not a substantive rule, such as the legality principle, but a procedural rule.[111] The guilt or innocence of the accused is irrelevant to extradition. Though the law subjected to double criminality examination are the criminal codes and not the codes of criminal procedure, it will not be applied as such, but used as a potential obstacle to extradition.

The similarity between the double criminality principle in extradition law and the legality principle in criminal law is obvious. Both principles demand that a specific conduct should be criminalised in domestic law. A person should not be treated differently than the rest of the people present in a state, in the sense that he could be incarcerated for an act that no one else in that country could be incarcerated for. The basic objects of the legality principle – to avoid arbitrariness and discrimination – should be presumed to be the objects of extradition law as well. These objects would be violated if double criminality were not complied with, as any person could be apprehended and placed in custody facing extradition for an act that happens to be a crime somewhere else.

1 6 Is there a General Duty to Extradite in International Law?

Grotius and other early legal scholars argued that there existed an obligation to extradite or prosecute in international customary law.[112] Today there is universal agreement that no such general obligation exists.[113] No state can demand, as a matter of right, an extradition from

[111] Van den Wyngaert in Jareborg (ed), 55.
[112] Joyner & Rothbaum, 232. Bedi says among scholars advocating an obligation to extradite or try were Grotius, Vattel, Story and Kent, 29.
[113] Gilbert, 14, 47, Schultz, 9, Shaw, *International Law* 4 ed (1997), 482, Bedi, 30, Joyner & Rothbaum, 232, Aughterson, 2, Henning, 350, La Forest, 16. As for American jurisprudence, any uncertainties to this point were

another state, unless the demand is authorised in an express treaty stipulation.[114] A sovereign state has full authority over all individuals within its territory and may deport or extradite anyone it wishes, or grant asylum and immunity from prosecution to fugitives.[115] However, the interests of society demand that crimes do not remain unpunished. To avoid impunity, many conventions adopt a system where the signatory states oblige themselves to either extradite or try the fugitive. This is the principle of *aut dedere aut judicare*.

Aut dedere aut judicare is encompassed in general extradition treaties as well as treaties creating international crimes. Depending on the wording of the treaty, it may apply to domestic crimes as well as international crimes. With regard to ordinary crimes there is undoubtedly no duty to extradite or prosecute in general international law.[116] Only a treaty can establish this duty. As for international crimes, scholars have distinguished a development in international criminal law, apart from treaty-obligations, of a general obligation to either extradite or prosecute.[117]

A potential obligation could be based on customary international law, general principles of law, or *jus cogens*. Such a duty could conflict with a requirement of double criminality. It is thus necessary to give an account of the content of this potential rule, its position in international law and its possible effects on double criminality.

1 6 1 *Aut Dedere Aut Judicare* in Conventions

An obligation to extradite or try is created to prevent safe havens for criminals and deter them from committing crimes and fleeing abroad.[118] It imposes a duty of non-asylum on the custodian state.[119] Grotius defined the principle as *aut dedere aut punire*, which means to

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brushed aside when the Supreme Court in 1840 in *Holmes v. Jennison*, 14 Pet. 540, 1840, stated that only a treaty could impose a legal obligation to extradite in international law.

[114] Bedi, 61, Blakesley & Lagodny, 69.

[115] Bassiouni & Wise, xi, La Forest, 37, Bedi, 28-30, 61. Aughterson says "[f]rom antiquity, the right of a state to protect persons within its territory was seen as a manifestation of the inviolability and integrity of the state," 34.

[116] Bassiouni & Wise, 23.

[117] Gilbert, 14, Bassiouni & Wise, 3.

[118] Levine, "Cuban Hijackers and the United States: The Need for a Modified *Aut Dedere aut Judicare* Rule", *Columbia Journal of Transnational Law* p. 133 (1995), 133, 137.

[119] Enache-Brown & Fried, "Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law", *McGill Law Journal* p. 613 (1998), 626.

extradite or punish.[120] For either element to apply, Grotius presupposed that the offender had been found guilty.[121] The modern version *aut dedere aut judicare* reflects the fact that the fugitive may be innocent.

Aut dedere aut judicare appears in varying formulations. There is no primacy for the one alternative to the other, unless stated in the treaty. The principle usually springs to life once the custodian state receives a request for extradition, and if extradition is denied, the case must be submitted to the competent authorities, which are required to take the ordinary steps towards prosecution.[122] Prosecuting authorities decide on whether and how to proceed, and the outcome may not be a trial.[123] The *aut dedere aut judicare* principle breaks down if the state does not make a good faith effort to prosecute the crimes.[124] The European Convention on Extradition enshrines *aut dedere aut judicare* in article 6 paragraph 2:

> "If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate."

1 6 2 *Aut Dedere Aut Judicare* in International Law

It has been claimed there is a general obligation in international law to extradite or prosecute for international crimes, detached from the treaties that originally created this system for these particular crimes. International crimes are founded in customary international law and treaties.[125] The notion of international crimes and obligations following this status were created because of the need for international co-operation in fighting this particular conduct.[126] Because these crimes directly or indirectly affect other states, the perpetrators are

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[120] Bassiouni & Wise, 4. The idea is apparently attributable to Baldus in the fourteenth century, 27.
[121] Bassiouni & Wise, 39.
[122] Levine, 140.
[123] Levine, 138-140, Joyner & Rothbaum, 248.
[124] Joyner & Rothbaum, 253.
[125] For instance, after the Second World War the Nazi leaders were tried at the Nuremberg Trial for crimes against peace, war crimes and crimes against humanity based on customary international law. After the war many conventions created international crimes, for example the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. The crime of genocide is also part of crimes against humanity in customary international law.
[126] Gardocki, "The Principle of Universality" in Jareborg (ed) *Double Criminality. Studies in International Criminal Law* (1989), 68.

hosti humani generis, enemies of all people and humankind.[127]

There is no generally accepted definition of what constitutes an international crime, but several factors may give an indication.[128] A strong indication is the fact that the conduct has been defined by an international convention, requiring states to proscribe and prosecute such conduct.[129] Another factor is the scope of the crime; some are directed against or are inimical to the international community as a whole, threatening international peace and order. A third factor is the heinous nature of certain crimes. International crimes could thus loosely be defined as offences of sufficient international concern so as to be the subject of international law requiring states to take steps of some sort to co-operate in their suppression.[130]

A few authors argue *aut dedere aut judicare* for international crimes is part of customary international law.[131] Opinions on the subject differ. The system is adopted in a large and ever-increasing number of international instruments dealing with international crimes. Domestic laws on the subject vary.[132] The rule is, however, often ignored in practice.[133] State practice does thus not furnish consistent evidence of the existence of a general obligation to extradite or prosecute with respect to international offences in general.[134] Whether a duty to extradite or prosecute is an implication of international crimes, is by no means clear in international law. However, the possibility that this custom is in the process of developing for specific international crimes should not be ruled out.

Aut dedere aut judicare may also have become a general principle of international law. The incremental number of instruments implementing *aut dedere aut judicare* for international crimes shows the widespread and increasing recognition of this principle. However, the abundance of variations of the principle makes it difficult to speak of a uniform principle that

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[127] Steven, 433-434, Enache-Brown & Fried, 622.
[128] Van den Wyngaert in Jareborg (ed), 48.
[129] A formal denomination as "international crime" is not necessary as international crimes also exist in customary international law.
[130] Bassiouni & Wise, 5-6. Some authors argue that accompanying principles such as universal jurisdiction and *aut dedere aut judicare* designates international crimes. It is however more common to view these principles as corollaries, and not prerequisites, of international crimes, see for instance Van den Wyngaert, 48.
[131] Joyner & Rothbaum, 240, Steven, 430.
[132] Van den Wyngaert in Jareborg (ed), 48.
[133] Levine, 144.
[134] Bassiouni & Wise, 43.

most states adhere to. And a strict application could easily violate human rights.[135] Furthermore, it would be difficult to distinguish whether such a principle applies to a specific international crime, a certain class of international crimes or to international crimes in general.[136] Authors advocating a general principle do so out of a conviction that it is the most efficient way of dealing with international offenders.[137] The propriety of deducing general rules of law from the necessity in establishing law and order, can be questioned.[138] There seems not to be a general conception that *aut dedere aut judicare* is a general principle of international law.

The distinction between international crimes that are *jus cogens* and those that are not must be kept in mind when examining the rights and duties of states in enforcing international criminal law.[139] A few international crimes have become rules of *jus cogens*.[140] To declare a rule of international law to be peremptory has no meaning unless there are certain consequences of this particular status other than not breaching these norms. The question is whether states merely have a right to treat these crimes more firmly than other crimes, or whether they are obliged to do so. Bassiouni says the answer in international law is uncertain, but that he supports the view that there are obligations following from *jus cogens* called *obligatio erga omnes*, as otherwise there would be no point in characterising these rules as peremptory.[141] It is widely assumed that there is a relation between *jus cogens* and *erga omnes* rules, but the character of this relationship is disputed.[142]

The International Court of Justice describes *obligatio erga omnes* as "obligations of a State towards the international community as a whole."[143] Scholars supporting the *jus cogens*-based

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[135] For instance if a Jew were to hijack a plane to escape Nazi Germany, Levine, 136. If one were to include human rights in *aut dedere aut judicare* the chances that the international community would reach an agreement on which human rights should be considered are very slim, Levine, 151.
[136] Bassiouni & Wise, 21-22.
[137] Enache-Brown & Fried adhere to this argumentation, 613, 631-632.
[138] Bassiouni & Wise, xiv.
[139] Steven, 436.
[140] According to Bassiouni in Joyner (ed) legal literature accepts as *jus cogens* the crimes of aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practice, and torture. Indications on such crimes are; the crime must threaten peace and security of humankind, shock the conscience of humanity, and explicitly or implicitly be characterized by state policy and conduct. Other indications are the historical legal evolution of the crime, the number of states incorporating the proscriptions in domestic law, the number of prosecutions of this crime, evidences in general principles of law, and scholarly writings, 139-143.
[141] Bassiouni in Joyner (ed), 136, 148.
[142] Byers, 211. Byers argues *erga omnes* rules derive from customary international law or treaties, 239.
[143] Bassiouni in Joyner (ed) quotes *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain)* Judgement, ICJ Reports 1970, p. 3, 146. In this decision however, the court makes no mention of *jus cogens*, De

obligatio erga omnes agree that the principle *aut dedere aut judicare* is included.[144] However, state practice does not support scholarly writings that there exists an *obligatio erga omnes* to prosecute or extradite for *jus cogens* crimes. On the contrary, evidence shows that such a rule "is more inchoate than established, other than when it arises out of specific treaty obligations."[145]

It could thus be concluded that in general international law there does not exist a general obligation to extradite or try for international crimes. The possibility that a general obligation to extradite or try for certain international crimes is developing gradually, however, should not be ruled out. Not extraditing or prosecuting may seem to be an abuse of right, but today it nevertheless still is a state's right.

1 6 3 Double Criminality and *Aut Dedere Aut Judicare*

A potential obligation to extradite or try for international crimes in general international law could collide with the principles of double criminality and legality if the offence is not criminal in the requested state. This scenario is not unlikely where new crimes are involved, for example, if computer crimes were to become international crimes,[146] or where the requested state in breach of a convention has not implemented an international crime into domestic legislation. The requested state cannot extradite due to lack of double criminality and it cannot prosecute because of the legality principle.

One could argue that the principle of double criminality is inherent in the principle *aut dedere aut judicare*, as would be the case where both principles are stipulated in a convention such as, for instance, the European Convention on Extradition. Conventions including *aut dedere aut judicare* still leave extradition subject to other conditions imposed by the pertinent

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Hoogh, 193. The concept of *obligatio erga omnes* for *jus cogens* crimes has support in statements in other desicions by the International Court of Justice, Bassiouni in Joyner (ed), 147.

[144] Bassiouni in Joyner (ed) includes *aut dedere aut judicare*, universal jurisdiction, non-applicability of statutes of limitations, non-applicability of immunities, non-applicability of the defense of "obedience to superior orders", universal application of these obligations whether in time of peace or war, and non-derogation under state of emergency, 133. Steven accepts the notion of *obligatio erga omnes,* but prefers to describe *aut dedere aut judicare* as a *jus cogens* norm, at least where *jus cogens* crimes are involved, 431, 447-448, 450. Bassiouni & Wise also accept this proposition, 25.

[145] Bassiouni in Joyner (ed), 137.

extradition treaties or by the extradition law of the state.[147] On the other hand, the object of an obligation to extradite or prosecute is to ensure that perpetrators of the most heinous offences are brought to justice irrespective of traditional obstacles. Nevertheless, as long as the principle *aut dedere aut judicare* is based in a treaty or on customary international law, the principle of double criminality as well as other principles of extradition law based on the same legal sources must be complied with as an integral part of *aut dedere aut judicare*.

The duty to extradite or prosecute may also collide with the legality principle in criminal law.[148] If extradition were refused because the requested state has not criminalised the conduct in question, this would naturally also obstruct prosecution. Though the legality principle is not described as a norm of *jus cogens*, it is a fundamental principle of criminal law and one can hardly imagine situations where a state would be willing to abrogate this principle in order to satisfy an obligation to extradite or prosecute.[149]

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[146] For instance, in the Phillipines the masterminds behind inventing and spreading the so-called love bug virus over the internet in May 2000 could not be prosecuted (and hence not extradited) because computer hacking and the spreading of viruses were not covered by the penal codes, www.usatoday.com/life/cyber/tech/cti095.htm.
[147] Bassiouni & Wise, 10.
[148] Levine, 133.
[149] Gardocki, 57.

2 Interpretation of Double Criminality

2 1 Introduction

The requirement of double criminality in extradition means that the court in the requested state has to determine whether the conduct for which extradition is requested also constitutes a criminal offence in domestic law. It is, however, not necessary that the court be competent to try the fugitive in the specific case.[150] When deciding on double criminality, the court does not interpret the treaty or the extradition statutes, as would be the case with the condition of "extraditable crimes", but the criminal statutes. The court has to examine domestic criminal law.[151]

The core of the double criminality principle has become a standard stipulation in instruments of domestic and international extradition law. Though simple to express, the principle gives rise to difficult interpretational problems. First of all, the provisions are vague, individually formulated and generally omit to specify how double criminality is to be interpreted. For instance, the European Convention on Extradition article 2 paragraph 1 states "extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party." Secondly, there is a web of prerequisites attached to it, expanding or limiting the scope of the principle.[152]

Conformity exists neither in domestic nor international instruments on extradition.[153] There are also wide variations as to the laws and institutions of the different states.[154] Despite a long history of double criminality and increasing uniformity among legal standards in domestic and international law, there are still tangible differences in the interpretation of the double criminality principle. The multiple rationale of the double criminality principle will naturally

[150] Rintelen, 15-16.
[151] Van den Wyngaert in Jareborg (ed), 50.
[152] Hafen, 195.
[153] Plachta, 110-111.
[154] Bedi, 70.

influence the way that the principle is or should be interpreted. Its ability to serve its purposes depends on the applicable instrument adopting this principle.[155]

There are three aspects of double criminality that require examination. The first is how to interpret the "criminality" of the offence and the required degree of similarity between the penal laws of the two states and the problem of comparing the laws with the actual conduct. This is called the substantive question of double criminality. The second aspect that needs examination is whether the place of the criminal conduct and subsequent extraterritorial jurisdiction, is of relevance. This is the locational question of double criminality. The third aspect is the relevance of the point in time at which the conduct was criminalised in the law of the requested state; this is called the temporal question of double criminality. These three issues will be discussed in the subsequent paragraphs.

2 2 The Substantial Question: Interpretation of Criminality

At first sight one would think double criminality represents not too many difficulties as states generally prohibit the same conduct.[156] Ordinary offences, for instance dishonesty offences such as murder and theft, are criminalised with certainty by all states. There are nevertheless considerable differences as to what is regarded as deserving of punishment, particularly where criminalisation is based on moral and religious grounds. Even geographically, culturally and politically close states show significant discrepancies.[157] For instance, Germany has a more liberal attitude towards pornography and the Netherlands a more liberal attitude towards cannabis than most other countries.[158] The double criminality doctrine runs, however, deeper than analysing general attitudes towards specific types of conduct. As double criminality provisions do not give any indications on the accuracy of interpretation of domestic law, it has become the judiciary's task to decide on how to interpret this requirement.

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[155] Hafen, 195.
[156] Plachta, 101.
[157] Shearer, 138.
[158] Gilbert, 104.

2 2 1 Interpretation of Domestic and Foreign Law

Double criminality must necessarily involve some form of comparative analysis of the domestic c riminal law and the criminal law in the requesting state. Treaties and domestic statutes rarely say anything about the nature of this comparison. There has been some uncertainty as to what extent the court of the requested state needs to examine not only the *lex fori* but also *lex loci delicti*.[159] The court of the requested state has basically three choices. It could presume criminality in the requesting state by virtue of the request; it could demand an affidavit presenting the law of the requesting state; or it could take the hard way of examining the foreign criminal law.

Supporters of a strict comparative analysis argue that the extradition request may be a cloak to obtain custody of a fugitive for the wrong reasons, for instance, for his political beliefs and activities, violating his human rights. For this reason courts have in the past taken upon them the difficult task of interpreting foreign criminal law when conducting a comparative analysis of the two sets of legislation.[160] On the other hand, if extradition is sought, for instance, on political, social, religious or racial grounds, it is not the double criminality requirement, but other provisions that safeguard the fugitive's rights that need consideration. This may be apparent in many extradition schemes today, but the protection of human rights in extradition cases has not always been obvious.

It has been claimed that the requested state, as an act of comity, should put suspicions aside and take the criminality in the requesting state for granted. It should be assumed that a request for extradition is based on a violation of the law. A presumption of criminality in the requesting state is similar to the rule of non-inquiry, which forbids an inquiry into the nature of other states' criminal laws. But trusting other states blindly in their motives for requesting extradition could be naive. Extradition is largely influenced by politics and extraditions are known to have taken place to retrieve political offenders. Furthermore, the strong obstinacy in protecting sovereignty does not support a presumption of criminality.

Much of the criticism directed against the double criminality requirement has been based on the assumption that courts have to delve into foreign law through the methods of comparative

[159] Shearer, 138.

law.[161] Interpreting foreign law is a hazardous venture that could easily go awry as the law and legal theory are unfamiliar.[162] The danger of making a mistake is significant. Domestic legislation is best interpreted by the courts of that state. This is the main justification of not scrutinising foreign law today.

Between the two extremes of scrutinising foreign law and simply assuming criminality in the requesting state, there is a middle road. A state requesting extradition will usually issue a warrant or an affidavit describing the elements of the offence. The formal extradition request includes a description of the crime in the law of the requesting state.[163] Australian law requires only that the magistrate examine such affidavits and not the foreign law itself.[164] This is also the case in Canada.[165]

During the twentieth century courts in the United States have adopted a more liberal approach towards the requirement of double criminality and most of them do not interpret the law of the requesting state any longer, but simply assume that the offence constitutes a crime in the requesting state as certified in an affidavit.[166] This is due partly to practical reasons and partly to a general desire to reduce the obstacles to extradition for serious crimes.[167] The European approach is also to concentrate on domestic law.[168]

Since the issue of the offender's guilt is not a topic of extensive review in an extradition case and one can generally suppose that the foreign state will not request extradition unless a crime has taken place, an examination of the charge or conviction as stated in the requesting documents should be enough.[169] This is also the case where a state has been requested to

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[160] Shearer, 139, Stanbrook & Stanbrook, 21, Hafen, 197.
[161] Plachta, 129-130, Blakesley & Lagodny, 54.
[162] Shearer, 140, Aughterson, 58, 80-81, Adler, 39.
[163] Blakesley, "The Law of International Extradition: A Comparative Study" in Dugard & Van den Wyngaert (eds) *International Criminal Law and Procedure* (1996), 157.
[164] Aughterson, 58-59, 81.
[165] http://www.lawsmart.com/canada/criminal/extradition.htm.
[166] Hafen, 198, Blakesley & Lagodny, 54. This affidavit could be compared with the complaint and warrant application for a provisional arrest warrant for fugitives in international extradition matters, which specifies only a minimum of information, such as information on the existence and nature of the foreign charge against the fugitive and a brief synopsis of the facts underlying the foreign charges, Wiehl, "Extradition Law at the Crossroads: The Trend Toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States", *Michigan Journal of International Law*, p. 729 (1997/98), 748-749.
[167] Hafen, 197-198.
[168] Palmer, 41.
[169] Palmer, 41-42.

provide judicial assistance, for instance, obtaining evidence.[170] The court only needs to be informed of the elements constituting the crime.

The judge examining double criminality must consider a hypothetical situation of the same conduct taking place in a new jurisdiction under a new set of rules.[171] The question is whether the fugitive's conduct, *if* it were committed within the requested state's jurisdiction, *would* constitute a crime according to the requested state's law. This is the essence of double criminality and it leaves a strict examination of foreign law redundant.[172]

Whether criminality is assumed without further ado or whether the requested state examines the submitted documents, it is generally accepted that a court should not examine foreign law. The situation could, however, be different if the fugitive himself claims that the conduct for which his extradition is sought is not criminal in the requesting state.[173]

2 2 2 Extraditable Crimes

Extradition is a complicated, expensive and time-consuming process and hence states wish to reserve this process for offences of some gravity. Treaties and domestic statutes on extradition determine what crimes should be considered extraditable. These crimes are called "extraditable crimes" and are either positively enumerated or negatively delimited/eliminated. The enumerative method, also called the list method, specifies the crimes by their names, whereas the eliminative method, also called the no-list method, delimits the pertinent crimes by a general formula of conditions, usually a minimum sentence prerequisite.[174]

Apart from the extradition treaties and statutes, conventions on international crimes and co-operation in criminal matters can also stipulate extraditable crimes. Such conventions can describe international crimes as extraditable crimes to be included in existing extradition treaties previously concluded by the State Parties. Furthermore, such conventions can also

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[170] Murray & Harris, *Mutual Assistance in Criminal Matters* (2000), say that the criminal elements of the relevant offence must be clearly described so that the requested state can be satisfied that the conduct is a crime in the requesting state, 50.
[171] Plachta, 105.
[172] Shearer, 140.
[173] Shearer, 140.
[174] Aughterson, 43.

stipulate that they are to be considered as extradition treaties between two State Parties where an extradition treaty does not exist and the domestic law of at least one of the states requires an extradition treaty in order to extradite. These systems are, for instance, incorporated into the United Nations Convention Against Transnational Organized Crime 2000.[175]

The requirement of "extraditable crimes" originated in the enumerative extradition treaty, as the enumeration itself was the list of extraditable crimes. Early extradition treaties and domestic extradition statutes named either a specific group of wanted persons or a type or class of offences. For instance, a treaty between England and Scotland of 1533 applied to "homicides, thieves, robbers and fugitives" and a treaty of Netherlands-Hanover of 1817 provided extradition for "murderers, those who have committed robbery by breaking in, robbers who make the public highway unsafe and others of the like."[176] Later it became common to list the pertinent crimes by their names.

The scope of the enumerative method was limited. Denominations were vague and interpretation problems arose as different jurisprudences had different names for and delimitations of the crimes. A further problem was the time-consuming and costly business of constantly updating the provisions. The need to expand the lists became more evident as societies became more sophisticated, creating more crimes. Because of these apparent disadvantages, modern extradition treaties usually abstain from applying the enumerative method.[177] The "extraditable crime" requirement has persisted, though in a new form.

Extraditable crimes are today defined by a minimum penalty requirement. Most treaties regard a minimum imprisonment of one or two years to be sufficient. The Norwegian Extradition Act 1975 says extradition can only take place for a conduct that, according to Norwegian law, can be punished with one year of imprisonment or more.[178] The reciprocal extradition scheme between the five Nordic countries is less strict. The Norwegian Act on Extradition between the Nordic Countries 1961 demands a more severe penalty than a fine in order to extradite a fugitive to Iceland, Sweden, Denmark or Finland.[179]

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[175] Kemp, 164.
[176] Shearer, 133.
[177] Gilbert, 85, Aughterson, 43.
[178] Lov 13. juni 1975 Nr. 39 om utlevering av lovbrytere m.v., § 1.
[179] Lov 3. mars 1961 Nr. 1 om utlevering av lovbrytere til Danmark, Finnland, Island og Sverige, §§ 1 and 3.

Despite the eliminative method's clear advantage of not leaving out crimes, it must be interpreted with care as its wide ambit and lack of precision can lead to misinterpretations. It is thus important to couple it with a requirement of double criminality.[180] The eliminative method may also be defined in terms of double criminality. The Norwegian Extradition Act 1975,[181] the Australian Extradition Act 1988,[182] and the United Kingdom Extradition Act 1989[183] describe extraditable offences by both a minimum imprisonment and a double criminality requirement. The European Convention on Extradition describes the extraditable crimes in terms of double criminality and a minimum imprisonment prerequisite in article 2 paragraph 1:

> "Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment awarded must have been for a period of at least four months."

The phrase "or by a more severe penalty" does not mean corporal punishment or capital punishment.[184] According to the Explanatory Report of the Council of Europe, this article means that a maximum imprisonment period of one year is a minimum requirement for extraditable offences.[185]

The requirement of a minimum sentence provision may raise difficulties for states that do not stipulate a mandatory minimum incarceration period in their penal provisions. A strict interpretation of such articles would mean that these states could not obtain extradition even for serious crimes like manslaughter. One way of dealing with this question is to exchange the

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[180] Gilbert, 86.
[181] Lov 13. juni 1975 Nr. 39 om utlevering av lovbrytere m.v., §§ 1 and 3.
[182] Australian Extradition Act 1988 ss. 5, 16 and 19, Aughterson, 43, 55-56.
[183] United Kingdom Extradition Act 1989 s. 2.
[184] The convention does not prohibit extradition where the fugitive may receive the death penalty, though article 11 gives the requested state the right to refuse extradition under such circumstances. Other instruments exclude extradition where the fugitive can risk corporal and capital punishments, torture and other inhuman and degrading treatment or punishment.
[185] Council of Europe, Revised edition of the Explanatory Report to the European Convention on Extradition of 1957 (1985), in the commentaries on Article 2 Paragraph 1. See www.conventions.coe.int. The Explanatory Report is not a legally binding instrument of law, but serves as a means of interpretation of the convention, Blakesley & Lagodny, 61.

minimum imprisonment period with a "possible" imprisonment period. In this way extradition for severe crimes is not obstructed. On the other hand, lesser crimes also qualify as extraditable crimes, which they would otherwise not under a strict interpretation of the article. State practice, however, leaves no evidence of a strict interpretation of minimum period requirements.[186]

As for convicted criminals, extradition treaties adopt a minimum imposed sentence requirement. For instance, under the European Convention a convicted criminal can only be extradited if the imposed sentence was at least four months. According to the Explanatory Report, the requirement in the first part of the section, namely that the maximum period that can be awarded must be at least one year, must also be fulfilled where extradition is sought for a convicted criminal. This is logical, as the opposite assumption would set a lower threshold for extradition of fugitives that have already been convicted. On the other hand, the current system gives convicted fugitives stronger protection than fugitives still awaiting their trials, as there are two sentence requirements to comply with. This ensures that the costly and time-consuming process of extradition is not applied in insignificant cases.

The requirements of extraditable crimes and double criminality are closely attached to each other.[187] Double criminality must be observed whether the enumerative or eliminative method is applied.[188] Where the enumerative method is used, the condition of extraditable crimes has an independent function. It is not enough that the conduct in question is criminalised under the criminal laws of both states; it must also be specifically mentioned in the list of extraditable crimes in the extradition law and the extradition treaty.

Where the eliminative method is adopted, double criminality is often a qualification of the extraditable crime.[189] It is not possible to establish the extraditability of the crime without it being criminalised in both states. As more treaties adopt the eliminative method, the fusion of these requirements becomes more common.

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[186] Shearer, 136.
[187] Hafen describes the requirement of an extraditable crime as an "embellishment" to the double criminality requirement, 195.
[188] Shearer, 137, Plachta, 112.
[189] Shearer, 138.

2 2 3 Interpretation *In Concreto*

The interpretation of double criminality varies from state to state and from case to case. The judiciary has developed theories of interpretation and legal scholars have distinguished two main approaches. One is to view the offence in legal terms and examine whether it constitutes *a crime* in both states, the other is to examine whether the conduct is *punishable* in both states. These two lines of interpretation are in legal theory called interpretation *in concreto* and *in abstracto* respectively.[190] There are many variations of the two approaches and states have to some extent applied a combination of these methods.

Interpretation *in concreto*, also called qualified double criminality,[191] relied originally on two factors.[192] The first factor was an identical denomination of the crime in the two statutes. This strictly formal prerequisite was developed by courts interpreting enumerated extraditable crimes, but it has been abandoned in modern international extradition law. No state demands a correspondence of names.[193]

In *Aamand v. Smithwick*[194] the Irish Supreme Court said extradition formed part of the penal codes and hence necessitated a strict interpretation. There should be no room for ambiguity in the law, which might lead to arbitrary treatment of persons facing extradition. The court said, however, that provisions of the Irish Extradition Act 1965 section 10 (1) "which speak of an offence punishable under the laws of the requesting country and of the State could not be too narrowly construed where, for example, the offence named in the request from the requesting country could not be matched by any offence of a similar name in Ireland but the acts constituting the named offence would constitute an offence punishable by the laws of Ireland."[195]

The second factor of the *in concreto* interpretation is an analysis of the elements of the offence. It includes a strict comparative analysis of the elements of the crime as described in the laws of the requesting and the requested state. The correspondence of elements test was

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[190] Aughterson, 61, Hafen, 199, Plachta, 105, Gilbert, 106, Palmer, 44.
[191] Plachta, 108.
[192] Hafen, 199.
[193] Gilbert, 106, Henning, 352.
[194] *Aamand v. Smithwick* [1995] 1 ILRM 61.
[195] *Aamand v.* Smithwick, 68.

the inducement for courts to scrutinise foreign law. Today courts compare the described elements in the extradition request with the domestic law.

The correspondence of elements test can be illustrated algebraically. If the offence in the requesting state consists of the elements a+b+c and the equivalent offence in the requested state consists of the elements a+b or a+b+c, there is a correspondence of elements as the offence in the requested state is embraced by the crime in the requesting state. If the elements of the offence in the requested state were a+b+c+d, there would be no correspondence of elements as the law of the requesting state falls short of one element in being a crime in the requested state.[196]

If the court finds according to the correspondence of elements test that the two statutes match, the court applies the domestic law theoretically to the conduct of the alleged offender.[197] The court of the requested state could even be more specific in establishing double criminality. In the *in concreto* test one could regard mitigating and aggravating elements of both a substantive and a procedural character, just like the court deciding the criminal case.

The court deciding the criminal case must examine all personal, factual and legal circumstances. Consideration must be given to rules related to extraterritorial jurisdiction, rules of complaints of the injured person, lapse of time, the age and mental health of the offender, degrees of guilt, pardon, amnesty, immunity, specific circumstances under which the offence took place, self-defence, *force majeure*, superior orders, provocation, withdrawal from attempt, and active efforts to prevent the effects of an already consummated crime, etc., and possibly also foreign law.

Does the judge deciding an extradition case have to pay attention to these elements as well? Most authors agree that the *in concreto* interpretation involves an examination of all objective and subjective elements as well as the punishability of the perpetrator.[198] The fugitive must be punishable under the *concrete* circumstances, meaning he is capable of bearing criminal liability. Van den Wyngaert says that "it is not sufficient for the crime to be punishable 'in the books'; the judge must also look at the elements which, in the concrete circumstances, either

[196] Gilbert, 109, and Aughterson, 62-63, refer to the Irish Supreme Court case of *State (Furlong) v Kelly*, [1971] IR 132, which illustrates the double criminality requirement algebraically.
[197] Hafen, 199.

justify or excuse the act (substantive elements) or make prosecution impossible (procedural impediments)."[199]

A strict *in concreto* interpretation means that the judge has to consider whether the conduct theoretically constitutes a crime and whether the perpetrator actually can be punished. This interpretation is the same as the one that the judge eventually deciding the criminal case in the requested state has to make. Both judges decide the criminality of the conduct of this particular offender in that particular situation according to domestic law. Obviously, such an interpretation would be preferable from the fugitive's point of view as it creates additional barriers to extradition. Whether none, some or all of these elements will be taken into consideration in an extradition case depends on the law of each state.

2 2 4 Interpretation *In Abstracto*

The second method of interpreting double criminality is the *in abstracto* interpretation, which involves an examination of the punishability of the conduct.[200] A correspondence of criminalised conduct focuses on the nature of the acts involved rather than associated factors such as the name and legal classification of the offences, or the theory of jurisdiction that is exercised over these acts by the legislature of the requesting state.[201] The conduct controls double criminality. The offence is extraditable when the acts of the fugitive qualify as being a crime in the requested state.[202] The *in abstracto* interpretation comports with the principle of sovereignty, as the extradition state does not impose its specific standards of criminal law and procedure on the requesting state.

Since focus is on the actual conduct of the fugitive, the *in abstracto* interpretation does not compare the crimes as described in the law of the two countries. Therefore, the pertinent crimes need not have identical names or scope. As a consequence, the concrete circumstances in the case are not considered either.[203] Interpretation *in abstracto* is based exclusively on the

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[198] Plachta, 105, 109, Palmer, 44-45, Van den Wyngaert in Jareborg (ed), 51.
[199] Van den Wyngaert in Jareborg (ed), 51.
[200] Hafen, 199-200.
[201] Mullan, "The Concept of Double Criminality in the Context of Extraterritorial Crimes", *Criminal Law Review* p. 17 (1997), 21, Plachta, 108-109.
[202] Palmer, 44, Aughterson, 61.
[203] Van den Wyngaert in Jareborg (ed), 51.

objective and material circumstances of the offence and disregards subjective and personal grounds of criminal liability.[204] For instance, where the time for prosecution has elapsed in the *lex loci delicti* – a fact that would be considered under an *in concreto* interpretation – it would be ignored under an *in abstracto* interpretation as this method only concerns itself with the criminality of the conduct as such.

The United States has shifted from adhering to an *in concreto* interpretation to applying an *in abstracto* interpretation.[205] This shift came about particularly through three decisions by the United States Supreme Court where extradition was requested by Great Britain. In *Wright v. Henkel*[206] extradition was requested of a person charged with the extraditable crime of fraud. The elements constituting the crime of fraud in the two jurisdictions, however, were different.[207] The Supreme Court ruled that the double criminality requirement was satisfied, as the statutes were "substantially analogous."[208]

In the second case, *Collins v. Loisel*,[209] a man was charged in Britain with the crime of cheating, which corresponds in American jurisprudence to the crime of obtaining property under false pretences. The defendant argued that neither the requirement of extraditable offences nor the requirement of double criminality were satisfied. The court rejected this by stating "[t]he law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions."[210] The court clearly adopted an *in abstracto* interpretation.

However, in the third case, *Factor v. Laubenheimer*,[211] the defendant was charged in Britain with the crime of receiving stolen property. This was not a crime in Illinois, but the court said the conduct was a crime in a majority of American states and thus double criminality was

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[204] Plachta, 109.
[205] Hafen, 200, Blakesley & Lagodny, 54.
[206] *Wright v. Henkel*, 190 U.S. 40 (1903).
[207] The British statute punished the making, circulating or publishing with intent to deceive or defraud, of false statements or accounts of a body corporate or public company, known to be false, by a director, manager or public officer thereof. According to the New York statute it was a misdemeanor if an officer or director of a corporation knowingly concurred in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which was false.
[208] At 58 the Court says "The two statutes are substantially analogous... Absolute identity is not required. The essential character of the transaction is the same, and made criminal in both statutes."
[209] *Collins v. Loisel*, 259 U.S. 309 (1922).
[210] At 312.

satisfied. The court said treaties should be interpreted liberally and in accordance with the intent of the parties. The policies behind broad treaty interpretations influenced the court's decision.[212]

This decision has been disputed. It ignored the fact that the conduct of the defendant actually could be construed as criminal under the laws of Illinois and it did thus not follow the line drawn by *Collins v. Loisel*. *Factor v. Laubenheimer* does not nullify the *Collins v. Loisel* test, but expands the double criminality requirement to such extremes that it almost becomes meaningless.[213] Lower courts have divided themselves into following either *Wright v. Henkel* or *Collins v. Loisel*. Even though courts in the United States are not united in their interpretation of double criminality, they are through these decisions granted sufficient freedom to balance the opposing interests of states and individuals.[214] Overall, courts in the United States apply the *in abstracto* interpretation of double criminality.

An example of an *in abstracto* interpretation by a United States court is a decision by the Court of Appeals where the extradition of a juvenile to Hong Kong was requested.[215] The applicable treaty in this case did not include a provision on juveniles, which is a common provision in extradition treaties. Hu Yau-Leung was charged in Hong Kong with armed robbery committed at the age of sixteen. The question formulated by the Court of Appeals was whether the acts committed by Hu Yau-Leung would have been a crime if committed in the United States. The answer was affirmative. The court said the limited scope of an extradition hearing does not extend to collateral issues that would be subject to the trial court deciding on the merits. The enquiry was supposed to end as soon as it was found that the detainee could be convicted of a felony according to the law of the United States.[216]

The replacement by the United Kingdom Extradition Act 1989 of the list system of extraditable offences in the old extradition law with a minimum punishability standard, indicates that the offences do not have to be identically named or constituted. This change may suggest that the focus of the double criminality rule is on the wrongfulness of the

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[211] *Factor v. Laubenheimer*, 290 U.S. 276 (1933).
[212] Hafen, 203.
[213] The decision allows the requested state to choose between federal law and state law when deciding double criminality, Hafen, 205.
[214] Hafen, 203-204.
[215] The case *Hu Yau-Leung v. Soscia*, 649 F.2d 914 (2d Cir.) is described by Levy, "Double Criminality and the U.S.-U.K. Extradition Treaty: *Hu Yau-Leung v. Soscia*", *Brooklyn Journal of International Law* p. 475 (1982).

particular conduct.[217] It is accepted in the United Kingdom that the double criminality requirement applies to the fugitive's alleged conduct, which will be regarded as if it had been committed in the United Kingdom. The Extradition Act 1989 concerns the punishability of the conduct.[218] This is also the approach in Canada[219] and Australia.[220]

2 2 5 Prevalent Interpretation in International Extradition Law

It is not clear what method of interpretation prevails in practice.[221] In 1880 the Institute of International Law advocated that "as a rule it should be required that the acts to which extradition applies be punishable by the law of both countries."[222] In 1909 Rintelen claimed the principle of double criminality in international law requires an *in abstracto* interpretation. The requested state has to satisfy itself of "die Strafbarkeit der fraglichen Handlung", meaning the "criminality of the act in question."[223] Shearer also seems to advocate an *in abstracto* approach.[224]

The prevalent view in common law countries is to specify whether the relevant conduct is criminal in both jurisdictions, rather than requiring that the actual crime charged also is an offence in the requested state, in other words the *in abstracto* method.[225] Palmer says the *in concreto* interpretation is the prevalent approach in Europe and that it is supported by most European legal scholars, even though the tenth International Congress of Criminal Law recommended the *in abstracto* interpretation.[226]

Both *in concreto* and *in abstracto* interpretations are used in extradition practice.[227] The *in concreto* interpretation used to be the traditional test. However, the twentieth century has witnessed a trend towards interpretation *in abstracto*, which now seems to be the most

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[216] Levy, 489.
[217] Mullan, 21.
[218] Stanbrook & Stanbrook, 21.
[219] http://www.lawsmart.com/canada/criminal/extradition.htm.
[220] Aughterson, 62.
[221] Van den Wyngaert in Jareborg (ed), 51.
[222] Aughterson, 61.
[223] Rintelen, 16.
[224] Shearer, 140.
[225] Aughterson, 62.
[226] Palmer, 44-45.
[227] Van den Wyngaert in Jareborg (ed), 51.

common approach.[228]

An explanation of the *in abstracto* trend may be found in the rationale of double criminality. Which interpretation method best supports the rationale? *In concreto* is a very technical interpretation and does not focus on the actual conduct of the defendant. For instance, where a person is charged with genocide, this will be a problem for a requested state that has criminalised only homicide, as the element of "intent to destroy, in whole or in part, a national, ethnical, racial or religious group"[229] is not part of the crime of homicide. "Reciprocity and sovereignty do not require that conduct universally considered abhorrent go unpunished because of the use of unusual elements designed to reach the worst offenders..."[230]

Considerations of individual rights do not justify the one or the other means of interpreting double criminality, though the *in concreto* interpretation is naturally preferable to the individual, as it creates extra obstacles to extradition. The legality principle, however, may be an argument in favour of the *in concreto* interpretation. The principle ensures that the law covers every aspect of the offender's action and that nothing should be left to chance. Because extradition is a procedural matter, it could be argued that it requires a lesser degree of accuracy when examining double criminality. *In abstracto* is concerned with the wrongfulness of the action and that should suffice as a basis for extradition.

2 2 6 Double Criminality and Convicted Criminals

Bedi claims that the requirement of double criminality does not apply where extradition is requested of convicted criminals.[231] This seems to be an uncommon opinion. Most authors on international extradition law do not make statements on this question, which one would assume that they would do if they agreed with Bedi, considering that it would represent a considerable exception to the double criminality requirement.[232] Stanbrook & Stanbrook say double criminality applies to convicted criminals.[233] Palmer presupposes that double

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[228] Gilbert, 106.
[229] Article 2 of the Genocide Convention.
[230] Hafen quoting Sicalides in discussing truck trafficking offences in the United States, 213.
[231] Bedi, 77.
[232] La Forest mentions that there might be an exception to the double criminality requirement for convicted criminals, but seems to base this on Bedi's writings, 55.
[233] Stanbrook & Stanbrook, 20.

criminality is a requirement also where convicted criminals are concerned. She says the requested state has to examine the conviction in order to establish double criminality.[234]

Extradition treaties and domestic statutes do not exempt convicted criminals from the double criminality principle. Unless it is expressly stated that double criminality is not required where the fugitive is convicted, one would assume that all provisions apply to both prosecuted and convicted fugitives. As the extraditable crime requirement definitely applies to convicted criminals, exempting them from the double criminality requirement will be technically impossible where the two requirements are interdependent. There is no reason to treat suspected and convicted criminals differently. The rationale behind the double criminality rule is the same in both cases. This could not lead to any other conclusion but that double criminality also is a requirement where the fugitive is a convicted criminal.

2 3 The Locational Question: Extraterritorial Jurisdiction

When a state has custody over a criminal to whom it does not wish to grant asylum and immunity from prosecution, it can either prosecute the criminal or extradite him to another state for prosecution. In the first case it must naturally have jurisdiction over the crime. This is a fundamental rule of criminal law.[235]

Jurisdiction means the authority, capacity, power and right to act.[236] It gives a state authority to legislate, adjudicate and enforce its laws.[237] States enact rules of both civil and criminal jurisdiction. In this thesis jurisdiction refers to the scope of the penal codes of a state and the competence of its judiciary to hear criminal cases, regulated in either the criminal code or the code of criminal procedure. Whether the one or the other method is used, the effect is the same. It is thus a term for a state's legal competence to act. The term "jurisdiction" as used in extradition treaties, however, has been interpreted by some states (for instance, the United States) as refering to the state's territory.[238] This understanding is not applied in this thesis.

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[234] Palmer, 42.
[235] Gardocki, 57.
[236] Bedi, 65.
[237] The different forms of jurisdiction match the three branches of government, the legislative, the judicial and the executive, Gilbert, "Crimes sans Frontières: Jurisdictional Problems in English Law" (1993) in Dugard & Van den Wyngaert (eds) *International Criminal Law and Procedure* (1996), 102.
[238] Blakesly, "A Conceptual Framework...", 736.

The court hearing the criminal case must have jurisdiction over the subject matter as well as over the person.[239] Jurisdiction over the fugitive in person is accomplished where he is physically present, for instance, after his extradition from another country, though many states allow for *in absentia* trials in specific circumstances. Jurisdiction over the subject matter naturally depends on the law.

Extradition could also depend on jurisdiction. It is disputed to what extent jurisdiction is or should be part of the double criminality requirement. A few states, mostly common law states, read a jurisdictional requirement into the double criminality principle.[240] Even when the crimes match or the conduct as such is criminal in both states, the requested state may refuse extradition if it does not approve of the jurisdiction asserted by the requesting state.[241] In Anglo-American jurisprudence the locational aspect of double criminality is called "the special use of double criminality." In order to give a complete account of this aspect it is necessary to outline the basic factual and legal properties of criminal jurisdiction.

2 3 1 The Right to Establish Criminal Jurisdiction

According to international law, a state is free to decide the scope of its extraterritorial criminal jurisdiction, unless there exists an explicit prohibition in international law to the contrary. This doctrine was declared by the Permanent Court of International Justice in the *Lotus* case.[242] So far no prohibition has been proved in customary international law,[243] though some authors argue there are restrictions.[244] There is no uniformly accepted limit to states' right to establish extraterritorial jurisdiction.[245] The principle of freedom of determination on extraterritorial jurisdiction is a right of the sovereign state and confirmed by uniform state

[239] Henning, 349-350.
[240] Du Plessis, 676.
[241] Blakesley, "A Conceptual Framework...", 735, Gilbert, 86.
[242] Permanent Court of International Justice, Series A (collection of Judgments) No 10 (1927).
[243] Gardocki, 61.
[244] Aughterson says "[i]n international law, while it is apparent that there are some, undefined, limitations to the assumption of criminal jurisdiction, the onus of establishing such limitations is on the state seeking to refute jurisdiction," 47.
[245] Gilbert, 87.

practice.[246] Factors that may affect a state's domestic jurisdictional legislation are its economic situation, legal history and geographical isolation.[247]

2 3 2 Jurisdiction over Territorial Crimes and Extraterritorial Crimes

Extradition can be requested for territorial and extraterritorial crimes, provided the requesting state has jurisdiction. A state always has jurisdiction over crimes committed within its territory. This is a most fundamental aspect of state sovereignty.[248] The courts of the *loci delicti* will usually be best equipped to entertain the matter, as witnesses, evidence and the scene of the crime will be close.[249] The territorial state is most affected by the crime and is normally willing to spend sufficient resources on investigation and prosecution.

Extradition ensures that the state most affected by a crime or the state best equipped to prosecute, will try the fugitive. If a state requests extradition for a crime committed within its territory, the locational aspect of double criminality will not prevent extradition, as the requested state naturally accepts the requesting state's territorial jurisdiction.[250]

It is common, however, to exercise jurisdiction over crimes committed outside the state's territory. This is where the special use of double criminality may obstruct extradition; some states, mostly those that exercise mainly territorial jurisdiction, do not extradite for crimes committed outside the territory of the requesting state, unless they approve of the extraterritorial jurisdiction claimed by the requesting state.

States are divided in their opinions on what is an acceptable use of extraterritorial jurisdiction and it is not uncommon to hear states object to other states' exercise of extraterritorial jurisdiction. Common law states generally adopt narrower forms of jurisdiction than is permitted in most civil law states and international law.[251] British and United States

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[246] Gardocki, 57-59.
[247] Mullan points out the factors that caused the United Kingdom to develop a different jurisdictional jurisprudence than continental Europe, of which particularly the geographical isolation led to "non-, or rather, extraterritorial bases of jurisdiction," 18.
[248] Steven, 432, Gilbert in Dugard & Van den Wyngaert (eds), 102.
[249] Plachta, 95, La Forest, 16.
[250] Hafen says nearly all states recognize territorial jurisdiction, 220. It is not known whether any states do not recognize this principle.
[251] Aughterson, 46.

jurisdictional policies have been very isolationist, but the list of exceptions is growing.[252]

Critical voices have been raised against what some view as usurpation of jurisdiction, which leads to jurisdictional conflicts, and interference with the territorial state's internal affairs and infringement of its sovereignty. Extraterritorial jurisdiction may even be taken by some as a general lack of trust in and respect for the criminal laws and procedures of other states.[253] The proximity principle also motivates states to refrain from extraterritorial jurisdiction. The sixth amendment to the United States Constitution says the accused has the right to a "jury of the State and district wherein the crime shall have been committed."[254] Similar principles are stipulated in other states' legislation on criminal procedure, for instance, in the Norwegian criminal procedure.

Whether the custodian state adopts the special use of double criminality or not, extradition will rarely be granted for crimes committed in the custodian state itself. This is recognised in the European Convention on Extradition article 7 paragraph 1:

> "The requested Party may refuse to extradite a person claimed for an offence that is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory."

The principle that territoriality prevails over extraterritoriality is, however, permissive. For instance, where a civil war has left the judiciary with an excessive number of war crimes cases, it would be legitimate to transfer some cases to foreign courts or international courts.

2 3 3 Jurisdiction over Ordinary Crimes and International Crimes

Fugitives can be extradited for "ordinary" domestic crimes or international crimes. Double criminality applies irrespective of the type of crime. Whereas various forms of jurisdiction over ordinary crimes have developed in domestic legislation, which due to widespread acceptance and use have turned into principles of international law, international law has

[252] Stanbrook & Stanbrook, 22, Blakesley & Lagodny, 9.
[253] Gilbert in Dugard & Van den Wyngaert (eds), 102, 105.
[254] Blakesley & Lagodny, 17.

developed principles of jurisdiction with regard to international crimes.

Because there is no international criminal court adjudicating on international crimes in general,[255] these offences are subject to enforcement through national courts. However, most courts will only prosecute an international crime if it also amounts to a crime under domestic law. Furthermore, prosecution will only take place if the court has jurisdiction. Whether jurisdiction must be endorsed by domestic law, or whether endorsement by international law is accepted as well, is not clear. Most likely jurisdiction as prescribed by international law would not suffice for prosecution in most states. It could, however, suffice with regard to the special use of double criminality in extradition law, depending on each state's approach to the problem.

2 3 4 Extraterritorial Jurisdiction in Customary International Law

There are five general principles of criminal jurisdiction under customary international law. These are the principles of territoriality, nationality, passive personality, the protection principle and the universality principle.[256] Some authors refer to a sixth principle called the representation principle.[257] There probably is a vague hierarchy of these principles,[258] which applies where several states ask for the extradition of the same person, but it would not be of consequence for the rule of double criminality. It should be noted that other forms of extraterritorial jurisdiction are established in international conventions in order to avoid jurisdictional loopholes.[259]

The territoriality principle exists in a simple form that is completely territorial and in a

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[255] The jurisdiction of the newly established International Criminal Court is limited to the crime of genocide, crimes against humanity, war crimes, and the crime of aggression, see the Rome Statute of the International Criminal Court article 5.

[256] Steven, 432-433, Joyner & Rothbaum, 235-236, Aughterson, 48, Hafen, 215, Blakesley & Lagodny, 7.

[257] Van den Wyngaert, 49-50, Gardocki, 63, Cornils, 79, Gilbert in Dugard & Van den Wyngaert (eds), 109.

[258] Gardocki, 62.

[259] There exists no convention on criminal jurisdiction as such, but conventions on international crimes assume jurisdictional bases for specific crimes. For instance, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 gives a state jurisdiction where a hijacked plane lands with the hijacker still on board, even if it has no connections to the aircraft, offenders or victims, and where the offence did not occur within its airspace. This situation unleashes extraterritorial jurisdiction notwithstanding the fact that the state cannot claim jurisdiction according to customary international law.

qualified form that is semi-territorial.[260] It is universally accepted that states can exercise qualified territorial jurisdiction in the form of objective or subjective territoriality.[261] Objective territoriality means the offence was committed abroad, but its result or effect was felt within the territory. Subjective territoriality means the offence was committed within the territory, but its result or effect was felt abroad. There are many versions of these principles. The widest version of qualified territoriality is the doctrine of ubiquity, which is a combination of subjective and objective territoriality.[262] A far-fetched use of qualified territoriality may be perceived as a territorialisation of extraterritorial crimes.

The protective principle, also called *compétence réelle*, gives a state jurisdiction over crimes wholly committed abroad that purport to harm the vital and fundamental interests of the state,[263] such as state security, integrity, sovereignty and basic governmental functions.[264] What constitutes vital interests is naturally subject to interpretation. Some states include political, military and economic interests. Terrorist acts are often covered by this principle, as their aim is to sway foreign policy.[265] The protective principle is relied upon by most states.

The nationality principle, also called the active personality principle, gives a state jurisdiction over crimes committed abroad *by* its nationals and possibly also its residents. The principle rests on a double rationale: state sovereignty and international solidarity.[266] Through this principle a state controls its citizens by perpetually demanding allegiance. Because nationals benefit from the protection of the law even if they are abroad, they must also respect the law whilst being abroad. Acts of nationals are said to reflect on the image of the state. The nationality principle is usually accompanied by a prohibition of extradition of nationals, particularly in civil law countries.[267]

The passive personality principle gives a state jurisdiction over crimes committed abroad *against* its nationals. Proponents argue the welfare of the state depends on the welfare of its

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[260] Gilbert, 87. Assimilated with the physical territory, the landmass, of a state are internal waters, territorial sea and subsoil, air space above these areas, man-made structures on the continental shelf, and airplanes and ships flying the state's flag, La Forest, 45.
[261] Aughterson, 48, Hafen, 216.
[262] Gilbert in Dugard & Van den Wyngaert (eds), 116, Blakesley & Lagodny, 15.
[263] Aughterson, 52, Gilbert in Dugard & Van den Wyngaert (eds), 105.
[264] Steven, 433, Hafen, 217.
[265] Joyner & Rothbaum, 237.
[266] Van den Wyngaert in Jareborg (ed), 46.
[267] Cornils, 75, Gilbert in Dugard & Van den Wyngaert (eds), 103-104. A few common law countries also forbid extradition of nationals, for instance Australia, Aughterson, 33.

citizens.[268] This is one of the most disputed and least compelling principles of extraterritorial jurisdiction.[269] Civil law states like Germany, France and Belgium have adopted it,[270] whereas Norway has not. Common law countries are generally restrictive, but the United States has adopted it for crimes of terrorism, as some terrorist acts are directed against American nationals *because of* their nationality.[271]

The universality principle gives a state jurisdiction over crimes committed anywhere, irrespective of any connection between the offence and the prosecuting state. The principle depends only on the character of the offence.[272] The relevant offences, basically meaning international crimes such as war crimes and the crime of genocide, are so egregious and universally condemned, that all states have an interest in punishing the perpetrators.[273] The propriety of universal jurisdiction is controversial and it is by no means universally adopted.[274]

The representation principle, also called derived jurisdiction or subsidiary universal jurisdiction, is derived from other principles of jurisdiction, most likely the universality principle.[275] It is only effective where the prosecuting state represents another state, either where a request for extradition has been denied or where a state with more pressing claims to prosecution has requested the former state to undertake prosecution, for instance, according to the European Convention on the Transfer of Proceedings in Criminal Matters, 1972. The principle is based on international solidarity.[276] As one of the conditions of the representation principle is the presence of the fugitive in the prosecuting state's territory, one can hardly imagine a request for extradition based on the representation principle.[277] The representation principle will thus never be an issue under the special use of double criminality.

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[268] Hafen, 218.
[269] Aughterson, 51, Gilbert in Dugard & Van den Wyngaert (eds), 105, Van den Wyngaert in Jareborg (ed), 47.
[270] Van den Wyngaert in Jareborg (ed), 47.
[271] See the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986.
[272] Steven, 433, Gilbert in Dugard & Van den Wyngaert (eds), 109, Gardocki, 61.
[273] Steven, 433, 435-436, see also Hafen, 219. It seems to be a general view that universal jurisdiction is applicable to most international crimes and lies implicit in the obligation to extradite or prosecute. Without universal jurisdiction, international crimes are not truly international. Universal jurisdiction seems also to be accepted in international law where the location of the crime is on the high seas, as is often the case with piracy and drugh trafficking, Steven, 435. See also La Forest, 44.
[274] Belgium has become a pioneer, adopting the Act on the Punishment of Grave Breaches of International Humanitarian Law which gives Belgian courts universal jurisdiction over war crimes, crimes against humanity and genocide. Lemaître, "Belgium Rules the World. Universal jurisdiction over Human Rights Atrocities", *Jura Falconis* (2000-2001), 255.
[275] Van den Wyngaert in Jareborg (ed), 49.
[276] Cornils, 79.

2 3 5 Double Criminality as a Condition to Extraterritorial Jurisdiction

As it is up to the discretion of each state to enact jurisdictional rules, each state also decides which conditions, if any, should be attached to extraterritorial jurisdiction. A common delimitation is to require that the offence is criminal in both domestic law as well as in the state where the offence was committed. The requirement of double criminality for extraterritorial jurisdiction does not mean that one should actually apply the foreign law. Its function is merely procedural.[278] The rather confusing state of law where jurisdiction can be a condition to double criminality and double criminality can be a condition to jurisdiction, calls for an explanation.

A court whose jurisdiction is dependent on double criminality is obliged to examine whether the offence constitutes a crime in the law of the state where the crime was committed, i.e. *lex loci delicti*.[279] The only exception to this may be where jurisdiction is based on the representation principle. In this case, it has been argued, the law that needs examination is the law of the state whose request for extradition was denied.[280] In any case, the court is obliged to examine *foreign* law. This differs from double criminality as a requirement to extradition, where the court has to examine *domestic* law.[281]

The rationale of double criminality as a condition to extraterritorial jurisdiction is to a large extent concurrent with that of extradition. Different aspects of the rationale are in focus depending on the theory of extraterritorial jurisdiction involved.[282] First of all, the resentment against extraterritorial jurisdiction may be softened by taking the law of the territorial state into consideration. Secondly, the influence of the legality principle is profound. Naturally the

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[277] Gardocki, 64.
[278] Van den Wyngaert in Jareborg (ed), 44.
[279] Cornils, 73.
[280] Whereas the universality principle does not require double criminality, the representational principle does. Van den Wyngaert, 50, and Gardocki, 64, differ as to what country's law is relevant; *lex deprehensionis* or *lex loci delicti*. In theory both laws could be relevant, creating a requirement of triple criminality. No-one has so far argued in favour of such a solution.
[281] Van den Wyngaert in Jareborg (ed), 50.
[282] Double criminality does usually not apply to the protection principle as states tend to enact provisions protecting themselves and not other states, nor to the universality principle, due to the character of the crimes involved. The representation principle on the other hand requires that the act is punishable in the place where it was committed. This is also common with the nationality, passive personality and qualified territoriality principles. Van den Wyngaert in Jareborg (ed), 46-47, 52-54, Gardocki, 62-64.

legality principle is more closely attached to double criminality in jurisdiction than in extradition as the question of jurisdiction is part of the criminal case itself.

The legality principle makes no mention of the place of crime. Irrespective of where the crime was committed, domestic courts never apply foreign criminal law. The accused will be tried and, if found guilty, punished according to *lex loci fori*, even if the crime was committed abroad.[283] This is a manifestation of state sovereignty,[284] but could also be deduced from the legality principle. Does the legality principle imply that a person should not be prosecuted *lex loci fori* for behaviour that was not punishable not only *tempore delicti,* but also *loco delicti*?[285]

In other words, does the legality principle enshrine a requirement of double criminality? Though many states do not prosecute for crimes committed in another country unless they were also criminalised there, this is by no means absolutely and universally practised. Some states adopt this requirement for certain crimes only; others do not adopt this prerequisite at all and prosecute without regard to the foreign law. State practice shows that there is no requirement of double criminality in the principle of legality.

As in the case of extradition, double criminality in jurisdiction is subject to either an *in abstracto* or *in concreto* interpretation.[286] Van den Wyngaert says double criminality in both extradition and jurisdiction does not mean identity of norms or denominations, but that the conduct is punishable under the laws of both states.[287] This is an *in abstracto* interpretation. However, due to the close connection of double criminality in jurisdiction with the legality principle, Van den Wyngaert favours an *in concreto* interpretation. Also international solidarity among states and the interest of a global criminal justice policy favour the *in concreto* interpretation. The state prosecuting the case on behalf of the territorial state should only intervene to the extent that the conduct actually was punishable in the concrete

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[283] Gardocki, 57, Cornils, 70. Van den Wyngaert in Jareborg (ed) says the Romans applied foreign criminal law, but the French revolution and the rise of the nation-state abolished such practices, 45. Cornils says a few countries apply foreign criminal law, for instance Switzerland and Uruguay, who apply *locus criminis* on crimes committed by nationals abroad, and that Germany also did so until 1940, 70-71.

[284] Van den Wyngaert in Jareborg (ed), 45.

[285] Van den Wyngaert in Jareborg (ed), 54.

[286] Van den Wyngaert in Jareborg (ed), 51. Gilbert in Dugard & Van den Wyngaert (eds), says where double criminality is a requirement to jurisdiction "prosecution will only take place if the offence exists in similar form in both States, or if the alleged conduct would constitute a crime in both states," 103.

[287] Van den Wyngaert in Jareborg (ed), 43.

circumstances.[288]

Cornils says it is not necessary that the foreign definition of or reason for criminalising the offence corresponds exactly with that of domestic law, nor that the act is legally classified in the same manner, but the offence must be considered a criminal wrong and punishable in both countries. Prevailing opinion is that all substantive requirements of punishability must be fulfilled, meaning the court has to examine the foreign grounds of justification, excuse and exemption from punishment. It is unclear, however, whether impediment to prosecution in the foreign law is relevant.[289] For instance, the Norwegian Criminal Act 1902 requires that the offender can actually be punished in the foreign country in the concrete case. All impediments in the foreign law must be taken into consideration.[290]

In practice it is unclear which method prevails in the law of jurisdiction, but it will probably depend on the theory of extraterritorial jurisdiction in question and why double criminality was attached to the jurisdiction.[291] Whether the prosecuting state is pursuing its own interests or those of a foreign state is also relevant.[292]

A common additional requirement to double criminality in jurisdiction is the principle of *lex mitior*, which says if there is a difference in the penalty between the *lex loci delicti* and the *lex fori*, the lowest applies.[293] *Lex mitior* is, for example, stipulated in the Norwegian Criminal Act.[294] This is a rule of sentencing, applicable if the defendant is found guilty. Naturally this rule does not affect an extradition case, but could be described as a parallel to the minimum sentence prerequisite found in the extraditable crime and double criminality requirements in extradition law.

2 3 6 Jurisdiction as a Condition to Double Criminality in Extradition

States applying the special use of double criminality do not extradite unless they accept the

[288] Van den Wyngaert in Jareborg (ed), 53-54.
[289] Cornils, 73-74.
[290] Lov 22. mai 1902 Nr. 10 §§ 12 Nr. 4b, 13 (2).
[291] Cornils, 75, Van den Wyngaert in Jareborg (ed), 51-52.
[292] Cornils, 75.
[293] Van den Wyngaert in Jareborg (ed), 44. Double criminality as a condition to extraterritorial jurisdiction can furthermore be delimited by the seriousness of the crime, or to crimes committed by certain persons, 46.

jurisdictional basis asserted by the requesting state. Extradition can thus be denied even though the offence as such is criminal in both states. In conformity with international law, extradition can be refused where the requesting state claims a form of extraterritorial jurisdiction that actually exists in the requested state, but not in the requesting state itself. This is, however, not the point of the special use of double criminality. The question is whether the requested state accepts as such the jurisdictional base existing in and claimed by the other state as grounds for prosecution. The United Kingdom, Ireland and the United States are amongst those applying it.

If the requested state attaches importance to the location of the crime, it needs hypothetical and not actual jurisdiction.[295] If one would demand actual jurisdiction, a state could rather prosecute the alleged offender itself and there would be no point in extraditing. But a state can, of course, extradite where both states have actual jurisdiction over the specific case.

Whether a principle of extraterritorial jurisdiction is accepted in international law is, not the decisive point in an extradition proceeding.[296] The five main principles of extraterritorial jurisdiction are indisputably established in customary international law, and states recognise this fact, even though they have not implemented these principles in their domestic statutes themselves. For instance, in *Pinochet (3)*[297] the House of Lords accepted that the crime of torture for which extradition was requested was a crime of universal jurisdiction under customary international law, but that was not sufficient for satisfying the locational element of double criminality.[298]

The bone of contention is whether the requested state in its domestic law has implemented extraterritorial jurisdiction. It naturally depends on the judiciary of each state how strictly the special use of double criminality is to be interpreted. Due to its technical character there are many problems related to the special use of double criminality. The problems can be illustrated through three examples.

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[294] Lov 22. mai 1902 Nr. 10 § 13 (2).
[295] Mullan, says the test of double criminality "asks whether the requested state *would have* jurisdiction over *equivalent conduct* in *corresponding* circumstances, *i.e.* it is a test of hypothetical, not actual, jurisdiction," 25.
[296] Hafen, 219-220.
[297] *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No 3)* (1999) 2 WLR 824, 905 (H). See below for an account of the course of events leading to this case.
[298] Du Plessis, 678.

Where a national of state A commits acts of terrorism in state A against nationals of state B, which bases its jurisdiction on passive personality, and then flees to state C, the latter state, if it asserts strict territorial jurisdiction and adopts the special use of double criminality, can neither prosecute the offender nor extradite him to state B. The fact that terrorism is a crime of universal jurisdiction under international law would not affect state C's position. Only state A could obtain extradition, based on the territoriality principle, but many reasons may hinder such a request. Due to the special use of double criminality, the offender would go free and state C would be a safe haven.

This example can be complicated where state C has criminalised terrorism under the protection principle. B and C exercise extraterritorial jurisdiction over the pertinent crime on different grounds. Does the special use of double criminality include a correspondence of jurisdictional bases test in the concrete cases? And what if the requested state accepts the form of jurisdiction claimed by the requesting state, but not over the same crimes, for instance, where C exercises passive personality jurisdiction over murder, but not over terrorism? If the special use of double criminality requires a strict correspondence of jurisdictional bases, extradition cannot take place in these cases.

Another complicating factor is where the crime was never carried out, but had only reached the planning level. Nationals of state A plan to kill nationals of state B in state A, which would have damaging effects in state B, but are cut off by the police before the assassinations take place and then flee to state C. If state B only exercises objective territoriality, it cannot apply this jurisdictional basis in this case because the effects of the crime never realised. Intent to effectuate the crime does not fulfil the objective territoriality principle, unless conspiracy is a separate offence. The special use of double criminality could here obstruct extradition.

The first question that needs examination is whether the requested state has implemented extraterritorial jurisdiction over the crime in question in its domestic law at all. In the Irish Supreme Court case *Aamand v. Smithwick*[299] Denmark sought extradition of a Danish national charged with narcotics offences committed on the high seas. Denmark based jurisdiction on the nationality principle. Drug-related crimes are criminal in Ireland, but not on an

[299] *Aamand v. Smithwick* [1995] 1 ILRM 61.

extraterritorial basis. The Irish Supreme Court based its decision on the European Convention on Extradition article 7 paragraph 2, which reads:

> "When the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned."

Despite the permissive wording of the article, the court interpreted it to be mandatory. The Irish Extradition Act 1965 incorporating the convention, was held to be "a penal statutory code involving penal sanctions on an individual and must therefore be construed strictly as is contended in the sense that not by anything other than unambiguous provision should a person be subjected to detention and extradition."[300]

The request for extradition was turned down on the grounds that Ireland does not exercise extraterritorial jurisdiction over narcotics offences. If Ireland had exercised jurisdiction over drug-related offences based on the nationality principle, Aamand would have been extradited. The court does not, however, indicate how the problem would have been solved if Ireland had exercised extraterritorial jurisdiction on a basis other than nationality.

The Explanatory Report to the European Extradition Convention says article 7 paragraph 2 was inserted to respect states whose laws do not permit extradition for acts that were committed outside the territory of the requesting country. The special use of double criminality, however, is not made mandatory by the convention. Furthermore, if the domestic extradition statute of a state does not stipulate the locational element of double criminality, that element cannot be used as a bar to extradition.

The special use of double criminality is practised in the United Kingdom too. The Extradition Act 1989 states that extradition shall be granted for extradition crimes, which are defined in section 2 partly in terms of double criminality, which again is partly defined according to the place of commission. This means that the courts have to consider the jurisdictional aspects of

[300] Aamand case (supra) 67.

double criminality. Section 2 reads:

(1) In this Act, except in Schedule 1, "extradition crime" means

(a) conduct in the territory of a foreign state, a designated Commonwealth country or a colony which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, Commonwealth country or colony, is so punishable under that law;

(b) an extra-territorial offence against the law of a foreign state, designated Commonwealth country or colony which is punishable under that law with imprisonment for a term of 12 months, or any greater punishment, and which satisfies

(i) the condition specified in subsection (2) below; or

(ii) all the conditions specified in subsection (3) below

(2) The condition mentioned in subsection (1)(b)(i) above is that in corresponding circumstances equivalent conduct would constitute an extra-territorial offence against the law of the United Kingdom [punishable similarly]

(3) The conditions mentioned in subsection (1)(b)(ii) are

(a) that the foreign state, Commonwealth country or colony bases its jurisdiction on the nationality of the offender;

(b) that the conduct constituting the offence occurred outside the United Kingdom; and

(c) that, if it occurred in the United Kingdom, it would constitute an offence under the law of the United Kingdom punishable with imprisonment for a term of 12 months or any greater punishment.

Section 2(1)(a) deals with territorial crimes in the requesting state and section 2(1)(b) deals with extraterritorial crimes against the law of the requesting state. According to the latter section, an extraterritorial offence against the law of a foreign state will be an extraditable crime, if an equivalent conduct in *corresponding* circumstances *would* constitute an extraterritorial offence against the law of the United Kingdom. The prerequisite "equivalent conduct" is a question of substantial interpretation of double criminality.

The courts accept the claims of other countries to exercise extraterritorial jurisdiction to the extent that in corresponding circumstances they would exercise extraterritorial jurisdiction themselves.[301] The crucial point is the meaning of "corresponding circumstances", or in other words, whether *any* extraterritorial jurisdiction would suffice, or whether the *same* extraterritorial jurisdiction is required. Aughterson argues the latter applies as "[i]n the United Kingdom generally jurisdiction is determined according to the standards of domestic law. Thus, the issue is whether the United Kingdom courts would have jurisdiction if the conduct in question had the same nexus to the United Kingdom as to the state seeking extradition."[302]

A question of extraterritorial jurisdiction as part of double criminality in extradition was raised before the House of Lords in *Pinochet (3).* In 1998 Senator Pinochet, Chilean head of state from 1973 to 1990, visited the United Kingdom to undergo surgery. Spain requested his extradition for crimes committed during his reign, most likely with the government's knowledge, acceptance or instigation.[303]

The question of "extraditable crimes" slipped the attention of the Divisional Court, holding that Senator Pinochet as a former head of state was entitled to immunity. The decision was appealed and in *Pinochet (1)*[304] the House of Lords decided that Senator Pinochet could be extradited to Spain because his immunity as former head of state did not cover acts of international crimes. In *Pinochet (2)*[305] this decision was set aside on grounds that the Appellate Committee was improperly constituted.[306]

A differently constituted House of Lords heard the case again in *Pinochet (3).* The charges against Senator Pinochet were widened, causing the focus to turn on the law of extradition and the requirement of "extraditable crimes." The Law Lords only needed to discuss extradition for the crime of torture.[307] Crimes of torture allegedly took place during and after

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[301] Stanbrook & Stanbrook, 22.
[302] Aughterson, 44.
[303] Du Plessis, 671-672.
[304] *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (1998) 4 AII ER 936.
[305] *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* (1999) 2 WLR 272.
[306] Lord Hoffmann, who had been voting in favour of extradition, had an interest in Amnesty International which supported extradition. Lord Hoffmann was a Director of Amnesty International Charitable Ltd, du Plessis, 674-675.
[307] Home Secretary Jack Straw ruled on December 9, 1998, on what charges could proceed before the Lords, Wilson, "Prosecuting Pinochet in Spain," *http://www.wcl.american.edu/pub/humright/brief/v6i3/pinochet.htm.* Originally, Spain charged him *inter alia* with acts of torture, hostage taking, genocide, terrorism and the crime of

Pinochet's period as head of state, in Chile and in Spain, Portugal, Italy and France. Most of these alleged crimes had no relations with Spain, but Spanish courts exercised universal jurisdiction over the crime of torture.[308]

After ratification and incorporation, the 1984 Torture Convention[309] came into force in the United Kingdom in 1988. The House of Lords interpreted this convention to oblige the parties to provide the courts with universal jurisdiction, making torture a crime of extraterritorial jurisdiction in the United Kingdom. The locational aspect of double criminality was in this case satisfied.[310] Both Spain and the United Kingdom exercised universal jurisdiction over the crime of torture. The decision gives no clues as to how the case would have been solved had the United Kingdom exercised extraterritorial jurisdiction on another basis.

In another case before British courts on the question of the locational aspect of double criminality, *Reyat*,[311] the fugitive was wanted in Canada for planting a bomb in a suitcase on a plane; it exploded in a Japanese airport, killing two baggage handlers.[312] Canada requested Reyat's extradition from the United Kingdom. Canada based her jurisdiction on the subjective territoriality principle because the bomb had been made and planted on the plane in Canada. According to the special use of double criminality, the British court had to consider whether it would have jurisdiction had the offence taken place in the United Kingdom, resulting in the deaths in Japan. The Divisional Court avoided this question and instead pointed out that the United Kingdom actually exercised jurisdiction based on the nationality principle as Reyat was a subject of Her Majesty.[313] Reyat was extradited to Canada. In reality, the court allowed extradition for an extraterritorial crime based on a different jurisdictional basis than the requesting state.

The United States also adopts the special use of double criminality. In 1873 the United States refused to extradite a Prussian subject to Prussia for offences committed in Belgium, because

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"forced disappearance." Because of the double criminality principle, these charges were not followed up in the extradition proceedings.

[308] Wilson, "Prosecuting Pinochet: International Crimes in Spanish Domestic Law", *Human Rights Quarterly* p. 927 (1999), 951, 964.

[309] United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment, 1984.

[310] Du Plessis, 679.

[311] Unreported, QBD, 1989.

[312] This case is described in Gilbert in Dugard & Van den Wyngaert (eds), 111.

[313] Gilbert in Dugard & Van den Wyngaert (eds), 112.

the United States did not accept the nationality principle exercised by Prussia. The term "jurisdiction" in the extradition treaty was interpreted to be the territory of Prussia.[314] In 1940 the United States refused to extradite an American national to Mexico for crimes committed against a Mexican national. The United States did not accept the passive personality principle exercised by Mexico.[315]

The special use of double criminality in these early cases indicates a strict correspondence of jurisdictional bases. Later the United States apparently accepted any jurisdictional basis asserted by the requesting state,[316] possibly with the exception of the protective principle, due to this principle's intrusiveness.[317] Canada also seems to attach importance to the jurisdictional basis asserted by the requesting state.[318]

Not all common law countries adopt the special use of double criminality. The Australian extradition statute makes no reference to the special use of double criminality and the magistrate cannot consider this issue when hearing an extradition case. The Attorney General may, however, take this aspect into consideration when exercising his discretion whether to extradite.[319]

The South African Extradition Act 67 of 1962 says a foreign state may request extradition for crimes committed within its *jurisdiction*. Jurisdiction could be equivalent to the territory of the state or the state's legal competence to prosecute. Du Plessis says the jurisdiction is presumably territorial, but due to the increasing acceptance of extraterritorial jurisdictions in international law, one cannot rule out that extraterritorial forms of criminal jurisdiction will be included in the provision.[320] Some statutes like the Prevention of Organised Crime Act 121 of 1998 also provide for extraterritorial jurisdiction.

Civil law countries also adopt the special use of double criminality. France, for instance, adopts the special use of the double criminality principle. In 1976 France refused to extradite one Abu Daoud to Israel for crimes committed against Israeli nationals in Germany, because

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[314] The case *In re Stupp*, 23 F. Cas. 281 (S.D.N.Y. 1873), is described by Blakesley & Lagodny, 32-33, Blakesley, "A Conceptual Framework...", 736.
[315] The case is described by Blakesley, "A Conceptual Framework...", 747-748, and Hafen, 223.
[316] Aughterson, 44.
[317] Hafen, 221.
[318] http://www.lawsmart.com/canada/criminal/extradition.htm.
[319] Aughterson, 45.

France did not exercise the passive personality principle.[321] France apparently adopted a strict test of corresponding jurisdictional bases. A similar approach seems to prevail in Austria. Conduct that occurred outside the territory of the requesting state is viewed as if it occurred outside Austrian territory. A corresponding extraterritorial jurisdiction would have to be found in Austrian criminal law.[322]

German jurisprudence, on the other hand, is unclear on the locational aspect of double criminality. Apparently a court once applied it in 1933. German law, however, has no prohibition on extradition for offences committed outside the territory of the requesting state. It seems that German courts will not apply the special use of double criminality.[323] This corresponds with the Explanatory Report to the European Extradition Treaty article 7 paragraph 2, which says the locational aspect can only be invoked by the requested state if it actually has implemented such a rule in domestic extradition law.

The immediate conclusion to be drawn from this chapter is that many common law states and a few civil law states apply the special use of double criminality. It seems to be uncertain whether *any* extraterritorial jurisdictional principle will qualify or whether it has to be an *identical* jurisdictional principle. Case law on the issue is sparse. A few cases seem to favour a correspondence of jurisdictional bases and this is also the prevalent view in legal literature.[324] The special use of double criminality thus generally requires a correspondence of extraterritorial jurisdictional bases over the same crime. However, Gilbert argues that if two states recognise the authority to prosecute an offender on different grounds, that should not be of any consequence and the requested state need only examine whether it would have jurisdiction at all.[325]

2 3 7 An Evaluation of the "Special Use" of Double Criminality

The divergent systems of civil law and common law are said to complement one another.

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[320] Du Plessis, 684-685.
[321] Blakesley, "A Conceptual Framework...", 745, This case is described in chapter 2 4.
[322] Palmer, 42.
[323] Blakesley & Lagodny, 59-63.
[324] See for instance Hafen who says jurisdiction based on passive personality is likely to obstruct extradition under the locational aspect of double criminality as not many states adhere to it, 223.
[325] Gilbert, 103-104.

Whereas civil law states exercise broad forms of extraterritorial jurisdiction predominantly based on the nationality of the offender and do not extradite their nationals, common law states only rarely exercise extraterritorial jurisdiction but do, on the other hand, extradite their nationals. Together these systems in theory ensure that a fugitive does not escape trial. However, where not only prosecution but also extradition unleashes questions of jurisdiction, this may disrupt the apparent equilibrium. The state can neither prosecute nor extradite on the same grounds, namely the lack of extraterritorial jurisdiction in domestic law.

The special use of double criminality is disputed because it weakens international co-operation in criminal matters and makes the custodian states a safe haven for fugitive criminals. Ireland became a shelter for John Poul Aamand as he could neither be prosecuted in Ireland nor be extradited to Denmark. One may ask why some states are willing to become a safe haven for perpetrators whose conduct is criminal in both domestic law and the law of the requesting state, and over which the requesting state has jurisdiction according to both its domestic and international law.

The motives behind the use, or rather non-use, of extraterritorial jurisdiction could provide an explanation. States opposing extraterritorial jurisdiction may feel provoked and could demonstrate against the exorbitant jurisdiction asserted by the requesting state by denying extradition. The denial is politically motivated and has a punitive element. The dangers of construing technical loopholes desirable from a political point of view, are that doing so will not solve the crime but favour the criminal, and the general trust in the ability of the legal system to achieve justice will diminish.

As early as 1888 Clarke argued against extraterritorial jurisdiction on the basis that it would be inconvenient to enforce, prosecution would be difficult and expensive and it would be impossible for an innocent man to provide a satisfactory defence. These arguments were put forward in a discussion of whether prosecution based on extraterritorial jurisdiction should substitute extradition, which were seen as two independent solutions to the transnational crime problem. Clarke argued that extraterritorial jurisdiction does not remove the evil and "being made a resort for foreign malefactors is as great a mischief to any country as the escape of offenders against its own laws."[326] The argument shows that the safe haven risk was

[326] Clarke, *A Treatise upon the Law of Extradition* 3 ed (1888), 13-14.

by no means ignored by contemporary scholars, but was used as an argument in favour of extradition and against extraterritorial jurisdiction. The special use of double criminality, a principle that obviously then developed later, represents a retrograde movement by actually creating safe havens.

The arguments used against applying extraterritorial jurisdiction can be turned against the special use of double criminality. By declining extradition by reason of not accepting the particular principle of jurisdiction, though the conduct in question is clearly criminal, the requested state could be accused of distrusting and disrespecting the foreign jurisprudence. States have developed different systems of law and procedure, and the methods and speed of law enforcement vary; this must be borne in mind when dealing with questions in international criminal law.

It is obvious that the special use of double criminality submits to the fundamental principle of criminal jurisdiction. However, the court deciding on extradition is first of all deciding on a procedural matter and, secondly, it is accepted that, where the special use of double criminality is applied, the court only needs hypothetical jurisdiction. It should suffice that only the court deciding the criminal case has jurisdiction.

The special use of double criminality, particularly a strict test of corresponding jurisdictional bases, hampers international co-operation in bringing criminals to justice.[327] One should thus ask whether the special use of double criminality benefits the rationale behind the double criminality principle.

It has been established that protecting the individual is an important factor of the double criminality principle. All individuals within a state's territory should be treated equally. For instance, if Aamand had an Irish co-criminal, it would seem illogical and unfair that the Irishman would go free because Ireland does not exercise jurisdiction over narcotics offences on the high seas, whereas the Dane would be extradited to Denmark to stand trial. The allocation of punishment would be arbitrary. On the other hand, the Dane has broken the law of Denmark, whereas the Irishman has not. The special use of double criminality is definitely desirable from the fugitive's point of view, but it does not protect any fundamental human

[327] Williams, 617.

rights. Individual rights are sufficiently protected through the substantive double criminality rule.

Some would argue the reciprocity principle is ensured through an equivalence of jurisdictional bases test. The requested state refuses extradition where it could not ask for extradition from the requesting state under corresponding circumstances. But where the requesting state does not apply the special use of double criminality, this reasoning is void because the requesting state would extradite without regard to the jurisdictional aspect. It is actually the state that applies the special use of double criminality that breaks the reciprocity principle.

According to the sovereignty rationale, a state should not be forced to restrict the freedom of a person whose acts are not criminal. Taken to the extreme, a state would not take any measures against foreign fugitives unless they had violated domestic law. But states do not protect their sovereignty to such extremes as, for instance, the increasing *in abstracto* interpretation bears witness to. It is accepted that the special use of double criminality requires hypothetical jurisdiction and not actual jurisdiction. The special use of double criminality strengthens the state's feeling of sovereignty. Where identical jurisdictional bases are required, the sovereignty principle is practised to the full.

A strict test of correspondence of jurisdictional bases is difficult to apply in practice. The five general principles of jurisdiction recognised in international law represent broad and inaccurate categories. States may implement and define these principles differently. This is particularly prevalent for qualified territorial jurisdiction. Where the conceptualisation differs, there is not really an equivalence of jurisdictional bases.

For instance, the United States 1986 Anti-Terrorism Act adopts a form of extraterritorial jurisdiction that is a combination of the protective principle and the passive personality principle. It covers terrorist offences directed against American citizens abroad and intended to coerce, intimidate or retaliate against the government or civilian population. A requirement of corresponding jurisdictional bases could obstruct extradition to the United States for crimes based on this unique bipartite jurisdictional basis.

Conditions attached to jurisdiction result in extensive divergence in scope and content.

Though the nationality principle is universally accepted, each state defines and applies it differently.[328] Where criteria for becoming a national in one state may differ radically from another state, this could lead to one state not accepting a person's nationality, and hence to not accepting the other state's jurisdiction based on nationality. Similar problems relate to all principles of extraterritorial jurisdiction.

Furthermore, the jurisdiction of the requesting state may depend on an interpretation by its domestic courts. This could mean that the requested state has to construe legal sources in the requesting state, which is an operation that the requested court clearly is not qualified for. These difficulties led courts to abstain from examining foreign law under the extraditable crime requirement.

The tendencies in international extradition law to adopt the eliminative method and an *in abstracto* interpretation suggest a focus on the wrongfulness of the conduct rather than differing legal technicalities. Where a statute obstructing international co-operation in criminal matters is not justified from a human rights perspective, but purports to protect the state, it contributes towards disturbing the general faith in justice and the legal system.

2 4 The Temporal Question: Retroactivity

The rule of non-retroactivity comes from the legality principle in criminal law. Generally it applies only to substantive provisions and not to procedural provisions.[329] However, what constitutes a substantive or a procedural issue varies in different states, particularly because the provisions may appear in the same statute.

The question of non-retroactivity in criminal law has been transferred into the law of extradition. The temporal aspect of double criminality is concerned with the potential retroactivity of the extradition law. In extradition law one must distinguish between the retroactivity of the *crime* and the retroactivity of its *extraterritoriality*. The former refers to the legality principle and the substantial rule of double criminality, whereas the latter refers to the principle of criminal jurisdiction and the special use of double criminality. Statutes of

[328] Hafen, 222.
[329] Lemaître, 266.

limitation, etc. may also in theory be subject to non-retroactivity. But in practice they are not. Such rules are first of all undoubtedly procedural and, secondly, they are ignored where the requested state engages an *in abstracto* interpretation.

Extradition treaties and domestic statutes usually omit to specify at what point in time the conduct was criminalised in the requested state or, if the special use of double criminality is adopted, at what time extraterritorial jurisdiction was adopted in the requesting state. Courts have addressed both questions in extradition cases.

2 4 1 Retroactivity of the Crime

The prohibition against retroactive punishment in the legality principle in criminal law has gained a parallel in the double criminality principle in extradition law. Double criminality could be interpreted as prohibiting extradition where domestic law did not criminalise the conduct at the time it was committed, at the time of the extradition request, or even on the extradition date itself. The last alternative is unlikely to become an actual problem, though one could imagine a situation where conduct is criminalised after an extradition request, because the authorities wish to extradite a specific person.

It is uncertain whether the pertinent criminal provision in the asylum state ought to precede the actual events. At the latest the offence must be criminal in the requested state at the time of the extradition request. Rezek says this interpretation of double criminality can be accepted without any outrage to the general principles of penology.[330] Bedi shares this view, saying that the question of whether an extraditable crime comes within the ambit of the treaty depends on the domestic law of the two states at the time extradition is applied for.[331] Unless an extradition instrument expressly stipulates the time of criminalisation, scholars seem to favour the date of the extradition request. The Inter-American Convention on Extradition 1981 is one of the few international instruments on extradition that is clear on the point of time of double criminality, demanding that the offence be punishable in both states at the time of commission.[332]

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[330] Rezek, 187-188.
[331] Bedi (1966), 75.

The United Kingdom Extradition Act 1989 does not specify at what time the conduct has to be criminal, and thus this question has been construed by the court. In *Pinochet (3)* the question was whether an extraditable crime, in the sense of section 2 in the Extradition Act 1989, needed to be a crime at the date it was committed or at the date of the extradition request. The Divisional Court had not decided on this question, though the issue had been raised by Lord Bingham CJ, who came to the conclusion that the date of the request was the decisive point in time. The House of Lords construed the Extradition Act and the Extradition Convention and concluded that the conduct had to be a crime under English law at the date of the conduct for it to be an extraditable crime. There were, however, dissenting views in the decision. It was held

> "that the requirement in section 2 of the Act of 1989 that the alleged conduct which was the subject of the extradition request be a crime under United Kingdom law as well as the law of the requesting state was a requirement that the conduct be a crime in the United Kingdom at the time when the alleged offence was committed, that... extraterritorial torture did not become a crime in the United Kingdom until section 134 of the Criminal Justice Act 1988 came into effect on 29 September 1988; and that, accordingly, all the alleged offences of torture and conspiracy to torture before that date and all the alleged offences of murder and conspiracy to murder which did not occur in Spain were crimes for which the applicant could not be extradited."[333]

Both the date of conduct and the date of the extradition request as crucial points of criminalisation, can be justified. A state complying with an extradition request acts in the interest of the requesting state and of the international community in general. The two affected states apply their respective laws in order to bring a person to trial. Because of this close co-operation, the two states' territories could be seen as one entity. It could thus be demanded that all aspects of the requested state's criminal law apply to this territorial entity. This philosophy may lead to states adopting the rule that the crime had to be criminal on the day it was committed not only in the requesting state but also in the requested state. Adopting the same standard as the prosecuting state may be influenced by the notion of state sovereignty as well as a desire to give the fugitive maximum protection.

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[332] Plachta, 113.
[333] 828 D.

Protecting the fugitive does not mean, however, that the date of criminalisation in the custodian state had to be earlier than the date on which the crime took place in another country. The legality principle in criminal law protects the individual by ensuring that all subjects within a state can predict their legal position and that nobody is punished for conduct that was not criminal at the time it was performed. When the fugitive criminal flees to another state, he has already broken the law of one state. His need to predict his legal situation is no longer present. As the state is not prosecuting the offender itself, the legality principle does not demand criminalisation at the time of conduct. It could thus suffice for the requested state to demand that the conduct is criminal at the time of the extradition request. The fugitive's rights are sufficiently protected by substantive double criminality, irrespective of when the criminalisation took place.

State sovereignty is not infringed upon by either cut-off date for non-retroactivity. Irrespective of the time of criminalisation, states involved in extradition do so because the relevant conduct actually is criminal in domestic law. Through the *in abstracto* interpretation, the requesting state only has to satisfy itself of theoretical criminality.

2 4 2 Retroactivity of Jurisdiction

It is not certain whether the fundamental rule of jurisdiction in criminal law includes a prohibition on retroactivity in the same way as the legality principle includes a prohibition on retroactivity.[334] Rules of jurisdiction could be described as both substantive and procedural rules. They decide the scope of the crimes as well as the judges' competence to act. Scholars disagree on these rules and hence also their retroactivity. The highest court in Belgium, the Cour de Cassation, has held that provisions extending jurisdiction do not apply retroactively.[335]

The question of retroactivity of extraterritorial jurisdiction has been transferred to extradition law. When a court adopting the special use of double criminality has approved the extraterritorial jurisdiction exercised by the requesting state, the next question is when that

[334] Lemaître, 266.
[335] Lemaître, 269.

particular form of extraterritorial jurisdiction was introduced into the domestic law of the requesting state. Unless this is specifically stated in the statute, it is up to the judiciary to decide whether to interpret a prohibition against retroactivity of extraterritorial jurisdiction in the special use of double criminality.

In *Pinochet (3)* the House of Lords applied a rule of non-retroactivity of extraterritorial jurisdiction. It was held that the crucial point was when the courts acquired extraterritorial jurisdiction. The Lords ruled that the principle of double criminality barred extradition for torture committed before 8 December 1988, when torture became a crime of universal jurisdiction in the United Kingdom. Pinochet could only be extradited for extraterritorial acts of torture that occurred after that date. This decision is suspected of having been motivated by ulterior considerations.[336]

France has introduced a stricter prohibition against retroactive extraterritorial jurisdiction in the special use of double criminality in extradition law. In 1976 Israel sought the extradition of Abu Daoud, a non-Israeli, from France in respect of crimes committed against Israeli nationals in West Germany.[337] Abu Daoud was the planner of the kidnapping – which turned into the killing – of eleven Israeli athletes during the Munich Olympics in 1972.[338] In 1976 he was arrested in France. Israel wanted his extradition for these murders and based its jurisdiction on the passive personality principle. France adopted a version of the passive personality principle in its domestic criminal law in 1975,[339] four years after the events in Munich, but before the extradition request from Israel. France refused to extradite him on grounds that at the time the crime took place France did not exercise the passive personality principle.[340]

This decision has been criticised. The extreme technical construction of the double criminality principle gave France a legal loophole justifying the refusal. West Germany also wanted Abu

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[336] Du Plessis, 680.
[337] Mullan, 27, Hafen, 223.
[338] LoLordo, "Abu Daoud tells all about his role in Munich operation", *The Star. Jordan's political, economic and cultural weekly, Online, 1 July 1999,* www.archives.star.arabia.com, says "Abu Daoud's admission that he planned the Munich operation surfaced with the publication this year [1999] of his autobiography, 'Palestine: From Jerusalem to Munich'."
[339] Gilbert in Dugard & Wyngaert (eds), 105.
[340] Mullan, 27, Blakesley, "A Conceptual Framework...", 745.

Daoud, but French authorities acted swiftly and Abu Daoud was set free.[341] Daoud's hurried release may indicate that the denial of extradition was politically motivated. It has been claimed that France acted in fear of terrorist retribution and concerns about Arab oil threats.[342]

States adopting the special use of double criminality only need hypothetical extraterritorial jurisdiction. Where a state requires *any* form of extraterritorial jurisdiction, a prohibition of its retroactivity would strike one as odd, because it is a very casual basis for the special use of double criminality. Where a state requires a correspondence of jurisdictional bases, the chances are high that it requires non-retroactivity. But, as always, states are free to decide on their interpretation of the double criminality requirement.

2 5 Concluding Remarks

The discussions on the substantive, locational and temporal aspects of the double criminality principle show that there are wide discrepancies in the interpretation of this requirement even among geographically, politically and historically close countries. It may be possible to distinguish between common law and civil law countries, particularly on questions related to extraterritorial jurisdiction. However, extradition practice is not *always* related to this classification of jurisdictions.

Due to manifold variations of the double criminality principle, it is not possible to point out a predominant line of interpretation that most states adhere to. The principle is under constant development through new statutes, treaties and case law. In the future different approaches to this principle will probably tend to become more similar. International extradition law will gradually become more refined and uniform, the intensity of international co-operation will increase, and courts interpreting double criminality will more often seek guidance from foreign court decisions.

Attempting to define a general rule of double criminality that prevails today or distinguishing a middle course that states should adhere to, would prove to be difficult. It is more fruitful to

[341] LoLordo says the French court released Abu Daoud before German authorities could seek his extradition. *Human Rights Watch Report*, "International Justice", www.hrw.org, says "when Abu Daoud, accused of the massacre of Israeli athletes in the 1972 Munich Olympics, was apprehended in France in 1976, Paris gave short shrift to extradition requests from West Germany and Israel, freeing him only four days after his capture."

distinguish the main approaches in the international community today and to examine what line of interpretation most widely supports the rationale behind the double criminality principle. Though the double criminality requirement most likely had its origin in states' desire to protect the integrity of the requested state's domestic legislation, it is indisputable that it is justified today on the basis of a desire to protect the fugitive from unfair encroachments on his freedom.

Though state sovereignty is still a dominant feature of international criminal law, it has become common to abstain from protecting sovereignty too strongly so as to co-operate with other states in ensuring domestic and international law and order. Multilateral conventions have been created on international crimes and criminal procedure. With the establishment of the International Criminal Court, it is more evident than ever that international criminal law is progressing rapidly. Extradition is in the interest of the international community of states in general and when double criminality is strictly interpreted, it represents a strong obstacle in the extradition process. Some states thus allow for a more liberal interpretation of double criminality, though not its total abolition.

This development is not devoid of sporadic retrograde movements. Some cases may be taken as proof of the fact that states are still reluctant to give up too much sovereignty at any one time. Where the rule of double criminality blocks extradition on a technicality, the case will most likely be suspected of being politically motivated by a desire to protect state sovereignty or for other ulterior motives that are irrelevant to the case. States should, like the defendant, have the benefit of the doubt; a strict interpretation of double criminality has the protection of the fugitive's rights as a primary concern.

The development of a more liberal international extradition law has called for a stronger protection of the individual affected by the process. The interpretation and importance of the double criminality principle in future, lies in finding a balance between international co-operation in criminal matters and the protection of the individual.

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[342] Joyner & Rothbaum, 249.

3 The Status of Double Criminality in International Law

3 1 Introduction

Chapter 2 focused on the principle of double criminality in treaties, domestic legislation and case law. Double criminality is part of international law where it is adopted by conventions. This chapter examines whether it has become part of general international law. The question is whether it has become a rule of customary international law or a general principle of law.

The principle of double criminality is a well-established principle in extradition procedures and is included in most domestic and international instruments on extradition.[343] In this respect it is a universal principle. Scholars on international criminal law furthermore describe the principle as a fundamental principle of extradition law.[344]

A few extradition instruments do not adopt the double criminality requirement, such as the Nordic Extradition Scheme.[345] Due to the similarity of the criminal systems and the close cultural, social, historical and political ties between Finland, Sweden, Denmark, Iceland, and Norway, these countries extradite despite lack of double criminality.[346] Double criminality is furthermore not required for rendition between certain commonwealth countries such as, for instance, in Canada's Fugitive Offenders Act.[347] The criminal laws of some groups of countries are very similar, and it is unlikely that a crime for which extradition is requested will not be criminal in the requested state.

The double criminality requirement has in a few situations become an unwanted barrier to extradition to both the requesting state and the requested state. Some new treaties adopt it

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[343] Hafen, 194, Plachta, 112, Williams, 581.
[344] For instance Plachta says it is one of the most important and characteristic features of extradition, 112.
[345] Träskman, "Should we take the Condition of Double Criminality Seriously?" in Jareborg (ed), *Double Criminality. Studies in International Criminal Law*, 140.
[346] Iceland was a province of Denmark for more than 500 years. Norway was a province of Denmark for more than 400 years and then a province of Sweden for close to 100 years before gaining its independence in 1905. During and after these unions these countries' legislations were largely identical. For instance King Christian V law of April 15th 1687 is still valid in both Norway and Denmark.
[347] Williams, 584.

only where the requested state requires it.[348] Certain crimes are so serious that states are willing to disregard established rules and procedures in order to counteract these crimes. This is probably the case with the ever-increasing crimes of drug-trafficking and terrorism, whose global effects make them a priority issue for all states. Due to these new developments it is necessary to evaluate the status of the double criminality principle in general international law.

The legal status of the principle in international law is disputed. Naturally, where double criminality occurs in a convention it forms part of international treaty-law. The question is whether double criminality should be complied with where the treaty has omitted the principle. Has the principle become part of customary international law or a general principle of law? These two sources of law are binding on all states irrespective of their acceptance. If double criminality is part of general international law, it must be tacitly included in treaties and domestic legislation where it is omitted.[349]

Opinions by legal scholars on the status of double criminality in international law differ. Some advocate the view that double criminality is not a legally binding rule of international law, unless stipulated in a treaty. Aughterson says "[d]ouble criminality, though not a mandatory rule of international law, is a principle which is generally adopted by countries when enacting municipal extradition laws or entering into treaties. Its existence and scope, therefore, is governed by the terms of the relevant legislation or treaty."[350] This view is possibly supported by the decision of *Factor v. Laubenheimer*, where it was held that "the principles of international law recognize no right to extradition apart from treaty."[351]

However, due to the almost universal use and acceptance of the double criminality principle, quite a number of authors claim it has become a rule of customary international law or a general principle of international law. When discussing the principle of double criminality as a possible customary rule or a general principle of law, one must evaluate other formal sources of law as well as other factors that may enlighten the issue such as, for instance, non-

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[348] Hafen, 191.

[349] Establishing the legal status of double criminality in international law is not only essential to international extradition law, but also to certain countries' domestic law, where customary international law forms part of the law of the land. The South African Constitution of 1996 section 232 says "Customary international law is law in the Republic unless it is inconsitent with the Constitution or an Act of Parliament."

[350] Aughterson, 60. Also Williams, 582, and Blakesley & Lagodny, 44, say extradition depends on the substantive conditions laid down in treaties and domestic legislations.

binding soft law.

3 2 Is Double Criminality a Rule of Customary International Law?

Where a rule of law is part of both treaty and custom, a state cannot terminate its customary obligation by withdrawing from the treaty. This was established by the International Court of Justice in 1986.[352] On the other hand, a treaty may be deviated from where certain provisions have been displaced or amended by a subsequent custom, where this effect is recognised by the states. Presumably, a treaty contrary to a custom would be void or voidable.[353] This view is disputable. Some argue that, where customary law prescribes a rule of law, states may derogate from the rule through new conventions, except where the custom has the character of *jus cogens* rules.[354] It has never been claimed, however, that double criminality is a *jus cogens* norm. If the principle of double criminality is customary international law, it must be complied with if a treaty does not include it. It can probably only be derogated from by a new treaty that explicitly says double criminality does not apply.

In the following analysis of whether the double criminality principle is a rule of customary international law, conventional law will be most influential. The difference in the nature of these two sources of law is vast. Treaties are only binding on those states that have expressly accepted them, whereas customary international law is binding on all states irrespective of their approval. International law, however, accepts local or regional customary international law.[355] Customary international law thus binds newly formed states that have not been given the chance to object to the rule or act otherwise.[356]

According to article 38 (1) (b) of the Statute of the International Court of Justice international customary law consists of two elements; the objective element of constant and uniform state practice ("general practice") and the subjective element of *opinio juris* ("accepted as law").[357] Customary international law is state practice that states carry out because they believe it is

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[351] At 287.
[352] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* Merits, 1986 ICJ Rep. 14 (Judgement of 27 June).
[353] Brownlie, 4.
[354] Ruud & Ulfstein, 46.
[355] Asylum Case, ICJ Reports 1950.
[356] Fleischer, 30.
[357] Ruud & Ulfstein, 50.

obligatory. Because both criteria are vague it is difficult to ascertain the exact content of the law. By making custom a source of international law one ensures that international law always reflects current opinions, beliefs, relations and politics among states. It is a dynamic source of law that adjusts to the general developments of a modern society.

Customary international law consists of the non-written rules of law that lack the precision of treaty law. These rules are relatively vague, imprecise and general. Customary international law contains principles of law rather than concrete rules. Even though custom is non-written, it can be given precision through codification in a convention or in a judicial decision. Conversely, treaties can lay the foundation of a new customary rule.[358] This has been recognised by the International Court of Justice, stating that the pertinent treaty-based provision had to be of a "fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law" and that "a very wide-spread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected."[359] The requirement for a treaty provision to become customary law was that the practice "including that of States whose interests are specially affected, should have been extensive and virtually uniform."[360]

Evidence of custom can thus be deduced from treaty law. Evidence may also be deduced from other sources. The two elements of customary international law thus materialise in actual behaviour, international treaties, domestic legislation, negotiations and voting in international organisations, statements by state officials and ministers, domestic and international court decisions, decisions by administrative and executive authorities, protests against other states' actions, assertions in other forums, etc. Thus both formal and material sources can be construed to establish customary law. States are bound through acquiescence and estoppel.[361]

As the principle of double criminality developed in treaty law, it is primarily the conventions that will give evidence as to the status of this principle in international law. Domestic legislation, case law and legal writings are good indicators as well. As states always adhere to

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[358] Ruud & Ulfstein, 52.
[359] Quotations from Ruud & Ulfstein, 52, referring to ICJ Rep. 1969 p. 3 on p. 41-43.
[360] Ruud & Ulfstein, 52.
[361] Brownlie, 2-4. Acquiescence means that states are bound tacitly where they had an opportunity to act but chose not to do so, whereas estoppel, in relation to international customary law, means that states are bound through their acts, which must be interpreted as an approval of a rule of law, Ruud & Ulfstein, 50.

domestic extradition law, domestic statutes and case law are the most adequate formal evidence of international custom on extradition.[362]

3 2 1 State Practice

State practice develops gradually. State practice is not only what states do, but also what they say.[363] It consists of two elements which can be summarised as consistency and generality.[364] Consistency refers to the substantial qualities of the practice, whereas generality refers to how widespread the practice is in the international community. Traditional international law has also required a third element of state practice: the temporal element.

The first element of state practice, the consistency requirement, says the rule represented by state practice must be constant and uniform.[365] Complete uniformity is not required, however, which means there could still be a rule of customary law even if it is practised somewhat differently.

Double criminality is practised by all states. In practically every extradition case the court somehow ensures respect for double criminality. The few instances where it is not explicitly stipulated, such as in the Nordic Extradition Scheme, is attributable to the fact that double criminality is presumed to exist because of the close ties between the relevant states. The propriety of double criminality is obviously accepted unanimously. The basic rule of double criminality is that an offence shall be criminal in two states and the court deciding on extradition has to examine domestic criminal law only. But from this point onwards states differ on how to proceed.

The examination of the exercise of the double criminality principle amongst states has uncovered wide discrepancies as to its interpretation and co-requirements. The most striking features are the differences of the *in concreto* and *in abstracto* interpretations, and the fact that some states attach importance to the locational and temporal aspects of double criminality, whereas others completely ignore these aspects. These discrepancies are

[362] Rezek, 172.
[363] Enache-Brown & Fried, 627.
[364] Brownlie, 5-6.
[365] Brownlie referring to the Asylum Case, 6.

attributable to the fact that states emphasise different parts of the double criminality principle's multiple rationale.

It has been claimed that, when examining the existence of a rule of customary international law, one should regard the rule's appropriateness and qualities.[366] This is a reference to the rationale of the pertinent rule. The different means of interpretation are reflections of disagreements between states on how this rule is best served and what aspects it should protect. States obviously apply the double criminality principle for different reasons.

The notions of state sovereignty and protection of individual rights are the main incentives of double criminality. The former motive is best carried out through a strict interpretation, but the need for efficient mutual assistance in criminal matters has led some states to refrain from this policy. The actual quality of double criminality has thus become the protection of individual rights. Though a strict interpretation is favourable to the fugitive, it is not essential. Double criminality in its simplest form provides sufficient protection.

On the one hand, the basic elements of double criminality are practised by virtually all states and the rule's character of being a protection for the individual in the process, also supports a customary rule. On the other hand, the differing methods of interpretation cannot be dismissed as mere technicalities. The discrepancies are too wide. There is a substantial difference between the *in concreto* and *in abstracto* interpretation.

The second element of state practice, the generality requirement, refers to the number of states that adhere to the practice. A substantial number are required, though universal recognition is not required. It is impossible to estimate a specific number of states. The difficult part of the generality requirement is to determine which states abstain from the practice. Silence may be taken as a token of tacit agreement or as a lack of interest in the subject.

Virtually all states that engage in extradition have adopted a requirement of double criminality in one form or the other. In earlier times double criminality was latently included in every treaty adopting the enumerative method of listing extraditable crimes. As the eliminative method became more common, double criminality was usually explicitly adopted. Most

[366] Fleischer, 30.

domestic laws adopt the principle as well. Trying to find treaties or domestic statutes that explicitly refrain from the double criminality principle on a general basis has been fruitless. The principle of double criminality in international extradition law can safely be assumed to be a general practice.

The third element of state practice is the period of time it has been exercised. Traditional international law demands that the state practice has existed for some time in order to become customary law.[367] Naturally it takes time to develop a custom, otherwise the individual acts would be perceived as isolated incidents. The International Court of Justice, however, has not stipulated strict temporal requirements.[368] The duration of the custom is not decisive for its existence, provided the consistency and generality of the practice are proved.[369] Though there is no strict requirement of its duration, state practice that has existed for a long time may serve as an indication on its firmness.[370]

The double criminality requirement in international extradition law has existed for more than two centuries, since it was stipulated probably for the first time in 1794 in the Anglo-American Jay Treaty. It has since become a common stipulation in domestic and international extradition instruments, and courts have also been occupied with the principle since the mid-nineteenth century. Without doubt, requiring double criminality has been practised by the international community for a very long time. Any requirements as to the duration of a custom are obviously fulfilled with regard to this principle. The duration of the double criminality principle certainly bears witness to the firmness of a potential customary rule.

3 2 2 *Opinio Juris*

It is pointed out in legal literature and decisions by the International Court of Justice that the state's conviction of doing what is legally required is essential.[371] The Statute of the International Court of Justice article 38 (b) refers to a "practice accepted as law". For the practice to become binding as law, it must have been executed in the belief that the acts were

[367] Fleischer, 30.
[368] Ruud & Ulfstein, 51.
[369] States for instance quickly established international customs regarding rules relating to the airspace and continental shelf, Brownlie, 5.
[370] Ruud & Ulfstein, 51.
[371] Ruud & Ulfstein, 52.

mandatory under international law. Motives of courtesy, fairness and morality do not create customary law.[372] This conviction is called *opinio juris.* Whether the legal obligation is actual or imaginary is not crucial. The International Court of Justice has said *opinio juris* requires a "wide-spread acceptance".[373] Regional customary law requires an equivalent acceptance.[374]

Conviction of obligation is a vague criterion that is difficult to prove. The International Court of Justice has apparently evaluated this question on a series of grounds. In some cases it has assumed the existence of *opinio juris*, or deduced it from a consensus in literature and previous decisions of the Court and other international tribunals.[375]

The status of double criminality in international extradition law has not been decided on by the International Court or by other international tribunals. Gilbert refers to a Swiss case where the court held that double criminality was a tacit precondition for all extradition cases, and to an Irish case where it was held that the principle was fundamental to extradition.[376] These cases were decided, however, on the basis of domestic extradition law. But they show that domestic courts attach significant importance to this requirement. Gilbert also refers to a case from Australia where it was held that the requirement of double criminality could be expressly excluded by domestic statutes or international treaties.[377] Domestic courts apparently view double criminality as mandatory, but this obligation follows from domestic legislation. It seems that proof of *opinio juris* has to be deduced from the writings of scholars.

Literature on the status of the double criminality principle in international extradition law is divided. A substantial number of scholars on international criminal law claim the principle of double criminality has become a rule of customary international law.[378] This presumption is based on the facts that treaties habitually recognise and incorporate the principle, that it is universally recognised and established by practice under a conviction that it is mandatory. However, there are also a number of authors who disagree.[379] Thus the literature does not give

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[372] Brownlie, 7.
[373] Ruud & Ulfstein, 51, referring to ICJ Rep. 1974 p. 3.
[374] Ruud & Ulfstein, 51, referring to ICJ Rep. 1950 p. 266 where the court required "constant and uniform usage" for regional customary law.
[375] Brownlie, 7.
[376] Gilbert, referring to the Swiss case of *M v Federal Department of Justice and Police*, 75 INT'L L REP.107 (Federal Tribunal, 1979) and the Irish case of *The State (Furlong) v Kelly*, (1971) IR 132, 104.
[377] Gilbert, referring to *Riley v The Commonwealth of Australia*, (1985), 159 CLR 1, 105.
[378] Among authors arguing double criminality in extradition is a rule of customary international law are Shearer, 138, Stanbrook & Stanbrook, 19-20, Hafen, 194, Plachta, 111, and Joyner & Rothbaum, 240.
[379] For instance Schultz, 9, and Aughterson, 60.

sufficient proof of *opinio juris*.

Basically all states engaging in extradition adopt the double criminality principle in written legal instruments. "In the books" all states adhere to the principle. Where the principle is not explicitly adopted, it is often presumed. The provisions are short, usually only stating the basic element that the extraditable crime must be criminal in two states. The provisions are too vague to give directions on interpretation. Hence the practice of this principle becomes inconsistent.

There exists no consistency on how to decide on the criminality in the requested state and states have thus developed this principle in different directions, finding individual solutions on how to satisfy this requirement. States adopt methods of interpretation that suit their own needs or the interests of the individual. Hence even the purpose of such a requirement is disagreed upon. Embellishments to the principle, such as the locational and temporal elements, also contribute to irreconcilable principles of double criminality. Furthermore, it has so far not been proven that there is a general feeling in the international community of an obligation to act according to the double criminality principle. The principle of double criminality is thus not a rule of customary international law.

3 3 Is Double Criminality a General Principle of Law?

"General principles of law recognised by civilised nations" are principles of law that are common in the domestic law of different states. One does not distinguish between "civilised" and "uncivilised" nations today. The laws of all states are of relevance. General principles can also develop within international law; they could, for instance, be based on customary law.[380]

General principles are binding on all states. They may decide international disputes where neither convention nor custom exists, but they are rarely used as the sole factor in deciding a case before the International Court of Justice. They are, however, a useful factor in deciding on the existence of customary international law.

[380] Ruud & Ulfstein, 54.

Because this source of international law depends on the general law of the states, one must establish how many states need to have a certain principle in common in order for it to become a general principle of law in international terms. There are no general guidelines on how many states must adhere to a specific principle. One can only resort to establishing whether it is generally, though not necessarily universally, accepted within the international community.[381]

Legal scholars have described double criminality as a general principle of international law.[382] Extradition is a practice based on treaty law and general principles could be derived from treaties. Shaw claims the double criminality requirement has become such a general principle of international law, derived from treaty law.[383] According to Shaw, this is supported by the decisions of the House of Lords in *Government of Denmark v. Nielsen*[384] and *United States Government v. McCaffrey*.[385]

Other authors do not view double criminality as a general principle of international law. Vogler argues that, though the principle is found in national statutes on extradition, the rule "is not indispensable from the point of view of adherence to the rule of law. This follows from the mere fact that the principle is frequently subject to exceptions with respect to the geographical, climatic or ethnological conditions of a country."[386]

Unlike customary international law, general principles of law are not dependent on state practice or *opinio juris*. They do not depend on written sources of law either.[387] The effect of the difference between relatively uniform provisions in treaties and domestic statutes and actual practice, is thus difficult to estimate. Principles are generally abstract and do not necessarily exist in legal instruments.[388] They do not have to be concrete and unambiguous norms. It should thus not be necessary to demand uniformity of the principle throughout the international community. The core of the double criminality principle, that the extraditable

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[381] Ruud & Ulfstein, 54.
[382] Among authors arguing double criminality is a general principle of international law are Plachta, 111-112, Shaw, 482, Jacobs, *The European Convention on Human Rights* (1975), 124, and Bedi, 69-70.
[383] Shaw, 482.
[384] *Government of Denmark v. Nielsen* [1984] 2 All ER 81; 74 ILR.
[385] *United States Government v. McCaffrey* [1984] 2 All ER 570.
[386] Vogler, "The Scope of Extradition in the Light of the European Convention on Human Rights" in Matscher & Petzhold (eds), *Protectiong Human Rights: The European Dimension* (1988), 671.
[387] Stanbrook & Stanbrook, 19.
[388] Duk, 31, see chapter 1 1.

crime is criminal in two states, could thus suffice as a general principle of law. But the literature is divided on this question.

3 4 Concluding Remarks

Authors on international extradition law differ in their opinions as to whether the principle of double criminality has become a rule of general international law. Several authors are not specific about what kind of international rule the principle belongs to: customary law or general principles of law.

As early as 1909 Rintelen claimed that double criminality had become a rule of general international law that all states had to adhere to and that contemporary authors accepted it.[389] In 1970 Schultz claimed that treaties and municipal law were the only sources to extradition law as it was unlikely that any principle of extradition law had received sufficient universal recognition to become a principle of general international law.[390] Because of the disagreement among scholars, the presumption is against the existence of a rule of general international law. It is the existence of a rule of general international law that needs proof, not its non-existence. The lack of sufficient support of a rule of general international law could mean the principle of double criminality in extradition has not attained this status. Sources of law other than legal writings must be consulted.

Double criminality is said to be one of the most elementary – and therefore least contested – among the substantive requirements in international extradition law.[391] Because it is generally included in all instruments on extradition, its validity as a general rule of international law has so far not been contested in a case before the courts. Where the double criminality requirement is left out of a treaty or domestic statute and challenged in an extradition case, the outcome of the dispute is not predictable.

The double criminality principle is not well defined nor uniformly applied. One could thus

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[389] Rintelen, 16-17. He argued the only exeption to double criminality was where the requested state had accepted the criminality of the act, but for obvious reasons had not criminalized the act itself, for instance where a land-locked country like Switzerland had not criminalized shipping offences. This is today not a question of the general obligation to comply with the double criminality principle, but a question of its substantive interpretation.

[390] Schultz, 9. Aughterson also claims double criminality is not a mandatory rule in international law, 60.

argue that it is not so reliable as a principle of international law. Its vagueness makes it difficult to apply and, if it is a rule of general international law, it will be very difficult to determine which interpretation of the principle is required. States adopting a lenient interpretation of double criminality could be accused of violating a general double criminality principle in international law.

It would be impossible to say how strictly states have to apply the rule. What degree of strictness is mandatory? Because of all the varieties in interpretations and additional conditions, it is difficult to find a common interpretation that is or should be a general rule. If the double criminality principle were to be a rule of general international law, it would have to be in a very simple and basic version. Probably both the locational and temporal aspects of double criminality would not be part of it. The fact remains, however, that as long as extradition within the international community is based on a network of differing domestic statutes and differing bilateral and multilateral conventions, which depend on interpretations of domestic courts, there will always be interpretational discrepancies.

Though many factors of the double criminality requirement point in the direction of a rule of general international law, it cannot be declared with certainty until a court of law, preferably an international tribunal, has decided on the issue. Due to strong disagreements between legal scholars, the principle of double criminality in international extradition law is probably not part of either customary international law or general principles of international law.

[391] Rezek, 187-188.

4 Double Criminality and International Human Rights

4 1 Introduction

International extradition law remained unnoticed for a long time by international human rights law. However, this picture has gradually changed. Human rights have given international extradition law new dimensions, influencing the process in several ways. Substantial extradition law has expanded, with new conditions to be considered by the authorities before ordering an extradition. Because of the extradition process's international character, states have been forced to scrutinise human rights not only within their own borders, but also in foreign states. Procedural extradition law is also about to change as individuals gradually gain a stronger standing in the process.

At the same time as most states have started considering general human rights aspects in extradition proceedings, many states are also willing to violate both traditional extradition law as well as human rights to obtain custody over fugitive criminals. Protection offered the fugitive in international extradition law such as, for instance, a requirement of double criminality, is jeopardised where extradition is subject to political considerations, whether by the executive or the judiciary. Where the extradition process is regulated exclusively by law, there is a chance that the fugitive could be surrendered by other means. Disguised extradition through deportations and even abductions, is known to have taken place.[392]

The unlawful surrendering of fugitives turns the double criminality principle into a dead letter. However, the increasing application of international human rights in international extradition law could possibly influence the way states deal with the principle of double criminality. As human rights gain importance it is necessary to establish which rules form part of the body of human rights. A discussion of the role of human rights in international extradition law is thus necessary to complete the picture of the double criminality principle. Does the body of human rights law only include traditional human rights developed within human rights-treaties, or does it also encompass other rules protecting the individual

[392] Rezek, 172.

developed in other fields of law, such as international extradition law?

It has already been established that the principle of double criminality in international extradition law probably does not constitute a rule of customary international law or a general principle of law. The question now is whether double criminality forms part of international human rights law.

4 2 The Nature of Human Rights

Human rights cover broad fields of law, purporting to protect human beings in many situations. They range from protecting individuals against encroachments by the authorities to general rights to peace and a healthy environment. The first group is particularly important in procedures that affect the individuals the most, namely the criminal process, where the liberty and reputation of the accused are at stake. It encompasses, for instance, the right to a fair trial.

Just like extradition law, human rights have developed in both domestic and international law. Domestic human rights are founded in constitutions, statutes, custom and case law. The jurisprudence of every state decides on the content and the status of these rules within its legal system and hence domestic human rights are unique to each state. Domestic human rights create no legal obligations in international law unless they are implemented in a convention or amount to international custom or general principles of law.

Protection offered the individual will, however, gradually become more uniform as international human rights increasingly influence domestic legislation, for instance, through conventions that oblige state parties to implement specific provisions in domestic legislation. The development of international human rights is described below.

4 2 1 Human Rights as "Rights"

The question of what is a "right" has no clear answer in legal philosophy. Rights can be enforceable or merely set out future patterns of behaviour.[393] Human rights fall within both categories. Legal rights can usually be acquired or waived. For example, the right of ownership is transferred when an item is inherited and then sold. Human rights cannot be transferred. Human rights are inalienable and perpetual rights inherent in every person.[394] Such a description is based on considerations of ethics and morality, and not on positive law. However, rights that reflect the ethical and moral values of the community, will more likely be implemented in positive law.[395]

The concept of a "right" entails a correlative "duty". The right of one person entails duties on other persons. In its simplest form, this duty is to respect the right. Other rights have a more substantive counterpart, requiring some form of action. There is no general agreement on whether human rights demand some form of active performance or whether merely refraining from violating them is sufficient.[396]

The concomitant duties of individuals' human rights are incumbent on states and not on other individuals.[397] Obligations on behalf of the states are expressed in conventions in terms of "respecting", "recognising", "ensuring", "secure" or "giving effect to" human rights.[398] The extent of the duties depends on the interpretation of the convention, or on other sources of law laying down human rights. One could argue that states fulfil their obligations by enacting appropriate legislation for the protection of these rights.[399] For instance, the right to a fair trial demands legislation on the way that a trial should be conducted.

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[393] Shaw, 196.
[394] Sieghart, 17.
[395] Shaw, 197.
[396] This issue is similar to the question whether *jus cogens* rules require action on the behalf of states in the form of *obligatio erga omnes*, or whether states comply with these rules by merely refraining from violating them, see chapter 1 6 2.
[397] Sieghart, 17.
[398] Sieghart, 43.
[399] Sieghart, 43. Strydom, "The Rights and Responsibility of Civil Society to Promote and Protect Human Rights", *South African Yearbook of International Law* p. 66 (1995), discusses a draft document of human rights by the Commission on Human Rights, and describes the corresponding duty of the state as "to adopt legislative, administrative and other measures to ensure the effective exercise of this right," 72.

Human rights can thus be divided into two groups according to their effects. They can be general declarations of intent on behalf of the states with no corresponding duties, or concrete rights on the part of the individual with a corresponding duty on the states. For the purpose of this thesis, the notion of human rights refers to the broad group of rules that purports to protect individuals against encroachment from the authorities, entailing a duty on the states to accept and actively protect these rights where appropriate. When discussing human rights in the law of criminal procedure, authors usually refer to this general and broadly defined category of rights.

4 2 2 The Development of International Human Rights

International human rights are generally believed to have originated in natural law. The notion of natural law was formed in legal philosophy in ancient Greece and then further developed in Roman law and the law of the Catholic Church in the Middle Ages. Natural law was perceived to be the law of God, raised above the positively established rules of man, and thus universal and absolute.[400] It was a product of religion, which later developed into the law of reason.[401] Its content was disputable, as notions of nature and reason depend on considerations of religion, ethics, morality and philosophy.[402] These aspects of natural law are also the foundation of human rights today.

The notion of inalienable and universal rights was carried into the Age of Enlightenment. In the 17th century the focus slowly turned to the rights of the individual, reflecting the harsh reigns of contemporary despotic rulers. Legal philosophy stipulated eternal and inviolable rights of man to life, freedom and property. These rights were deduced from the social contract, ending the state of nature.[403] Through this notion of natural law developed the concept of human rights vis-à-vis the state.[404] The American Declaration of Independence, 1776, the Bill of Rights, 1791 and the French Human Rights Declaration, 1789, laid down certain principles of rights of man that could not be violated by the state, by law or otherwise.[405] Before this period the interests of the state prevailed over the interests of the

[400] Castberg, 15, Shaw, 197.
[401] Castberg, 16.
[402] Shaw, 197.
[403] Shaw, 197.
[404] Castberg, 18-20.
[405] Sieghart, 8-9.

individual.[406] These principles of freedom represent early ideas of what today is recognised as human rights.

In the late nineteenth century a new school of thought developed, which rejected the concept of divine or natural law and asserted that only rules that can be enforced could be law. This is called legal positivism. Together with the doctrine of national sovereignty in international law, it effectively obstructed states from interfering with other states' treatment of their subjects.[407] Any ill-treatment by a state of its nationals within its territory was purely a matter of domestic concern. The consequences of this legal philosophy were tragic, as witnessed by the unprecedented atrocities committed by the Nazis before and during the Second World War.

Up to the Second World War states showed concern only for the treatment of their own subjects in other states.[408] After the war international law witnessed the rapid development of the branch of law called international human rights.[409] This is attributable to the disclosure of the crimes that took place in Central Europe and the desire to avoid a recurrence of similar events. It became clear that there was a need for a new order where states were not free to treat their own people as they like.[410] The doctrine of humanitarian intervention allows foreign intervention in a state whose oppression of its people shocks the conscience of mankind. The way a state treats its own subjects has become the legitimate concern of international law.[411]

States that breach international human rights obligations have most probably not implemented domestic remedies to secure these rights. The international community has thus established international institutions for the surveillance and protection of human rights. The Charter of the United Nations was established in 1945. Article 55 obligates the global organisation to promote universal respect for and observance of human rights and fundamental freedoms. With a few vague exceptions, the Charter does not define these rights and freedoms. This task

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[406] Aughterson, 4.
[407] Sieghart, 12.
[408] Dugard, 234.
[409] Dugard, 234, Dugard & Van den Wyngaert, 187, Jacobs & White, *The European Convention on Human Rights* 2 ed (1996), 3.
[410] Dugard, 235, Sieghart, 14.
[411] Sieghart, 15. Dugard, 234, claims the doctrine was recognised in the seventeenth century, and Sieghart, 13, says it was an established rule of international law by the nineteenth century. Shaw on the other hand, 802-803, is sceptical to the content and existence of this doctrine.

was left for later instruments, starting with the United Nations Universal Declaration of Human Rights of 1948, stipulating fundamental human rights that states are encouraged to comply with in their domestic law.

The Universal Declaration of Human Rights is not a legally binding document, but rather a proclamation of morally binding norms.[412] However, it is possible that the Declaration has become customary international law, general principles of law, or even *jus cogens*, and should be consulted where human rights issues appear.[413] The Declaration has contributed significantly to the further development of international human rights, particularly by laying the foundation for the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of 1966.[414] In the following decades the international community negotiated and adopted numerous conventions on general and specific human rights, and through these treaties human rights became positive international law.

International human rights laws today are no longer the ubiquitous freedoms of man given by God, nature or reason, but the positive rules for the protection of human beings against encroachment by the states, as stipulated in conventions and other sources of international law.

4 2 3 The Universality of International Human Rights

The concept of universality was a crucial aspect of natural law. Universality means applicable to all human beings. Though the idea of a divine law was rejected by modern philosophy, its characteristic feature of universality lived on in international human rights.[415] The universality as well as the content of these rights is disputed because of conflicting opinions within the international community on legal philosophy, justice, morality and political ideology.[416] The notion of universal human rights does not mean that these rights are universally binding, but is a reflection of the nature of these rights.

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[412] Castberg, 31, Strydom, 80.
[413] Levine, 149-150, Jacobs & White, 5.
[414] Levine, 150, Ruud & Ulfstein, 54.
[415] Shaw, 197-198.
[416] Bystrický, "The Universality of Human Rights in a World of Conflicting Ideologies" in Eide & Schou (eds), *International Protection of Human Rights* (1968), 86-88.

Human rights are to a large extent embodied in international documents. The Universal Declaration of Human Rights is, according to both title and content, universal.[417] The preamble presents the Declaration as a "common standard of achievement for all peoples and all nations." Conventions are denominated "international" and not "universal". The protection of international human rights depends on two obligations that states have taken upon themselves: the obligation to ensure protection of human rights within their territories, and the obligation to participate in international co-operation to promote, protect and develop human rights.[418] Irrespective of the universal nature of human rights, their enforcement nevertheless depends on traditional international law, governed by sovereign states.

4 2 4 The Status of Human Rights in International Law

While there is widespread acceptance of the importance of international human rights, there is considerable disagreement as to their precise nature and role in international law. Human rights are part of international law through numerous treaties on the subject and it has also been argued that certain human rights form part of customary international law, such as the prohibition on torture, genocide, slavery and discrimination.[419]

Human rights have become increasingly important and are, due to their nature, often given paramount status when conflicting with other rules of domestic or international law. Dugard and Van den Wyngaert suggest that human rights arise from *jus cogens* and that they form part of the *ordre public* of the international community.[420] Sieghart claims "there is now a superior international standard, established by common consent, which may be used for judging the domestic laws and the actual conduct of sovereign States within their own territories and in the exercise of their internal jurisdictions, and may therefore be regarded as ranking in the hierarchy of laws even above national constitutions."[421] Vogler says that "[t]he extent of peremptory rules in international human rights law is constantly widening."[422] Obviously, states are willing to give priority to human rights where they conflict with other

[417] Bystrický in Eide & Schou (eds), 83.
[418] Bystrický in Eide & Schou (eds), 84.
[419] Shaw, 196, 204.
[420] Dugard & Van den Wyngaert, 195.
[421] Sieghart, 15.
[422] Vogler in Matscher & Petzold (eds), 669.

provisions.

4 3 The Influence of International Human Rights on the Law of Extradition

The core of human rights is to protect individuals against encroachment by the authorities. Human rights developed as a corrective to the law of criminal procedure because it involves restraints on individuals' freedom. Human rights and extradition law developed side by side for some decades, as two separate sets of rules. Where the defendant has fled abroad extradition is normally a necessary prerequisite for the conclusion of domestic criminal proceedings. The process of extradition has also gradually been affected by human rights. Obviously, extradition involves restraining the freedom of individuals as well.

As human rights have gradually come to influence the law of extradition, this has given rise to new problems for states as they have suddenly found themselves with two conflicting obligations on their hands, derived from human rights treaties and extradition treaties respectively. Undoubtedly there exists potential conflict between human rights and extradition obligations. The propriety of dividing human rights law and extradition law into two separate categories of law can be discussed.[423]

The suppression of crime, being the ultimate object of the law of criminal procedure and extradition, serves the interest of the community. The transformation of the nature, pattern and extent of crimes has produced a corresponding transformation in international co-operation in criminal matters.[424] This development calls for stronger protection of the individual. Striking a fair balance between a strong and efficient system for preventing and punishing crimes and the protection of the individual in the process, has dominated the continuing development of domestic criminal procedure law and international human rights law. Modern bilateral extradition treaties also seek to obtain a balance between the ideals of co-operation between nations, and the protection of the rights of the individual.[425]

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[423] Gilbert, 6, seems to view extradition as an integral part of international human rights law, whereas other authors, for instance Dugard & Van den Wyngaert, treat international human rights and extradition law as two separate fields of law that recently have fused.
[424] Woltring, "Politics, Crime and Criminal Justice", *www.isrcl.org.*
[425] Aughterson, 12.

Furthermore, new forms of international co-operation in criminal matters are more offender oriented such as, for instance, transfer of criminal proceedings, execution of foreign judgements and transfer of offenders.[426]

In 1989 the European Court of Human Rights in *Soering v. United Kingdom*,[427] dealing with extradition and human rights, said the European Convention on Human Rights comprises "a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[428]

Soering was a West German national who had murdered his girlfriend's parents in the state of Virginia in the United States, and then fled to the United Kingdom. The United States requested his extradition, but he petitioned the European Commission of Human Rights, which referred the case to the European Court of Human Rights. The court held that potential violations of the Convention in the United States qualified as an obstacle to extradition. Given his young age and mental health, it was held that keeping Soering on death row would cause unnecessary suffering and thus constitute a breach of the Convention's article 3, prohibiting torture and inhuman and degrading treatment and punishment.

Whether balancing the interests of the international community and the individual has been an aim of international extradition law all along or whether it is a new concept introduced by modern human rights ideologies, can be disputed. It is probably correct to say that the question of ensuring individuals' rights has been addressed through traditional extradition law, but gained more attention with the latest developments regarding human rights in other areas.

After the *Soering* decision it became clear that international human rights are relevant to extradition proceedings.[429] *Soering* was among the first decisions to acknowledge that an extradition as such could violate human rights obligations. This case opened up new ways of impeding extradition and it has now become more common to invoke actual or potential human rights violations in extradition cases. Where a treaty and domestic statute do not provide for human rights as an exception to extradition, lawyers have started invoking, with

[426] Van den Wyngaert in Jareborg (ed), 45.
[427] *Soering v. United Kingdom*, 161 European Court of Human Rights, (Series A) (1989).
[428] Paragraph 89.

varying degrees of success, human rights provisions found in other instruments, for example domestic legislation, constitutions and international conventions. The new development has opponents. Harrington claims this is "an attempt to carve out some form of 'human rights exception' to otherwise valid requests for extradition."[430]

The European Convention on Human Rights does not explicitly limit the scope of extradition.[431] The Convention obligates state parties to respect the provisions within their domestic legal systems and contains no provisions forbidding extradition or deportation to a state where these provisions may be violated. On the other hand, one could read the obligation as being intended to protect everyone within their own jurisdiction from the risk of such treatment. This view is confirmed by the Commission.[432] Before *Soering* there was also a general conception that conditions in the requesting state, particularly the use of torture, were of relevance in extradition proceedings.

The Commission had declared before *Soering* that the Convention does not contain provisions on extradition law and procedure, though there has been agreement on the fact that an extradition could violate article 3, where the extraditee is in danger of being tortured in the requesting state. Another question is whether extradition in cases where the fugitive will not receive a fair trial upon his return to the requested state, can be a violation of article 6. This is hardly a settled matter.[433] The evaluation of foreign legal systems that these two situations involve is in strong opposition to the Anglo-American rule of non-inquiry.

The protection of human rights is not an entirely new concept within the law of extradition. Extradition treaties and extradition statutes contain provisions designed to protect the individual. These provisions are casuistic and sporadic and do not form part of a systematic catalogue of individual rights as found in general human rights treaties and bills of rights. The United Nations Model Treaty on Extradition, 1990, is one of the few exceptions, listing mandatory and optional human rights grounds for refusing extradition in article 3 and 4

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[429] Dugard & Van den Wyngaert, 191. The authors say human rights have influenced treaties, executive acts and judicial decisions on extradition, 187. See also Harrington, "Human Rights Exceptions to Extradition Moving Beyond Risks of Torture and Ill-Treatment", *www.isrcl.org.*

[430] Harrington, *www.isrcl.org.*

[431] Vogler in Matscher & Petzold (eds), 663.

[432] According to Vogler in Matscher & Petzold (eds), 666-667, the Commission has confirmed this view in its decision 10479/83.

[433] Vogler in Matscher & Petzold (eds), 663-665.

respectively.[434]

It would be wrong to assert that traditional extradition law was completely void of human rights impulses in its creation. As international communication and awareness increased, many nations became concerned about the treatment of extradited individuals; and the preservation of the fugitive's fundamental human rights became an important factor for many nations considering extradition requests.[435] Because each nation had different standards concerning the treatment of criminals, a complex web of procedural extradition requirements developed, ensuring that a fugitive would not be prosecuted for an act not considered criminal by both nations or for acts not falling within the scope of the extradition treaty.

Extradition law, created mainly in nineteenth-century Europe, thus came to contain an ambience of that era's liberalism such as, for instance, protecting political activism in autocratic regimes.[436] A fugitive may, for instance, plead that he will suffer prejudice due to his race, nationality, religion or political opinion, as stipulated in the European Convention on Extradition article 3 paragraph 2.

Long established barriers to extradition are, for instance, the political offence exception,[437] the double jeopardy rule,[438] the principle of specialty,[439] the non-extradition of nationals and the principle of double criminality. With the exception of the double jeopardy rule, these principles apply to the extradition process only and are of no relevance in a domestic prosecution. The principles obviously protect the fugitive, but it would be incorrect to explain them entirely in human rights terms.[440] Harrington claims the traditional extradition obstacles, though perceived by some as motivated by state interests, were nevertheless "intended, or

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[434] This document is however, as the name suggests, only a model for other extradition treaties. The Model Treaty embodies a set of general and commonly agreed standards developed by experts in the field. As there exists no global extradition treaty, the United Nations has sponsored this Model Treaty as a guide to countries negotiating new extradition treaties, Harrington, *www.isrcl.org*.

[435] Hafen, 193.

[436] Gilbert, 15-16.

[437] The political offence exception ensures the requested state's neutrality in a political struggle in the requesting state at the same time as it accepts the legitimacy of resistance to oppression and prevents unfair trials of political activists. It is stipulated in the European Convention on Extradition article 3.

[438] The principle of double jeopardy forbids extradition where the fugitive has previously been tried and either acquitted or convicted for the same offence in another coutnry. It protects individuals against double prosecution and punishment. It is stipulated in the European Convention on Extradition article 9.

[439] The principle of specialty demands that the extradited person is only tried for the offences for which he was extradited. It the requesting country wants to try the person for other crimes, the prosecutor needs the consent of the country from which extradition was obtained. It is stipulated in the European Convention on Extradition article 14.

accepted, as giving some degree of protection to the individual extraditee from abuse, and that abuse can be described today in human rights terms."[441]

General instruments on human rights and conventions dealing with specific human rights are likely to influence extradition law, whether or not they deal explicitly with extradition.[442] The relevance of human rights treaties to the law of extradition depends on the subject matter and the level of state participation.[443]

International extradition law is not the arena where general international human rights norms have developed. This has resulted in a relatively weak position of human rights in extradition law. Extradition law has, however, entered a new phase where international human rights norms have emerged as a new set of rules requiring compliance. However, where obligations arising from human rights treaties conflict with an obligation to extradite, the outcome is still not clear.

4 3 1 Is There a General Human Rights Exception to Extradition?

There is a long list of rights and prohibitions comprising the body of human rights.[444] Some of these human rights are more pressing than others. For instance, the prohibition of torture is a *jus cogens* rule, and its *obligatio erga omnes* could include a total prohibition on extradition to states where fugitives risk torture. There is no agreement as to which human rights are particularly important. The content and scope of several human rights have no clear legal definition. There is no system by which one can identify and determine the content of human rights.[445] Together with the uncertainties as to their application in the extradition process, one

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[440] Dugard & Van den Wyngaert, 188.
[441] Harrington, *www.isrcl.org*.
[442] The Torture Convention is one of few human rights conventions that mentions extradition. Article 3 paragraph 1 says "No State Party shall expel, return (*"refouler"*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."
[443] Carnegie, "The Extradition and Return of Fugitive Offenders. Applicability of Human Rights Consideration" in San Jose (ed) *Seminar for Caribbean Judicial Officers on International Human Rights Norms and the Judicial Function"* (1995), 86.
[444] Human rights that may obstruct extradition are procedural conditions, for example lapse of time, personal conditions, for example the fugitive's fragile mental and physical health, and conditions in the requesting state, for example the danger of corporal and capital punishment.
[445] Dugard & Van den Wyngaert, 210.

cannot speak of a general human rights exception to extradition.[446]

4 3 2 Compliance of Human Rights by the Requested or the Requesting State?

Each state is responsible for ensuring that human rights are observed within its borders. One could argue that as long as the requested state complies with international human rights standards in the extradition process itself, for example, during detention, questioning, procedures before the court, etc., the state does not violate international human rights. The process, however, aims at sending the individual to another country. Are states obliged to take into consideration actual or potential human rights violations awaiting the fugitive in the requesting state?

Courts in many countries, including the United States, Canada and the United Kingdom, interpret extradition laws and treaties in favour of enforcement because this promotes both justice and friendly relations with foreign states.[447] This has led courts to adopt the rule of non-inquiry, which means they do not inquire into non-justiciable matters such as the requesting state's motive for seeking extradition and the procedures or treatment which await a surrendered fugitive in the requesting country.[448] Enquiry into foreign practices is held to infringe the principle of sovereignty and reciprocity.[449] Nursing good relations with other states is given preference over human rights. The rule of non-inquiry does not affect the rule of double criminality. The court will accept the criminality of the offence by means of an affidavit provided by the requesting state.

Resentment against inquiring into foreign criminal systems has softened over the last decades. Most states accept an inquiry into conditions in the requesting state where there is a considerable probability that the extradited person will be deprived of fundamental rights.[450]

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[446] Dugard & Van den Wyngaert launch two solutions to the problem of conflicting extradition obligations and human rights. Either states could make more use of conditional extradition and monitoring of trial and punishment, or they could implement a system of *aut dedere aut judicare*, allowing them to refuse extradition where human rights may be violated and instead prosecute the fugitive themselves, 206 ff.
[447] Dugard & Van den Wyngaert, 189.
[448] Wiehl, 772.
[449] Henning, 351.
[450] Dugard & Van den Wyngaert, 190-191. In the United States the executive branch may considering policies and practices in the requesting state that are fundamentally unfair and contrary to United States public policy,

Because extradition involves arresting and detaining an individual in the interest of the requesting state, the requested state should represent the requesting state in its human rights obligations as well. Human rights violations in the requesting state would then affect the extradition proceedings. After all, human rights aim to protect the individual against encroachments by the government, irrespective of formal proceedings.

The European Court of Human Rights established in *Soering* that the conditions awaiting the fugitive in the requesting state are of relevance in the extradition process. In three decisions by the United Nations Human Rights Committee the question arose whether extradition as such would violate human rights under the International Covenant on Civil and Political Rights. In all the cases the United States sought extradition from Canada of fugitives charged with murder, risking the death penalty. In *Kindler*, influenced by *Soering*, and followed by *Ng* and *Cox*, the Committee declared that if the requested state did not consider potential violations of the Covenant in the requesting state, the former would be in violation of the Covenant itself by allowing extradition.[451]

Through these decisions it is clear that extraditing states must ensure that the requested state complies with the European Convention on Human Rights and the International Covenant on Civil and Political Rights. When evaluating extradition, the court must examine the human rights situation in the requesting state. If it chooses to extradite, the extraditing state is in breach of its international obligations. Indirectly, the requested state will be held responsible for violations of human rights in the requesting state. It must, however, be borne in mind that these decisions were made by institutions created with the sole purpose of promoting the rights contained in the respective conventions. The sole task of the European Court of Human Rights and the United Nations Human Rights Committee is to evaluate whether their respective conventions have been or will be violated.[452]

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thereby permitting exercising executive discretion and refusal to surrender the person otherwise judicially found extraditable, Bassiouni, *International Extradition: United States Law and Practice* 3 ed (1996), 489.

[451] De Merieux, "Extradition as the Violation of Human Rights. The Jurisprudence of the International Covenant on Civil and Political Rights", *Netherlands Quarterly of Human Rights* p. 23 Vol. 14 (1996) gives a description of *Kindler v. Canada*, CCPR/C/48/D/470/1991 (1993), *Ng v. Canada*, CCPR/C/49/D/469/1991 (1994), and *Cox v. Canada*, CCPR/C/52/D/539/1993 (1994). In *Kindler* the Committee accepted that the methods of executing the death penalty or conditions on death row *could* lead to violations of the prohibition of torture or cruel, inhuman or degrading treatment or punishment in article 7 of the Covenant on Civil and political Rights. In *Ng* Canada was held to have violated the same article by extraditing Ng to California where he risked execution by gas asphyxiation, which could take up to ten minutes to work before reaching point of death.

[452] Dugard & Van den Wyngaert, 195.

4 3 3 The Subjects of International Law: Do Individuals have Standing?

International law is the law between states. Traditionally the subjects of international law have been states only.[453] This is the inevitable consequence of a set of rules that depends on the will and consent of its constituents, expressed in treaties and custom. Another consequence is the fact that when one state treats a national of another state in a manner that violates international law, then this is regarded as an offence committed against the other state and not against the injured person himself.[454] The maltreatment amounts to a violation of the "personal sovereignty" of the national state.[455]

Even treaties that directly affect individuals have been apprehended as concerning interstate relations, with the states being the subjects.[456] Fugitives requested for extradition have traditionally not been considered to be subjects of international law and hence have not possessed individual rights.[457] This confirms the attitude that extradition was purely a matter of solving issues between states. State sovereignty was the main concern.

After the Second World War international organisations were gradually accepted as subjects of international law.[458] The progress was slower for individuals, but already in 1950 Lauterpacht claimed that, as a result of the Charter of the United Nations and other general changes in international law, the individual had acquired a status and a stature that transformed him from an object of law into a subject of law.[459]

The improved status of individuals within international law is connected to the development of international human rights law.[460] Traditionally human rights belonged to the domestic sphere of law and politics and were of international concern only where other states' interests were affected, for instance, where its nationals were involved.[461] But evidently people are as much in need of protection from their own governments as from foreign authorities. By giving

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[453] Dugard, 235, Pyle, 2.
[454] Castberg, 30.
[455] Sieghart, 11.
[456] Dugard & Van den Wyngaert, p. 188.
[457] Blakesley & Lagodny, 44.
[458] The International Court of Justice delivered an Advisory Opinion in 1949 stating that the United Nations was a subject of international law, Shaw, 39.
[459] Lauterpacht, *International Law and Human Rights* (1950), 4.
[460] Shaw, 182.
[461] Jacobs & White, 4-5.

individuals standing in cases involving breaches of human rights, one ensures that the breaches actually are addressed. Dugard says one of the principal aims of international law today is to protect the human rights of the individuals against their own governments.[462] Several general conventions on human rights have established institutions that can receive complaints from individuals.[463]

States have, however, not been willing to confer total standing to individuals in international law. The general rule is that individuals lack standing to assert violations of international law, including breaches of treaties, unless the state of nationality consents in the complaint. This has been the traditional situation in extradition cases as well.[464] This picture is gradually changing. States do confer particular rights on individuals, which can be enforced in international law, independently of national law.[465] Treaties on human rights have taken to establishing systems for individuals to complain about breaches of the conventions. The extent of individuals' rights will depend on an interpretation of the treaties.

4 4 Is Double Criminality an International Human Rights Norm?

We have seen that international human rights have become an important field of international law. Human rights have affected both criminal and extradition procedures, and strengthened the position and standing of individuals within the international law system in general. Courts deciding on extradition have to consider whether the fugitive will be subjected to human rights violations through the extradition. However, the scope of human rights is unclear.

The influence of international human rights on international extradition law is indisputable. The new impetus of focusing on human rights, most likely also involves a strengthening of traditional extradition provisions protecting the individual. In this new environment one has to

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[462] Dugard, 234.

[463] For instance, the European Convention for the Protection of Human Rights and Fundamental Freedoms has established a system where persons can submit complaints about violations of the Convention to a Commission on Human Rights. The International Covenant on Civil and Political Rights article 28 established the Human Rights Committee. According to the preamble of the Optional Protocal, the Committee is enabled "to receive and consider... communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant." The American Convention on Human Rights 1969 article 33 establishes a Commission on Human Rights, which according to article 44 can receive complaints of violations of the Convention lodged by individuals.

[464] Dugard & Van den Wyngaert, 189.

[465] Shaw, 183.

question to what extent the established rights and duties of states may have become part of human rights law as rights of which the fugitive is entitled to take advantage.[466] The principle of double criminality was created as a protection of state sovereignty, but its property of protecting the fugitive has gradually become its main justification. Has the principle of double criminality become a rule of international human rights law?

4 4 1 General Considerations

One could argue that the inherent qualities of the double criminality principle as a protection of individual rights could make it a human rights norm. However, even though human rights protect individuals from encroachment by the authorities, one cannot deduce from that fact that all provisions purporting to protect individuals are human rights. Several aspects distinguish the principle of double criminality from ordinary human rights in international extradition law.

Double criminality in extradition law has the same function as ordinary human rights in a domestic criminal case. It is a rule that applies to the process itself. It represents directions to and restrictions on the court deciding on extradition. This differs from the invocation of traditional human rights in extradition law, which actually refers to the human rights situation in the requesting state and not in the state deliberating on extradition. The new trend of considering human rights in extradition law has to do with evaluating potential or actual human rights abuses in the *requesting* state. The rule of double criminality entails an examination of conditions within the *requested* state.

The nature of the conditions that require examination also differs between double criminality and traditional human rights. Double criminality requires examination of *statutes*, whereas the application of human rights in extradition requires examination of *actual conditions*, for example, whether the requested state has a history of practising torture on prisoners. This difference can be illustrated with an old extradition case from Canada.

In 1860 the United States requested that John Andersen be extradited from Upper Canada to Missouri to answer charges of murder. Anderson was a black slave who, during his escape

[466] Carnegie in San Jose (ed), 89.

from Missouri to Canada, had killed a man who tried to capture him. The victim was not only authorised but also obliged by law to attempt to prevent slaves from fleeing. The institution of slavery and appurtenant laws did not exist in Canada. The court, however, construed the double criminality principle to say that if a man kills another man whilst resisting a lawful apprehension, it would amount to murder in Canada.[467]

Today it is beyond doubt that a fugitive slave would not be returned to a state practising slavery. In 1860 there existed no international human rights that would obstruct extradition where the fugitive would be tortured, enslaved and executed upon his return. In the case of Anderson, the court naturally had to base its decision on existing extradition law. The task of double criminality is not to prevent violations of human rights in the requesting state. Other provisions are created to deal with that aspect.

The principle of double criminality has developed through extradition law and the law of international assistance in criminal matters. Though the principle partly purports to protect individual rights, it has not been part of the development of traditional human rights. Because it has been a rule of international extradition law, with states being the subjects of the law, the principle has not been allowed to develop in international jurisprudence like other principles of individual rights. In comparison, the legality principle in criminal law has become part of every major human rights treaty. The double criminality principle does not form part of traditional human rights law. Furthermore, it is a right that only applies to criminal fugitives and not to putative offenders in general.

Though double criminality is accepted as a fundamental rule of extradition law in the protection of individual rights, it is not denominated as a human right in literature nor generally perceived as a "human right." The principle is not yet *per se* part of any human rights conventions.

The United Nations Model Treaty on Extradition does not classify double criminality as a human right in the lists of mandatory and optional obstructions to extradition in articles 3 and 4, but as part of the extraditable offence requirement in article 2. This is basically how all extradition treaties and domestic statutes "classify" double criminality, including the

[467] Bedi, 70-71, La Forest, 53.

European Convention on Extradition. Though double criminality is not expressly stipulated as a separate human right or individual right, it is made mandatory through the extraditable offence clause. It is thus made a fundamental and mandatory extradition requirement.

4 4 2 The Relation to the Legality Principle

Establishing double criminality is not an end in itself, but indirectly represents other values. International human rights are generally purposeful *per se*, for example, the prohibition of torture and discrimination. Next to ensuring state sovereignty, it ensures that a person is not treated any differently from the rest of the population. This individual right is closely connected with the legality principle in criminal law.

Given the fact that both the legality principle and the double criminality principle aim to protect the individual from being treated arbitrarily and differently from the rest of the population of a given country, one obviously has to evaluate the legality principle as a human right in order to examine whether the principle of double criminality also represents a human right. One could argue that the principle of double criminality has to be considered, indirectly through the legality principle, as part of international human rights.

The right to liberty is a basic human right, expressed in numerous human rights instruments.[468] Criminal procedure and extradition are, however, accepted exceptions to the right of liberty. For instance, the European Convention on Human Rights declares the right of everyone to liberty and security of person, except in certain procedures, such as criminal proceedings, deportations and extradition.[469] Deprivation of liberty can only take place in these specific procedures and only as described by law. Only in this manner can one avoid arbitrariness. This is called "the rule of law" and has been described as a fundamental human right.[470] The legality principle lies at the core of the concept of the rule of law.[471]

The legality principle appeared in an undeveloped form in the Magna Carta in 1215, though

[468] For example the Universal Declaration of Human Rights article 3, the European Convention on Human Rights article 5, and the International Covenant on Civil and Political Rights article 9.
[469] Article 5 (1).
[470] Sieghart, 18-19. Disputes must furthermore be decided by independent and impartial courts.
[471] Loucaides, 32, Jacobs, 120.

Aristotle had previously outlined it.[472] Later it formed part of the American Constitution and constitutions in Europe and elsewhere. It was also expressed in the Declaration of Human Rights adopted by the French legislative assembly in 1789.[473] The modern doctrine of legality emerged from European revolutions against the oppression, despotism and authoritarianism of contemporary rulers, and the philosophy of separation of powers, as developed by Montesquieu.[474] It was gradually accorded universal recognition. In 1935 the Permanent Court of Justice recognised the legality principle.[475]

The legality principle represents a right for the individual with correlative duties on the authorities. The legality principle comprises a directive to the legislature (on how to formulate penal provisions) and to the judiciary (on how to interpret them).[476] The legislature, when adopting penal provisions, must define the crimes clearly, avoiding vague and ambiguous terms. It is essential that criminal provisions are as specific as possible so that individuals expected to comply with them can be certain about their rights and duties. Also vital is the threat of punishment. It is not enough to describe the prohibited conduct; the punishment must also be clearly defined. Otherwise the conduct would not constitute a *crime*.[477]

The criminal nature of an act depends exclusively on the law and cannot be left to the discretion of the courts.[478] This conforms to the doctrine of separation of powers. The legislature makes the laws and the judiciary applies them; these roles should not be confused. In common law jurisdictions (like South Africa) an exception to the strict separation of powers used to be ability of the courts to create new crimes. In South Africa the list of these crimes is now closed and no new crimes may be added.[479] As to the role of the judiciary, the legality principle demands that the penal provisions be strictly construed.[480] The judiciary should interpret the penal statutes as so to find the intention of the legislature and may use the extensive, restrictive or teleological method of interpretation, but interpretation of penal statutes by analogy is not consistent with the legality principle.[481]

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[472] Loucaides, 32.
[473] Castberg, 19-20, Sieghart, 287.
[474] Burchell & Milton, 57.
[475] *Certain Danzig Legislative Decrees*, PCIJ (1935), Loucaides, 33.
[476] Jacobs, 120.
[477] Burchell & Milton, 60-61.
[478] Loucaides, 35.
[479] Burchell & Milton, 59.
[480] Burchell & Milton, 63.
[481] Loucaides, 35-38.

The legality principle has generally been interpreted in the context of domestic law. This is the general view among scholars and also confirmed by state practice.[482] International instruments that encompass the legality principle, however, occasionally include "national or international law."[483] This formulation expands the traditional view by including international crimes in the list of crimes for which national authorities can prosecute. This is in line with developments in international criminal law since 1945.[484]

Today the legality principle is a most fundamental protection of individual rights in both domestic and international criminal law. It forms part of domestic criminal laws, constitutions and bills of rights,[485] human rights conventions,[486] and other instruments of international law.[487] The legality principle in the international instruments is not to be deviated from under any circumstances.[488] It is a justiciable right that the individual can invoke where a state starts a prosecution for something that is not clearly criminal, or where the penal provision is ambiguous or has to be applied by analogy.

The fact that the legality principle is included in all major human rights treaties has led some authors to conclude that it is a human right.[489] This assumption would also be supported by the fact that the development of human rights was clearly influenced by the liberalism of the eighteenth and nineteenth centuries, when people fought for freedoms from arbitrary encroachment by the state.

It is not obvious, however, that the legality principle is a human rights norm. The scope and

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[482] Jacobs, 123.
[483] The Universal Declaration o f Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights.
[484] Jacobs, 123.
[485] For instance in the South African Bill of Rights section 35(3)(l)-(n) and the Norwegian Constitution (Grunnlov) §§ 96 and 97.
[486] For instance in the International Covenant on Civil and Political Rights article 15, the European Convention for the Protection of Human Rights and Fundamental Freedoms article 7, the American Convention on Human Rights article 9, the African Charter on Human Rights and People's Rights, 1981, article 7. The texts contain only minor differences.
[487] For instance in the United Nations Declaration of Human Rights article 11. The Statute of the International Criminal Tribunal for Rwanda and for the Former Yoguslavia respectively also contain references to the legality principle, Schabas, "Perverse Effects of the Nulla Poena Principle: National Practice and the Ad Hoc Tribunals", *European Jounral of International Law* p. 521 (2000), 521.
[488] Sieghart, 286, Schabas, 522.
[489] Schabas, 522. Van den Wyngaert advocates that the legality principle is a human right, "Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?", in Dugard & Van den Wyngaert (eds), *International Criminal Law and Procedure* (1996), 218-219.

content of human rights are still not agreed upon and, even though the legality principle provides protection to the defendant, the principle is not in literature generally referred to as a human right. The Human Rights Committee has warned against presuming that non-derivable rules are the same as human rights.[490] The question is thus unresolved.

Whether the legality principle is a human right or not, it nevertheless represents a rule of both domestic and international law that requires compliance. When examining whether double criminality is a human right, it could be relevant to ask whether an extradition for an act that is not criminal within the requested state violates the legality principle.[491]

The legality principle forbids punishment for something that is not criminal. Extradition is not tantamount to a punishment.[492] Extradition does not involve allocation of punishment, but merely provides the requesting state with personal jurisdiction over the offender for purposes of prosecution. To detain and arrest someone is not included in the legality principle. Such action naturally demands a statute and is generally included in constitutions, etc., but entails a rule other than the legality principle.[493] Vogler supports the approach that, because extradition is not equivalent to a punishment, the offender's liability to punishment under the law of the requested state is irrelevant.[494]

The legality principle furthermore stipulates a strict interpretation of the penal code. The individuals are entitled to know in advance what conduct is punishable. This reasoning does not apply to the extradition process. When the question of extradition arises, the fugitive has already violated the law and most likely become a fugitive for this very reason. As to the strict interpretation of penal statutes in criminal cases, state practice has shown that many states adhere to the *in abstracto* interpretation, which does not consider all aspects of the law.

Obviously, the requesting state needs to satisfy the legality principle. If the legality principle is a human right and the requested state has to consider potential human rights violations in the requesting state, the requested state has to ensure that the conduct for which extradition is requested actually is criminal in the requesting state. The practice of merely accepting an

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[490] Schabas, 522.
[491] Van den Wyngaert in Jareborg (ed), 53.
[492] Blakesley & Lagodny, 52, Vogler in Matscher & Petzold (eds), 671.
[493] For instance, the Norwegian Constitution contains a provision prohibiting arrest without law, § 99.
[494] Vogler in Matscher & Petzold (eds), 671.

affidavit of the criminality of the conduct in the requesting state when examining double criminality, would probably suffice in this respect.

Irrespective of the close and indisputable link between the legality principle and the double criminality principle, the examination of the legality principle has shown that it does not support the view that double criminality is a human rights norm.

4 4 3 Is Double Criminality a Justiciable Right in the Extradition Process?

A justiciable right is a right that can be taken to court in order to enforce it. Is the double criminality requirement of such a nature that an extraditee has standing before a court to claim that the rule is not satisfied?

Individuals will usually have standing to assert that the domestic extradition statute will be violated. But in certain states the statute is auxiliary to the treaty. For instance, in the United States there is no general federal extradition act and the extradition process is regulated entirely by treaties. But even where the state has national extradition statutes, it could be that international extradition law gives the fugitive better protection. A fugitive would naturally wish to invoke rules of international law where these may obstruct his extradition.

What does it mean that individuals are subjects of international law? Are they given the right to petition national and international tribunals and institutions where their international human rights are violated? According to Lauterpacht, "[t]he fact that the beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them."[495]

The position of the fugitive offender has traditionally been discussed in the context of the principle of territorial asylum. Extradition law developed with the sovereignty principle in mind. The network of extradition treaties was seen as purely consensual limitations on the privilege of the state granting territorial asylum.[496] The main rule is that individuals do not

[495] Lauterpacht, 27.
[496] Carnegie in San Jose (ed), 85-86.

have standing. As shown above, this view is gradually changing. The question of standing is likely to vary according to what rules the extraditee wants to invoke for his release. Lauterpacht says individuals' status as subjects of international law and an inherent capacity of enforcement of international rights, will depend on the given situation and the relevant international instrument.

The law in the United States on arrest, detention and extradition of international fugitives forms a separate body of law apart from the law of arrest and detention of suspects in domestic criminal cases, even to the extent that constitutional protections given to defendants in domestic cases are not given to fugitives awaiting extradition.[497] The United States has considered the extradition process to be a creation of international law, conducted partly by the executive, and not being of a criminal nature, as guilt or innocence is not determined.

However, recent decades have witnessed a trend in United States extradition law to allow fugitives more procedural rights, which will obviously strengthen the fugitives' opportunities to assert violations of human rights. An argument against giving fugitives more procedural rights is that doing so will make it more difficult for the United States to extradite fugitives as well as to obtain extradition from other states. Also, some allege it could have a negative impact on the United States' negotiation of new extradition treaties. Wiehl claims the liberalising trend may affect the United States government's foreign policy in general and its relations with foreign countries and "may serve to undermine the process of international extradition."[498]

Though the trend in international law clearly allows for a more lenient attitude towards individual standing, it has so far been confined to specific human rights conventions and institutions. There are no indications of a state practice that supports standing for fugitives in international extradition law.

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[497] Pyle, 4, Wiehl, 731-732. For instance, to obtain a provisional warrant of arrest of a fugitive from the courts, the government does not have to show probable cause, as opposed to the Fourth Amendment's prohibition that "no Warrants shall issue, but on probable cause", applying in domestic cases, 734 (probable cause will be established during the extradition hearing, which usually follows months after the arrest, 751). In the question of bail, the government has the burden of proof in domestic cases, whereas in extradition cases the burden of proof is placed on the fugitive, 735, 741. The fugitive may not cross-examine anyone who testifies at the extradition hearing, nor may he cross-examine affiants or deponents on whose affidavits or depositions the foreign complaint is based, and the fugitives right to present evidence is limited etc, 742.

[498] Wiehl, 738-740.

4 4 4 Is Double Criminality a Justiciable Right after Surrender?

The only legitimate means by which a fugitive can be sent to a state for purposes of prosecution, is by extradition. Both requested and requesting states have, however, in the past resorted to illegitimate means where extradition was barred.

According to the sovereignty principle, a state is free to deport unwanted foreigners. Deportation is a legitimate procedure in international law by which states send out unwanted foreigners from their territories according to their immigration statutes. Deportation law and extradition law are separate sets of rules that serve different purposes. Because of the criminal proceedings awaiting the extraditee, he has been granted special protection in the law of extradition that are not granted deportees in the law of deportation. However, states are known to make use of disguised extradition through deportation where domestic law forbids extradition.

Some states have been involved in abductions of fugitives. Abductions have been carried out by officials of the state or by private citizens. Abductions take place where a request for extradition has been denied, or where no request has been put forward because the custodian state for political or legal reasons will not extradite. Sometimes the custodian state has tacitly consented to, or clandestinely aided, the abduction in cases where returning the fugitive was desirable but not legally feasible.

Whether a person has been abducted, illegally deported or extradited contrary to the double criminality principle, the question remains the same. Is the double criminality principle a justiciable international human right that the individual can invoke during criminal proceedings? Technically, neither a deportation nor an abduction is an extradition as defined by scholars and there has been no extradition process in which the fugitive could have invoked protections offered him by extradition law. The reality is, however, that the fugitive has been returned to the prosecuting state in contravention of laws and treaties, thus violating provisions safeguarding individual rights, such as the double criminality principle.

The question could be asked to what extent the fugitive offender's position is one of loss of

rights by comparison to other offenders.[499] The following example will illustrate the problem. Two persons commit a serious crime together and then one escapes abroad whereas the other remains in the country. Later they are both arrested, the former abroad and the latter in the state where the crime was committed. The person arrested abroad is extradited or returned by other means contrary to the double criminality principle. Joint criminal proceedings are instigated against the two culprits. Is it fair that the person who escaped abroad before being returned is entitled to invoke a breach of the double criminality principle in the requested state as a breach of international human rights and thus go free, whereas his fellow culprit will be punished?

In the United States the question of standing in criminal cases has been the subject of several judicial decisions where a person who has been extradited from a foreign state has claimed the United States has violated the principle of specialty. The denial of standing to the individual is premised on the doctrine that states and not individuals are subject to international law, and this effectively deprives the individual of the right to raise objections in both the requested and the requesting state.[500] This reasoning is likely to apply where any violation of international extradition law is invoked, including the double criminality principle, if the prosecuting state does not regard individuals as subjects of international law.

If breaches of extradition law committed by the prosecuting state are not allowed to be invoked in a criminal case, then breaches of the extradition law by a foreign state are even less likely to be allowed to be invoked. Where a person who already has been surrendered invokes a breach of double criminality, he is actually complaining about circumstances related to another state. If the person was illegally extradited or deported, it was the requested state that breached the double criminality principle, not the requesting state. In this case an assertion of a breach of double criminality will most likely be ignored. Can the indicted person invoke the breach of double criminality as a violation of his human rights?

In the case of *deportation and irregular extradition* the fugitive's appearance on the territory of the prosecuting state gives such a state personal jurisdiction without it breaking domestic or international law. Where the prosecuting state has indulged in *abduction*, it has obtained personal jurisdiction by breaking international law and probably also the domestic law of both

[499] Carnegie in San Jose (ed), 107.
[500] Dugard & Van den Wyngaert, 189.

states. This does not necessarily mean that it cannot prosecute the person.

First of all, the legality principle does not, as concluded above, exclude prosecution where the principle of double criminality has been violated. Secondly, the kidnapping itself could bar prosecution according to domestic law, but some states have chosen to accept illegal means of obtaining personal jurisdiction. The rightfulness of kidnapping, however, is not the issue here. The question is whether double criminality is an international human right that prevents prosecution when the fugitive was kidnapped.

Courts of several states have dealt with cases where fugitives have been kidnapped or irregularly deported. The cases are not concerned with a possible violation of the double criminality rule, but whether the irregular means by which the defendants were brought to the prosecuting states were lawful. The cases may, however, shed some light on the human rights aspects of double criminality as well, or they could be interpreted by analogy with double criminality.

The United States is among those states that have resorted to abductions where an extradition request was unsuccessful.[501] One of the first cases before the United States Supreme Court involving the legality of extraterritorial abductions was *Ker v. Illinois*.[502] It was held that forcible abductions do not deprive the court of personal jurisdiction. This rule was upheld in *Frisbie v. Collins*, where it was held that "the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction."[503]

The *Ker-Frisbie* doctrine means that there exist no restrictions on how courts in the United States obtain personal jurisdiction over the defendant. Some courts have, however, construed exceptions to this doctrine where the extradition treaty or the defendant's due process rights have been violated.[504]

In 1990 a Mexican national, Mr. Alvarez-Machain, was kidnapped from Mexico to stand trial

[501] Blakesley & Lagodny, 9.
[502] *Ker v. Illinois*, 119 U.S. 436 (1886).
[503] *Frisbie v. Collins*, 342 U.S. 519 (1952).
[504] Henning, 363.

in the United States on charges of torture and murder. In *Alvarez-Machain*[505] the validity of the abduction itself, a procedure not condoned by the extradition treaty between the United States and Mexico, was questioned. Alvarez-Machain argued the court lacked personal jurisdiction because he had been forcibly abducted in violation of his due process rights and because the abduction violated the extradition treaty between Mexico and the United States.

The District Court rejected the claim that Alvarez-Machain's due process rights were violated and that the court lacked personal jurisdiction.[506] However, the court did find that the abduction had violated the extradition treaty, even though it did not expressly forbid abduction by the requesting state's officials. Mexico had launched official protests and these were held to be sufficient to grant Alvarez-Machain derivative standing to invoke Mexico's rights under the treaty.[507] The Ninth Circuit upheld the decision.

The United States Supreme Court followed the *Ker-Frisbie* doctrine, overruling the district court decision. It held that the abduction did not violate the extradition treaty and that "the manner in which an accused came before the court was irrelevant to the jurisdiction of the court to try the accused."[508]

This reasoning strongly suggests that any potential objections to an extradition by the state whose territorial sovereignty was violated are irrelevant to the court in the prosecuting state. If the court is willing to prosecute the defendant irrespective of the unlawfulness of his arrest, then the court is not likely to accept the argument that the extradition law of a foreign state was broken either. Even where the national state has objected to the unlawful treatment of its national, the United States Supreme Court refused to give the defendant standing. This is probably not inconsistent with international law, though it has been accepted for some time that individuals can be given standing where its national state backs the complaint.

However, the District Court and the Ninth Circuit opened the possibility that defendants may invoke two exceptions to the *Ker-Frisbie* doctrine. The defendant was allowed to object to violations of the extradition treaty and violations of due process rights. The legal weight of these decisions is difficult to estimate. It is most likely that the fact that the Supreme Court so

[505] *United States v. Alvarez-Machain*, 508 U.S. 655 (1992).
[506] Henning, 365.
[507] Henning, 364-365.

clearly quashed these decisions supports a continuance of a strict application of the *Ker-Frisbie* rule.

Courts in the United States are thus not willing to distinguish between defendants who have fled abroad and then were retrieved by lawful or unlawful means, and defendants who never left the country. Any objection the defendant who fled abroad may raise regarding his capture, is ignored.

What is the situation where there is no treaty and a person is extradited in breach of domestic law? Does this represent a violation of international human rights law? In the case of *Bennett*[509] the United Kingdom and South Africa had co-operated in the transfer via London of a fugitive, who was supposed to be deported from South Africa to New Zealand. This was a clear case of disguised extradition. The case came before the courts of the United Kingdom. The extraditee claimed this procedure violated the specialty principle.[510] The outcome of the case was clearly influenced by considerations of human rights. Lord Griffith, considering the specialty principle, said:

> "Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country... If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit."[511]

In a case from South Africa a Mr. Ebrahim had been abducted from Swaziland and brought to trial before the Transvaal Provincial Division of the High Court on charges of treason. Ebrahim had been abducted from Swaziland by informers of the South African National Intelligence Service and brought into the custody of the police in South Africa before he had been officially arrested. He was convicted and sentenced to 20 years imprisonment. Ebrahim

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[508] Carnegie in San Jose (ed), 99, Henning 365.
[509] *Bennet v. Horseferry Road Magistrates' Court* (1993) 3 All E.R. 129.
[510] See Carnegie in San Jose (ed).
[511] 1993 (3) All ER at 150.

successfully appealed to the Appeal Court. In *S v Ebrahim*[512] the Appeal Court held that under Roman Dutch law a South African court has no competence to try a person abducted from another state by agents of the prosecuting state.

Ebrahim v Minister of Law and Order[513] heard in the Transvaal Provincial Division in South Africa was the follow-up of the abduction, where Ebrahim in a civil action sued the defendants for damages for unlawful abduction, arrest and detention. It was held that the South African Police knew about the unlawful abduction and transportation and had thereby formed common purpose and associated themselves with the abductors. One of the defendants was found liable for damages resulting from these unlawful acts. Though this case was raised years after the defendant had been released from jail and did not form part of his defence, the decision includes several important elements. The individual was given standing and was allowed to invoke the principle that his rights had been violated through the abduction. The court declared that the abduction was illegal and on this basis imposed a duty of paying damages.

In *Mohamed and Another v. President of the Republic of South Africa and Others*[514] the South African Constitutional Court examined a case where the appellant, Mohamed, had been handed over by South African customs officials to United States officials in Cape Town and then allowed to be taken out of the country and flown to the United States. Neither deportation proceedings nor extradition proceedings were followed. Mohamed was charged in the United States with a number of capital charges related to the bombing of the United States embassy in Dar es Salaam, Tanzania, in 1998.

At the time of the proceedings before the South African Constitutional Court, Mohamed was standing trial in a court in New York. One would think that a case in South Africa would not help Mohamed in the United States that applies the *Ker-Frisbie* doctrine. The South African Constitutional Court held, however, that it would not be futile to pronounce on the illegality of the government's conduct due to the important issues of legality and policy involved and due to the desire to send a signal to the court in New York regarding the wrong done to Mohamed. The Constitutional Court held the acts of the South African officials to be

[512] 1991 (2) SA 553 (A).
[513] *Ebrahim v Minister of Law and Order and Others*, 1993 (2) SA 559 (T).
[514] *Mohamed and Another v. President of the Republic of South Africa and Others,* 2001 (3) SA 893 (CC).

unlawful, whether they were characterised as a deportation or an extradition. It was held that the authorities should have obtained an assurance from United States authorities that the death penalty would not be imposed or carried out.

These decisions by the courts of the different states show that the issue of allowing the individual standing in cases where international law has been broken, appears regularly in the courts. However, one cannot deduce from these decisions that individuals generally have gained standing in international extradition law. The two South African cases did not affect the defendant in a criminal case, but they nevertheless are very important as they pronounce on the fundamental rights of the individual. These decisions indicate how a case of a defendant who has been illegally brought before South African courts would be handled, but deducing a general standing for international fugitives from these decisions would probably be too optimistic.

4 5 Concluding Remarks

Though the question of the individual's rights may not have been the original inducement for states in creating the rule of double criminality, it nevertheless holds these qualities. Double criminality cannot, however, be classified as an international human rights norm. Irrespective of this, the fact that human rights have obtained a strong position in international extradition law will influence the general attitude towards fugitives among states engaging in extradition. The focus is no longer on state sovereignty, but on the weakest part in the process, the fugitive. Due to the increasing focus on human rights in extradition law, traditional extradition requirements protecting the fugitive will become increasingly important as well. Traditional extradition provisions such as the double criminality requirement will become more important *because* they protect the individual.

5 An Evaluation of Double Criminality

5 1 Introduction

Three opposing interests govern the existence and interpretation of the double criminality principle in international extradition law. These are the interests of the requested state, the fugitive, and the international community as such. Whereas the fugitive's interest always favours a strict interpretation of double criminality, the international community as such favours an abolition of the principle. In the middle we find the interests of the requested state, which may benefit from both a strict and a lenient interpretation of the double criminality requirement, and even its non-existence, depending on the concrete circumstances. The double criminality requirement offers no help to the requesting state in the specific case, but it may of course be of use to the requesting state the day it is requested for an extradition itself.

5 2 State Sovereignty versus International Co-operation

On the one hand, the double criminality principle protects the requested state's sovereignty. On the other hand, states have come to realise that it is not in their interest to have criminal fugitives at large in their territories. This has led states to engage in co-operation in criminal matters, as it is in the interest of the international community to combat crime and punish criminals.

International co-operation in criminal matters could be negatively affected by the double criminality principle. A strong enforcement of international criminal law would benefit from the abrogation of the double criminality requirement. In this respect states have increasingly accepted restrictions on their sovereignty. Certain international incidents may trigger strong nationalistic feelings and call for a strong display of state sovereignty and integrity, but this aspect has become less adamant in international criminal law. Though the double criminality principle has so far not been abolished, it is likely that the interests of the international community have led to a more lenient interpretation of this principle.

The system and magnitude of international law and co-operation have clearly changed over recent decades. Interstate relations are in transition as new forms of mutual assistance emerge. The fact that principles laid down at a time when the notion of sovereignty was absolute are upheld today when inter-state relations are in transition, could cause difficulties.[515] As international co-operation on crime suppression becomes more vital, many states – both those that request extradition and those that receive such requests – have expressed a wish to derogate from the double criminality requirement. States have realised that surrendering fugitive criminals is in their own interests as well. One could thus ask whether double criminality – a principle described as a fundamental rule of extradition law – has outplayed its importance as a restriction on extradition.

International co-operation depends on a certain degree of similarity between the cultural, political, social and legal structures of the states concerned. The increasing or decreasing significance of the double criminality requirement probably depends on the comparison of ideological assumptions, political and economic structures, social norms and customs, legal traditions, etc., which exist in the two states involved in the extradition proceedings.[516] One could assume that the more similarities between the two countries, the less significance the double criminality requirement has.

Each state, in conformity with its social and cultural standards and values, defines what conduct should be regarded as criminal in its territory. There are significant diversities within the international community as to what should be considered as criminal behaviour. States have not yet reached the stage where they unconditionally accept foreign criminal law and procedure. Though some states are willing to give up sovereignty in matters of international criminal law, they still view foreign law with some scepticism. The double criminality principle represents a compromise. Even if demonstrating state sovereignty as such is no longer a political goal, it nevertheless plays an important role in securing some level of conformity between states' legal systems in their co-operation in criminal matters.

[515] Schultz, 10.
[516] Plachta, 99.

5 3 The Individual in the Process

The desire in the international community to relax the double criminality requirement is subdued by the recognition of the need to protect the individual.[517] Is it possible to defy the double criminality requirement and still respect and protect the individual's basic rights? Compared with defendants who have not fled abroad after committing a crime, the fugitive criminal has suffered no loss of right if he is extradited contrary to the double criminality principle. However, the double criminality principle applies to the extradition process itself.

As human rights law has entered the sphere of the international law of extradition, the basic rights offered a defendant in an ordinary criminal process are also offered the fugitive in an extradition process. One could ask whether the double criminality principle still serves the purpose of protecting the individual against persecution or whether other human rights provisions give sufficient protection in this respect. Several international human rights instruments provide for provisions on fair trials and prohibitions of discrimination based on religion, ethnic background, political opinions, gender, etc. One cannot from these instruments deduce general universal rights. Neither international extradition law nor general human rights can substitute for the double criminality principle. The requested state has a duty to protect individuals within its territory and the double criminality principle imposes a duty to ensure that the fugitive is not surrendered for acts that are not considered punishable. The double criminality principle offers considerable protection to the fugitive that cannot be replaced by other existing rules of international law.

5 4 The Political Side of Double Criminality

Though it could be convenient for a state to overlook the double criminality requirement in certain cases, there will always be other cases where a state would for several reasons want to comply with the principle. It serves both the political interests of nations and the interests of the individual.[518]

One could claim the double criminality condition has become so technical and convoluted that

[517] Hafen, 208.
[518] Hafen, 230.

it obstructs justice rather than promoting it. Such a statement presumes justice would be served by extraditing the alleged or convicted criminal. A liberal double criminality rule does not create many obstacles to extradition, whereas a rule with many prerequisites attached to it and a strict interpretation would complicate the extradition process. As shown above, there are wide varieties as to how strictly the double criminality principle is interpreted in the different states.

Naturally, defendants fight their extradition by taking advantage of the extreme technical requirements dominating the double criminality principle in certain states. Statutes that are very technical risk creating legal constructions that may result in illogical and unfair results appalling to society. In politically sensitive cases there will naturally be different opinions on what result would serve justice. As the extradition process is historically closely connected with considerations of politics, one could be tempted to assume that a strict construction of the double criminality principle actually serves the underlying aspects of what is politically desirable.

5 5 Final Remarks

As long as the subjects of international law are equal and independent states, and no supranational legislature, prosecuting authority or judiciary has been established, the different legal systems will continue to generate different penal statutes and the principle of double criminality will most likely not be abolished. It is more likely that the principle will gradually be liberalised in countries that today apply a strict interpretation. The principle serves its purposes also if it is interpreted liberally. It is important, however, that it is not interpreted too liberally as – in the words of Pyle – "no regime on earth can be trusted in all circumstances to provide wholly apolitical and wholly fair investigation, prosecution, trial, or punishment."[519]

[519] Pyle, 7.

6 List of Cases and Decisions

Ireland

Aamand v. Smithwick, (1995) 1 ILRM 61

The United Kingdom

Bennett v. Horseferry Road Magistrates' Court, (1993) 3 All ER 129

Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No 3), (1999) 2 WLR 824, 905 (H)

Regina v. Bow Street metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2), (1999) 2 WLR 272

Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 1), (1998) 4 AII ER 936

The United States

Holmes v. Jennison, 14 Pet. 540 (1840)

Ker v. Illinois, 119 U.S. 436 (1886)

Wright v. Henkel, 190 U.S. 40 (1903)

Collins v. Loisel, 259 U.S. 309 (1922)

Factor v. Laubenheimer, 290 U.S. 276 (1933)

Frisbie v. Collins, 342 U.S. 519 (1952)

United States v. Alvarez-Machain, 508 U.S. 655 (1992)

South Africa

Mohamed and Another v. President of the Republic of South Africa and Others, 2001 (3) SA 893 (CC)

Ebrahim v. Minister of Law and Order and Others, 1993 (2) SA 559 (T)

S v Ebrahim, 1991 (2) SA 553 (A)

The European Court of Human Rights

Soering v. United Kingdom, 161 European Court of Human Rights, (Series A) (1989)

The Permanent Court of International Justice

Lotus, PCIJ, Series A (collection of Judgements) No 10, 1927

Certain Danzig Legislative Decrees, PCIJ, 1935

The International Court of Justice

Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain) Judgement, ICJ Reports 1970

The United Nations Human Rights Committee

Kindler v. Canada, CCPR/C/48/D/470/1991, (1993)

Ng v. Canada, CCPR/C/49/D/469/1991, (1994)

Cox v. Canada, CCPR/C/52/D/539/1993, (1994)

7 Internet sites

http://www.archives.star.arabia.com

http://www.hrw.org

http://www.isrcl.org

http://www.law.duke.edu/journals/lcp

http://www.lawsmart.com/canada/criminal/extradition.htm

http://www.conventions.coe.int

http://www.wcl.american.edu/pub/humright/brief/v6i3/pinochet.htm

http://www.usatoday.com/life/cyber/tech/cti095.htm

8 Bibliography

Books

Aughterson, *Extradition – Australian Law and Procedure* (1995)

Bassiouni, *International Extradition: United States Law and Practice* (1996)

Bassiouni & Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995)

Bedi, *Extradition in International Law and Practice* (1966)

Brownlie, *Principles of Public International Law* 5 ed (1998)

Burchell & Milton, *Principles of Criminal Law* 2 ed (1997)

Clarke, *A Treatise upon the Law of Extradition* (1888)

Council of Europe, *Explanatory Report of the Council of Europe to the European Extradition Treaty 1957* (1985)

Council of Europe, *Legal Aspects of Extradition among European States* (1970)

Dugard, *International Law. A South African Perspective* (2000)

Dugard & Van den Wyngaert (eds), *International Criminal Law and Procedure* (1996)

Eide & Schou (eds), *International Protection of Human Rights* (1968)

Fleischer, *Folkerett* 6 ed (1994)

Gilbert, *Transnational Fugitive Offenders in International Law* (1998)

Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988)

Jacobs, *The European Convention on Human Rights* (1975)

Jacobs & White, *The European Convention on Human Rights* 2 ed (1996)

Jareborg (ed), *Double Criminality. Studies in International Criminal Law* (1989)

Joyner (ed), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights* (1998)

La Forest, *Extradition to and from Canada* 2 ed (1977)

Lauterpacht, *International Law and Human Rights* (1950)

Loucaides, *Essays on the Developing Law of Human Rights* (1995)

Matscher & Petzold (eds), *Protecting Human Rights: The European Dimension* (1988)

Murray & Harris, *Mutual Assistance in Criminal Matters* (2000)

Palmer, *The Austrian Law on Extradition and Mutual Assistance in Criminal Matters* (1983)

Pyle, *Extradition, Politics, and Human Rights* (2001)

Rintelen, *Die Grundsätze des Heutigen Völkerrechts über die Auslieferung von Verbrechern* (1909)

Ruud & Ulfstein, *Innføring i Folkerett* (1998)

San Jose (ed), *Seminar for Caribbean Judicial Officers on International Human Rights Norms and the Judicial Function* (1995)

Shaw, *International Law* 4 ed (1997)

Shearer, *Extradition in International Law* (1971)

Sieghart, *The International Law of Human Rights* (1983)

Stanbrook & Stanbrook, *Extradition Law and Practice* 2 ed (2000)

Villiger, *Customary International Law and Treaties* 2 ed (1997)

Periodicals

Adler, "Translating and Interpreting Foreign Statutes", *Michigan Journal of International Law* p. 37 (1997/98)

Blakesley, "A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes", *Utah Law Review* p. 685 (1984)

Blakesley & Lagodny, "Finding Harmony Amidst Disagreement Over Extradition, Jurisdiction, The Role of Human Rights and Issues of Extraterritoriality Under International Criminal Law", *Vanderbilt Journal of International Law* p. 1 (1991)

Byers, "Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules", *Nordic Journal of International Law* p. 211 (1997)

De Hoogh, "The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective", *Austrian Journal of Public and International Law* p. 183 (1991)

De Merieux, "Extradition as the Violation of Human Rights. The Jurisprudence of the International Covenant on Civil and Political Rights", *Netherlands Quarterly of Human Rights* p. 23 (1996)

Du Plessis, "The Pinochet Cases and South African Extradition Law", *South African Journal on Human Rights* p. 669 (2000)

Dugard & Van den Wyngaert, "Reconciling Extradition with Human Rights", *American Journal of International Law* p. 187 (1998)

Enache-Brown & Fried, "Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law", *McGill Law Journal* p. 613 (1998)

Hafen, "International Extradition: Issues Arising Under the Dual Criminality Requirement", *Brigham Young University Law Review* p. 191 (1992)

Harrington, "Human Rights Exceptions to Extradition Moving Beyond Risks of Torture and Ill-Treatment", *www.isrcl.org.*

Henning, "Extradition Controversies: How Enthusiastic Prosecutions Can Lead to International Incidents", *Boston College Interntional and Comparative Law Review* p. 347 (1999)

Joyner & Rothbaum, "Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?", *Michigan Journal of International Law* p. 222 (1993)

Kemp, "The United Nations Convention Against Transnational Organized Crime: A Milestone in International Criminal Law", *South African Journal of Criminal Justice*, p. 152 (2001)

Lemaître, "Belgium Rules the World: Universal Jurisdiction over Human Rights Atrocities", *Jura Falconis* p. 255 (2000-2001)

Levine, "Cuban Hijackers and the United States: The Need for a Modified *Aut Dedere aut Judicare* Rule", *Colombia Journal of Transnational Law* p. 133 (1995)

Levy, "Double Criminality and the U.S.-U.K. Extradition Treaty: Hu Yau-Leung v. Soscia",

Brooklyn Journal of International Law p. 475 (1982)

Mullan, "The Concept of Double Criminality in the Context of Extraterritorial Crimes", *Criminal Law Review* p. 17 (1997)

Rezek, "Reciprocity as a Basis of Extradition", *British Yearbook of International Law* p. 171 (1981)

Schabas, "Perverse Effects of the *Nulla Poena* Principle: National Practice and the Ad Hoc Tribunals", *European Journal of International Law* p. 521 (2000)

Steven, "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations", *Virginia Journal of International Law* p. 425 (1999)

Strydom, "The Rights and Responsibility of Civil Society to Promote and Protect Human Rights", *South African Yearbook of International Law* p. 66 (1995)

Wiehl, "Extradition Law at the Crossroads: The Trend towards Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States", *Michigan Journal of International Law* p. 729 (1997/98)

Williams, "The Double Criminality Rule and Extradition: A Comparative Analysis", *Nova Law Review* p. 581 (1991)

Wilson, "Prosecuting Pinochet: International Crimes in Spanish Domestic Law", *Human Rights Quarterly* p. 927 (1999)

Wilson, "Prosecuting Pinochet in Spain," *http://www.wcl.american.edu/pub/humright/brief/v6i3/pinochet.htm.*

Woltring, "Politics, Crime and Criminal Justice", *www.isrcl.org.*