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L'EXTRADITION

Actes du Séminaire international
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international solidarity among the workers," in accordance with provisions contained in Chapter 1, Section 1 of the Special Part,[5] (Article 73). Similarly, crimes against the state or public property of other socialist states committed with respect to property located on the territory of the RSFSR shall be punishable pursuant to Chapter 2 of that Code.

The Bulgarian Penal Code of 1968 provides that the offenses defined in Chapter 1 of the Special Part: "Offenses Against the National Republic"[6] shall be punishable if committed against another "workers' state" or against the armed forces which act together with the Bulgarian Army (Article 113). Furthermore, the offenses against "socialist property" as defined in Chapter 5 of that Code shall be equally punishable if committed to the detriment of the state or public property of another socialist state.

Modest protection of the interests of another state of the "Socialist world system" is granted by Czechoslovakian law. It is limited to some political offenses against the state.[7]

Only two socialist countries do not grant equal protection to the values and interests of other member states of that "block," i.e. Romania and Yugoslavia. The Penal Code prior to 1969 provides that for offenses committed to the detriment of a representative of a foreign state, (i.e. where life, bodily integrity, health, liberty, or dignity are endangered), a harsher penalty shall be imposed than for ordinary offenses.[8] Prosecution of such offenses is initiated at the request of the foreign government. "Socialist state" is mentioned neither in this context, nor in any other place.

[5] They are the following crimes: treason (Art. 64), espionage (Art. 65), terrorist acts (Art. 66-67), sabotage (Art. 68), wrecking (Art. 69), anti-soviet agitation and propaganda (Art. 70, propagandizing of war (Art. 71), conspiracy (Art. 72).

[6] They are the following crimes: high treason (Art. 95-97), treason and espionage (Art. 98-105), diversion and wrecking (Art. 106-197), anti-state agitation and propaganda (Art. 108), conspiracy (Art. 109).

[7] According to Sec. 99, 104 and 108, the following offenses are punishable if committed to the detriment of another socialist state: acts against the state (Sec. 92), terrorist acts (Sec. 93-94), wrecking (Sec. 95-96), sabotage (Sec. 97), diversion (Sec. 98), defamation of the state or its representative (Sec. 102), espionage (Sec. 105), disclose of the state secrecy (Sec. 106-107).

[8] The maximum penalty is then increased by two years deprivation of liberty.

THE EXTRADITION REQUIREMENT OF DOUBLE CRIMINALITY IN COMPLEX CASES: ILLUSTRATING THE RATIONALE OF EXTRADITION

Michael E. TIGAR*

The principle of double criminality, or "*double incrimination*" or "*réciprocite d'incrimination*," requires that the acts constituting the offense charged in the requesting state (*requerant*) also be an offense punishable by a severe sentence in the requested state (*requis*). There are variations on this theme, most of which are introduced by treaties and municipal laws governing extradition. Some treaties simplify the analysis by specifically listing offenses for which the signatories will grant extradition. Where the treaty does not rely upon a list, and where its text and the municipal law of the requested state are unclear, the principle of double criminality may provide a more or less strict canon of construction.

This paper discusses the problems involved in interpreting the principle of double criminality and the conflicting views of leading text-writers, examines recent American extradition law and practice, and concludes by restating the rationale of the double criminality principle. Finally, this paper says that double criminality is allied to concepts of fairness to the accused as well as to sovereign prerogative.

The most difficult cases for requested states are, not surprisingly, those involving fraud, deceit and theft, particularly when these basic concepts are interwoven in a complex business crime case. For those of us in common-law countries, with our complex and history-laden concepts of theft, these cases require us to ask whether particular elements of a given theft offense are the result of historical accident or whether they reflect deliberate decisions about public order.

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The Problem Stated

The rationale of extradition itself comes to us garbed in reinment older than the modern nation-state. Grotius, in *De Jure Belli ac Pacis (Of the Law of War and Peace)*, spends most of Book II, chapter XXI, "On the Sharing of Punishments," developing a theory of punishment that comprehends the obligations of return and of asylum.[1] Grotius expressly contemplates non-extradition for minor offenses, an element of most double criminality provisions today. He also recognizes, however, that sovereigns may deny return of those whose alleged misdeeds are not punishable under their own, more enlightened, view of justice.[2] Indeed, Grotius begins his discussion by quoting Oedipus' plea in *Oedipus at Colonnus*. Oedipus denies intentional wrong-doing, and Theseus agrees on this condition to succor him.[3]

It is possible to interpret this passage as simply reflecting an overarching concern that punishment, however inflicted, be consistent with Grotius' natural law views. Such an interpretation is not entirely supportable. Grotius makes clear at several points that he is discussing sovereign prerogative as well as metanorms. A sovereign, in Grotius' view, may make and enforce a system of legal rules, subject to natural law limitations. He cites several examples of sovereigns rightly refusing to render fugitives based on their own assessment that the conduct should not be punished.

This is contrary to Professor Bassiouni's suggestion that Grotius did not have a high regard for the principle of double criminality, or at least to its underlying rationale of reciprocity.[4] Professor Bassiouni suggests that it would be "desirable" if "the requested state set aside the requirement of double criminality, unless special circumstances exist in the requesting state such as a question of *ordre public*."[5] This question is addressed in the concluding section.

Professor Shearer's treatise, *Extradition in International Law*,[6] comes closer to the views expressed in this paper. He argues:

[1] Grotius, De Jure Belli Ac Pacis Libri Tres (1646) (Kelsey trans. 1925).

[2] *Id.*, at 371-72.

[3] *Id.*, at 370-71. *See also* Tigar, *Intending, Knowing and Desiring: The Mental Element in Federal Criminal Law*, to be published in a forthcoming issue of Cleveland-Marshall Law Review. The article is based on a lecture given at the law school in 1988.

[4] M.C. Bassiouni, International Extradition and World Public Order 323 (1974). *See also* 1 M.C. Bassiouni, International Extradition: United States Law & Practice 325 (1987) (to the same effect).

[5] *Id.*, at 322.

[6] I.A. Shearer, Extradition in International Law 137-41 (1971).

> The validity of the double criminality rule has never seriously been contested, resting as it does in part on the basic principle of reciprocity which underlies the whole structure of extradition, and in part on the maxim *nulla poena sine lege* . . . . The social conscience of a state is also not embarrassed by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment. . . . The point is by no means an academic one even in these days of growing uniformity of standards; in Western Europe alone sharp variations are found among the criminal laws relating to such matters as abortion, adultery, euthanasia, homosexual behavior and suicide.[7]

The cogency of Professor Shearer's remark is illustrated by the list of reservations by signatories to the European Convention on Extradition of 1957.[8] Most commentators on the European Convention support the principle of double criminality, though on varying theories. Professor Hans Schulz believes it "irrefutable" that "In law it would be intolerable to begin an extradition procedure against a person and to imprison him for an offence which under the criminal law of the requested state could never be the subject of criminal proceedings."[9]

Another observer finds the principle behind the double criminality requirement to be "problematic."[10] For this observer, the role of the requested state is little different from that of a local authority in one part of a country called upon to execute an arrest warrant from another part of the same country. However, even he recognizes that "for the time being -- with legal, political, social conditions as they are," it is right to insist upon double criminality. That is, the principle rests on notions of sovereignty that ought to be obsolete but are not.

A leading French treatise speaks of double criminality as a principle "criticized by certain authors, but to which the treaties and the [French] law of 1927 remain attached."[11]

[7] *Id.*, at 137-38.

[8] *See* Karle, Some Problems Concerning the Application of the European Convention on Extradition, in Legal Aspects of Extradition Among European States 51 (Council of Europe 1970). The text of the European Convention appears in M.C. Bassiouni, International Criminal Law, volume 2 (Procedure) 505-13 (1986), reviewed in Tigar, *New Frontiers: The Expansion of International Criminal Law*, 22 Tex. Int'l L.J. 411 (1987).

[9] H. Schulz, The Principles of the Traditional Law of Extradition, in Legal Aspects of Extradition Among European States 7, 12-13 (Council of Europe 1970).

[10] W. Duk, Principles Underlying the European Convention on Extradition, in Legal Aspects of the Extradition Among European States 29, 37-38 (Council of Europe 1970).

[11] R. Merle & A. Vitu, *Traité de Droit Criminel*, at 225 (1967).

John Kester, in an otherwise firm defense of historic limits on extradition, regards double criminality as having doubtful relevance and value in today's world. He expressly declines to discuss, however, the relationship between double criminality and the protection of a fugitive from the risk of being prosecuted for an offense that is arguably beyond the territorial jurisdiction of the requesting state.[12] Yet, this issue lies at the heart of many recent decisions involving complex cases because such cases often involve alleged fraud or market manipulation conducted from outside the requesting state, but with the intent to cause a result there and with the knowledge that such a result was likely to occur.

With noted authors in disagreement, it is hardly surprising that the principle of double criminality is fragile and at times ill-defined. Nonetheless, it remains a viable notion, subject always to the power of states to minimize or even eliminate its impact through an express treaty or even by municipal laws that guide the extradition process within a particular country. This latter means of limiting the principle's application is limited by a recognition that double criminality may have become a norm of customary international law designed for the protection of individuals as well as sovereign states.[13]

The Problem Illustrated: Some Recent Cases

The American cases have, in general, been generous to requesting states in construing the requirement of double criminality. As the United States Court of Appeals for the District of Columbia Circuit held in *United States v. Sensi*:[14]

> Customarily, the double criminality principle requires that the '*acts* charged' constitute a serious offense in both countries. Restatement (Third) of Foreign Relations Law of the United States § 476, comment d (emphasis added). The Restatement

[12] J. Kester, Some Myths of United States Extradition Law, 76 Geo. L. J. 1441, 1459-64 (1988).

[13] "The rule seems to be universally established by practice, however, that it could without much doubt be regarded as a customary rule of international law, should the question ever arise as a result of some chance omission in the wording of a treaty." I.A. Shearer, *supra* note 6, at 138. However, some courts have held that language permitting extradition despite the absence of double criminality is to be liberally construed. Such a view cuts against the idea of an international customary norm in favor of double criminality. *See, e.g.*, Matter of Assarsson, 635 F.2d 1237 (7th Cir. 1980); Matter of Assarsson, 687 F.2d 1157 (8th Cir. 1982).

[14] 879 F.2d 888, 894 (D.C. Cir. 1989). Compare the approach taken in the *Aronson* case, discussed below.

> makes clear that the focus is on the acts of the defendant, not on the legal doctrines of the country requesting extradition.

The Court upheld prosecution of *Sensi* in the United States for mail fraud, on the theory that he had in essence stolen from his employer and that such conduct was a crime in both the United Kingdom and the United States. The use of the mails and interstate transportation of theft proceeds were only "jurisdictional" elements, excluded from the reach of double criminality analysis by the U.K. - U.S. treaty itself.[15] Similarly liberal constructions of the double criminality requirement appear in a number of cases.[16]

This liberal interpretation runs into trouble in three kinds of situations: (A) when offense-elements clearly reflect legislative policy decisions on criminalization; (B) when extraterritorial jurisdiction is a

[15] *Id.*, at 894.

[16] *See, e.g.*, Matter of Suarez-Mason, 694 F.Supp. 676 (N.D. Cal. 1988) (Granting extradition of Argentine military figure; restates principle of double criminality based in part on reciprocity and comity;in dicta, finds double criminality satisfied on kidnapping charge even though purpose of abduction was to gain information while U.S. law would require abduction was to gain information while U.S. law would require abduction for ransom or reward); Matter of Russell, 789 F.2d 801 (9th Cir. 1986) (complex fraud case; double criminality requirement held satisfied although Australian law does not require proof of an overt act in furtherance of conspiracy as does U.S. law; however, the Australian evidence shows that many overt acts were in fact committed; emphasis is on "conduct" not elements of offenses); Matter of Rabelbauer, 638 F.Supp. 1085 (S.D.N.Y. 1986) (double criminality conceded, but fugitive unsuccessfully contends that treaty offense of malversation broadly corresponds to bribery and inducement to abuse authority; case is relevant by analogy to double criminality analysis); Matter of Yarden, 1989 WL 56119 (E.D.N.Y. 1989) (extradition to Belgium granted in parental kidnapping case; court looks to both state and federal law, and finds analogous New York kidnapping offense); Matter of Tofaya, 572 F.Supp. 95 (W.D. Tex. 1983) (if acts for which extradition is sought are serious crimes in requesting and requested state, principle is satisfied; broad interpretation; arson with intent to injure); Matter of Extradition of Prushinowski, 574 F.Supp. 1439 (1983)(U.K. offense of obtaining property by deception is sufficiently similar to North Carolina statute on obtaining property by false pretenses); Tang Yee-Chun v. Immundi, 674 F.Supp. 1058, 686 F.Supp. 1004 (S.D.N.Y. 1987)(deferential view to foreign sovereign's interpretation of its law; court finds substantially analogous crimes concerning international fraud scheme involving use of telephone and telegraph); Vaid v. James, 691 F.Supp. 805 (S.D.N.Y. 1988)(fraud prosecution satisfies double criminality requirement); Oen Yin-Choy v. Robinson, 858 F.2d 1400 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 3157 (1989)(false accounting and false statement charges in requesting state analogous to federal bank false statement statute); United States v. Herbage, 850 F.2d 1463 (11th Cir. 1988), *cert. denied* 109 S.Ct. 1158 (1989)(fraud and transportation of stolen money); Matter of Extradition of Sindona, 584 F.Supp. 1437 (E.D.N.Y. 1984)(liberal construction; test is whether acts charged are criminal under law of both jurisdictions); Theron v. United States Marshal, 832 F.2d 492 (9th Cir. 1987)(reaffirms "substantially analogous" test of double criminality); United States v. Deaton, 448 F.Supp. 532 (N.D. Ohio 1978)(scheme to defraud G.F.R. bank; liberal interpretation); Emami v. United States District Court, 834 F.2d 1444 (9th Cir. 1987)(court looks to acts charged in judging double criminality).

consideration; or (C) when there are significant considerations of the fugitive's personal liberty.

Offense Elements and Legislative Policy

Some have argued that Anglo-American offenses based on common law crimes, such as theft, are a patchwork without a unifying theme. This view is mistaken: In fact, the major outlines of theft offenses have responded to social conditions in England and the United States.[17] Three major issues in Anglo-American law are: whether the government must prove a conversion, what kinds of property may be the subject of theft, and the degree of interference with property rights. Different jurisdictions in the English-speaking world define theft offenses quite differently with respect to these issues. The differences are magnified when one examines such crimes in a broader comparative law setting.[18]

In order to permit intelligent disposition of a double criminality issue, the Ninth Circuit insisted in *Caplan v. Vokes*[19] that:

> "[A]n adequate extradition proceeding must include in its record a specific delineation, as to each charge, or the legal theories under the requesting country's law by which the accused's conduct is alleged to constitute an extraditable offense, together with an identification of the corresponding offenses in this country relied on to show that the 'dual criminality' requirement has been met.[20]

The court noted that the requirement on the United States side can be met by reference to federal law, the law of the place where the fugitive is found, or the law of the "preponderance of states."[21]

Judge Friendly, in an opinion relied upon by the Ninth Circuit in *Caplan*, denied extraditability to alleged forgery against the law of Israel.[22] He reasoned that the conduct charged did not constitute forgery under New York law. Judge Friendly declined the government's invitation to construe the Supreme Court's decision in *Factor v. Laubenheimer*[23] as having made the double criminality requirement otiose.

[17] *See generally* M. Tigar, The Right of Property and the Law of Theft, 62 Tex. L. Rev. 1443 (1984).

[18] *See* G. Fletcher, Rethinking Criminal Law §§ 1.1 - 1.3.4 (1978).

[19] 649 F.2d 1336 (9th Cir. 1981).

[20] 649 F.2d at 1344.

[21] *Id.* at 1344 n. 16.

[22] Shapiro v. Ferrandina, 478 F.2d 894 (2nd Cir. 1973).

I turn now to the substantive offenses that have been most litigated in this context. In *Brauch v. Raiche*,[24] the court found that the relator was not extraditable on United Kingdom currency charges. The charges were brought under the Theft Act of 1968, but did not require proof that the accused deprived anyone of property. Rather, the U.K. statute rested upon a kind of intangible rights defrauding. United States theft law generally requires conversion.[25] Theft offenses lie at the heart of the criminal justice system of capitalist states.[26] Acquiescing in the requesting state's decision to call a currency fiddle "theft" raises a more significant issue than might first appear.[27]

In *Matter of Russel*,[28] the Ninth Circuit permitted extradition of the accused to Australia under a conspiracy charge, even though Australian law does not require proof of an overt act. However, the court insisted that there be evidence that would support a finding of overt acts, as that term is used in American law. The decision is consistent with an analysis that stresses significant elements of offense as defined by the requested state.

The offense of conspiracy is hardly known at all outside the Anglo-American world. In the United States, the overt act requirement is thought to be a protection against untoward application of this sprawling and elastic offense.[29]

A similar analysis is found in *Matter of Alvarado*[30] where the defendant was sought by Canadian authorities for kidnapping. The court upheld extraditability only upon finding that both the Canadian law and the relevant American provision contained a similarly liberal interpretation of the asportation requirement. Kidnapping statutes vary considerably as to the requirement of asportation, and significant

[23] 290 U.S. 276 (1933).

[24] 618 F.2d 843 (st Cir. 1980).

[25] *See generally* Tigar, *supra* note 17. *See also* S. Bedi, Extradition in International Law & Practice 69-77 (1968)(discussing not only theft offenses but such historical benchmarks as extradition under the fugitive slave laws).

[26] *See* M. Tigar, [cite].

[27] So it was that Marx mocked the Prussian legislators for thinking that in order to repress ear-boxing it was enough to decree that a box on the ear should be murder. *See* Tigar, *supra* note 17, at 1458-60.

[28] 789 F.2d 801 (9th Cir. 1986).

[29] M. Tigar, *Crime Talk, Rights Talk and Double-Talk: Thoughts on Reading Encyclopedia of Crime and Justice*, 65 Tex. L. Rev. 101, 127-34 (1986).

[30] 1988 WL 59261 (W.D>Mich. 1988).

issues of legislative policy turn on the degree to which the offense requires that the actor have moved the victim in a way unrelated to the accomplishment of some other, non-abduction, criminal purpose.[31]

In *Freedman v. United States*,[32] Canadian authorities requested the relator for giving a "secret bribe" in connection with a stock deal, and with securities fraud. The court held the fraud offenses were extraditable, however, the alleged bribery failed to pass the double criminality test. At common law, bribery was an offense relating to the conduct of public officials.[33] By statute, many states (though hardly a commanding majority), have criminalized so-called "commercial bribery," and such conduct may constitute bribery for purposes of the Travel Act in 18 U.S.C. § 1952. There is no federal commercial bribery statute, although the mail fraud statute has been used to criminalize payments designed to induce a breach of fiduciary duty.[34] Freedman, however, was apprehended in Georgia, which did not recognize such an offense.

The extent to which fiduciary breaches should be criminalized is a subject on which sovereigns might and do differ a great deal. The *Freedman* result makes good sense.

A similar analysis was used by the House of Lords in *Government of Canada v. Aronson*,[35] discussed in more detail below.

We need not pause long over cases involving American extensions of conspiracy law to cover "continuing criminal enterprises" and racketeering enterprises. As Professor Bassiouni points out, the courts have struggled to make these offenses fit the traditional extradition patter.[36] Many of these cases involve narcotics offenses, as to which many municipal legal systems are expanding the territorial reach of their criminal law. The watchword of these cases has been deference to the requesting state's determination.[37]

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[31] *See* the insightful essay by S. Kanter, Kidnapping, in 3 Encyclopedia of Crime & Justice 993 (Kadish ed. 1983).

[32] 437 F.Supp. 1252 (1977).

[33] *See generally* J. Noonan, Bribes (1984).

[34] *See generally* Carpenter v. United States, 484 U.S. 19 (1987).

[35] 3 W.L.R. [1989] 436.

[36] M.C. Bassiouni, 2 International Criminal Law (Procedure) 412 at n.29 and cases there cited.

[37] *See, e.g.*, United States v. Lehder-Rivas, 668 F.Supp. 1523 (M.D. Fla. 1987) (focusing on the relative national interests of Colombia and the United States to the virtual exclusion of the defendant's rights); Re Sudar and the United States, 63 Can. Cr. Cases 512 (Ont. High Ct. 1981). Sentiments about universal jurisdiction appear most strongly in the war crimes cases. *See, e.g.*, Matter of Demjajuk, 612 F.Supp. 544 (N.D. Ohio), *aff'd* sub nom. Demjajuk v. Petrovsky, 776 F.2d 551 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (upholding extradition of alleged war criminal to Israel, rejecting challenges based on double criminality and territorial jurisdiction). The limitation on "standing" adopted by the court has been rejected by other courts. *See, e.g.*, United States v. Cuevas, 847 F.2d 1417 (9th Cir. 1989).

Extraterritoriality

Extraterritoriality is an aspect of double criminality. If someone is sought for conduct with so tenuous a connection to the requesting state that the requested state would not recognize the jurisdiction of its own courts in an analogous situation, the double criminality condition is not satisfied.[38] Behind this limitation on doubt lies concern that a foreign state will reach into the requested state for one of the latter's own nationals on a theory of liability that the requested state finds troubling. There are wide disparities among states, and even at times within the same legal system, over the permissible reach of criminal prohibitions. One can hear, in the background, echoes of the old regime of "*personnalité des lois*."[39]

Republic of France v. Moghadam[40] is a good example of the unity of double criminality and extraterritoriality doctrine. Moghadam was a resident of the United States. He was implicated in France by the often-contradictory testimony of an American woman, Custer, who had been arrested there on narcotics charges and who was serving time in a French prison. Moghadam told her to make a flight connection in Paris while carrying heroin from India to the United States, that he must have known she might stop in Paris, and that he was innocent of all guilty knowledge.

The decision might have rested upon the bizarre contradictions in Custer's solo performance as witness. Instead, the court found that whatever Moghadam could be said to have done, the French had not shown that he intended to have an impact in France. His asserted connection with a transit passenger who happened to be searched by customs agents did not provide the necessary link, and was not "reasonable."[41] On the way to its decision, the court canvassed theories of extraterritoriality and its relationship to double criminality.[42]

Extraterritoriality is, of course, an argument that can be raised outside the extradition context. One reason for prohibiting prosecution of those who have never physically entered the forum state is that legal regimes differ, and that such differences lead us to doubt whether an

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[38] *See* J. Kester, *supra* note 12.

[39] 1 H. Battifol, Droit International Privé §§ 9-12 (5th ed. 1970).

[40] 617 F.Supp. 777 (D.C. Cal. 1985).

[41] 617 F.Supp. at 787.

[42] 617 F.Supp. at 786-87.

accused acted with enough knowledge, intent or desire to make inculcation reasonable. This theme harks back to Grotius' treatment of double criminality.[43]

Considerations of Personal Liberty

Who is the principle of double criminality designed to protect? Grotius would have responded that it is designed both to respect the independent judgment of the sovereign about the proper scope of criminal law, and the fugitive who seeks asylum from unjust treatment. American courts have wavered, however, in their discussions of double criminality, and indeed other precepts of extradition law.

Certainly extradition law is, in the first instance, the business of sovereigns. They can, by treaty, set broad or narrow limits. The municipal law of the requested state can take a broad or narrow view of extraditable offense categories.[44] Subject, however, to treaties or legislation, is it reasonable to say that individuals possess rights under extradition treaties?

It is submitted that the answer is yes. A partial basis for this conclusion derives from the extraterritoriality cases. There is also a strong strand of American doctrine permitting the accused to raise any claim that "might have been raised by the asylum state."[45]

No one can doubt that the years since World War II have seen a revival of the notion that individuals as well as states are right-bearers under international law, and can assert their rights in appropriate

[43] *See* text at notes 1-3, *supra*. *See also* United States v. Moncini, 882 F.2d 401 (9th Cir. 1989). The court affirms the child pornography conviction of an Italian whose wrongful conduct took place outside the United States, without requiring proof that he knew he was violating United States law. The decision seems clearly wrong.

[44] The extradition At 1989, ch. 33 (27 July 1989) is an example of a broad view. It is certainly arguable that the Act's section 2 redefines the test to be used in assessing double criminality claims and calls into question the continued validity of Government of Canada v. Aronson, [cite]. *See also* G. Zellick, The Law, in The Thatcher Effect 274, 278 (Kavanagh & Seldon eds. 1989) (questioning the oversimplification of extradition law in the 1989 act).

[45] United States v. Cuevas, 847 F.2d 1417, 1426-27 n.23 (9th Cir. 1988) (speaking in the context of specialty). Compare United States v. Van Cauwenberghe, 827 F.2d 424, 428-29 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 773 (1988) (on appeal from Conviction in the requesting state, deference will be given to the requested state's determination that the offense is extraditable, and this includes double criminality and political offense considerations); United States v. Diwan, 864 F.2d 715 (11th Cir. 1989) (refusing to permit specialty claim when requested state, U.K., advised requesting state, U.S., that it had no objection to indicting the fugitive on charges other than those for which she was extradited).

municipal and international tribunals.[46] Recognizing that extradition involves individual as well as sovereign rights respects this clear trend in the development of international customary norms.

Judge Weinstein, faced with an ambiguity in the United Kingdom - United States treaty involving the treatment to be accorded to juveniles, looked to the protectionist philosophy of American juvenile law and denied extraditability.[47] His decision was reversed by the court of appeals over a strong dissent by Judge Tenney, but the reasoning repays study.

Subsequently, *Government of Canada v. Aronson*,[48] which sharply divided the House of Lords, but in which the majority held that Aronson could not be extradited for offenses involving fraud because there was no cognate provision in English law. The case well-illustrates the problem of complex cases, particularly those involving regulation of markets through the criminal law. Of course, many offenses favored by prosecutors will not be extraditable because they are fiscal in nature. Beyond this, however, the line between civilly-redressable misconduct and criminal peculation is drawn very differently in the various countries of the First World.

In Aronson's case, under Canadian law, "a defendant could be convicted even if he had perpetrated no deception and in the absence of an intention to deprive the victim permanently of the goods or money obtained." This result was "contrary" to English law.[49]

The Canadian government argued, however, that the evidence against Aronson would be sufficient to convict him of fraud under English law, even though the elements of the English offense were different. This, said Canada, would satisfy the requirement that "the act or omission constituting the offence . . . would constitute an offence against the United Kingdom if it took place within the United Kingdom."[50] A "wide construction" of this language would favor Canada. A narrow construction would look first to the two offenses involved, *e.g.* the Canadian one and the nearest United Kingdom equivalent. Lord Bridge of Harwich expressed the majority's view when he said, "But, if the language is ambiguous, the narrow construction is to be preferred

[46] *See* M. Tigar, The Foreign Sovereign Immunities Act and the Pursued Refugee: Lessons from Letelier v. Chile, [1982] Mich. Y.B. Int'l L. 421.

[47] Hu Yau-Leung v. Soscia, 500 F.Supp. 1382 (1980), *rev'd.*, 649 F.2d 914 (2nd Cir. 1981), *cert. denied*, 454 U.S. 971 (1981).

[48] 3 W.L.R. [1989] 436.

[49] *Id.* at 450.

[50] *Id.* at 438, quoting Fugitive Offenders Act 1967, since repealed in relevant part by the Extradition Act 1989.

in a criminal statute as the construction more favorable to the liberty of the subject."[51]

True, the House of Lords was considering a statute, but the statutory language forms a backdrop to construction of treaty provisions as well. At least in the common-law world, the principle that statutes touching upon criminal liability will, if ambiguous, be interpreted in favor of lenity is well-entrenched. However, the decision also supports as well the notion that double criminality remains a background assumption in the law of extradition, and in the international setting has acquired the status of a customary norm.

Conclusion

In a world of sovereign states with differing legal systems, the principle of double criminality protects the respective rights of sovereigns. The principle also protects personal liberty, because the criminal law is built upon an assumption --that the accused was free to choose the right path and avoid the evil one. The rules of conduct that constitute the criminal laws of states are not, in the main, deducible from first principles. They are the product of social existence. If it is fair to bind individuals to the choices they have supposedly made, this will be so only because the individuals have been socialized to know the acceptable boundaries of their conduct. While this observation is attenuated in the case of those fleeing the requesting state to avoid punishment, it has great force in most other extradition settings.

The principle of double criminality helps to ensure that the shared principles of criminal law, i.e. no punishment without a prior, valid and no punishment without a minimal showing of moral blameworthiness are respected.

[51] *Id.* at 439.

DUAL CRIMINALITY IN ORGANIZED CRIME CASES

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The requirement of dual criminality is an historic feature of extradition treaties. Its presence in such treaties represents a recognition by the parties involved that there exist sufficient similarities between specific criminal statutes to permit two or more nations to grant extradition for trial on those offenses. Implicit in this principle is the further, more fundamental, conclusion that each nation finds in the others' criminal justice system sufficient guarantees of fairness (both in principle and practice) to consign a resident or citizen to the other country for trial. At the same time, the dual criminality provision exists as a limitation on that assumption, by withholding from the category of extraditable offenses certain acts or offenses as to which there is no such shared view. Thus the dual criminality provision is an essential part of every treaty, and, the way in which it is written and interpreted has a great impact on the ability of cooperating governments to deal with complex criminal offenses, such as terrorism, organized crime and narcotics violations. This paper examines the standards used to define dual criminality, and the problems encountered in the application of those standards in complex cases involving new statutes designed to combat organized criminal activities.

Standards for Establishing Dual Criminality

Methods of describing dual criminality requirements have evolved as new treaties have been written, and as experience and practice have developed. The past practice in treaty negotiation and drafting was to list all those offenses recognized by both nations as crimes for which extradition could be granted. Many existing treaties contain just such lists, which attempt to resolve the question of dual criminality in simple fashion: if an offense is listed, extradition may be granted; if not listed, the offender will not be subject to extradition.

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