THE ROLE OF DOUBLE CRIMINALITY IN INTERNATIONAL COOPERATION IN PENAL MATTERS

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1. International cooperation in criminal matters

1.1. The need of the cooperation

The necessity and significance of international cooperation in criminal matters derives from the internationalization of criminality[1] and the growing number of "cases with a foreign element".[2] Today, when everything is seen in an international perspective – and delinquency like many other social phenomena is no exception to the rule – it has become necessary to offer a multinational solution to problems which though originated in a national background, overpass the boundaries of the state, to produce an impact at the international level.

It is a universally recognized principle of international law that a state's authority ends at its borders. It is doubtful, however, that this rule should apply mutatis mutandis also to the fight against criminals. On the contrary, the concerted efforts by the states in the field of criminal law seems imperative. The fact that state sovereignity continues to be the most powerful force on an international arena needs no emphasis. It is often acknowledged that whatever order and collaboration one finds on the international scene it is the result of states realizing their common

[1] This term covers both "international (conventional) crimes" and those fields of ordinary criminality where the states' boundaries enable and facilitate committing specific types of offences, making their prosecution and suppression more difficult.

[2] The notion of the "case with a foreign element" is broader than the "offence with a foreign element" as defined by S.Z. Feller: Jurisdiction over Offenses with a Foreign Element, in: A Treatise on International Criminal Law, vol. II: Jurisdiction and Cooperation, M.Ch. Bassiouni & V.P. Nanda (eds.), Springfield 1973 (hereinafter cited as Treatise 1973), p. 5–7.

interests and their preceived need for cooperation rather than the result of an imposition by an effective international organizations or supranational bodies.[3] It should be noted that the states are generally in favour of a closer and tighter international collaboration in the field of penal law.

It has been better understood that the prosecution of an offender is not just a matter for one state but is in the interest of all states. An offence which injures a value generally recognized as protected by the law may imperil similar interests in other states. Thus the hijacking of, or bomb attacks against aircraft have become an international problem. No country can be sure whether an offender who commits an offence of this kind in one state today will stop to continue his criminal activity in the other state tomorrow. This danger can be eliminated – or at least reduced – only through a close cooperation of the states in the administering of criminal justice. An efficient suppression of these offences requires international cooperation between countries in the field of criminal legislation, prosecution and execution of punishment. Such cooperation can contribute essentially to increasing the rate of offences actually prosecuted and punished, this adding to the preventive effect of criminal law.

The increase of transnational tourism and commercial traffic caused by the liberalization of the labour market in the context of supranational economic communities and by improved transport facilities, has turned the fight against crime into a task which states cannot adequately fulfill on their own.[4] It needs to be addressed by close cooperation of different states. Countries must work together and render each other assistance in the fight against crime if they wish to fulfill their protective function. The internationalization of crime calls for an internationalization of the re-

[3] H. Schultz: The Classic Law of Extradition and Contemporary Needs, in: Treaties 1973, p. 310. Here one can recall many ineffective attempts to convince the states to ratify the conventions in this field elaborated in the framework of various groups of states, e.g. "councils", "communities", etc. A state of ratification of the Council of Europe's conventions gives a particular example of such a situation. It has been discussed recently at the 15th Conference of European Ministers of Justice in Oslo, June 17–19, 1986, see doc. MJU–15/86/3.

[4] The result of the improved means of transportation and the ensuing mobility of populations is that in many criminal proceedings persons such as the accused or witnesses must be heard, or documents must be served, in foreign countries if the proceedings are to be carried through properly. In the interest of a proper administration of justice it is not possible to desisit from instituting prosecution merely for the reason that the evidence would have to be taken abroad.

pression[5], internationalization of penal responsibility[6], internationalization of the administration of criminal justice[7], and international criminal policy.[8]

The necessity of strengthening international cooperation in the field of criminal law is stressed in various international connections. The XIIIth Congress of AIDP pointed out that the prosecution of criminals could no longer be confined to the borders of one country or even to those of a single continent, to achieve the goal of an efficient sanction to international crime.[9] This goal could be achieved by improving both substantive international criminal law as well as procedural law. This increasing necessary cooperation should, however, not lead to a neglect of the rights of the defendant and the interest of the victim.

1.2. The forms of cooperation

1.2.1. The catalogue of methods

Initially the cooperation consisted of simple acts of assistance aimed at the securing and delivering of the prosecuted (or convicted) person and the evidence. In the course of further development of the mutual relationships between the states new forms of this cooperation appeared. As a result the cooperation may take one of four forms:

1. the surrender of a person by the requested state to the authorities of the requesting state for the purpose of instituting criminal proceedings against him or executing a criminal judgment pronounced against him (extradition);

2. the furnishing of information and evidence to the judicial authorities of the requesting state ("minor" judicial assistance);

[5] H. Donnedieu de Vabres: Les principes modernes du droit pénal international, Paris 1928, p. 1, 220: "Il est urgent qu'á l'internationalisme de crime s'oppose l'internationalisme de la répression".

[6] L. Gardocki: Internationalization of Penal Responsibility for Offences Committed Abroad (in Polish), Uniwersytet Warszawski 1979, p. 15.

[7] H. Grützner: International Judicial Assistance and Cooperation in Criminal Matters, in: Treatise 1973, p. 190.

[8] T. Vogler: General Report on "Structures and Methods of International and Regional Cooperation in the Field of Criminal Law", RIDP 1984, No. 1–2, p. 33.

[9] H. Epp: Structures and Methods of International and Regional Cooperation in the Field of Criminal Law, RIDP 1985 No. 3–4, p. 530.

3. the transfer of criminal proceedings;

4. the enforcement (execution) in the requested state of a criminal decision pronounced in the requesting state, e.g. the transfer of sentenced persons.

1.2.2. Recognition of foreign penal judgments

Is this catalogue complete? One may ask about a well known phenomenon in international criminal law, namely the recognition of foreign penal judgments. Is such an act a form of international cooperation? The answer should be positive.[10] It should be recalled that international cooperation not only remains a prior condition for the effective fight against crime, but in addition it is essential to enhance mutual confidence of the states and respect for each other's criminal law and procedure. This may be achieved by the recognition of penal judgments rendered abroad, as well as by a regular exchange of experience and ideas and the permanent assessment of the operation of the conventions, treaties, agreements, etc. in light of the practical needs.

When the recognition of foreign penal judgments is treated as a form of international cooperation in criminal matters a determination of its relationship to other forms is required. In particular its relationship to the enforcement (execution) of foreign criminal judgments should be clarified. Four possible solutions may be taken into consideration:

1. the enforcement (execution) and recognition of foreign penal judgments are two separate and distinct but nonetheless equivalent forms of international cooperation;[11]

[10] Some authors explicitly omitted the recognition of foreign penal judgments in their lists of forms of international cooperation in criminal matters; se e.g. L.H.C. Hulsman: Transmission des poursuites pénales a l'Etat de séjour et exécution des décisions pénales étrangêrs, in: Le droit pénal international. Recueil d'etudes en hommage á J.M. van Bemmelen, Leiden 1965, p. 114; H.-H. Jescheck: Rapport géneral provisoire sur la question des effets internationaux de la sentence pénale, RIDP 1963, No. 1–2, p. 208.

[11] Some authors place "recognition" just by "enforcement" at the same level. See e.g. D. Oehler: Recognition of Foreign Penal Judgments *and* Their Enforcement (emphasis added), in: Treatise 1973, p. 261; W. Grützner: Les effets dans un état européen des décisions pénales rendues dans un autre état européen, in: Droit pénal européen, Institut d'Études européennes, Bruxelles 1970 (hereinafter cited as Droit européen 1970), p. 361, 364.

2. the recognition is a condition for the subsequent enforcement which means that before the foreign judgment is executed it must be recognized; from this point of view the exequatur proceedings might be seen, apart from other functions, as a form of recognition of a foreign penal judgment which is to be enforced;[12]

3. the enforcement (execution) of foreign penal judgments is embodied in the recognition: the former is just a form of the latter;[13]

4. the recognition and the enforcement are synonyms.[14]

Only in the first case is the recognition a fully independent form in the field of international cooperation. When used in this meaning an object-

[12] This attitude is particularly advanced on the American continent. Restatement (Revised) of the Foreign Relations Law of the United States, Tentative Draft No. 4, April 1, 1983, § 491, Reporter's Note No. 3: "Recognition is a necessary prerequisite to enforcement of foreign judgment". See also M.Ch. Bassiouni: Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada, 11 Vanderbilt Journal of Transnational Law (1978), p. 261–262. The U.S.-Turkey Treaty on Enforcement of Penal Judgments of 1979, U.S.T. ___, T.I.A.S. No. 9892, defines "requesting state" or "sentencing state" as "the party which requests the recognition of the validity and enforcement of a penal judgment", Art. I(a). Recognition of foreign judgments is allowed under the doctrine of comity. D.F. Schutler: The Prisoner Transfer Treaty with Turkey: Last Run for the "Midnight Express", 84 Dickinson Law Review (1980), p. 698. As defined in Hilton v. Guyot, 159 U.S. 113 (1895), comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws". See also Note: Justice with Mercy: The Treaties with Canada and Mexico for the Execution of Penal Judgments, 4 Brooklyn Journal of International Law (1978), p. 254; A.B. Miotto: Les effets des jugements pénaux étrangers au Bresil, Revue de droit pénal et de criminologie 1965, No. 6, p. 540. The last author cites J.F. Marques who stated that "La sentence pénale, aussi bien que civile, a besoin d'une "homologation" préalable seulement pour qu'elle puisse avoir l'effet d'un jugement exécutoire"; idem, p. 541. This view was expressed also by H. Meyer in his national report for the IXth Congress of AIDP, RIDP 1963, No. 1–2, p. 44, and G. Altavista: Exequatur Procedure, in: Aspects of International Validity of Criminal Judgments, Strasbourg 1968, p. 155.

[13] H. Epp: Transfer of Prisoners: The European Convention, in: International Criminal Law, vol. II: Procedure, M.Ch. Bassiouni (ed.), Transnational Publishers, New York 1986 (hereinafter cited as Bassiouni 1986), p. 253; H.-H. Jescheck: Rapport général, supra note 10 at 209 and 214; Explanatory Report on the European Convention on the International Validity of Criminal Judgments, Strasbourg 1970, p. 15.

[14] H. Thornstedt: Proceedings of the IXth International Congress on Criminal Law, Hague 1964, p. 350; H. Luther & L. Reuter; National Report, RIDP 1984, No. 1–2, p. 299–300.

ive test can be easily employed to separate it from the enforcement of a foreign judgment. Both forms should be referred to the "effects of foreign penal judgments" as a broader category which can comprise them.

1.2.3. The "primary" and "secondary" forms

In the light of the development and progress in the field of international cooperation in criminal matters the first two forms listed above may be called "traditional" och "classical". From another point of view all forms are divided into two groups: "primary" (3. and 4.) and "secondary" (1. and 2.) forms of international cooperation.[15] In the former the criminal proceedings as a whole, or at least an essential portion of them are taken over by another state; as a consequence both the requesting state and the requested state participates in the prosecution of a particular offender through trying him or executing the judgment pronounced against him. In the latter the entire criminal proceedings remain in the hands of the requesting state and the requested state merely gives it some assistance through extradition or letters rogatory.

Obviously, there is no general abstract rule for deciding which of these four forms of cooperation is the best. The very reason for the differentiation in this field is the question of the legal regulation of each of the above-mentioned forms. Are the "secondary" forms more suitable for less restrictive conditions, whereas the level of requirements is (or should be) higher with regard to the "primary" forms? Is there any significant difference between them from the viewpoint of a double criminality requirement? It seems doubtful whether the decision can be general. An answer should be based on the examination of each particular form of the cooperation.

The secondary form can take place independently of a primary form, nonetheless the former may support the latter. There is no rivalry or

[15] Originally, these categories were referred to as the forms of mutual assistance. This should not be confusing, however, since the acts of assistance are the content of the cooperation. This classification was first used in the essays by A. Mulder: Des observations préliminaires; L.H.C. Hulsman: Transmission des poursuites; and W. Duk: Collaboration au sein du Benelux pour la lutte contre les délits fiscaux et économiques, in: Le droit pénal international, supra note 10, pp. 3–13, 108–136 and 137–154 respectively. Against this H. Schultz: Das Ende der Auslieferung?, in: Aktuelle Probleme des internationales Strafrechts, D. Oehler & P.G. Pötz (eds.), 1970, p. 141.

conflict between primary and secondary forms,[16] or between the two forms of secondary assistance. On the other hand, the transfer of criminal proceedings and transfer of prisoners (two primary forms) are two instruments of concurrent nature.[17] Mutual assistance is always given by one state at the request of another. In so far as the requested state is bound to provide the act of assistance asked for it is the exclusive responsibility of the requesting state to choose the type of the assistance. The choice of one or the other form will largely depend on the nature of the offence, on the requirements of the criminal procedure, particularly where the presentation of evidence is concerned, and on the personality of the offender; the main effect of the choice will be on the nature of the sentence or measure and its enforcement.

1.3. The idea of cooperation in the Polish legal system

In the Polish legal system one can find all forms of international cooperation in criminal matters. The Criminal Code of 1969 regulates the extent of the application of Polish penal norms (Art. 3 and 113–119). This Code stipulates also the principle of non-extradition of nationals (Art. 118). The provisions of Polish domestic law on the cooperation are contained in the Code of Criminal Procedure of 1969: Part XII, "Procedure in Criminal Cases in International Relations", provides, however, only for two traditional forms, namely extradition and "minor" judicial assistance. The provisions of this part shall not be applicable if an international agreement to which Poland is a party, resolves the matter otherwise, Art. 541(1). In this way the Polish Code of Criminal Procedure gives priority to a treaty over the domestic provisions with regard to extradition and judicial assistance. On the other hand, the provisions of this part need not to be applied in relation to a foreign state with which there is no agreement in the matter and which does not guarantee reciprocity, Art.

[16] L.H.C. Hulsman: The European Conventions on Mutual Assistance in Criminal Matters Seen as an Instrument of a Common Criminal Policy, paper delivered to the European Committee on Crime Problems, Council of Europe, DPC/CEPC /71/8, p. 5.

[17] L. Viski: La coopération internationale en matière de répression des infraction à la circulation routière, RIDP 1974, No. 3–4, p. 663; L. Gardocki: National Report, for the XIIIth Congress of AIDP, RIDP 1984, No. 1–2, p. 281–82.

541(2). The regulation of the two other forms of international cooperation, albeit necessary, is still lacking in Polish internal law.[18]

The Hungarian Criminal Code of 1978 contains a more complex regulation; it provides for the recognition of foreign penal sentences (Sec. 6), execution of foreign penal judgments (Sec. 7), transfer of criminal proceedings (Sec. 8) and extradition (Sec. 9).[19] A different solution can be found in Romania: the chapter "Recognition of Penal Judgments of Foreign Courts" is not a part of the Criminal Code, but that of the Code of Criminal Procedure under the heading "International Legal Assistance".[20] According to these provisions final foreign penal judgment may be – on some conditions – recognized and executed in Romania. This solution is very broad since it is limited neither by reciprocity, nor by the requirement of the existence of an international convention to this effect.

The main basis of cooperation in Polish legal system are international treaties, agreements and conventions. Poland has ratified many conventions on the suppression of international crimes, e.g. slavery, obscenity, drug trafficking, hijacking, etc.; apart from the obligation of extradition some of them provides for legal assistance. Among all international instruments devoted exclusively to the cooperation the only multilateral convention is the Convention on the Transfer of Persons Sentenced to Imprisonment for Enforcement of the Sanction in the State of Their Nationality of 1978.[21] Bilateral instruments prevail. The following analysis shows the progress in the evolution of the treaties on cooperation in criminal matters concluded by Poland with other states:

[18] The need for such domestic regulation is pointed out by L. Gardocki: An Outline of International Criminal Law (in Polish), Warszawa 1985, p. 208 and 228; M. Plachta: Übernahme des Strafverfahrens und Übernahme der Vollstreckung: Neue Instrumente der Zusammenarbeit in Strafsachen zwischen den sozialistischen Staaten, ZStW 99(1987), Heft 3, p. 483.

[19] See the text of the Code in Hungarian Law Review 1980, No. 1–2, p. 25 et seq.

[20] M. Manescu: Proceedings of the IXth International Congress on Criminal Law, Hague 1964, p. 358–60.

[21] Ratifications by Bulgaria, C.S.S.R., Cuba, German Democratic Republic, Hungary, Mongolia, Poland and U.S.S.R. Recently this Convention has been called, obviously erroneously, the "Convention on the *Extradition* of Offenders Sentenced to Deprivation of Liberty"(emphasis added); V. Shupilov: Legal Assistance in Criminal Cases and Some Important Questions of Extradition, 15 Case Western Reserve Journal of International Law (1983), p. 132.

1. Of all treaties signed before the Second World War six are still in force. However, their scope is very limited. Three of them are confined to extradition[22], whereas three others provide, apart from extradition, also for judicial assistance.[23]

2. More significant is the evolution of the agreements with socialist countries. The pre-war treaties were replaced by the new agreements typically titled "agreement on legal assistance in civil, family and criminal matters". Those signed in the years 1957–1961 provided for traditional forms of cooperation, namely extradition and judicial assistance. In the eighties the Additional Protocols amended the agreements with G.D.R.[24], Bulgaria[25], Hungary[26], and U.S.S.R.[27], adding the third form, namely the transfer of criminal proceedings. The agreement with Yugoslavia is the only one the catalogue of which has not been supplemented yet.[28] The agreements with other socialist countries which were signed later comprise three forms of cooperation.[29] The only agreement which provides for all four forms is the agreement with Korea; this state is not a party to the Berlin Convention of 1978.[30] The transfer of criminal proceedings is governed also by the bilateral agreements signed by the Polish Procurator-General with the Procurator-General of C.S.S.R in 1978, G.D.R. in 1976, Hungary in 1978, Bulgaria in 1985 and Cuba in

[22] Treaty with France of 1925, Dziennik Ustaw (hereinafter cited as Dz. U.) of 1929, No. 63; Treaty with the United States of 1927, Dz. U. of 1929, No. 45; as amended by the Additional Treaty on Extradition of 1935, Dz. U. of 1936, No. 43; Treaty with Great Britain of 1932, Dz. U. of 1934, No. 17.

[23] Convention with Belgium of 1931, Dz. U. of 1932, No. 59; Convention with Luxemburg of 1934, Dz. U. of 1936, No. 16; Treaty with Switzerland of 1938, Dz. U. of 1939, No. 4.

[24] Agreement of 1957, Dz. U. 1958, No. 27; Additional Protocol of 1975, Dz. U. of 1976, No. 14.

[25] Agreement of 1961, Dz. U. of 1963, No. 17; Additional Protocol of 1980, Dz. U. of 1981, No. 10.

[26] Agreement of 1959, Dz. U. of 1960, No. 8; Additional Protocol of 1980, Dz. U. of 1982, No. 5.

[27] Agreement of 1957, Dz. U. of 1958, No. 32; Additional Protocol of 1980, Dz. U. of 1980, No 20.

[28] Agreement of 1960, Dz. U. of 1963, No. 27.

[29] Agreement with C.S.R.S. of 1961, Dz. U. of 1962, No. 23; with Romania of 1962, Dz. U. of 1962, No. 63; with Mongolia of 1971, Dz. U. of 1972, No. 36; with Cuba of 1982, Dz. U. of 1984, No. 47.

[30] Agreement of 1986, Dz. U. of 1987, No. 24.

1987. From a practical point of view they are even more important, though none of them was officially published.

3. The agreements on legal assistance concluded by Poland with five non-socialist states in the years 1976–1980 include, apart from the classical forms, also the transfer of criminal proceedings.[31]

4. In 1985 Poland signed (and ratified) the agreements on legal assistance with three Arab states. Their provisions are interesting in the context of double criminality (see below 3.5.3.1.). The agreement with Tunisia provides for extradition, minor assistance and transfer of criminal proceedings,[32] whereas the agreements with Syria[33] and Libya[34] include the complete catalogue of these forms.

5. Last but not least, one should mention the Agreement on mutual assistance in the matters connected with the Soviet forces stationed temporarily in Poland, concluded by Poland with the U.S.S.R. in 1957.[35] Article 7 states that the Polish Minister of Justice may, at the request or with the consent of the proper Soviet authorities, transfer the execution of a judgment passed upon a Soviet soldier or a member of his family to the U.S.S.R. The motions and requests of both parties should be examined in the "spirit of goodwill".

1.4. Aims of international cooperation

1.4.1. The goals in general

There are many various tasks, aims, goals, expectations, etc., which are formulated in the field on international cooperation in criminal matters. One may ask whether they are related with the sets of formal requirements attached to each particular form of this cooperation. Does the diversity in this sphere lead to a differentiation of the meaning of double criminality and, possibly, to abandonment of this condition? The analysis

31 Agreement with Algeria of 1976, Dz. U. of 1982, No. 10; with Austria of 1978, Dz. U. of 1980, No. 14; with Finland of 1980, Dz. U. of 1981, No. 27; with Greece of 1979, Dz. U. of 1982, No. 4; with Morocco of 1979, Dz. U. of 1983, No. 14.

32 Dz. U. of 1987, No. 11.

33 Dz. U. of 1986, No. 37.

34 Dz. U. of 1987, No. 13.

35 Dz. U. of 1958, No. 38.

of the significance of double criminality should therefore be preceded by brief recapitulation of the statements and opinions on the goals.

The suppression of crimes, although it gave rise to the international cooperation, is no longer the sole, or even the most important aim of the efforts in this arena; the interests of the accused, or the sentenced person has become equally important.[36] In this way new and better methods and measures of treatment of offenders should be elaborated.[37] The forms of cooperation and mutual assistance may be seen as determined by the function of national criminal law.[38] This function can be described, much like the purposes of state-imposed punishment, as the protection of legal interests and the reintegration of the offender into society. The forms of international cooperation in the area of criminal law should accord with this twin purpose. It is not sufficient, therefore, that they support merely the repressive function of the criminal law; mutual assistance must also be appropriate for serving the preventive function of this law. That preventive function is furthered, for instance, by allowing adjudication of the offender in his home state, by letting him serve at home a sentence imposed abroad, or by granting him the opportunity to prove himself at liberty even if convicted abroad.

The principle underlying the work in this field should be that the resources in penal and penitentiary matters existing in every state must be employed in such a way as to ensure their maximum efficacy with a view not only to reducing crime but also to protecting the rights of the individual and furthering the subsequent rehabilitation of the offender.[39]

Cooperation here is also necessary in the interest of a rapid and comprehensive compensation to victims of crime who, in relation to the offender, are citizens of a different state.[40] Another factor to be pointed out is the change of the conception of the aims of criminal liability. In the past few decades the systems of penalties have changed considerably in many countries. There has been a substantive increase of non-custodial sentences. The completion of such sentences is efficient only in the

[36] R. Koering-Julin: Rapport national, RIDP 1984, No. 1–2, 173.

[37] R. Linke: Wechselseitige Anerkennung und Vollstreckung europäischer Strafurteile, Österrechische Juristen-Zeitung (OJZ) 1971, Heft 2, p. 30.

[38] T. Vogler: General Report, supra note 8 at 33.

[39] This task is expressly stated in the Explanatory Report on the European Convention of 1970, supra note 13 at 18.

[40] H. Luther & L. Reuter: National Report, supra note 14 at 288.

offender's home country. The same applies to imprisonment which is not supposed to be a mere isolation of the offender but should facilitate his rehabilitation.

1.4.2. Enforcement of penal judgments

Some punishments such as disqualifications can be executed with no regard to the place where the convicted person or his property is found. On the other hand, the presence of the sentenced person is essential for the enforcement of imprisonment and carrying out the supervision over those conditionally sentenced. To execute a fine the availability of the convicted person's property is of particular importance, unless he pays the fine voluntarily.

The social effects of the punishment, i.e. general prevention and the solution of the conflict, do not depend on the place where the sentence is enforced, nor, as a rule, on the place where the judgment is pronounced.[41] Thus neither the criminal proceedings, nor the enforcement of the judgment outside the state in which an offence was committed prejudices, in principle, the social effects of the criminal law in loco delicti commissi.

As far as special prevention is concerned it is necessary for imprisonment, especially when it exceeds a few weeks, to be enforced in the country of residence of the convicted person or in the country of his origin, and not in the country with which his contact was merely casual and in which he does not intend to remain after his release. Another reason for enforcing the judgment in the former country is that the execution of imprisonment in a foreign state amounts as a rule to a considerable aggravation of the punishment and is thus contrary to the principle of non-discrimination (factual) of the accused (convicted) foreigner. In analyzing these questions, the offender's customs, language and social ties should be considered carefully without, however, disregarding the necessity of effective enforcement of the law. Because of the availability of evidence, it might often be suggested that the state where the offence was committed should conduct the criminal proceedings. Moreover, regarding the offender's social circumstances a com-promise between the conflicting interests of an effective enforcement of the law on one hand

41 C.Y. Enschede: La competence personelle dans les législations de l'Europe occidentale, in: Le droit pénal international, Leiden 1965, p. 30.; L.H.C. Hulsman: The European Conventions, supra note 16 at 16–17.

and an improved rehabilitation of the offender on the other has to be found.

1.4.3. Transfer of prisoners

The problem of aims of international cooperation in criminal matters becomes more complex with respect to the new phenomenon in international criminal law, namely the transfer of prisoners. The Council of Europe Convention on the Transfer of Sentenced Persons of 1983[42], in facilitating the transfer of foreign prisoners, takes account of modern trends in penal policy.[43] This policy is also rooted in humanitarian considerations: difficulties in communication by reason of language barriers, alienation from local culture and customs, and the absence of contacts with relatives may have detrimental effects on a foreign prisoner.[44] M. Cherif Bassiouni, in discussing the assumptions on which the transfer of prisoners is based, has stressed the interests of states.[45] It seems, however, that both the states concerned, i.e. the transferring state and the receiving

[42] Council of Europe, E.T.S. No. 112.

[43] Explanatory Report on the Convention on the Transfer of Sentenced Persons, Addendum I to CDPC /82/7.

[44] This concern underlying the efforts in the framework of international criminal law is the most common feature of all instruments, both international and domestic. See e.g. H. Epp: Der Ausländer in Strafvollzug (unter besonderer Berücksichtigung der Übertragung der Strafvollstreckung), OJZ 1982, Heft 5, p. 119; P. Wilkitzki: "Rechtshilfe durch Vollstreckung". Zur praktischen Anwendung des neuen Rechtsinstituts, JR 1983, Heft 6, p. 227; J.-D. Schouwey: Nouvelles perspectives pour les ressortissants suisses condamnés à l'étranger, Revue internationale de criminologie et de police technique 1985, No. 3, p. 342; E. Harremoes: Une nouvelle Convention du Conseil de l'Europe: le transfèrement des personnes condamnées, Revue de science criminelle et de droit pénal comparé 1983, No. 2, p. 236. See also Recommendation No. R/84/12 of the Committee of Ministers to member states of the Council of Europe concerning foreign prisoners and the Appendix II. As F. Fox stated: "In a world marked by great cultural, social and political diversity, it is inevitable that incarceration in a foreign land will increase the pains of imprisonment, far in excess of the punishment intended by the courts which impose sentence", News Release, Solicitor General of Canada, March 2nd, 1977.

[45] M.Ch. Bassiouni: Perspectives on the Transfer of Prisoners, supra note 12 at 250, recently updated and reprinted in: Bassiouni 1986, p. 239 et seq. The author assumes that: (1) a state has an interest in the treatment of its citizens abroad; (2) a state has an interest in the future behaviour of its citizens; and (3) states have a common interest in preventing and suppressing criminality. Id. at 240–41.

(administering) state, and the sentenced person are interested in this form of international cooperation; also the latter has an important role.[46]

In general, the concern for the inmate is a humanitarian concern. It is the concern allowing him to have the choice – to some extent – as to where and in what sort of prison environment he serves his sentence. It is also the concern that the inmate can be given the opportunity to rehabilitate himself in an environment which he assumes more conducive to such a goal.[47] It is true, however, that the choice to be transferred is not entirely in the inmate's hands but requires the approval of both the transferring and the receiving (administering) state[48], as well as that of the province to which the inmate is transferred if he is going to a provincial institution.[49]

The complexity of the problem discussed here is well illustrated by the "American example": in the seventies the United States found itself faced with two conflicting objectives. The primary American policy goal

[46] This role is evidenced and manifested by the fact that almost all treaties and conventions ground the transfer on the consent of the sentenced person. Sometimes it is he who commences the proceedings leading to his transfer, e.g. the U.S.-Canada Treaty of 1977, Art. III/3/. Consent is not required in: the Berlin Convention of 1978; the Arab Convention on Judicial Cooperation signed in Ryad on April 6, 1983, entered into force on October 30, 1985; and the European Convention on the International Validity of Criminal Judgments of 1970. Taking into consideration the former group of treaties one could speak about a "tripartite" agreement, especially when the consent of the prisoner is equal to that of the sentencing and the administering state, see e.g. Report of the European Regional Preparatory Meeting on the Prevention of Crime and the Treatment of Offenders, Sofia, June 6–10, 1983, A.CONF 121/RPM/1, para. 100. H. Epp finds it misleading to refer to individual transfer agreements as "tripartite" agreements, as the prisoner himself cannot be a party on an international level. Thus in the author's view the prisoner's consent is of minor significance as compared to the sovereign state's agreement, H. Epp: Transfer of Prisoners, supra note 13 at 262; H. Epp: Der Ausländer, supra note 42 at 121. P. Wilkitzki is of the opinion that the thesis on "Dreiseitigkeitsübereinkommen" took the place of one of the axioms of extradition law, P. Wilkitzki: Rechshilfe, supra note 42 at 235.

[47] A.J. Nazarevich: The Transfer of Offenders Act and Related Treaties: An Analysis, 4 Criminal Reports (1978), p. 221.

[48] The consent of both countries is required by most treaties, e.g. the Council of Europe Prisoner Transfer Convention of 1983, Art. 3(1)(f); U.S.-Mexico Treaty of 1976, Art. IV(2); U.S.-Canada Treaty of 1977, Art. III(3) and (4); the Berlin Convention of 1978, Art. 1 and 4(e).

[49] See e.g. Canadian Transfer of Offenders Act of 1978, Sec. 6(2); U.S.-Canada Treaty, Art. III(5); Canada-Mexico Treaty of 1977 Art. 4(6); U.S.-Bolivia Treaty of 1978.

was to combat the flow of drugs from Mexico into the United States.[50] Increased enforcement, however, resulted in incarceration of many Americans who subsequently complained of intolerable treatment by Mexican law enforcement agents.[51] The official State Department position was that there was no conflict between these objectives.[52] Finally, in an attempt to reconcile the legitimate complaints of its citizens incarcerated in Mexico jails with the need to reduce the flow of illegal drugs across its borders, the U.S. government concluded a treaty with the government of Mexico concerning the transfer of penal sanctions.[53] It was followed by similar treaties with other countries.[54] The treaties were praised as novel, thoughtful responses to problems of a world-wide nature: easy access to foreign travel, different standards for arrest, trial and imprisonment of offenders, and resulting foreign policy strains due to application of multiple criminal standards and statutes to foreign travellers or visitors.[55] The goals and aims of this form of international cooperation, as well as the values involved, are reflected in the text of the treaties, the implementing legislation[56] and the circumstances surrounding their adoption.[57] These are:

[50] U.S. Citizens imprisoned in Mexico: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations, 94th Congress, 1st and 2nd Session 1975–1976, pt. I, p. 90–91; Meisler: War on Drugs: Mexico No Place to Get Caught, Los Angeles Times, December 9, 1974.

[51] House Hearings, supra note 48 (statement of L.F. Walentynowicz, U.S. Department of State); A. Abramovsky & J.J. Eagle: A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty, 64 Iowa Law Review (1979), p. 266–277; D.F. Schutler: The Prisoner Transfer Treaty, supra note 12 at 690.

[52] House Hearings, supra note 48 (part III) at 4 (statement of W.H. Luers, U.S. Department of State); D.F. Vagts: A Reply to "A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty", 64 Iowa Law Review (1979), p. 325, 331.

[53] Treaty of the Execution of Penal Judgments, Nov. 25, 1976, United States-Mexico, 28 U.S.T. 7399, T.I.A.S. No. 8718.

[54] These states are: Canada, Turkey, Bolivia, Panama, Peru, Thailand and France. In addition, the United States signed the Council of Europe Convention on the Transfer of Sentenced Persons of March 21, 1983.

[55] Legislative History of P.L. 95–144, U.S. Code Congressional and Administrative News, Washington 1977, vol. III, p. 3149.

[56] Act on the Transfer of Offenders to or from Foreign Countries of October 28, 1977: 18 U.S.C. §§ 4100–4115 (ch. 306) (1982) P.L. 95-144.

[57] As Percy from the Committee on Foreign Relations states briefly: "The underlying purposes of such treaties are to assist in law enforcement, relieve the country in which

1. the increased probability of rehabilitation of offenders,
2. improvement of bilateral relations between transferring countries,
3. securing the interest of law enforcement,
4. humanitarianism.

1.5. The substantive assumption of international cooperation

In analysing the double criminality requirement in the field of international cooperation in criminal matters one cannot avoid the following question: does the increasing, or decreasing significance of this requirement depend on the comparison of ideological assumptions, political and economic structures, social norms and customs, legal traditions, etc., which exist in two or more countries concerned? Can any interdependence be observed here, e.g. the more similarities – the less significance, and vice versa?

It is commonly believed that the most important prerequisite for more advanced forms of international cooperation, particularly for the enforcement of foreign penal judgments and the transfer of prisoners, is the existence of similar conditions in all countries involved in this cooperation.[58] Those include cultural, political, social and legal structures in both states. Even if generally true, this opinion has exceptions in two opposing ways, as illustrated by the following. First, the United States signed the treaties on the transfer of prisoners not only with Canada (1977) but also with Turkey (1979), Peru (1979) and Thailand (1982); here one can hardly defend the view of "similarities" between these countries and the

a foreigner may be imprisoned of an unwanted economic and administrative burden, and promote the social rehabilitation of the offender in his home country where he may be placed in a more favourable environment and where he may receive the support of family and friends", Percy: Report on the Ratification by the United States of the European Convention on the Transfer of Sentenced Persons, reprinted in: Bassiouni 1986, p. 296.

58 D. Oehler: Recognition of Foreign Penal Judgments: The European System, in: Bassiouni 1986, p. 212; D. Oehler: Internationales Strafrecht, 1983, 2nd ed., p. 590; H.-H. Jescheck: General Report, supra note 10 at 210; V. Solnar: National Report, RIDP 1963, No. 1–2, p. 199. W. Breukelaar cites an opinion of W.C. van Binsbergen that "la reconnaissance des effets juridique à un jugement étrangere suppose une certaine uniformité et une certaine équivalence des systèmes juridiques", W. Breukelaar: La reconnaissance des jugements répressifs étrangers, RIDP 1974, No. 3–4, p. 570.

U.S.A.[59] Moreover, one is even tempted to say that the deeper the differences between two or more states, the more they are willing to cooperate with one another in the field of enforcement of penal sanctions. Secondly, it would seem that international cooperation would prove to be easiest between states which have the same ideological assumptions and a similar level of development and in which, therefore, a judgment would be similarly interpreted. Undoubtedly, one of these groups of states includes socialist countries[60] in which this expectation was not, however, realized for a long time.[61]

While it is true that the international character of crime calls for international, i.e. universal, structures of cooperation and while it may be desirable to pursue this aim as a long-term objective[62], worldwide international cooperation will not be possible until the world community is united on such basic principles as the rule of law and the protection of human rights in criminal justice. Furthermore, reality shows that the difficulties of cooperation increase, as a rule, in proportion to the number of participating states. This phenomenon is rooted not so much in exaggerated nationalism or in a lack of international solidarity but in the differing political, cultural, social and legal structure of the participating states.[63] Sometimes it is assumed that the differences in this field delimit the extent of international cooperation and nearly paralyze it outside the scope of the common values shared by the states concerned.[64]

Consequently the common values and interests as well as the common attitude, particularly towards the underlying principles of criminal justice, condition and govern international cooperation in the penal field. As these states share common ideas and principles, and adhere to the same concept of human rights protection and, in consequence, have a common

[59] Similarly the treaties on transfer of prisoners concluded by France with Turkey and Thailand, as well as the Polish agreements on legal assistance with Libya and Syria.

[60] R. Screvens: Collaboration en matière pénal et tentatives d'harmonisation du droit pénal dans certain groupes d'États, in: Droit européen 1970, p. 613.

[61] M. Plachta: Transfer of Proceedings and Transfer of Prisoners: New Instruments of Cooperation in Criminal Matters Among Communist Countries, Connecticut Journal of International Law 1988 (in print).

[62] R. Koering-Julin: Commentary on the Question IV: Structures and Methods of International and Regional Cooperation in the Field of Criminal Law, RIDP 1984, No. 1–2, p. 32.

[63] T. Vogler: General Report, RIDP 1984, No. 1–2, p. 36.

[64] L.H.C. Hulsman: Transmission des poursuites, supra note 10 at 110.

understanding of criminal justice, they enjoy the existence of a basis of mutual trust which allows them to cooperate closely with one another. Thus the cooperation between states having identical political and social foundations is not only smoother but can be extended to the field of the protection of this common social background. An example can be found in the group of socialist states: the criminal codes of some of them explicitly provide that certain offences defined by them are equally punishable if they are committed to the prejudice of another socialist state.[65] This tendency is even broader in the judicial practice in these states.[66] It is accompanied by the postulates of the doctrine.[67]

For two reasons, political, cultural and legal similarity of the parties may be viewed as a prerequisite in early enforcement and transfer treaties. First, similarity enhances the likelihood that the states will criminalize the same acts.[68] Second, it also increases the likelihood that the countries will have confidence in each other's systems of criminal adjudication.[69] As will be seen below, however, the above-mentioned similarities and even identity do not automatically lead to the elimination of a double criminality requirement in legal relations not only among socialist states but also between the countries belonging to other groups, e.g. Benelux[70], European Communities[71], member states of the Council of Europe[72],

65 E.g. the Hungarian Criminal Code of 1978, Sec. 151; the Polish Criminal Code of 1969, Art. 129 and 317; the Criminal Code of the G.D.R. of 1968, Sec. 108.

66 L. Gardocki: Judicial Assistance and Mutual Cooperation in Penal Matters: The Socialist System, in: Bassiouni 1986, p. 136; B. Repik: National Report, RIDP 1984, No. 1–2, p. 354.

67 M. Stanoiu & C. Mihaila: National Report, RIDP 1984, No. 1–2, p. 328.

68 "Le système des sanctions pénales d'un état doit pouvoir servir à assurer le respect non seulement des règles de ce pays, mais aussi des règles correspondantes des pays étrangers", Exposé des motifs commun de la Convention Benelux concernant l'applicabilite de la loi pénale dans le temps et dans l'espace, Group de travail ministériel de la Justice, Bruxelles 1979, M/Just /79/2, p. 18.

69 G. Gelfand: International Penal Transfer Treaties: The Case for an Unrestricted Multilateral Treaty, 64 Boston University Law Review 594 (1984).

70 O. Hansen: Trente années de tentatives d'unification du droit dans le pays du Benelux: une experience, Revue de droit international et de droit comparé 1980, p. 60 et seq.

71 H. Johannes: Le droit pénal et son harmonisation dans les Communautés Européennes, Revue de droit européen 1971, p. 21; W.C. Van Binsbergen: Le droit pénal des Communautés Européennes; in: Droit européen 1970, p. 203 et seq; Ch. van den Wijngaert: Criminal Law and the European Communities: Defining the Issues, in:

even if this might be expected.[73] The Scandinavian exception[74] merely confirms this view.

In the enforcement and transfer context neighbouring countries have important reasons for desiring to extend their criminal laws into each other's territory.[75] Such nations interact frequently and their citizens travel often between their territories. Thus, for these countries the benefits of obtaining assistance in criminal law enforcement offset the drawbacks of enforcing a neighbouring country's laws. Similarly, where interaction between the countries is common, the reciprocal benefits of penal transfer will be more apparent. More distant nations with less interaction may feel that the drawbacks of enforcing foreign criminal sanctions outweigh the direct benefits that may occur. Geography, however, accounts only partly for the difference in degree and efficacy of cooperation: geographic proximity of states cooperating within regional organisations is no longer the decisive explanation why the regional structure provides a more effective cooperation than any of the arrangements operating at a universal level.[76]

Transnational Aspects of Criminal Procedure, 1983 Michigan Yearbook of International Legal Studies, p. 247–70.

[72] E. Müller-Rappard: Judicial Assistance and Mutual Cooperation in Criminal Matters: The European System, in: Bassiouni 1986, p. 95 et seq. The Ministers taking part in the 15th Conference of European Ministers of Justice, Oslo, 1986, were aware that "divergent domestic law and practice" in the member states is one of the main obstacles on the way to ratification of the European conventions in a larger extent, Conclusions and Resolutions of the Conference, Strasbourg 1986, MJU-15/86/Concl. It seems doubtful, however, that international cooperation in criminal matters might be improved and furthered by the elaboration of a complex convention comprising all forms and methods of this cooperation, particularly in light of the official opinion expressed by the authors of the European Convention on the International Validity of Criminal Judgments as early as in 1970 that a single convention would be an impractical solution rendering the presentation of the methods of cooperation less clear and ratification by the member states more difficult, see Explanatory Report, supra note 13 at 14. Compare the Comprehensive (European) Convention on Interstate Co-operation in the Penal Field, Preliminary draft, Strasbourg 1986, MJU 15/86/5.

[73] H.-H. Jescheck: Die internationale Rechtshilfe in Strafsachen in Europa, ZStW 66(1954), p. 531.

[74] H. Romander: Les tentatives d'harmonisation et d'unification du droit pénal et de la procédure pénale dans les états nordiques, in: Droit européen 1970, p. 557 et seq.

[75] G. Gelfand: supra note 67 at 595.

[76] E. Corves & H.-J. Bartsch: National Report, RIDP 1984, No. 1–2, p. 310.

The majority of existing conventions and treaties on enforcement of foreign penal judgments and transfer of prisoners are based on close geographic proximity of the contracting countries.[77] There are groups of states in which, instead of this geographic proximity other links between the states are manifested, e.g. historical[78] or political (ideological.)[79] Still there are some exceptional cases.[80] Geographic proximity and interdependence of the parties should not limit the range of countries that may participate in a penal transfer treaty. On the contrary, there seems to be an inverse relationship between these factors and the strength of humanitarian concerns underlying the international instruments in this field. The likelihood of cultural dissimilarity and higher travel costs for the prisoner's family increase the need for transfer of enforcement with the distance between the countries involved.[81] Humanitarian considerations might require an action toward transfer of prisoners between countries without the above-mentioned similarities and even when the standards of the enforcing (administering) state's legal safeguards have not been observed in the sentencing state, particularly when the prison conditions in the latter state impose special hardship on the prisoner.[82]

77 See the Benelux states, the Scandinacian states, the member states of the Council of Europe, the Eastern European States, the Arab states and several neighbouring states of the United States with which the latter concluded the treaties on transfer of prisoners.

78 See the agreements between France and certain African states reproduced in 52 Revue critique de droit international privé, 863 (1963) and the Convention on the Transfer of Sentenced Persons between France and Marocco of 1981, Law No. 82.477, J.O. of June 11, 1982, p. 1839.

79 The Berlin Convention of 1978 was ratified, apart from Eastern European socialist states, also by Mongolia and Cuba.

80 E.g. the Council of Europe Convention on the Transfer of Sentenced Persons of 1983 which was signed not only by Western European states but also by the United States and Canada. See also the bilateral treaties on the transfer of prisoners between the United States and France, Turkey and Thailand; the Canadian treaty with Thailand; the French treaties with Turkey and Thailand; and the Polish treaties with Syria and Libya.

81 M.S. Harari, R.J. McLean & J.R. Silverwood: Reciprocal Enforcement of Criminal Judgments, RIDP 1974, No. 3–4, p. 596.

82 H. Epp: Transfer of Prisoners, supra note 13 at 259.

2. Double criminality

2.1. Terminology

The variety of denotations attributed to the term "double criminality" and sometimes its vagueness, particularly if the texts of international conventions, agreements, etc. are taken into consideration, has led to a sort of terminological chaos.[83] An attempt of clarification seems useful.

There are several different expressions used which even if they are thought to mean the same, may easily be misleading and confusing. Without prejudice to the importance of this problem at least some of them should be rejected. While studying the literature in English on international criminal law, and especially on international cooperation in this field one can find no less than nine terms:

1. double criminality,[84]
2. double punishability,[85]
3. double penalisation,[86]
4. dual (criminal) liability,[87]
5. dual incrimination,[88]
6. double prosecution,[89]

[83] This terminological problem if of much less significance in publications in German where, apart from the traditional "die beiderseitige Strafbarkeit", also "der Grundsatz der identen Norm" is used. The mutual relationship between them will be discussed below.

[84] "Criminality": "the state or quality of being criminal", Collins Dictionary of the English Language, 1985, p. 353.

[85] "Punishable" ("punishability"): "liable to be punished or deserving of punishment", Collins Dictionary, p. 1184.

[86] "Penalise": (1) "to impose a penalty on (someone), as for breaking a law of rule", (2) "to declare (an act) legally punishable; make subject to a penalty", Collins Dictionary, 1084.

[87] "Liability": "the state of being liable", Collins Dictionary p. 846.

[88] "Incriminate": (1) "to imply or suggest the guilt or error of (someone)", (2) "to charge with a crime or fault", Collins Dictionary, p. 742.

[89] Thornstedt: supra note 14 at 350.

7. dual culpability,[90]
8. equivalency of offences,[91]
9. reciprocity of offences.[92]

The first term, *double criminality*, denominates an act (a behaviour) which is contrary to the criminal law of a state, irrespective of its nature, i.e. judicial or administrative; it refers to a hypothetical situation in which such a feature may be attributed to an act in light of the legal system existing in the state. This is the most common term, and the scope of its use is the widest. To make it more convenient and enlarge its capacity two forms are usually distinguished within the reach of this term, namely "double criminality in abstracto" and "double criminality in concreto". The latter term means that a punishment, again irrespective of its nature, can be imposed on account of the ("criminal") act, as well that the perpetrator is capable to bear criminal liability.

The third term seems too vague, and the fourth – too narrow. The use of other terms was most likely caused by mistake.

However, since double criminality is not the only circumstance required where transfer of criminal proceedings and enforcement of foreign penal judgment is considered, two additional expressions might be proposed: *double prosecutability* and *double enforceability*. To estimate their correctness one should specify their relationship to the above-mentioned terms, namely double criminality and double punishability. It seems that the former notions are broader; e.g. to make instituting and conducting the criminal proceedings possible both double criminality and double punishability must be fulfilled. Therefore from a procedural point of view both "criminality" and "punishability" should be included in "prosecutability"; the latter simply assumes their existence. The same is valid for "enforceability". In this conception "double criminality" and "double punishability", respectively, would constitute merely one of the integral elements of "double prosecutability" and, consequently, might be avoided in some instance as covered by a more general prerequisite.

90 "Culpable": "deserving censure; blameworthy", Collins Dictionary, p. 363. This term is used very seldom; see e.g. Explanatory Report on the European Convention on Mutual Assistance in Criminal Matters, Strasbourg 1969, p. 14 – 15.

91 A.J. Nazarevich: The Transfer of Offenders Act, supra note 45 at 234.

92 M.S. Harari, R.J. McLean & J.R. Silverwood: Reciprocal Enforcement, supra note 81 at 624.

Nevertheless it would not be reasonable to expect that one of the classical terms of international criminal law, namely double criminality, will immediately go out of use. Eventually both the proposed expressions might be used besides double criminality and double punishability. In such a case they would denominate special procedural requirements which must be met when the criminal proceedings are to be transferred (or taken over) and a foreign judgment enforced.

2.2. The legal nature

Double criminality is treated either as a "principle (or a rule) of double criminality"[93] or in terms of a requirement with regard to its existence. The latter approach which seems to be prevailing in the publications on this subject means that double criminality together with other prerequisites condition a particular form of international cooperation.[94] The former qualification seems to be an exaggeration as applied to double criminality for the latter is not directed to solve any legal problems arising in the framework of international cooperation but its very role and real significance lies in the limitation of the scope of matters in which a certain form of cooperation is admissible, i.e. an act of assistance can be rendered by one state and simultaneously accepted by the other. Therefore the latter qualification expresses better the essence of double criminality.

Double criminality constitutes one of the most common prerequisites for all forms of international cooperation. It is placed among those requirements of each form of cooperation in criminal matters which are considered at an international level, and not at the internal one.[95] From

[93] See e.g. H. Schultz: The Principles of the Traditional Law of Extradition, in: Legal Aspects of Extradition Among European States, Strasbourg 1970, p. 12; W. Duk: Principles Underlying the European Convention on Extradition, in: Legal Aspects, p. 37; A.L. Melai: Les conventions européennes et les traités Benelux d'entraide judiciaire en matiére pénale et d'extradition, in: Le droit pénal international, Leiden 1965, p. 100; H.-H. Jescheck: Rapport général provisoire, supra note 10 at 210.

[94] It is acknowledged also by those who use the term "principle of double criminality", see e.g. B. Repik: National Report, RIDP 1984, No. 1–2, p. 368: "Le principe de la double incrimination est la condition du transfert du condamné aux fins d'exécution de la peine".

[95] D. Krapac: Medunarodna krivicnopravna pomoc (International Assistance in Criminal Matters), Informator, Zagreb 1987, p. 94, 108.

another point of view one may say that double criminality belongs to the category of substantive conditions.[96]

Originally the requirement of double criminality was developed in the framework of extradition. The reason for this requirement is largely to be found in the paramount role which extradition has played in the sphere of international cooperation for many decades; the principles evolved in connection with extradition are for the most part deemed controlling and decisive also in respect to other forms of cooperation. It is doubtful however, whether double criminality in these forms plays the same important role as in extradition.[97]

2.3. Justification

The application of double criminality is prevalent in the field of co-operation between states in criminal matters for a common defence against crime presupposes that there is an agreement, at least as regards their aims, between the laws of various states governing the punishment of criminal offences.

The significance of double criminality and the necessity of its preservation is widely recognized, irrespective of the form of international co-operation. Nevertheless it seems questionable to assume that the "double criminality rule" is a manifestation of the equality of all states.[98] Nor may it be said that the validity of double criminality requirement is based on and adopted from the state sovereignity.[99]

This requirement could be thought to be derived from the principle of reciprocity. At the same time the former is a substantive guarantee for the latter. Only in the event of double criminality is the legal balance between the two cooperating states regarded as protected.

The mentioned requirement is based on one of the most fundamental rules of the domestic criminal law, namely nullum crimen sine lege, nulla poena sine lege. Where the protection of the individual rights is of paramount importance this prerequisite makes sense. It is of particular significance when a state participates in any manner and in any extent in the

96 H.-H. Jescheck: supra note 93 at 210.

97 Traité Benelux sur l'execution des décisions judiciaires en matière pénale: Exposé des motifs communs, Bulletin Benelux 1968, p. 30.

98 Z. Knypl: Extradition in International and Domestic Law (in Polish), Warszawa 1975, p. 84.

99 A.L. Melai: Les conventions européennes, supra note 93 at 100.

criminal proceedings leading to adjudication of both its own and the other state's criminal law, as well as in the execution of a judgment. In such cases an internal constitutional legal order of the state concerned may be at stake.[100]

A state must not be obliged to cooperate with any other with respect to an act which is not "criminal" in any sense, i.e. which is either legally irrelevant, or even in accordance with its law. This rule, though derived from extradition, refers to all forms and methods of cooperation. Its modification should be, however, admissible; it would depend on various circumstances of which the degree of interference into such fundamental human rights as for instance the right to liberty must be seen as the most decisive criterion.

An argument in favour of a double criminality requirement developed on the ground of extradition[101] may be similarly considered and used with regard to certain other forms of cooperation.

Last but not least, a practical and pragmatical argument can be set forth here: it is still easier to examine double criminality, even if the context of complicated provisions of the law and legal solutions, than to analyse the circumstances constituting its substantive basis.

2.4. The meaning

The prevailing tendency which may easily be noticed in both the publications by scholars and various explanatory reports is the use of one general term, namely double criminality, rather than two different expressions to denominate particular aspects of the requirement concerned. For there are, generally speaking, two approaches towards this prerequisite; consequently two meanings of the general note must be distinguished, i.e. double criminality in abstracto and double criminality in concreto; the latter is also called "qualified double criminality".[102]

The former is satisfied with the mere statement that a type of act (behaviour) which is "criminal" in one state has the same general qualification in the other. This does not, however, mean that the "nomen iuris" must necessarily be identical, since the laws of two or more states cannot be expected to coincide to the extent that certain acts should invariably

[100] D. Oehler: Internationales Strafrecht, 1983, p. 590.

[101] H. Schultz: supra note 93 at 12; A.L. Melai: supra note 93 at 100.

[102] J.R.H. Kuyper: The Netherlands Law of Extradition, in: International Law in the Netherlands, Hague 1979, vol. II, p. 218.

be considered as constituting the same offence. This implies that differences in the legal classification of an offence are not decisive if the set of facts belongs to the category of acts which are prohibited by the law of both states. It is important to add that such determination is based exclusively on the "objective" and "material" circumstances contained in the description of the relevant offence and disregards the "subjective" or "personal" grounds of the criminal liability. The basic idea is that, regardless of differences in wording and legal classification, the essential constituent elements of the offence should be comparable under the law of both states.[103]

To say that double criminality in concreto is fulfilled one must prove two circumstances: the first one is, that for an offence which is punishable in one state a penalty can be inflicted in the other state if committed in the latter state; the second one is, that the perpetrator can bear the criminal responsibility and be liable to a sanction under the legislation of the state concerned. Thus, double criminality in concreto is viewed as a complex of objective and subjective elements as well as the punishability of the perpetrator. While deciding whether double criminality in concreto is fulfilled particular attention must be paid to the relations between the offender and the injured party (e.g. the consent of the person aggrieved), grounds justifying an act or serving as an excuse for it (e.g. self-defence, force majeure, superior order, etc.) and objective considerations which rid the offence of its criminal character or the perpetrator of his liability to punishment. To establish double criminality in concreto the provisions of the law in the state concerned which delimit an ambit of its internal criminal law are of no significance.[104] On the other hand, in some cases the lack of a complaint required by the law of the requested state may be one of the deciding points.[105]

What is the relation between double criminality in abstracto and double criminality in concreto? Looking from a purely logical point of view one should say that, quite similarly to the above-mentioned pair of terms, namely "double criminality" and "double prosecutability", the former is comprised in the latter since the punishability and criminal

103 "The name of the offense does not matter a bit: every country looks at the facts", J. Swift in R. v. Corrigan (1931) 1 KB 527, CCA.

104 W. Breukelaar: La reconnaissance, supra note 56 at 577. On the contrary J.R.H. Kuyper, supra note 102 at 223.

105 Explanatory Report on the European Convention on the International Validity of Criminal Judgments, Strasbourg 1970, p. 28.

liability presupposes that an act in question is proscribed in the criminal law. In other words, one can be punished only for an act which is "criminal".

In German doctrine there has been developed a conception based in the distinction between "der Grundsatz der identen Norm" (the principle of norm identity) and "die beiderseitige Strafbarkeit" (mutual punishability).[106] The former should be applied in those cases in which the legal effects of the adjudication of criminal law and the enforcement of penal judgments are soundly manifested within the limits of the state and its interests. As a criterion of the mentioned differentiation "die sinngemässe Umstellung des Sachverhalts" (the analogous transformation of facts) is used. This "transformation" is allowed only in the framework of "mutual punishability". An act punishable under the criminal law of one state can be considered to be and understood as an offence constituting an encroachment upon the legal system of the other state if under the criminal law of the latter a similar (analogous) encroachment upon its legal system is punishable. This operation, leading to an interpretative extension, is of less significance where universally recognized and protected interests are involved. e.g. the right to life. On the other hand, it is of crucial importance with regard to the offences which contain some national elements in their legal descriptions i.e. those which have been incorporated into the legal system of a state in order to protect primarily, or even exclusively, its own domestic interests, or some public interests.[107]

2.5. The suggestions

Although the double criminality requirement has already had a long history, it still rises questions which are not always answered identically in the doctrine and the states' legislation and practice, nor can such

[106] M. Mörsberger: Das Prinzip der identischen Strafrechtsnorm in Auslieferungsrecht, Berlin 1969; H. Epp: Der Grundsatz der identen Norm und die beiderseitige Strafbarkeit, OJZ 1981, p. 197 et seq. It is pointed out, however, that one should speak about "der *korrespondierenden* Norm" rather than "der *identen* Norm" (emphasis added), H. Epp: ibidem at 198; H. Lammasch: Auslieferungspflicht und Asylrecht, Leipzig 1887, p. 56; Interestingly, M.A. Vieira has used French equivalents of the German terms, but in a different sense: "le principe de l'identité de la norme *ou* de la double incrimination" (emphasis added), M.A. Vieira: L'evolution récente de l'extradition dans le continent américain, 185 Recueil des Cours de l'Academie de Droit International 1984 – II, p. 212.

[107] L. Gardocki: The Socialist System, supra note 64 at 136; H. Epp: The European Convention, supra note 13 at 263.

conformity be found in the texts of international instruments of cooperation. The following suggestions may be useful for the examination of this condition in the field of international cooperation in criminal matters:

1. Double criminality must not be seen as a fully homogenous condition in all methods and instruments of international cooperation in criminal matters; on the contrary, evaluation of this circumstance should be differentiated according to the way in which such cooperation is realized and to the diversified internal structure of the cooperation.

2. An appraisal of the double criminality requirement which may lead either to the need of preservation of this condition or to the opportunities of its abandonment should be strictly connected with and depend upon the essence and functions of each particular form of the cooperation; the goals and tasks of the specific form should be taken into particular consideration in this context.

3. While deciding on the future perspectives of the double criminality requirement attention should be paid to the "ordre public" clause which may serve – at least in some spheres – as an alternative.

3. The double criminality requirement as applied in various forms of international cooperation

3.1. Extradition

3.1.1. General remarks

Double criminality has met with such a broad consensus and has been so commonly and highly appreciated by the scholars of both international public law and international criminal law that it may be considered as "customary rule of international law".[108] Sometimes the qualification of a

[108] D. Poncet & P. Gully-Hart: Extradition: The European Model, in: Bassiouni 1986, p. 467; I. Shearer: Extradition in International Law, Manchester 1971, p. 137; M.Ch. Bassiouni: International Extradition and World Public Order, 1974, p. 325.

"general principle of international law" is attributed to it.[109] Undoubtedly, this was and still is one of the most important and characteristic features of extradition.[110] It is manifested in both international conventions and treaties, whether multilateral or bilateral, and in internal legislations; it is confirmed in the judgments of the domestic courts.[111] It applies whether the list of extraditable crimes is compiled by the "eliminative" method, or by the "enumerative" method.

3.1.2. Multilateral conventions

Irrespective of the degree of similarities among the Benelux countries the condition of double criminality was expressis verbis retained in the Treaty on Extradition of 1962.[112] It is understood in the sense of an offence being punishable in both states and not an offence demanding identical qualification.[113] Even though the "analogous transformation of facts" is admissible,[114] the Dutch Minister of Justice generally follows the practice of granting extradition not for the corresponding offence under Dutch law, but for the offence described in the request.[115]

A Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth defines a "returnable offence" as an offence described in its Annex 1 (whether the name of the offence under the law of the countries and territories concerned and whether or not it is described in that law by reference to some special intent or any special circumstances of

[109] I. Brownlie: Principles of Public International Law, Oxford 1973, p. 308; H. Meyer: Die Einlieferung, Bonn 1953, p. 108.

[110] P. Weis: Territorial Asylum, 6 The Indian Journal of International Law 1966, No. 2, p. 187; M.A. Vieira; supra note 106 at 212.

[111] See e.g. the English, Dutch, Israeli and American cases: M.Ch. Bassiouni: Extradition: The United States Model, in: Bassiouni 1986, p. 413; J.R.H. Kuyper: supra note 102 at 225–25; I. Stanbrook & C. Stanbrook: Extradition. The Law and Practice, Barry Rose (Publishers) 1980, p. 10–11; M.D. Gouldman: Extradition from Israel, in: Transnational Aspects of Criminal Procedure, 1983 Michigan Yearbook of International Legal Studies, p. 180–81.

[112] Art. 2(1), Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters of June 27, 1962, 616 U.N.T.S, p. 79 (in force since 1967).

[113] J. Constant: La traité Benelux d'extradition et d'entraide judiciaire en matière pénale, 43 Revue de droit pénal et de criminologie 1962, p. 86.

[114] A.L. Melai: Les conventions européennes, supra note 89 at 99; Rapport de la Commission de legislation pénale, civile et commerciale, Doc. Conseil interparlementaire consultatif de Benelux No. 27–2, p. 11.

[115] J.R.H. Kuyper: supra note 98 at 223.

aggravation) being an offence which is punishable by the competent court of the requested state.[116]

Also the Council of Europe Convention on Extradition of 1957[117] and the Arab Convention on Judicial Cooperation of 1983[118] adhere to a double criminality requirement. The new Inter-American Convention on Extradition of 1981 provides that the offence for which extradition is requested must be punishable at the time of its commission, by reason of the acts that constitute it, disregarding extenuating circumstances and the denomination of the offence under the laws of both states concerned.[119]

The predominant majority of bilateral treaties contain the double criminality requirement. This condition is standard for instance in all French and United States extradition treaties.[120] The 1970 American-French Proclamation added a general double criminality provision which reads: "Extradition shall be granted for the following acts if they are punished as crimes or offenses by the laws of both states."[121]

3.1.3. Treaties between socialist states

Other examples of a universal character of the discussed condition are bilateral treaties between socialist states in which double criminality in concreto is required. This can easily be inferred from such expressions as "an offence threatened by a penalty" or "an offence for which a penalty can be imposed", or from the general grounds to refuse extradition in which the legal bars to institute the criminal proceedings are included.[122]

116 Art. 2(2); the Scheme is reprinted in Bassiouni 1986, p. 537.

117 Art. 2(1), E.T.S. No. 24. See on this subject H. Schultz: The Principles of the Traditional Law of Extradition; W. Duk: Principles Underlying the European Convention on Extradition; and B. Karle: Some Problems Concerning the Application of the European Convention on Extradition, in: Legal Aspects of Extradition Among European States, Strasbourg 1970, pp. 9–25, 29–48 and 51–68 respectively; D. Poncet & P. Gully-Hart: supra note 108 at 479.

118 Art. 40(a),(c).

119 Art. 3(1); the Convention was signed in Caracas, OEA/Ser. A/36 Tr. Ser. 60. However, on the Inter-American arena the double criminality requirement can be found only exceptionally, see M.A. Vieira, supra note 106 at 216.

120 Ch.L. Blakesley: Extradition Between France and the United States: An Excercise in Comparative and International Law, 13 Vanderbilt Journal of Transnational Law 1980, p. 673.

121 Proclamation on Extradition of February 12, 1970, United States-France, 22 U.S.T. 407, T.I.A.S. No. 7075.

122 See e.g. the Agreement between Poland and U.S.S.R, supra note 27, Art. 64(b).

It does not seem correct to assume that "the rule of socialist internationalism" prohibits any limitations of the scope of extraditable offences and the extradition itself, so that every offender must be surrendered between socialist states irrespective of a double criminality requirement.[123] On the contrary, it is evident that the treaties between socialist states have retained all basic rules of the traditional law on extradition.[124]

A question may arise whether, and to what extent, the condition of double criminality has a different meaning and significance for the requesting and for the requested state. It is clear that criminality in concreto must be required in the former state, otherwise its request would be useless. The problem becomes more delicate when the requested state is involved. Since fundamental human rights are at stake in extradition proceedings (see above 2.3.) one should expect that double criminality will be examined in concreto in the requested state.[125]

On the other hand, however, the reason for extradition as a form of mutual assistance in criminal matters would be greatly strained if the requirements of punishability in the requesting state were to apply equally to the requested state.[126] In the latter state the double criminality requirement may be treated less strictly and decided in abstracto; some states follow this way.[127] It is interesting to note that the position of the United States on this subject has evolved in the last hundred years from one of strict construction of finding the alleged offence criminal in both legal systems to one of liberty of construction.[128] Various circumstances have combined to produce a more flexible and elastic approach that has manifested itself in the jurisprudence of U.S. courts irrespective of whether the U.S. is a requesting or requested state.[129]

[123] H. Fritsche: Die Auslieferungsstraftaten in Verkehr der Deutchen Demokratischen Republik mit den anderen Staaten des Sozialismus, Staat und Recht, Berlin 1961, p. 1324.

[124] Z. Knypl: Extradition between Socialist States (in Polish) Problemy Wymiaru Sprawiedliwosci 1980, No. 1, p. 122–169.

[125] T. Gardocka: Prerequisites of Extradition in Polish Law (in Polish), Studia Prawnicze 1979, No. 2, p. 81.

[126] A.L. Melai: supra note 93 at 98; J.R.H. Kuyper, supra note 102 at 224; H. Schultz: Les problèmes actuels de l'extradition, RIDP 1974, No. 3–4, p. 503.

[127] See e.g. the Netherlands: the judgment of the Dutch Supreme Court of Jan. 16, 1973, N.J. 1973, No. 281, 5 Netherlands Yearbook of International Law 1974, p. 310.

[128] M.Ch. Bassiouni, supra note 108 at 413.

[129] See cases cited by M.Ch. Bassiouni (preceding note).

The Polish Code of Criminal Proceedings provides that double criminality must be examined in concreto by Polish authorities when Poland is the requested state.[130] All agreements concluded by Poland with socialist countries – except one, namely with Yugoslavia – contain provisions to the same effect. On the other hand, of six treaties concluded before the World War II[131] only one – that with the United States – provides for double criminality in concreto in the requested state.[132] Most treaties concluded by Poland with non-socialist states in the seventies and eighties retained the solution adopted in the treaties between socialist states; there are, however, exceptions.[133]

3.2. Judicial assistance

In the framework of judicial assistance ("kleine Rechtshilfe") double criminality is viewed almost completely inversely to how it is viewed in the field of extradition. The reason is that an involvement of human rights in this form of cooperation is very limited. Apart from this consideration, an act of assistance rendered by one state to the other can hardly be recognized as a form of participation in the criminal proceedings conducted by the authority of the latter state, or in the enforcement of its judgment. Thus the possibility of a abandonment of double criminality requirement may here be the highest.

Indeed, the requirements for rendering assistance are often much weaker than for extradition. In many instances the principle of reciprocity as well as the conditions of double criminality and prosecutability are waived and legal assistance is rendered even if the proceedings are conducted against nationals of the requested state. Among scholars there are some who want to uphold the condition of double criminality in the form "in abstracto",[134] as well as some who propose to abstain from it if the legal assistance was not of a compulsory character,[135] and, finally some for

130 Art. 534 § 2(2). Similarly Art. 9(3) of the Hungarian Criminal Code, supra note 19.

131 See supra note 22 and 23.

132 Art. I and V.

133 See e.g. the agreement with Austria, supra note 31, Art. 2(1); with Greece, supra note 31, Art. 32(2); with Syria, supra note 33, Art. 31(1).

134 See discussion during the preparatory colloquium in Strasbourg, RIDP 1984, No. 1–2, p. 69.

135 T. Vogler: General Report, RIDP 1984, No. 1–2, p. 44; Resolution IV(9) of the XIIIth Congress of AIDP, Cairo, 1984.

whom the best and the simplest solution would be to substitute this prerequisite with the "ordre public" clause.[136]

In many treaties this condition was relinquished.[137] The European Convention on Mutual Assistance in Criminal Matters of 1959, based on an assumption that judicial assistance should be separated from extradition for the latter does not have exactly the same effects as the former, did not retain the double criminality requirement.[138] Nevertheless, it provides in Article 5 that any contracting party may reserve the right to make the execution of letters rogatory for search and seizure of property dependent on the condition that the offence motivating the letters rogatory is punishable under that law of both states concerned.[139]

The new Swiss Law on International Judicial Assistance in Criminal Matters of 1981 limits the double punishability requirement to the compulsory measures adding, however, that such measures shall be allowed for the exculpation of a fugitive even if the offence prosecuted abroad is not punishable in Switzerland.[140]

The domestic law in Poland adheres to double criminality in abstracto.[141] On the other hand, the question of double criminality is answered in various ways in the treaties on judicial assistance concluded by Poland. All agreements with socialist states have abandoned this requirement.[142] The treaties with other states are not identical at this

136 H.-H. Jescheck: Die internationale Rechtshilfe, supra note 71 at 542; T. Vogler: Die europäischen Übereinkommen über die Auslieferung und die sonstige Rechtshilfe in Strafsachen, ZStW 80(1968), p. 500.

137 See e.g. the Benelux Treaty of 1962 and the Arab Convention of 1983.

138 Explanatory Report on the European Convention on Mutual Assistance in Criminal Matters, Strasbourg 1969, p. 14.

139 According to a much broader reservation made by Finland to Article 2 of this Convention assistance may be refused if the request concerns an offence which would not be a crime under Finnish law if it had been committed under corresponding circumstances in Finland; see J. Littunen: National Report, RIDP 1984, No. 1–2, p. 144.

140 Art. 64(1),(2), Law on International Judicial Assistance in Criminal Matters, March 20, 1981, entered into force on Jan. 1, 1983, International Legal Materials 1981, p. 1339–1364; J. Gauthier: La nouvelle législation suisse sur l'entraide internationale en matière pénale, Schw. Zeitschrift für Strafrecht 1984, p. 51 et seq.

141 Assistance may be refused by the Polish authorities if the request is concerned with an act which is not an offence under Polish law, Art. 521 § 3(3), Code of Criminal Procedure.

142 All but an agreement with Yugoslavia which requires that an act be "judicially punishable" in the requested state, Art. 64, supra note 28.

point: all treaties concluded before the World War II contained the requirement,[143] as well as some agreements concluded after the war.[144] It is therefore difficult to specify precisely the criterion differentiating the solutions of the problem of double criminality adopted in these treaties.[145]

Of the United States treaties on mutual assistance in criminal matters double criminality is specifically required only in the treaty with Switzerland,[146] however, with some exceptions concerning this prerequisite.[147] Other treaties generally abandon this requirement.[148]

This course has been taken also by the Federal Republic of Germany since 1958 where it is assumed that if the states agree that the widest measure of judicial assistance is to be afforded to promote the administration of justice and to further the interest of the accused, the relinquishment of the double criminality requirement appears to be, as a rule, imperative.[149]

3.3. Recognition of foreign penal judgments

Individualisation of the sanction requires knowledge of the offender's personality and this in its turn requires knowledge of his previous convictions no matter in which state they were passed. The criminal record is relevant to the offender's history and should not be influenced by the

[143] Supra note 22 and 23.

[144] Austria, Art. 3(1), supra note 31; Syria, Art. 13(2), supra note 33; Tunisia, Art. 4(d), supra note 32; Finland, Art. 13(2), supra note 31. Interestingly, the wording of the latter provision is virtually identical with Art. 28(1) of the Soviet Union-Finland Treaty on Legal Assistance in Civil, Family and Criminal Matters concluded on Aug. 11, 1978, in Helsinki; both require double criminality in concreto.

[145] It turns out that the double criminality requirement is applied in the agreements with some Arab states, e.g. with Syria and Tunisia, but not with the others, e.g. with Morocco and Libya.

[146] Treaty with the Swiss Confederation on Mutual Assistance in Criminal Matters with related notes, May 25, 1973, entered into force on Jan. 23, 1977; 27 U.S.T. 2019, T.I.A.S. No. 8302.

[147] A. Ellis & R.L. Pisani: The United States Treaties on Mutual Assistance in Criminal Matters, in: Bassiouni 1986, p. 159.

[148] The treaties with Italy and Netherlands exceptionally require double criminality in some cases. The provisions of the latter treaty is compatible with the Dutch domestic law, namely the Code of Criminal Procedure which demands double criminality in abstracto when the request is made for seizure of property, J.-M. Sjöcrona: National Report, RIDP 1984, No. 1–2, p. 259.

[149] H. Grützner: International Judicial Assistance, supra note 7 at 221.

national or foreign origin of his convictions. In this context it is indeed important to have all information necessary to enable the court to decide whether it should establish recidivism, qualify a person as a habitual offender, grant a suspended sentence or probation, etc.

A necessary prerequisite for the recognition of foreign penal judgments is the mutual confidence in both the law and the criminal justice system existing in the cooperating states. It requires a certain level of uniformity and equivalence of the legal order existing in the states concerned. The sovereignity of the state is at stake since the domestic law and law enforcement authorities may be subordinated to the law or the judgment of the other state. Finally, the direct or indirect effects of the recognition may in many various ways and spheres disturb the human rights and personal interests.

It is therefore understandable that double criminality should be considered as a point of departure in this field. Indeed, this condition was adopted as early as in 1928 by the International Conference on the Unification of Criminal Law,[150] then affirmed by the Institute of International Law in 1950.[151] The resolution of the IXth International Congress on Penal Law reads as follows: "Recognition of a foreign judgment requires, as a rule, double criminality in concreto of the offence in question".[152] It is regarded as a "silent condition" of the recognition.[153]

An opinion was expressed that double criminality should not be required as a condition sine qua non for taking a foreign criminal judgment into consideration with respect to the "contingent" effects.[154] The wording, however, is too broad and, therefore, may refer also to such situations in which abandonment of this condition is unthinkable.

The provisions on double criminality are contained in international treaties only very seldom; the domestic law is their domain. E.g. the

150 Actes de la Conference, Rome 1931, p. 237.

151 Annuaire de l'Institut de Droit International 1950 – II, p. 382.

152 Resolution II. 1(b), RIDP 1964, No. 3–4, p. 1141. Initially this condition was understood in abstracto as proposed by H.-H. Jescheck, Conclusions pour le Rapport Général définitif, RIDP 1963, No. 1–2, p. 244. After the discussion, however, the qualification "in concreto" was added, Proceedings of the IXth International Congress on Penal Law, Hague 1964, p. 391.

153 H.-H. Jescheck: Rapport général provisoire, supra note 10 at 210.

154 N. Kunter: The European Validity of Criminal Judgments in Respect to Contingent Effects, in: Aspects of the International Validity of Criminal Judgments, Strasbourg 1968, p. 151.

Austrian Criminal Code provides that in the countries where the law does not refer explicitly to the conviction by the court in Austria, the foreign convictions are equivalent to the Austrian convictions on condition that an offender was found guilty for an act which is judicially punishable also under Austrian law, and these convictions were pronounced in proceedings consistent with the rules of Article 6 of the European Convention on Human rights, § 73.

The domestic legislations in socialist states do not provide expressis verbis for the double criminality requirement in this sphere. E.g. the Hungarian Criminal Code states that a sentence rendered by a foreign court is equivalent to one given by a Hungarian court, where (a) this is provided by international convention and (b) the foreign court proceeded on the basis of an offer on the part of the Hungarian authorities (Section 6(1)). Similarly, according to the Romanian Code of Criminal Proceedings a final foreign penal judgment may be recognized in Romania on the following conditions: (a) the sentence was rendered by a court having jurisdiction over the case; (b) the sentence does not contradict the public order in Romania; and (c) the sentence can be recognized according to the Romanian criminal law, Art. 519 and 520.

Undoubtedly, double criminality plays a particularly important role in the establishment of recidivism when it is based on a foreign conviction.[155] The Polish Criminal Code does not provide for this expressis verbis. Nevertheless, the Supreme Court has ruled that an offender can be acknowledged as a recidivist when after having served at least six months imprisonment, and after having been sentenced to this imprisonment for an act being an offence under Polish criminal law, he has committed a similar intentional offence.[156] (Double criminality in abstracto, and not in concreto is mentioned in this context.[157]) The same should be required as a condition for the registration of foreign convictions.[158] Unfortunately,

[155] An exception is nevertheless admissible, and practically existing, in which double criminality is disregarded in this context, W. Duk: Collaboration au sein du Benelux, supra note 15 at 147.

[156] Judgment of the Supreme Court of April 24, 1975, VI KZP 59/74, OSPiKA 1976, No. 6, p. 276.

[157] L. Gardocki thinks that double criminality in concreto should be required in this context. L. Gardocki: Internationalization, supra note 6 at 73.

[158] The same view is expressed by L. Gardocki, supra note 6, at 76.

neither the existing legislation, not any judgment of the Polish Supreme Court provides for this.[159]

3.4. Transfer of criminal proceedings

Since both states cooperating in this way participate in prosecution, adjudication of penal law and administering of criminal justice the prerequisites for this form are considered stricter and more carefully than those which condition for instance judicial assistance. Double criminality is deemed to be one of the most important among them.

Recently this has been pointed out at the seminar organized at the Institute of Higher Studies in Criminal Sciences in 1985 in Siracusa. One of the main principles underlying the proposed model of the transfer of criminal proceedings is double criminality. Principle 5 provides that proceedings may not be taken in the requested state unless the act in respect of which the proceedings are requested constitutes an offence under its law. This rule, however, is supplemented with two "explaining" provisions: (a) when charging the suspected person under their law, the prosecuting authorities of the requested state shall make the necessary adjustment with respect to any particular elements in the legal description of the offence under the law of the requesting state; (b) the requested state shall, if appropriate, take into consideration any circumstances which might influence the personal liability of the suspected person under the law of the requesting state.

The European Convention on the Transfer of Criminal Proceedings of 1972 requires explicitly double criminality in the broadest sense[160] which means that not only an act of the type which the suspect is thought to have committed must be criminal and punishable under that law of both the states concerned, but also that the offender must be deemed to be criminally liable in the specific case in question under the law of both states and, finally, that there are no impediments to prosecution. Thus this solution comprises all elements of what was above referred to as "double criminality" (or double criminality in abstracto), "double punishability" (or double criminality on concreto) and "double prosecutability" (see 2.1). An extensive treatment of double criminality manifested by the application of "sinngemässe Umstellung des Sachverhalts"

[159] See the Order of the Ministers of Justice and National Defence on the Registration of Final Convictions, 1983, Du. U. of 1983, No. 66.

[160] Art. 7(1), E.T.S. No. 73.

(see 2.4.) is thought as a guarantee that the statutory description of the offence in respect to which the charge is brought contains elements of territoriality or nationality.[161]

Transfer of proceedings is conditioned by the double criminality in concreto under the Benelux Convention on the Transfer of Criminal Proceedings of 1974.[162] The "sinngemässe Umstellung des Sachverhalts" is provided for; its scope, however, is limited as compared with the European Convention. Both this Benelux Convention[163] and the Benelux Convention on the Enforcement of Judicial Judgments Rendered in Criminal Matters 1968 (hereafter called the Benelux Convention on the Execution of Penal Judgements),[164] unlike the European conventions, provides for exceptions to this condition, i.e. for the offences in respect to which double criminality is not required; the Committee of Ministers is asked to establish such a list. This solution derives from and is justified by the diferences among the member states which are not only manifested in their legal systems, but also rooted in the economic and geographic structures and therefore are difficult to eliminate.[165] Thus in some cases the Benelux states have decided to sacrifice the double criminality requirement and give priority to other values, e.g. an interest of the administration of criminal justice, an interest of the suspected person, etc.

Transfer of criminal proceeedings between socialist states is based merely on bilateral treaties and not on a multilateral convention. The situation in respect to double criminality in them is paradoxical: in spite of a common and strong belief expressed by the writers from socialist states that double criminality in concreto must be, and is required,[166] these treaties, however, do not explicitly mention this condition; nor do the agreements concluded between the Procurators-General (see 1.3.,

161 J. Schutte: Transfer of Criminal Proceedings: The European System, in: Bassiouni 1986, p. 326.

162 Art. 2(1), Benelux Basic Texts, pt. 4.III (Supp. 1975), not yet in force.

163 Art. 20.

164 Art. 57, Bulletin Benelux 1968 – 4.

165 E.g. the absence of a legislation on viniculture in the Netherlands and a legislation on sea-defence works in Luxemburg. See Project de Traité sur la transmission des poursuites. Exposé des motifs communs, Conseil Interparlementaire Consultatif de Benelux, Bruxelles 1969, p. 12; L.H.C. Hulsman: Proceedings of the IXth International Congress on Penal Law, Hague 1964, p. 352.

166 See e.g. L. Gardocki: Internationalization, supra note 6 at 60; B. Repik: National Report, RIDP 1984, No. 1–2, p. 364; M. Plachta: Übernahme des Strafverfahrens, supra note 18 at 484.

point 2). Nevertheless, it is respected in the practical application of this form of international cooperation between socialist states.[167] The same solution, i.e. avoiding an explicit provision on double criminality, is adopted in the majority of agreements concluded by Poland with other states; the only difference is that criminal proceedings are not transferred to and from these states by Polish authorities. On the other hand, two arrangements concluded recently mention double criminality expressis verbis, but require it "in abstracto".[168]

Finally, some domestic legislations adhere to this condition, e.g. the Hungarian Criminal Code states that criminal proceedings must not be transferred abroad by the Hungarian authorities when under the law of the other state the act is not a criminal offence, or the offender is not punishable, Section 8(3). A similar provision is embodied in the Swiss Law of 1981.[169]

3.5. Enforcement of foreign penal judgments

3.5.1. General remarks

Since the enforcement of foreign penal judgments is an act of international legal cooperation, certain general prerequisites and guarantees as to the proceedings must be provided. Undoubtedly, double criminality belongs to them, thus being considered as an indispensable condition of this form of cooperation. This requirement is derived from a recognition of the fact that the enforcing (executing, administering) state must not be put into the position of executing a sentence of a foreign country which was imposed for an offence not known to the criminal law of the former and which might be even abhorrent to the enforcing state.[170] Thus the basic assumption is that a foreign judgment can be enforced by the re-

[167] L. Gardocki reveals some exceptional cases in the relations between Poland and the German Democratic Republic, L. Gardocki: The Socialist System, supra note 64 at 143.

[168] The agreements with Austria, Art. 16(1), supra note 31; and Tunisia, Art. 32, supra note 32. Such an explicit provision on double criminality is adopted also in two treaties concluded by Yugoslavia with F.R.G., Art. 18(1), and Austria, Art. 19(1); D. Krapac supra note 91 at 85 and 93.

[169] Art. 88, Law on International Judicial Assistance in Criminal Matters, supra note 135.

[170] See an example given at the Legislative History of the American P.L. 95–144, supra note 53 at 3153.

quested state only when it harmonizes with the fundamental legal principles of that state.

3.5.2. Attitudes towards the problem

However, a more detailed examination of the condition of double criminality, taking into consideration its two forms, namely "in abstracto" and "in concreto", reveals a much more complicated situation than one could expect. The mosaic of legal solutions of this problem is striking. The scale of the provisions on double criminality contained in international instruments and domestic legislations is wide enough to cover: double criminality in abstracto, double criminality in concreto, and relinquishment of it. Furthermore, in at least one case the Explanatory Report contradicts what was clearly provided for in the relevant provision.[171] Consequently, the opinions of writers on this subject are not homogenous.

For two reasons it may seem appropriate and justified to require not only that an act for which the transferred person was sentenced be an offence under the law of the enforcing state, but also that this specific offence be punishable and the offender be criminally liable (double criminality in concreto): first, both the sentencing and enforcing state participates in the criminal proceedings and administering of criminal justice;[172] second, the enforcement of foreign penal judgments touches inevitably the human rights and legal interest of the person concerned.[173] As a consequence, the existence of justifications, excuses and other grounds precluding punishment must be thoroughly examined in the light of the criminal law of the enforcing state. Therefore if the exequator authority discovers that self-defence has not been taken into consideration by the verdict of the sentencing state it must determine whether the actual prerequisites of self-defence have been fulfilled and, accordingly, recognize the results of that determination by accepting the foreign judgment or rejecting it.[174] If, however, the judgment indicates, even implicitly, that the sentencing judge after having taken such a defence into consideration eventually rejected it and based its decision on the specific circumstances of the case, renewed examination and a decision of the requested judge to the contrary seems inadmissible. An extensive interpretation of the

171 Se below notes 182–183 and accompanying text.

172 W. Breukelaar: La reconnaissance, supra note 56 at 577.

173 W. Grützner: Les effets, supra note 11, at 365.

174 D. Oehler: Internationales Strafrecht, 1983, p. 594.

double criminality requirement is suggested in the way of the "transformation of facts" (die sinngemässe Umstellung des Sachverhalts).[175]

On the other hand, the requirement of double criminality in abstracto may seem reasonable and sufficient because this condition can here be formulated more flexibly than in the law of extradition, since the result of the refusal to enforce the foreign judgment is that the prisoner cannot serve the penalty in more humane conditions.[176]

One should note that double criminality is examined most often twice in the state which is to enforce the foreign judgment and receive its national sentenced abroad: first, before the decision of the administrative authority (usually the Minister of Justice) to receive the sentenced person is issued; secondly, during the exequatur proceedings. The former is provisional, whereas the latter is final. Their determination in respect to double criminality may, naturally, differ. In some countries it is assumed that there is too much material for a court to decide on double criminality in all cases and that this decision might best be entrusted to the Minister for most offences.[177] However, situations may arise in which this decision has particular consequences for the transferred person. It has been proposed that the decision on double criminality be rendered before such a person gives his consent to the transfer in order to help him to make up his mind.[178]

3.5.3. The legal solutions

(a) Multilateral conventions

The legal solutions of the said problem vary considerably. The radical solution is the relinquishment of a double criminality requirement. It can be found in the model of cooperation existing among the Scandinavian countries.[179] This is due to the fact that this system is based on a high degree of mutual trust between these countries and the common cultural

[175] W. Breukelaar: La reconnaissance, supra note 56 at 576; H. Epp: Transfer of Prisoners, supra note 13 at 263.

[176] L. Gardocki: The Socialist System, supra note 64 at 146.

[177] E.g. Art. 6(1) and Art. 9 of the Canadian Transfer of Offenders Act empowers the Solicitor General to decide on double criminality.

[178] A.J. Nazarevich: The Transfer of Offenders Act, supra note 45 at 234.

[179] See e.g. The Swedish Law No. 193 on the Cooperation with Denmark, Finland, Norway and Iceland in the field of execution of punishments, Art. 1 and 2, RIDP 1963, No. 1–2, 256.

och social values, as well as on a thorough knowledge of the criminal law and practice in each country. Also practical considerations were taken into account.[180] The Arab Convention of 1983 does not mention double criminality in the list of prerequisites for enforcement of foreign penal judgments.[181] Finally, the recent treaties on legal assistance concluded by Poland with other states, whether socialist or not, have abandoned a double criminality requirement.[182]

An opposite position was taken by the European Convention on the International Validity of Criminal Judgments which provides expressis verbis for double criminality in concreto. It requires not only that the act for which the sanction was imposed in the sentencing state be an offence if committed on the territory of the enforcing state, but additionally that the person on whom the sanction was imposed be liable to punishment if the had committed the act in the latter state.[183]

The middle position seems to be taken by the Council of Europe Convention on the Transfer of Sentenced Person of 1983,[184] the Benelux Convention on the Execution of Penal Judgments of 1968[185] and the Berlin convention of 1978:[186] all of them require merely double criminality in abstracto. According to the relevant provision of the former it is sufficient to prove in the enforcing state that the act on account of which the sentence has been imposed "constitutes a criminal offence" under the law of the enforcing state or "would constitute a criminal offence if committed on its territory".[187] Nothing in this provision refers to the punishability of the act concerned, nor to the liability of the sentenced person. Therefore the "Explanatory Report" obviously contradicts what was provided in the text of this Convention since according to the Report, the condition is fulfilled, only if "the person who performed the act could, under the law of the administering state, have had a sanction imposed on

180 Thornstedt: Proceedings of the IXth International Congress on Penal Law, Hague 1964, p. 350; H. Romander: Les tentatives d'harmonisation, supra note 74 at 564.

181 Art. 58.

182 See an Agreement with the Democratic Republic of Korea, supra note 30, and with Libya, supra note 34, and Syria, supra note 33.

183 Art. 4; see also Explanatory Report, supra note 100 at 27.

184 E.T.S. No. 112.

185 See supra note 159.

186 Published in Poland in Dz. U. of 1980, No. 8.

187 Art. 3(1)(e).

him".[188] The Berlin Convention provides that a transfer shall take place if the act for which the person was sentenced constitutes an offense under the law of the native country of this person.[189] Also the Benelux Convention contains a similar regulation,[190] providing, however, that double criminality should be examined in light of the "corresponding provisions of the criminal law" existing in the enforcing state.[191] This implies that "transformation of facts" is admissible. Additionally, unlike all other conventions, the Benelux Convention admits that double criminality should not be required in respect to certain groups of offences.[192]

The United Nations Model Agreement on the Transfer of Foreign Prisoners, as adopted by the VIIth UN Congress on the Prevention of Crime and the Treatment of Offenders, provides that the offence giving rise to conviction must be punishable by deprivation of liberty by the judicial authorities of both states concerned.[193] Such a statement may indicate that double criminality should be interpreted "in concreto".[194] The Model Convention on Expatriation of Accused Persons for Trial and Sentence and Repatriation for Enforcement of Sentence sets any interpretative doubts aside providing explicitly for double criminality in concreto.[195] Another "model convention", namely the Comprehensive (European) Convention on Inter-state Co-operation in the Penal Field has taken the notion of double criminality verbatim from the European Convention of 1970.[196]

188 Explanatory Report on the Convention on the Transfer of Sentenced Persons, supra note 41 at 21.

189 Art. 4.

190 Art. 3(1).

191 Exposé des motifs communs, Bulletin Benelux 1968 – 4, p. 48.

192 Art. 57.

193 Section 3, A/CONF. 121/22.

194 The meaning "in abstracto" is not precluded, however, particularly in the light of the Explanatory Notes on this Model Agreement which explains that "this condition might be interpreted in the same way as for traditional extradition and mutual assistance", A/CONF. 121/10.

195 The Model Convention on Expatriation and Repatriation was elaborated by the International Criminal Law Committee of the International Law Association in the years 1981–1982; see the International Law Association: Report of the Sixtieth Conference, Montreal 1982, p. 381, Art. 7(1).

196 Chapter V, Art. 2(1), supra note 69.

(b) Bilateral treaties

All but two bilateral treaties on the transfer of prisoners concluded by the United States[197] and Canada[198] with other countries contain virtually identical provisions on double criminality which usually read as follows: "The offense for which the offender was convicted and sentenced is one which would be (generally) punishable as a crime in the receiving state."[199] In most treaties it is provided that this condition shall not be interpreted as to require that the crime described in the laws of both states be identical in those matters which do not affect the nature of the crime.[200] It is, however, not clear whether the treaties require double criminality in abstracto or in concreto. On the contrary, the provisions of the Treaty Canada-France and the Treaty United States-Turkey are at this point unquestionably to the effect that the former refers to the double criminality in abstracto,[201] whereas the latter – reflecting the solution adopted in the European Convention on the International Validity of Criminal Judgments of 1970 – explicitly requires double criminality in concreto.[202]

(c) Domestic legislations

Double criminality is also the subject of the domestic legislation, though it is rarely defined. Each of the comprehensive laws on international cooperation in criminal matters enacted in Switzerland,[203] Austria[204] and

197 See treaty with Bolivia of 1978, Art. III(1); with Peru of 1979, Art. III(1); with Thailand of 1982, Art. II(1); France of 1983, Art. 2(a); Canada of 1977, Art. II(1); Mexico of 1976, Art. II(1).

198 See Treaty with Peru of 1980, Art. III(1), and Mexico of 1976, Art. II(a).

199 Additionally, the Treaty USA-Mexico excludes the offences under the immigration laws which may seem unnecessary since this group of offences would not presumbly meet the double criminality requirement, Art. II(4). The Treaty Canada-France contains a similar provision, Art. III(a).

200 See e.g. the Treaty USA-Canada and the Treaty USA-Thailand.

201 Art. II(a) requires that the offence which leads to a request merely "be in violation of the law" of both states.

202 Art. III(1) of the Treaty USA-Turkey was taken nearly verbatim from Art. 4 of the European Convention of 1970; see supra note 178 and accompanying text.

203 IRSG, Law on International Judicial Assistance in Criminal Matters, S.R. 3531, supra note 135, Art. 94(1)b).

204 ARHG, Law on International Mutual Asistance in Criminal Matters, Federal Law Gazette No. 529/1979, enacted January 1, 1980.

West Germany[205] provides for double criminality in concreto. Full double criminality in concreto is also required by the new Dutch Law on the Transfer of Enforcement of Criminal Judgments.[206] Pursuant to the United States legislation "double criminality" means that at the time of transfer of an offender the offence for which he has been sentenced is still an offence in the transferring country and is also an offence in the receiving country.[207]

4. Appraisal and perspectives

4.1. The function of double criminality

A final and at the same time brief answer to the question of the role of double criminality in the framework of international cooperation in penal matters is not easy partly due to the diversity of forms and acts of the latter. More important, however, seems to be the fact that this role is not univocal; it has double nature: positive and negative.

On one hand, as it was pointed out, convincing arguments are invoked to justify double criminality in many instances. Among them the protection of individual and human rights and the domestic legal order, as well as the need to preserve reciprocity in this field are the most significant. Additionally, if one takes into consideration the political, economic, social, cultural and legal differentiation of the world it must be admitted that double criminality enables the states to cooperate, notwithstanding these differences, sometimes very deep. On the other hand, despite this highly desirable and positive function, one must not forget that double criminality in its practical application is still a condition and prerequisite

205 IRG, Law on International Mutual Assistance in Criminal Matters, Federal Law Gazette 1982, IS. 2071, enacted July 1, 1983, § 49(1)(3).

206 Both the offence and the offender must be punishable, Section 3(1) (c) and (d). The subsequent definition explains that "an offence shall be deemed punishable under the Dutch law if the violation of law and order which is the subject of the foreign judgment would also be punishable under the law of the Netherlands as a violation of the Dutch system of law and order", Section 3(2). The Law on the Transfer of Enforcement of Criminal Judgments, Sept. 10, 1986, entered into force on Jan. 1, 1987, Staatsblaad 1986, No. 464.

207 18 U.S.C. § 4101(a), supra note 54. With regard to a country which has a federal form of government, an act shall be deemed to be an offence in that country if it is an offence under the federal laws or the laws of any state or province thereof. Id.

of the cooperation and, as a consequence, limits its scope. Furthermore, this requirement bars and excludes certain acts of assistance even if much can be said for them in the particular case, e.g. in the interests of an offender or, on the contrary, because of the need to prosecute him for important reasons.

Therefore while evaluating the solutions of the problem of double criminality which are adopted in international instruments and domestic legislations, while considering the proposals and suggestions demanding either the retention or relinquishment of this prerequisite, the necessity to preserve the balance between the two sides of double criminality must be taken into account.

4.2. The uncommon and controversial character of double criminality

The survey of application of the double criminality requirement in various forms of international cooperation in penal matters throughout the world reveals that the common character of this condition did not reach such a degree that might have been assumed and expected. The differences concern not only its general retention or abandonment, but also its meaning and the scope of exceptions to it. Nor are the opinions of scholars on double criminality homogenous.

The double criminality requirement has been criticized for a long time.[208] This criticism has originated from and developed in the field of extradition.[209] It appears to be based primarily on the supposedly onerous burden the double criminality requirement places on the requested state's judiciary to determine the criminality of the act and the punishability of the offender in the requesting state's law.[210] In order to make such an examination possible the authority of the requested state must, of course, have access to a fairly exhaustive description of the act on one hand, and

[208] M. Martitz: Internationale Rechtshilfe in Strafsachen, 1888, vol. I, p. 440; P. Bernard: Traité theoretique et pratique de l'extradition, 1890, p. 226; F. Liszt: Das Völkerrecht, systematisch dargestellt, Berlin 1906, 4th ed., p. 220; M. Travers: Traité de droit pénal international, Paris 1929, vol. 4, No 2158; M. Donnedieu de Vabres: Traité élémentaire de droit criminel, Paris 1943, 2nd ed., p. 878–79.

[209] For a fundamental criticism of the double criminality requirement, see report prepared by C. Markees for the Xth International Congress on Criminal Law in Rome, 1969, RIDP 1968, No. 3–4, p. 748 et seq. See also the discussion of these arguments in the general report by H. Schultz, RIDP 1968, No. 3–4, p. 801–2.

[210] A.L. Melai: Les conventions, supra note 93 at 106.

the materials explaining its legal aspects on the other.[211] It is supposed that the elements of the method known in comparative law would have to be employed.[212]

Some European authors have considered this condition to be a setback in international cooperation.[213] The main criticism concerns the fact that the judge of the requested state considers himself a universal judge and imposes his own values on the requesting state.[214] It is also pointed out that if a request for judicial assistance is denied for lack of double criminality this may prove highly prejudicial to the interests of the accused.[215] The double criminality requirement is also criticized, albeit not unanimously, by the Latin American authors.[216]

Following this way one may expect a general abandonment of the double criminality condition. However, as proved by the survey such cases are very rare. One of the most recent proposals is the draft Benelux Convention on the Application of Criminal law with Regard to Time and Place of 1979 which abandons double criminality in respect to all but one principle of applicability of national criminal law.[217] On the other hand, two other phenomena should be mentioned: first, an extensive interpretation of double criminality, particularly in the way of "analogous transformation of facts" leading, at first sight, to better protection of foreign interests, but when reciprocity is guaranted, widening the scope of our interests protected abroad; second, in spite of a general retention of a double criminality requirement several exceptions to this condition are

211 B. Karle: Some Problems, supra note 117 at 57.

212 L. Viski: La cooperation, supra note 17 at 664. In reality, there is no such burden on the court, as it is satisfied if the requesting state submits, along with the rest of its evidentiary documentation, an affidavit of relevant law containing the statute that makes the action in question criminal. See Ch. L. Blakesley: Extradition Between France and the United States, supra note 115 at 672.

213 See e.g. Schwander: Rechtsstaatliche Grundsätze in Auslieferungsrecht, in: Etudes en l'honneur de J. Graven, Memoire de la Faculté de Droit de l'Université de Génève 1969, p. 147; D. Poncet & P. Neyroud: L'extradition et l'asile politique en Suisse, 1976, p. 23.

214 D. Poncet & P. Gully-Hart: The European Model, supra note 108 at 479. See also I. Shearer: Extradition, supra note 108 at 138–39.

215 H. Grützner: Judicial Assistance, supra note 7 at 221.

216 See authors cited by M.A. Vieira: Extradition, supra note 106 at 213–14.

217 This exceptional rule is the personal (active) principle as defined in Article 7, Project Convention Benelux concernant l'applicabilite de la loi pénale dans le temps et dans l'espace, supra note 66 at 25.

introduced and admitted particularly where certain behaviour is punished in a certain state merely due to external factors, e.g. geographical conditions.[218]

4.3. Possible options

4.3.1. Relinquishment of the double criminality requirement

As it was stated and proved above the abandonment of the double criminality condition is possible, at least to some extent, both as a doctrinal view and a proposal, and as a solution practically adopted in the legal instruments, whether international or domestic. This may be at least partly due to the fact that if a specific method of international cooperation is looked upon as a means of facilitating criminal proceedings in another state it might be inferred that it is of no importance to the requested state whether its laws sanction punishment of an offender. Would it be mutatis mutandis unthinkable for a state to participate in the transfer of the sentenced persons without the requirement of double criminality being met?

One might say that double criminality, like related limitations which evolved in the context of extradition, should not be carried forward to the context of the transfer of prisoners. Due to the purely humanitarian nature of the treaties on transfer of prisoners such limitations would be unnecessary and even undesirable. Moreover, they "create a bizarre and cruel anomaly".[219] It is pointed out in connection with this that due to a double criminality requirement a prisoner whose behaviour would be legal in his home country must remain in the foreign prison, while another whose acts are considered as criminal in his home country, can be transferred. The effect, therefore, is to deny the benefits of transfer in the most appalling cases. In short, the problem which was supposed to be solved, in this way, i.e. rehabilitation of an offender, simply cannot be solved if this mechanism is based on double criminality.

There is a danger, however, that the proposed idea will be challenged either by the sentenced person or by the enforcing state. The danger from the side of the former practically does not exist especially when his

[218] See the Benelux example discussed supra at 3.4. and 3.5.3 (a). Another example is provided for in the Swiss Law on Extradition of Jan. 22, 1982, Art. 4. See also reports by H. Grützner and T. Vogler for the Xth International Congress on Criminal Law, RIDP 1968, No. 3–4, p. 383 and 403 respectively.

[219] G. Gelfand: International Penal Transfer, supra note 69 at 593.

consent to transfer is required. Whatever the conditions may be in a foreign jail as compared with a home one, native surroundings are usually more important to the prisoners than better facilities offered in the former. Therefore one should not expect the prisoner to complain that by such a transfer, the authorities of his home state assisted in the denial of fundamental rights, when the inevitable alternative to such an intervention is incarceration in what may sometimes constitute substandard prison facilities.

The second danger is more real. One must bear in mind that the interests of the prisoner, albeit most decisive, are not the only involved in the transfer. The interests of his home country must be also taken into account.[220] The legal order and constitutional issues of the administering state may be at stake. Can the humanitarian considerations be given priority? In no case can the enforcement of a foreign judgment infringe the legal order of the administering state.[221] Thus not even the consent of the prisoner to serve a sentence imposed on him for behaviour not constituting a criminal offence in his home country could outweigh constitutional considerations.

4.3.2. Introducing an "ordre public" clause

Can an "ordre public" clause constitute an alternative to the double criminality requirement? Precisely speaking, may the latter be substituted by the former?

Undoubtedly, no act of assistance rendered by one state to another should infringe the legal order of the former; particularly it must not conflict with its constitutional principles.[222] Irrespective of a broad[223] or

220 R. Linke: Wechselseitige Anerkennung, supra note 37 at 30.

221 A similar problem arises when we ask about the standards of criminal justice, e.g. procedural human rights, as applied and observed in the criminal proceedings leading to the conviction in a foreign country. Here it is stressed that fundamental fair trial rights should not be abandoned in order to save prisoners from the appalling prison conditions that exist in some countries. Sh. Williams: Canadian Criminal Law: International and Transnational Aspects, Butterworths, Toronto 1981, p. 469; H. Epp: The European Convention, supra note 13 at 159; D. Krapac: Medunarodna Pomoc, supra note 95 at 112.

222 H. Grützner: Judicial Assistance, supra note 7 at 219.

223 J.-M. Sjöcrona: National Report, supra note 148 at 267–68.

narrow[224] interpretation of the notion of "ordre public" this term should refer to the fundamental bases and rules of the social and legal order. If so, the long standing maxim "nulla poena, nullum crimen sine lege" which justifies a double criminality requirement at the domestic level is surely embodied in this meaning. Therefore one can say that double criminality constitutes an element of the "ordre public",[225] or the former is a "species" in relation to the latter which is a "genus".[226]

As a consequence the question may arise, why would not an "ordre public" clause create a sufficient ground for a state to refuse cooperation and assistance in a specific case? It is commonly recognized that if the double criminality requirement is, in principle, waived, then judicial assistance may be denied, at any rate under the "ordre public" clause.[227] There seems to be no reason to restrict this view merely to judicial assistance and avoid other forms of international cooperation. As a result the relevant ground for refusal would be more flexible as compared with the classical notion of double criminality.

The opponents of an "ordre public" clause point out that it originates from private international law and is not suited to serve in the penal field; moreover it is vague and inexact.[228]

In spite of this criticism the "ordre public" clause is commonly applied in the framework of international cooperation in criminal matters. Many instruments, both domestic[229] and international, adopt this clause though its wording and scope varies in them. All treaties on legal assistance in criminal matters concluded by Poland with other states contain an "ordre public" clause, also those in which a double criminality requirement was abandoned. Furthermore, the Procurators-General agreements on the transfer of criminal proceedings between socialist states (see supra 1.3,

224 H.-H. Jescheck: Conclusions pour le Rapport Général definitif, RIDP 1963, No. 1–2, p. 244.

225 J. Graven: National Report, RIDP 1963, No. 1–2, p. 86.

226 L.H.C. Hulsman: Proceedings of the IXth International Congress on Penal Law, Hague 1964, p. 351.

227 H. Grützner: Judicial Assistance, supra note 7 at 221; H.-H. Jescheck: Die internationale Rechtshilfe, supra note 73, 541.

228 L.H.C. Hulsman: Transmission des poursuites, supra note 10 at 117; J. Gauthier: La nouvelle législation, supra note 140 at 57.

229 See e.g. the Swiss Law on International Judicial Assistance in Criminal Matters of 1981, Art. 1(2); Polish Code of Criminal Procedure of 1969, Art. 521(2); Romanian Code of Criminal Procedure of 1969, Art. 520(b).

point 2), though avoiding a double criminality requirement, contain a general clause which provides that the transfer shall not take place if it is against important interests of the state or there are other important reasons.

5. Conclusions

The proposal aimed at a general and total relinquishment of the traditional double criminality requirement. But refraining from determination of the criminality and punishability of an act in an international context and meaning[230] seems to be at present idealistic and ahead of its time. Again, one can hardly accept that where constitutional considerations stand in the way of the development and application of international law on cooperation between friendly and like-minded states, it is constitutional law which should be modified.[231] An absolute abandonment of double criminality will finally lead to the elimination of the general prevention of the criminal policy carried out by the state. Therefore as long as the criminal laws of several states differ on what behaviour is to be punished the requirement of double criminality must be upheld, sometimes irrespective of its effect as a protection of an offender.

It is particularly important within a wider framework than a couple of neighboring countries. If such a condition is needed it might, however, be inferred that the time for general recognition and enforcement of foreign penal judgments has not yet come. In such a situation attention must be paid to a greater willingness of every state to display confidence in and respect for the criminal law procedures and policies of other states. Finally, a constant exchange of knowledge and ideas is essential; without greater harmonization of the theory and practice of the law no further progress can be achieved in international cooperation in criminal matters. This is an uneasy art of patience.

230 M.A. Vieira: Extradition, supra note 106 at 215–16.

231 International Cooperation in Criminal Matters Between the Member States of the Council of Europe, Report submitted by the Netherlands delegation for the 15th Conference of European Ministers of Justice, MJU-15/86/3 p. 7.