

SHOULD WE TAKE THE CONDITION OF DOUBLE CRIMINALITY SERIOUSLY?

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1. “When in Rome do as the Romans do...”

Few provisions that apply to the general grounds for the punishability of an offence are able to rouse debate among the general public. It is interesting that the provisions on the territorial scope of criminal law have been (and quite presumably are still able) to lead to a heated discussion not only among experts but also among ordinary interested parties. One of the questions asked, for example, is whether we are all bound by the criminal law of our home state even when we are travelling abroad, or can we freely (without any fear of legal consequences on our return home) enjoy whatever “temptations” our trip abroad has to offer?

During the second half of the 1800s, at a time when new penal codes were being drafted in a number of states (such as the Swedish Penal Code adopted in 1864 and the Finnish Penal Code adopted in 1889), the general position on this was quite clear. Wherever a citizen travelled, the criminal law of his home state followed in his baggage. An “offender” did not cease to be a citizen of his state by virtue of staying abroad, and an offence remained an offence according to the law of his home state even if the offence was committed beyond its borders. The unconditional observance of “the law of the land” to which all citizens were subject required that they be punished for offences they had committed abroad.¹

¹ See Jaakko Forsman, “Anteckningar enligt professor Jaakko Forsmans föreläsningar öfver straffrättens allmänna läror med särskild hänsyn till strafflagen af den 19 december 1889” (Notes based on Professor Jaakko Forsmans lectures on the general doctrines of criminal law, with special reference to the Penal Code of 19 December 1889), Med tillstånd af föreläsaren utgifna af Lars Wasastjerna, Helsingfors 1893, pp. 413–414.

There was no requirement that the act should also be punishable according to the law of the place where it was committed. After all, the criminal law was the expression of the prevailing moral norms. Whatever was punishable in one state was therefore certainly punishable also in another state, or at least should be. "Furthermore, the legislation of each state must regard an act that is prohibited by its own law under threat of punishment to be punishable also when it is committed by a citizen of this state when abroad."² For example, a citizen of one state who used a slave for his own needs and bought or sold slaves for such a purpose in a state where slavery was allowed would, on his return to his home state, obviously be punished according to the law of his home state for engaging in the slave trade.³

It was not until after the Second World War that a different attitude began to develop. The increase in foreign travel, the increase in foreign commerce with distant states and extensive immigration (in particular to Denmark and Sweden) even from states with a different religion, culture and political regime provided fertile soil for a more "liberal" view. The changes in one's own society as well as the increased possibilities for obtaining personal experiences with foreign societies demonstrated the relativism of the need to punish. Why should I, as a Finnish citizen, be punished for something I have done in Spain, as long as the Spaniards are not punished for the same thing in their own state? And how can an immigrant from Kurdistan who has quite recently become a Swedish citizen understand that he can no longer behave, in his former home state, in any way other than that expected of a good Swede?

Following an intense public discussion in Sweden during the 1960s that was sparked off by a group of Swedish women who, in accordance with Polish law but in violation of the Swedish Criminal Code had abortions in Poland and were then threatened with punishment in Sweden, the basic opinion became prepared to accept a view that was the opposite of what had prevailed one hundred years earlier. Punishment would follow an offence committed abroad only if the act was punishable also according

² Cited from "Förslag till Allmän Criminallag" (Proposal for a general Criminal Code"; translated here), Stockholm 1832, Motiver ("Reasoning"), p. 41.

³ This example is taken from "Utlåtande i anledning af Anmärkningar wid förslaget till Allmän Criminallag af Lagcommiteen" (Statement on the basis of comments regarding the proposal by the Law Committee for a general Criminal Code), 2 ed., Stockholm 1840, p. 40.

to the law of the place where it was committed.⁴ A 1972 amendment brought the Swedish Criminal Code largely in line with this view, but the refusal to make a corresponding amendment of the Finnish law led to criticism.⁵

The shift in opinion has certainly not been total or definite. It is easy to outline example cases which would lead at least certain groups of citizens to demand punishment according to the law of the home state without regard to the law of the place where the act was committed. Shouldn't people who, while abroad, indulge themselves in the hunting of endangered species that are protected under the law of their home state be held responsible for this despite the legality of the hunt in the place where it was held? Shouldn't people who, while abroad, engage in sexual perversions prohibited in their home state be held responsible for this on their return home? And what should our position be in respect of states that allow euthanasia in their territory? In such a case, are we really supposed to tolerate, without recourse to penal measures, the arrangement of chartered groups of elderly people and the incurably ill to institutions that have been established in such a state for purposes of euthanasia?

In later stages of criminal proceedings the condition of double criminality could raise problems of a different type. For example, if double criminality is required, for the transfer of the enforcement of punishment, such transfer could be impossible even in a situation where both criminal policy and humanitarian arguments favour such transfer. Let us consider the case of a person who is sentenced in a totally alien state to a long term of imprisonment for an act that is not punishable in his home state. The transfer of the enforcement of this sentence to a prison in his home state would then probably be defensible on several grounds. But what should our position be on double criminality in such a case? Should we continue to hold that this is an unconditional requirement, and there-

⁴ See Hans Thornstedt, "Svensk medborgares ansvar för brott utomlands" (The responsibility of a Swedish citizen for an offence committed abroad), *Svensk Juristtidning* 1966, pp. 506-507, and Alvar Nelson, "Swedish and Foreign Crimes in the Swedish Criminal Justice System", *Netherlands International Law Review*. *International Law, Conflicts of Laws, Comparative Law*, vol. XXXIV (1987), no. 3, pp. 343-366.

⁵ See P.O. Träskman, "Straffrättsliga åtgärder vid brott med främmande inslag" (Penal measures in connection with offences with foreign elements), *En granskning av den finska straffrättens tillämpningsområde* (An examination of the scope of application of Finnish criminal law), Borgå 1977, pp. 370-374.

upon refuse the offender the possibility of serving his sentence in his home state? Or should the home state waive the requirement of double criminality and permit the enforcement in one of its own prisons of a severe sentence for an act that, in such a state, does not constitute or is not regarded as an offence?

2. Double criminality as a requirement in Nordic law

The disagreement over the justification of double criminality as a condition for punishment of an offence committed abroad is also reflected in the differences in the legislation in force in the Nordic states. In this respect, the provisions are not identical. In the following, double criminality in the different phases of criminal proceedings shall be reviewed.

2.1. Double criminality as a requirement for punishment of an offence committed abroad

Attention shall first be directed at norms on jurisdiction. The focus shall primarily be limited to the issue of jurisdiction over offences that a citizen of one's own state (and persons with a corresponding status) have committed abroad, as well as offences directed at such persons (in other words, jurisdiction based on either the active or the passive personality principle). If jurisdiction is based on other principles, double criminality is less problematic.⁶ The fact that the demand cannot be raised in connection with the punishment of international offences (jurisdiction based on the universality principle) is as self-evident as is the fact that it shall apply in connection with punishment based on the principle of substitute administration of criminal law (the representation principle).⁷

⁶ Each state is deemed to have a lawful right to protect itself against criminal acts that are directly aimed at the state or against its interests. This also implies that the demand for double punishability does not apply when jurisdiction is based on the protective principle. See also S.Z. Feller, "Jurisdiction over Offenses with Foreign Element", in M. Cherif Bassiouni (ed.), *A Treatise on International Criminal Law. Volume II, Jurisdiction and Cooperation*, Springfield, Illinois 1973, pp. 26-27. The demand for double punishability when jurisdiction is based on the flag principle can, once again, scarcely be decided independently. In such a case the issue is resolved on the basis of what other principle of jurisdiction might be applicable.

⁷ See Dietrich Oehler, "Internationales Strafrecht", 2. neuarbeitete und erweiterte Auflage, Köln, Berlin, Bonn, München 1983, pp. 497-570.

In the application of the active personality principle in the criminal law of all the Nordic states with the exception of Finland, double criminality has been raised as a specific condition for passing sentence for offences committed abroad. According to the provisions in Denmark (section 7, paragraph 1, subparagraph 2 of the Danish Penal Code) and in Iceland (section 5, paragraph 1 of the Icelandic Penal Code) this condition does not allow any exceptions (unless, at the same time, another principle of jurisdiction, i.e. the protective principle or the universality principle, may be applied).

According to the present Norwegian provisions, the condition of double criminality does not apply when sentencing an offender for certain offences explicitly listed in section 12, paragraph 1, subparagraph 3 of the Norwegian Penal Code. According to a proposal for the amendment of the provisions on criminal jurisdiction, prepared in connection with the total reform of the Norwegian Penal Code currently under way,⁸ the condition of double criminality would only apply to those minor offences, which, under Norwegian law, are subject at most to three months' imprisonment. In Sweden, the condition of double criminality applies to all offences, with the exception of certain international offences enumerated in law as well as of offences for which the minimum punishment under Swedish law is four years' imprisonment.

Finnish law does not raise any explicit requirement for double criminality in such cases. Thus, as long as there is no bar under international law, a Finnish citizen can also be convicted for an offence committed abroad that is not punishable according to the law of the state in which it was committed.⁹

At present, none of the Nordic countries raise double criminality as a condition for the punishability of offences committed abroad that have been directed at the state of the court exercising jurisdiction or against its immediate interests (jurisdiction on the basis of the protective principle; the "injured forum" theory). This can be explained by the fact that the protective principle is intended to provide the injured state with protection against acts that are insufficiently taken into consideration by

⁸ See Norges offentlige utredninger 1984:31, "Straffelovgivningens stedlige virkeområde" (Norwegian committee reports 1984:31, The territorial scope of criminal law), Straffelovkomisjonens delutredning II, Oslo, Bergen, Tromsø 1984.

⁹ See Tråskman, *op.cit.*, pp. 305–309.

the legal system of the foreign state. Acts are often criminalized in penal provisions that have a nationally restricted validity.¹⁰

Double criminality is also not raised in connection with the punishment of offences committed abroad that are directed against citizens of the state of the court exercising jurisdiction. For Denmark, Iceland and Sweden, this is a natural consequence of the fact that the jurisdiction of the state of the court is restricted in such cases only to offences that are committed in an area that is not subject to a foreign state.¹¹ The fact that the Finnish provisions do not require double criminality in these cases can be explained by the fact that (with the exception of jurisdiction based on the principle of representation) Finnish criminal law does not raise this demand in any other cases, either.

2.2. Double criminality as a requirement for extradition for an offence

In international reviews of legislation and in monographs on extradition for an offence, it is customarily noted that one of the fundamental conditions for such extradition is that the condition of double criminality has been met. This is also true of the Nordic states. In most cases this requirement is explicitly expressed in law and in extradition agreements: extradition for an offence is possible only if the act in question is an offence not only under the law of the requesting state but also under the law of the requested state.¹²

With this background in mind, it is interesting to examine the exceptional cases where extradition does not require double criminality. The most important case concerns extradition from one Nordic state to another:¹³ in such a case the condition of double criminality is not raised

¹⁰ *Ibid.*, pp. 211–222.

¹¹ See section 8, paragraph 1, subparagraph 3 of the Danish Penal Code, section 6 of the Icelandic Penal Code, and chapter 2, section 3, paragraph 1, subparagraph 5 of the Swedish Criminal Code.

¹² See section 3 of the Danish Extradition of Offenders Act (1967), section 4 of the Finnish Extradition of Offenders Act (1970), section 3 of the Norwegian Extradition of Offenders Act (1975) and section 4 of the Swedish Extradition of Offenders Act (1957).

¹³ Within the framework of Nordic legislative cooperation, laws with substantively the same contents have been passed by all the Nordic countries on inter-Nordic extradition for an offence. All these laws were originally passed between 1959 and 1961. See, for example, the Extradition between Finland and Other Nordic Countries Act (1960/270).

unless the case involves extradition of a citizen of the requested state, or extradition for a political offence.

For example according to the Finnish law on extradition between Nordic states on the basis of an offence, a person who is not a Finnish citizen can be extradited to another Nordic state also if the offence is not punishable in Finland. However, if the act is deemed to be a political offence, there is the additional requirement that this act or an act of a similar nature is punishable under Finnish law.¹⁴ On the other hand, a Finnish citizen (who at the time of the commission of the offence did not have his permanent residence in the requesting state) can be extradited for an offence only if this is also punishable in Finland (and, in addition, the offence is so serious that under Finnish law it would be punishable by imprisonment for over four years).¹⁵

The other exceptions are more particular. The provisions in the International Convention for the Suppression of Counterfeiting Currency has been considered to require that extradition for counterfeiting would always be possible.¹⁶ A consequence of this has been that in Finland, the general law on extradition for offences makes a specific exception to double criminality as a condition for extradition when the offence in question is counterfeiting (section 4, paragraph 4).

Another exception concerns extradition (or to use the terminology of the law itself, "return") of a person who is guilty of the hijacking of civilian aircraft, as covered by the special agreement between Finland and the Soviet Union. In this agreement, it is taken for granted that a person guilty of the hijacking of civilian aircraft registered in the other contracting party shall always be returned.¹⁷ There is no explicit requirement for double criminality. However, and disregarding certain exceptional cases, since acts involving the hijacking of aircraft are fully criminalized in both

¹⁴ Contrary to what is normally the case, in Nordic law on extradition also the citizens of one's own country may be extradited for an offence, as long as this is to another Nordic country. However, citizens of one's own country may not be extradited for a political offence. See, for example, section 2 of the Finnish Act (1960/270).

¹⁵ See section 2 of the Finnish Act referred to above (1960/270).

¹⁶ See articles 8 and 9 on the Convention on the Prevention of Counterfeiting, and section 8 of the Finnish Extradition on the Basis of an Offence Act.

¹⁷ See the Treaty between the Government of Finland and the Government of the Union of Soviet Socialist Republics on Cooperation for the Prevention of Hijacking of Civil Aircraft (ratified in August 1974).

Finland and the Soviet Union, in practice the condition of double criminality is fulfilled.¹⁸

2.3. Double criminality in connection with other forms of international assistance

There has been a clear increase in the potential for international mutual assistance in criminal cases over the past few decades. Along with the adoption of new forms of mutual assistance, the conditions for the granting of assistance have become more heterogeneous. This is also reflected in the provisions on double criminality. The requirement for double criminality is maintained with varying success in connection with different forms of assistance.

Measures which involve the *transfer of prosecution* for an offence from the state where the act is committed to another state require, as a rule, that this act is punishable in both states. The European Convention on the Transfer of Proceedings in Criminal Matters is clearly based on the requirement that the criterion of double criminality is met (art. 7, paragraph 1). Also the intra-Nordic provisions on the transfer of prosecution for an offence are based on this requirement. Prosecution shall normally be transferred from the state of commission to another Nordic state where this corresponds to the interests of the defendant and where this can also be justified with reference to the demand for effective investigation. In this, the transfer of prosecution is always subject to the condition that the act is punishable in both states.¹⁹

Double criminality is also an absolute requirement in cases where the transfer of prosecution is possible on the basis of the bilateral agreements on mutual assistance that Finland has entered into with certain socialist states.²⁰

¹⁸ See P.O. Träskman, "The Finnish-Soviet Hijacking Treaty", *Scandinavian Studies in Law* 1982, volume 26 (ed. by Anders Victorin), Stockholm 1982, pp. 243–261.

¹⁹ See, for example, chapter 1, section 5 of the Finnish Penal Code, and the Nordic agreement on prosecution for offences in a country other than where the offence was committed (1970).

²⁰ Finland has entered into such agreements with the Soviet Union (11 August 1978), Poland (27 May 1980), Hungary (22 May 1981) and the German Democratic Republic (1 October 1987). In regard to double punishability as a condition for the provision of legal assistance, see for example article 28 of the agreement with the Soviet Union: "Legal assistance in criminal cases may ... be refused: a) if the case concerns an act which, according to the law of one of the contracting parties is not regarded as an offence. ..."

Measures designed to *assist in prosecution* of an offence in the state of commission (or in another state that has primary jurisdiction), on the other hand, are not always deemed to require double criminality. An example of this is the intra-Nordic legislation on mutual legal assistance in the summoning of a defendant in criminal proceedings to a court in another Nordic state.²¹ When a court in a Nordic state has issued a summons or public summons as defendant for a person who is suspected of an offence, the appropriate authority in another Nordic state is required to serve the summons or public summons to the suspect. There is no requirement that the act for which the person in question is suspected is also punishable under the law of the state where service is given.

Service obliges the person who is staying in the state where the service takes place and who has his permanent residence in this or in another Nordic state to obey the summons. If he refuses to do so, however, he cannot be forced to appear before the court to which he is summoned except in accordance with extradition proceedings for an offence. When, in such a case, extradition takes place and the law on extradition for an offence between Nordic states is applied, the condition of double criminality does not arise except in connection with the exceptions described above.²²

Also mutual legal assistance in the form of *assistance in the presentation of evidence* during court proceedings normally does not require that the condition of double criminality is met. Thus, lack of double criminality is not mentioned among the grounds entitling the requested state to refuse legal assistance according to the European Convention on Mutual Legal Assistance in Criminal Matters (article 2). In this convention, double criminality has been considered only as a possible condition for granting the request of another state for a search or seizure of property. According to article 5, a contracting state can, by making an explicit declaration, specify that these measures are dependent on double criminality. Of the Nordic states, Denmark, Finland and Norway have made such a declaration on acceding to the convention (Iceland has not yet acceded).

According to the intra-Nordic legislation, legal assistance in connection with the presentation of evidence also does not require that the condition

²¹ This legislation has been drafted in the same way as the laws on extradition for an offence among the Nordic countries (see note 13). See also, for example, the Finnish Act on summoning defendants in a criminal case to a court in another Nordic country (9 July 1976/601).

²² See note 13.

of double criminality be met. For example, on the demand of the appropriate authority in a Nordic state, a witness can be heard before the court of another Nordic state, even in a criminal case where the charges refer to an act that is not criminalized in the latter state.²³ Furthermore, the presentation of testimony can also be carried out by having the person to be heard as a witness summoned before the court where the charges are being considered. According to the intra-Nordic legislation,²⁴ a person who has reached the age of 18 years and who is resident in one of the Nordic states is required, on receiving a summons from a general court in another Nordic state, to appear before this court to testify. If he refuses to do so, he may be subjected to fines and the threat of a fine.²⁵

Certain other conventions on international legal assistance require double criminality in connection with measures intended to assist in the production of evidence. An example that may be mentioned is that all mutual legal assistance on the basis of the bilateral conventions mentioned above between Finland and certain socialist states require double criminality.²⁶

Mutual legal *assistance in the enforcement of punishment* and in the transfer of the enforcement of punishment from one state to another normally requires double criminality. In those cases where mutual legal assistance is given through the application of legislation on extradition (extradition of a sentenced person for the enforcement of the sentence) the condition of double criminality applies to the some extent as in other extradition for an offence. In this, what is generally at issue is extradition of a person from the state to which he has escaped after being sentenced, to the state that sentenced him.

Transfer of the enforcement of a sentence from the state that passed sentence to another state cannot normally take place without an express agreement on this. According to the most important agreement of this type, the European Convention on the International Validity of Criminal Judgments, transfer requires that the condition of double criminality is met (article 4). The sanction shall not be enforced by another contracting

²³ Also this legislation has been drafted in the same way as the laws on extradition for an offence. See notes 13 and 21. See, for example, the Finnish Act on the obligation in certain cases to appear before a court in another Nordic country (23 May 1975/349).

²⁴ See, for example, section 1 of the Act mentioned above.

²⁵ See section 3 of the Act referred to.

²⁶ See note 20.

state unless under its law the act for which the sanction was imposed would be an offence if committed on its territory and the person on whom the sanction was imposed would be liable to punishment if he had committed the act there.

The intra-Nordic legislation, on the other hand, does not stipulate double criminality as a condition for the transfer of enforcement.²⁷ According to this legislation, sanctions (fines, forfeiture, imprisonment and certain forms of community-based sanctions) imposed by a court in a Nordic state can be enforced, on the request of the appropriate authority in this state, in another Nordic state. When the issue of the transfer of the enforcement of a sentence is considered, no attention is paid at all to the offence for which the sentence has been passed. This means, in effect, that enforcement can be transferred to a state where the act which led to the sentence is not punishable.

3. Arguments on behalf of the condition of double criminality

The above review of double criminality as a condition for prosecution and for international mutual legal assistance provides very little guidance when assessing the arguments for such a condition. Clearly, the provisions are formulated differently in identical cases primarily on the basis of what states are concerned (for example, mutual assistance between Finland and the other Nordic states, or Finland and the socialist states).

Furthermore, a review of the literature on this issue has little to offer us. Often, the authors satisfy themselves simply with noting that double punishment either is or is not required, without giving any details on the reasons for this.²⁸

In those cases where reasons were sought in support of the requirement of double criminality, these have above all consisted of a reference

²⁷ The cooperation also in these cases is based on laws with substantially identical contents (see notes 13, 21 and 23). See, for example, the Finnish Act on cooperation between Finland and the other Nordic countries on enforcement of sentences in criminal cases (20 June 1963/326).

²⁸ See, for example, Madeleine Löfmarck, "Straffansvar" (Criminal responsibility), *Kompedium över straffrättens allmänna del utarbetat som ett led i framställningen av en ny lärobok för grundkursen i straffrätt* (Compendium of the general doctrines of criminal law, prepared in connection with the preparation of a new textbook for a basic course in criminal law), Stockholm 1985, pp. 97–99.

to the argument that the legality principle in criminal law requires dual criminality,²⁹ that the requirement for double criminality is a fundamental legal norm generally recognized by civilized states and is therefore a binding norm in international law,³⁰ that a refusal to consider the requirement for double criminality can amount to a misuse of law that is prohibited by international law,³¹ and quite simply that a refusal to consider this requirement in individual cases could lead to unreasonable consequences from the point of view of the individual involved.³²

In the following, I shall seek to analyze the reasons in greater detail.

3.1. The point of view of the state exercising jurisdiction: effectiveness and the maintenance of credibility as arguments against the maintenance of the condition of double criminality

As is the case with other political decisions, decisions in criminal policy are rational. Decisions according to which a certain act is criminalized are always understood to guide people's behaviour. When a certain type of act is found to conflict with interests that are deemed to be so important that they must be protected, one seeks to criminalize this type of act in order to make people refrain from acting in the prohibited manner.

The criminal justice system is considered to operate on the basis of general prevention. The general preventive effect that the threat of punishment has in law and the punishment of individual concrete acts appears in different ways. One of these ways is the positive effect on general morality that goes with stipulating in law that a certain type of act constitutes an offence, and by stipulating the sentence for the act that shall follow in a concrete case. By threatening persons who commit certain types of acts with punishment, these are clearly labelled as condemnable. By punishing an individual act, society demonstrates that the threat of punishment is not an empty gesture.³³

²⁹ See, for example, O.A. Germann, "Rechtsstaatliche Schranken im Internationalen Strafrecht", *Schweizerische Zeitschrift für Strafrecht* 1954, pp. 237–246.

³⁰ See Eberhard Rosswog, "Das Problem der Vereinbarkeit des aktiven und passiven Personalgrundsatzes mit dem Völkerrecht", Bonn 1965, pp. 149–158.

³¹ *Ibid.*, pp. 106–176.

³² See, for example, Hans Schultz, "The Principles of the Traditional Law of Extradition". *Legal Aspects on Extradition among European States*, Strasbourg 1970, pp. 9–25.

³³ See Nils Jareborg, "Essays in Criminal Law", Uppsala 1988, pp. 75–78.

One condition for the effective operation of this system is that the authorities act in a consistent manner. A penal provision has a positive effect on morality and the maintenance of morality if the contents of the provision is sufficiently unambiguous. This means that a concrete act that matches the essential elements of the offence must always (when there are no subjective or objective grounds for non-imputability) be labelled to be an offence. If the same act at times is called an offence and at other times is not, the system will break down.

Double criminality as a condition for the punishment of an offence committed abroad thus decreases the effectiveness of the system. The message that an act is to be condemned loses its persuasiveness if this act is punished as an offence when it is committed in one's home state but not if it is committed abroad, unless there is some rational reason for this difference. Thus, a state can have a more uniform and effective criminal policy if it does not require double criminality for the punishment of an offence that was committed beyond its borders.

The requirement of double criminality can also lead to a diminishment of faith in the belief that decisions in criminal policy are rational and well-considered. It may be difficult for a person in state A to see that the threat of punishment for an act criminalized in this state has been considered sufficiently and is justified on the grounds that the act is reproachable if he or she, without any risk of sanctions, can commit the same act in state B where the act is not punishable. The situation becomes even more untenable and it is even more difficult for the individual to see the rationality of the threat of punishment, if an act that is strictly prohibited and punishable in his or her home state is permissible in a foreign state. The requirement of double criminality presents a risk for a state that would like to have a strong criminal policy of its own.

3.2. The point of view of the state of commission: the prohibition against intervention in internal affairs as an argument for requiring double criminality

One of the fundamental norms in international law is that each state has the right to full sovereignty over its own territory. This right includes the right to formulate the national legal system according to the state's own views, as long as the peremptory norms of international law are not breached. This means that the decision over what acts shall be criminalized is an internal matter except in the cases where the criminaliza-

tion has consequences that affect that legitimate interests of other states or where an international agreement requires that a state adopt certain criminalizations.

This right to territorial sovereignty has its reverse side: other states have a duty to refrain from measures that involve interference in the internal affairs of a foreign state. Every state is thus obliged to respect the form in which another state has given its legal order. If one state (state A) does not deem an act to be so reprehensible that its criminalization is justified, this assessment must be respected. Another state (state B) that deems that the act should be criminalized can not, therefore (except when the act is deemed to be an international offence)³⁴ have the right to formulate its criminal law so that this act would always be punishable even when it was committed in the territory of another state (state A). If state B presents demands relating to the punishment also of citizens (or permanently domiciled persons) in state A for the fact that they have committed said act in the latter state, state B is guilty of misuse of law, unless the punishment can be justified with the need for self-defence (jurisdiction based on the protective principle). Whether or not this is also the case when state B punishes its own citizens (or foreigners permanently domiciled in B) for such acts is more doubtful (see section 3.4).

The requirement for double criminality is thus a good guarantee against a state using its right to formulate its criminal law in order to interfere without justification in the internal matters of another state.

3.3. The point of view of the offender: the requirement for double punishability as a guarantee of due process

The most important norm providing a person suspected of an offence with due process is the one expressed in the principle of legality in criminal law (the principle of *nulla poena sine lege*). This principle contains, among other elements, a prohibition against punishing a person for an act that, at the time of commission, was not criminalized as an offence.³⁵ Thus, the judge may not find that an offence has been committed if the

³⁴ In regard to international offences *stricto sensu* and *largo sensu*, see the reports prepared for the XIV International Congress on Penal Law, Vienna 1989, Section IV, "International crimes and domestic criminal law".

³⁵ Regarding the different aspects of the principle of legality in criminal law, see Dan Frände, "Den straffrättsliga legalitetsprincipen" (The principle of legality in criminal law), Ekenäs 1989, pp. 1-17.

concrete act and the circumstances in which it was committed do not correspond to what the legislator, in a valid penal provision, has declared to constitute an offence.

It may seem that the principle of *nulla poena sine lege* cannot be maintained if the requirement for double punishability is not maintained. A person who commits an act in a state where it is permitted has not committed an offence *in this state*. How, then, can a judge punish him for the act without violating the principle of *nulla poena sine lege*?

Most material penal provisions, however, are universally valid. When a state formulates a penal provision criminalizing a certain act, this is rarely restricted only to acts that are committed in its own territory. Usually, the legislator merely states that a certain act shall constitute an offence, which means that this is the case *anywhere* in the world. As soon as *one* state in the world criminalizes an act, therefore, a norm exists that satisfies the demand on the principle of legality, that punishment for an offence must be based on the law in force. However, punishment also demands that this law be *the applicable law* in the state where charges are brought.

When seen from the point of view of the individual, therefore, the acts he has committed potentially *can* be judged on the basis of a network of laws. An act might be an offence according to a penal provision in the law of his home state, according to the law of the state where he is residing, or according to the law of a state that is totally foreign to the person who committed the act. All of these penal provisions (generally) have universal validity. As soon as a concrete act corresponds to the essential elements of one of these laws, a conviction is possible without violating the principle of *nulla poena sine lege*. However, a condition for this is that the person who committed the act can be charged before a court that has the right to apply such a law to his act. Even where the penal provision has universal validity, it cannot be applied beyond what is possible on the basis of the provisions on jurisdiction in criminal law (which, in this connection, stipulate the international jurisdiction of the court considering the criminal case).³⁶

³⁶ See, for example, "Folkrätt och straffansvar" (International law and criminal responsibility), Justitiedepartementet, DsJu 1984:6, Stockholm 1984, pp. 40–49.

3.4. The point of view of the state exercising jurisdiction and the state of commission: the principle of *nulla poena sine lege* as a factor restricting the consideration

The principle of *nulla poena sine lege* prohibits the punishment of a person for an act which, at the time it was committed, was not punishable. The principle is considered not only to incorporate this prohibition against punishing a person for an act that *is not* an offence; it also stipulates the limits to the sanctions that can be applied, and what additional measures can be applied to an act that *is* an offence. Courts and other authorities applying the law are bound by the possibilities that they are given in the law *in force*. It is clear that this law must also be a law that the authority in question *can*, i.e. has the right to, *apply*.

Let us assume that an act is punishable (on the basis of a penal provision with universal validity) in state A, but not in state B. If a person commits the act in the latter state, he is not guilty of an offence according to the law of the state of commission, but he is according to the law of state A.

The courts (and the other justice authorities) in state A always apply their own criminal law and criminal procedural law to a criminal case (*lex fori*). Since, according to the law of state A, the act is an offence, the principle of legality in criminal law is not a bar to prosecution and punishment. The situation is different in state B. In this state, the courts and authorities apply their own laws, and according to these the act is not an offence. In this state, it is not possible, without violating the principle of *nulla poena sine lege*, to punish the person for the act or undertake other measures in criminal law as a consequence of the act.³⁷ Double criminality as a condition for extradition or for other legal assistance that involves the taking of measures of a criminal or procedural law nature against the person who committed the act is thus a direct consequence of the demand of the principle of legality that there be a legal basis for the measure.

The principle of legality therefore requires that a state where a certain act is not punishable refrains from all measures that would assist the conviction of a person for this act. On the other hand, the principle of legality does not constitute a norm on the basis of which this state could prevent another state from extending its jurisdiction to include pro-

³⁷ See Frände, *op.cit.*, pp. 1–4. Cf. article 15 of the International Convention on Civil and Political Rights.

secution and punishment also for an offence that was committed in the territory of the first state. If, in accordance with the principle of *nulla poena sine lege*, a state is prevented from punishing the act or from assisting in the punishment of the act, it is bound to accept the fact that another state punishes this act. The only protection a state has in this case is the one provided by the prohibition against interference in its internal matters.³⁸

The possibilities that a state has of extending its jurisdiction, without maintaining the condition of double criminality, to cover also acts that have been committed in another state brings with it a certain element of legal uncertainty. It is true that a citizen (or a person who is granted the same position as a citizen) in such a state can prepare himself for such an eventuality by obeying the criminal law in his home state also when he is abroad, and by always behaving in a way that conforms with the demands both in his home state and in the place where he is visiting.

Such a person does not have an absolute duty always to obey the provisions of the law of his home state. Should there be a direct conflict between the norms of the law of his home state and those of the state he is visiting (for example, when the latter state permits an act that the law of his home state prohibits), the law of the state he is visiting has priority. In such a state, he can “enjoy” protection against prosecution in his home state for acts that are not criminalized in this state in cases, and to the extent that such prosecution would be considered interference in the internal matters of the state he is visiting. When this is the case, however, is decided in the basis of the application of norms of international law that have an exceptionally weak force.³⁹ The possibility of making a reasonably certain prediction of whether or not a certain act shall lead to punishment in the home state or not is thus not one that is normally required in criminal law or criminal procedure.⁴⁰

When punishment for an offence committed abroad is extended to include offences directed against physical or legal persons in the state exercising jurisdiction without double criminality being required, there is an even greater risk of unsuitable interference in the internal matters of a

³⁸ See Rosswog, *op.cit.*, p. 161.

³⁹ See M. Akehurst, “A Modern Introduction to International Law”, 4th ed., London 1984, pp. 112–116.

⁴⁰ See Frände, *op.cit.*, pp. 169–214.

foreign state. At the same time, there is a decrease in the possibilities that the “offender” has of foreseeing the consequences of his behaviour.

If the double criminality is not required, a citizen of one state (state A) who commits an act that is not punishable in this state but that is directed against a person in another state (state B) where this act is criminalized, risks prosecution and punishment in state B. If the “offender” is not a citizen of the home state of the victim (the state exercising jurisdiction) and there are no other connecting factors between himself and state B, his possibilities (and his obligation) of letting the law in state B guide his behaviour are nonexistent. In such a case the condition of double criminality is the only sufficient guarantee to foresee prosecution and punishment.⁴¹

Double criminality as a condition for punishment of an offence committed abroad can thus not be derived from the principle of *nulla poena sine lege*. Requiring double criminality, however, does to a certain extent serve the same interests as the demand of the principle of legality. For the individual, the legal safeguards are naturally all the greater if he (with the exception of offences under international law) can rely on the fact that offences other than those that are punishable in the state of commission cannot lead to punishment. In the same way as legalism in criminal law leads to greater predictability and, therefore, greater legal safeguards, requiring double criminality leads to a more secure system.

4. Conclusions: when is the requirement for double criminality justified in criminal policy?

To require double criminality as a condition for the punishment of an offence committed abroad can, when this is based in the active or passive personality principle, be justified both by referring to the individual demand for legal safeguards and by referring to the sovereign right of the state to decide on its internal matters. The reasons that can be presented against the requirement for dual criminality are primarily those that emphasize the need for effectiveness in the prevention and control of crime or that refer to the right of the individual state to carry out a unique national criminal policy.

⁴¹ Cf. Frände, *op.cit.*, pp. 206–214.

The possibility of punishing offences committed abroad regardless of double criminality is based on the tie that exists between a certain state and its citizens. When double criminality is required, the significance of the territory of the state is emphasized as a limit under international law for measures that have a political nature (and thus also for measures in criminal policy).

In this respect, the provisions in the penal codes of Denmark, Iceland and Sweden seem to be well founded. Double criminality is explicitly expressed as a condition for punishment except in the cases where there are pressing reasons against this condition (for example in the punishment of certain serious offences against the Swedish Criminal Code). The Finnish provisions on jurisdiction in criminal law clearly differ from these provisions in that they never require double criminality when punishment is based on the active or passive personality principle. The fact that the requirement for double criminality is accorded so little significance does not seem to be well justified in a state that likes to emphasize its roots in the Nordic and, through this, the legal tradition of Western Europe. In this respect also the Nordic provisions would appear to give the requirement of double punishment much too little significance.

Double criminality is generally required for extradition for an offence. This can also be said to be a logical consequence of the ties to the law in force that are to be found in the legality principle in criminal law. Extraditing a person for an offence is obviously a measure under criminal law. It is for this reason that the principle of legality in criminal law requires that the basis for the measure is an act that constitutes an offence according to the applicable law in force. Since, in a criminal case, a court cannot primarily apply a law other than the criminal law and procedural law of the state exercising jurisdiction, the principle of *nulla poena sine lege* requires that the act constitutes an offence according to the law in this state. This means that when a state agrees to extradite a person for an act that is not an offence in this state, this state determines and enforces a sanction under criminal law for an act that is not an offence according to domestic law.

How, then, is it possible that the Nordic law in force allows extradition in certain cases without requiring double criminality? This question has not been accorded any appreciable attention. In the preparation of the Nordic extradition laws that make extradition possible between the Nordic countries regardless of this requirement, this was justified in part

with the demand for effective crime prevention and control in a region where there are large possibilities for crossing national frontiers without any appreciable checks and in part with the great confidence that exists between the Nordic states.⁴²

The arguments presented when abandoning the requirement of double criminality are, as can be seen, one-sided: the assessment that has been made has been limited to the point of view of the states involved. An assessment from the point of view of the individual, from the point of view of the person suspected of an offence, would – as shown above – have led to a different result. After all, in such a case the requirement for double criminality (as is the case with other requirements that follow from or that are contained in the principle of legality in criminal law) carries with it a guarantee of due process. This guarantee has been renounced when one waives the requirement for double criminality in extradition. On these grounds the inter-Nordic legislation on extradition can justifiably be criticized despite the fact that it promotes effectiveness and rationality of means.

The transfer of the enforcement of punishment from one state to another without the requirement of double criminality being met can be criticized on the same grounds as extradition for an offence without regard to this requirement. After all, when the enforcement of a sentence is transferred to a state where the act for which the punishment has been imposed is not criminalized, this state undertakes penal measures for an act that is not an offence according to domestic law. This means that this state is not taking into consideration the principle of *nulla poena sine lege*.

It is true that from the point of view of the person who has been convicted, the situation in such a case can differ from that of extradition for an offence. After all, the transfer of the enforcement of punishment from one state to another often takes place in the interest of the convicted person himself. Paradoxically enough, one can thus argue that in such cases there are humanitarian grounds for renouncing the guarantees that are normally present in order to ensure fundamental human rights.

Other forms of international mutual legal assistance have at times (but not always) been considered to require double criminality. It is clear that in such cases one has not followed a consistent criminal policy, but has

⁴² See the Government proposition to Parliament with a proposal for an Act on Extradition Between Finland and Other Nordic Countries (1959:94), Helsinki 1959.

instead often allowed implicit ideological factors, as well as factors in general policy, to prevail.

If also in these cases one begins from the function that double criminality has as a guarantee of the legal safeguards of the individual, it is justified to require double criminality only in those cases where what is at issue is the undertaking of measures that have or can have a penal nature and that are directly aimed at a person who is suspected of an offence. On this basis double criminality may be seen to be a condition for legal assistance that involves the bringing of criminal charges against the suspect (for example service of summons). In other cases, on the other hand, legal assistance can scarcely be said to involve measures of a penal nature directed against a suspect. Therefore, the requirement of double criminality does not seem to have an appreciable function as a guarantee for due process.