A History of Double Criminality in Extradition

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Abstract

This article sets out the history of double criminality in the law of extradition. It shows how that it only emerged as a legal requirement in the ‘Jay Treaty’, the 1794 treaty between the US and UK. The article explores how the ‘Jay proviso’, a procedural requirement that the requesting state produce sufficient evidence to satisfy the requested state of the criminality of the requested person, morphed through interaction between common law and civil law states into a substantive requirement that the acts for which extradition is requested be criminal under the laws of both states. The article discusses the evolution of the idea, and of its rationale, and then concludes that acceptance of this idea by the early part of the 20th Century confirmed its status as a general principle of law, or perhaps even a rule of customary international law.

Keywords

double criminality – extradition – Jay Treaty – general principle of law – customary international law

1 Introduction

In 1963, Marjorie Whiteman noted:

A common requirement for extradition is that the acts which form the basis for the extradition request constitute a crime under the law of both the requesting and requested States. This requirement exists whether the
request is made under a treaty or apart from a treaty and whether a list of offenses or a minimum-penalty provision is involved.1

Double criminality, known by many names (dual criminality, dual culpability, double incrimination, dual liability, equivalency of offences, identity, réciprocité d’incrimination, double extraditability, nulla traditio sine lege)2, is considered central to extradition today.3 It requires, in essence, that the crime for which extradition is requested should not be too alien to the requested state, or extradition will be refused.

This article explores the history of the law of extradition4 to try to identify when and how double criminality emerged as the basic legal condition for extradition. It examines extradition treaties, legislation, judicial decisions and secondary comment to analyse the evolution of the form and content of double criminality. The article also explores the ontological basis of double criminality during its development, and in particular the received wisdom that double criminality is an expression of enlightenment liberalism and that justice and fairness lie at its roots.5 Epps argues that the crimes for which states request extradition reveals their concept of themselves as normative entities.6 Wise, focussing on how that normative position is made clear to states seeking cooperation, thinks double criminality’s best defence is that it is

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1 Whiteman, Marjorie. Digest of International Law 6 (1968), 773–774.
4 The term ‘extradition’ was used in French decret loi of 19 February 1791. Prior to that restituer or remettre was used; Billot, Albert. Traité de l’extradition (Paris: E Plon et cie, 1874), 34.
a device for giving vent to doubts about the justice of putting the fugitive to trial for the particular acts charged against him. The requested State mechanically invokes its own law as a yardstick simply to avoid the indelicate aspersions to which a rule more clearly pegged to considerations of justice might give rise.  

This article tries to identify (where possible) the justifications offered both explicitly and implicitly at the time of its introduction, and those arguments that grew up for dispensing with it, and how they throw light on modern debates about the necessity for retaining double criminality as a foundation of extradition. In sum then, the article tries to identify the first incidents of double criminality, how double criminality was legally classified, and what interests it was believed to protect, all questions still pertinent today.

A periodization is usually adopted in discussions of the history of extradition. The peculiar scheme adopted here begins with an abridged discussion of pre-19th Century practice and theory because double criminality did not feature as a condition of extradition until 1794. The focus of the article is on the development of the Jay Treaty, the first half of the 19th Century, the second half of the 19th Century, and the first half of the 20th Century. Although reasonably integrated, there was a great deal of activity from the mid-19th to the mid-20th Century and thus the discussion of this period has been broken into developments in extradition treaties, domestic laws, domestic judicial decisions and finally in scholarly commentary. The article’s exploration of the development of double criminality terminates mid-20th Century because in its modern sense double criminality was settled by its adoption in instruments like the 1957 European Convention on Extradition, and the aim here is to explore the historical roots of double criminality.

The history of how and why double criminality was introduced into the law of extradition are important because double criminality is under pressure from those who seek to make cooperation in the suppression of crime more effective. While, for example, the UN Model Treaty on Extradition retains double criminality, it subjects double criminality to a number of caveats designed to

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7 Wise, ‘Some Problems’ 1969 (n. 5), 719.
9 Epps, ‘Development’ 2003 (n. 6), 374.
10 13 December 1957, ETS 24, art. 2 (1).
restrict its impact. Thus although article 2(1) insists that extraditable offences 'are punishable under the laws of both parties', article 2(2) provides that in determination of double criminality ‘it shall not matter whether (a) the laws of the parties place the acts or omissions constituting the offence within the same category or denominate the offence by the same terminology’ or ‘(b) under the laws of the parties the constituent elements of the offence differ, it being understood the totality of the acts or omissions as presented by the requesting State shall be taken into account.’ Article 2(3) provides that in the case of fiscal offences refusal is not permitted on the ground that the requested state's law does not impose the same tax. Finally, article 2(4) provides that if

‘the request for extradition includes several separate offences each of which is punishable under the laws of both Parties, but some of which do not fulfil the other conditions set out in paragraph 1 of the present article, the requested Party may grant extradition for the latter offences provided that the person is to be extradited for at least one extraditable offence.

While accepting that double criminality is a ‘deeply ingrained principle of extradition law’, the UNODC Commentary on the Model Treaty rationalises these restrictions of double criminality as militating ‘against … an excessively formalistic’ rather than ‘practical’ interpretation; they are designed to allow ‘sufficient flexibility’ to permit extradition of revenue offences foreign to the requested state, and to permit accessory extradition for offences for which double criminality cannot be established on the reasoning that ‘once extradition is granted for more serious conduct and the person will rendered in any event, there is no reason not to bring him or her to justice for additional charges that meet all the other requirement for extradition.’

Double criminality’s more trenchant critics believe it to be a relic of a sovereignty-centred international law that has no place in a system of international cooperation against crime. They seek to problematise double criminality, to simplify it, or

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to dispense with it entirely. Unfortunately, what Margolies terms the ‘quiet development’ of double criminality suggests an insubstantiality that makes it vulnerable to erosion.

2 Early Developments

Prior to the 19th Century, double criminality was not a condition for the return of an individual to face criminal charges; extradition was based on allegiance not reciprocity. An early trace of double criminality is evident, though, in a request made by Spain to England in 1564 to return a Fleming accused of murder. The English Privy Council examined the evidence against him when he denied the charge, and concluded:

The Lordes thought good that he should remain in prisonne until some authentique matter be sent of his falte, and then the Queen is contented he shall be delivered.

In 1606, Bodin pointed out that the Swiss Commonwealth, Geneva, Venice as well as in earlier times the Romans, all insisted on the necessity of proof of

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culpability in the state of refuge before returning a fugitive.\textsuperscript{18} Vattel, writing in 1758, espoused more orthodox views when he averred that it was not for the requested state to judge whether the accusation was true or false; the neighbouring state's justice was to be presumed to preserve international harmony.\textsuperscript{19} In 1765, Beccaria was sceptical if extradition could be said to exist without subscription to universal normative values.\textsuperscript{20} His view is considered to have been influential in establishing the conditions for an increasing reliance on double criminality.\textsuperscript{21} Fostered by a sovereignty driven positivism that rejected assumptions about crime based in a shared natural laws,\textsuperscript{22} it was grounded in the idea of international relations as essentially reciprocal.\textsuperscript{23}

3 The ‘Jay Proviso’

Double criminality only emerged at the end of the 18th Century,\textsuperscript{24} in the context of a shift away from a public law model of extradition to a treaty-based international law of extradition. The 1794 ‘Jay Treaty’\textsuperscript{25} between the US and Great Britain, named after the US plenipotentiary, Chief Justice John Jay, made specific provision for extradition in article 27. Article 27 contained the first articulation of double criminality in a treaty, implied in a requirement that the requesting state provide sufficient evidence to convince a local tribunal of the fugitive's alleged actions. It read:

\begin{quote}
24 See Altamimi, Mohammad. \textit{La condition de la double incrimination en droit pénal international} (Poitiers: Université de Poitiers, 2018), 58, par 60.
25 Treaty of Amity, Commerce and navigation (United States Great Britain), 19 November 1794, 8 Stat 116, TS 105.
\end{quote}
It is further agreed that His Majesty and the United States on mutual Requisitions by them respectively or by their respective Ministers or Officers authorized to make the same will deliver up to Justice, all Persons who being charged with Murder or Forgery committed within the Jurisdiction of either, shall seek an Asylum within any of the Countries of the other, Provided that this shall only be done on such Evidence of Criminality as according to the Laws of the Place, where the Fugitive or Person so charged shall be found, would justify his apprehension and commitment for Tryal, if the offence had there been committed. The Expence of such apprehension and Delivery shall be borne and defrayed by those who make the Requisition and receive the Fugitive.

Article 27 limited eligibility for extradition to the two listed offences so long as they were committed in the requesting state’s jurisdiction (prefiguring later concerns about jurisdictional double criminality, the requirement of matching jurisdictions rather than crimes). Most interestingly, article 27 established a formula, the ‘Jay proviso’, used thereafter in US extradition treaties. The proviso required that the requesting state produce evidence of criminality against the individual sought sufficient to commit them to trial in the state where they are found, ‘if the offence had been there committed’. A century later in 1886, Spears explained how this testing of evidence also functions as a double criminality requirement:

The ‘criminality’ referred to is a particular criminality, and the express words of the stipulation require that the proof thereof shall show a prima face case of guilt, according to the laws of the country asked to make the delivery. The proof must make out such a case as would justify the apprehension and commitment of the accused party if he had committed the offense in that country. The delivering Government, and not the one making the demand, is by the terms of the treaty in regard to evidence the final judge as to the propriety of the demand, and also as to the sufficiency of the evidence in its support. It applies its own rule of evidence to the case, and withholds or grants the surrender under that rule. This right is secured to it by treaty.

The provenance of the ‘Jay proviso’ is difficult to determine. It was not in Jay’s instructions from Secretary of the Treasury Alexander Hamilton when Jay was sent to the negotiations but appeared in Article 25 of a draft treaty submitted on 30 September 1794 by Jay. This draft was identical to the final version except that ‘on such evidence of criminality’ became ‘provided that this shall be done on evidence of criminality’ in the agreed version. Although Jay, charged by his leaders to guard the interests of a newly independent US weary of British imperial overreach, may well have been suspicious of extradition for common crimes defined by the British, it seems likely that the ‘Jay proviso’ is of British origin, given the 16th Century utterances of the English Privy Council about the necessity of proof of guilt for return and the fact that since the 17th Century preliminary examinations in England had become a standard procedure ‘for obtaining evidence sufficient to secure the accused’s conviction.’ Although, as we shall see, it later became an important shield for the British against extradition requests for escaped former slaves from the US, it is difficult to know whether the rise of abolitionism in Britain in the late 19th Century also underpinned the ‘Jay proviso’.

Whatever its source, the US embraced the ‘Jay proviso’ because it suited its sovereign interests in normative control within its territory and this embrace became the engine for double criminality’s global diffusion. A year later negotiations for the 1795 Treaty of San Lorenzo with Spain foundered because while Spain wanted surrender ‘upon a single demand’, the US countered that any demand should be supported by testimony of the commission of the crime which should be sufficient in the country to which the fugitive has flown to cause him to be arrested and brought before the tribunals of justice if the crime had been there committed.

27 See Shearer, Ivan. A. Extradition in International Law (Manchester: University of Manchester Press, 1971), 152, who notes that it has obscure origins.
The First Half of the 19th Century

Double criminality crystallized in the US in the early part of the 19th Century. In 1819 in Washburn’s case, an extradition request for theft in Canada, Chancellor of the US Court of Chancery, James Kent, noted that after the lapse of the Jay Treaty with Britain the general duty of extradition revived and this was dependant in part on due proof of a commission of a crime, which suggests the ‘Jay proviso’ had only made patent what was implicit. An 1822 New York Statute required that a requisition of surrender to a foreign government be justified in a US court by evidence of criminality sufficient by the laws of the US to detain a party on like charge.

Double criminality also began to spread through the British Empire. In 1833, Canada passed extradition legislation, which in section 1 made surrender to a foreign country on request dependant ‘upon such evidence of criminality as would warrant his apprehension and commitment for trial had the offence been committed in Upper Canada’. In 1846, Egan noted that in English law the duty to surrender was ‘subject to a qualification; that the case of rendition must be one where the act done is equally a crime in both states.

In its treaty relations with the US, Britain mobilised double criminality to minimise the possibility of foreign injustice resulting from extradition. Article 10 of the 1842 Webster – Ashburton Treaty, which revived extradition relations between the US and Britain, repeated the ‘Jay proviso’ and extended the list of extraditable offences but deliberately omitted offences that might lead to a duty to return escaped slaves. The double criminality provision almost sank the treaty in 1844 when it came to ratification by the US Senate, senators from slave-owning states arguing that it would frustrate the extradition of escaped slaves who murdered or robbed their masters during the course of escaping to a British dominion, where a British Court would undoubtedly refuse to extradite them on the basis that according to the laws of England.

32 5th April 1822, New York Revised Statutes i. 164; §§ 8, 9, 10, 11, cited by Clarke, ibid., 39.
33 An Act respecting the apprehension of fugitive offenders from foreign countries, and delivering them up to justice, Act 3 William IV, c. 6, sec 2.
36 Convention on Boundaries, the Slave Trade and Extradition, 8 August 1842, 8 Stat 572, TS 119.
there was no criminality. In 1843, a British Court sitting in Nassau in the Bahamas had refused to return seven escaped slaves to Florida to face murder charges for killing their ‘master’ while escaping, holding that ‘What may constitute a crime of murder in Florida may be very far from doing so according to British law, or even the laws of the Northern states of America.’

From relatively early in the 19th Century the ‘Jay proviso’ also began to percolate into the practice of states outside the common law tradition. A version of it was included in article 20 of the 1802 Treaty of Amiens between Britain, France, Spain and Batavia (and later adhered to by the Ottoman Empire).

It is agreed that the contracting parties, upon requisitions made by them respectively, or by their ministers, or officers duly authorized for that purpose, shall be bound to deliver up to justice persons accused of murder, forgery, or fraudulent bankruptcy, committed within the jurisdiction of the requiring party, provided that this shall only be done in cases in which the evidence of the crime shall be such, that the laws of the place in which the accused persons shall be discovered, would have authorized the detaining and bringing him to trial, had the offence been committed there.

Similar explicatory tinkering designed to make the ‘Jay proviso’ more compatible with inquisitorial criminal pre-trial process is also evident in other treaties between common and civil law states. The draft of the first and unratified US Mexico Treaty of 1826, required production of evidence of criminality justifying ‘apprehension or commitment for trial’.

France, which only granted extradition in non-trifling cases (although it would do so without a treaty) was introduced to double criminality through its interaction with the US and Britain. Article 1 of the 1843 Convention between Great Britain and France, for the Mutual Surrender, in certain cases, of Persons Fugitive from Justice, provided for the extradition

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39 25 March 1802, 56 Parry’s 75 289.
40 10 July 1826. The original formula was reverted to in the also unratified US Mexico Treaty of 14 February 1828, see Moore, *Treatise* 1891 (n. 30), 96.
41 *Circulaire du Ministre de la Justice du 5 Avril 1841*, § 5; Clarke, *Treatise* 1874 (n. 31), 160.
42 13 March 1843, see Clarke, *Treatise* 1874 (n. 31), Appendix, (iii). It never came into force in the UK; see Clarke, *Treatise* 1874 (n. 31), 122.
only when the commission of the crime shall be so established as that the laws of the country where the fugitive or person so accused shall be found would justify his apprehension and commitment for trial, if the crime had been there committed.

Article 1 of the 1843 US France Convention for the Surrender of Criminals was in identical terms except it required the ‘fact of the commission of the crime’ to be established, a procedural adaptation of the ‘Jay proviso’ designed to make it more acceptable to France. While the justification had to be sufficient for arrest and commitment to trial for an offence in the loco deprehensios, the substitution of ‘evidence of criminality’ according to those local laws by ‘the fact of the commission of the crime’, permitted a more flexible approach to how that fact was established before the inquiring authority. These treaty innovations did not, however, precipitate immediate reform in France of the domestic extradition process as its moved gradually in the second half of the 19th century away from regarding extradition as a purely administrative process towards increasing judicial intervention based on the idea of a special law of extradition.

5 The Second Half of the 19th Century to the Middle of the 20th Century

5.1 Double Criminality in Extradition Treaties

Although extradition without a treaty was fairly common in the 19th century, the view gained traction that perfection of the obligation to extradite required a treaty. By then, a double criminality provision in US extradition treaties was standard. The form of the ‘Jay proviso’ used in US extradition treaty-making depended on the treaty partner. It was used almost verbatim in the 1850 US Hawai‘i Treaty, while the 1850 US Switzerland Treaty used the looser ‘civil

45 On the mistaken attribution of this view to Pufendorf see Clarke, Treatise 1874 (n. 24), 4 et seq.
46 Moore, Treatise 1891 (n. 30), 516–517.
47 US Hawaiian Islands Treaty of Friendship, Commerce and Navigation, 20 December 1849, 12 Stat 25 (1851), art. XIV.
48 Convention of Friendship, Commerce and Extradition between the United States and Switzerland, 25 November 1850, 11 Stat 587 (1851), art. XIII.
law’ model first developed in US treaties with France, providing that a person was to be delivered up ‘only when the fact of the commission of the crime shall be so established as to justify their apprehension and commitment in the country where persons so accused shall be found.’ Treaties with states as various as Haiti (1864), Italy (1868), the Ottoman empire (1874), and Japan (1886), clarified that double criminality was a matter for adjudication in the requested state.

An increasingly sophisticated understanding of double criminality was illustrated in article 2 of the 1852 UK France Treaty, dealing with the fact that the treaty partners designated offences differently:

The surrender shall be made on account of the following crimes which, however differently denominated in the respective legislations, are punishable under both with grave penalties

In a further effort to prevent a rigid application of double criminality from frustrating extradition, article 2 then listed twenty extraditable crimes, sometimes specifying the analogue crimes in the cooperating states, such as in article 2(4):

4. Blows and wounds followed by death: a crime provided for and punished by the French Penal Code; and punished also in England and Ireland under the denomination of manslaughter, and in Scotland under the denomination of culpable homicide.

By 1866, the British practice of requiring the matching of an actual offence in the requesting state with a hypothetical offence in the requested state was firmly established. The UK also applied double criminality in treaties such as

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51 US Italy Extradition Convention, 23 March, 15 Stat 629, art. 1.
52 US Ottoman Extradition Convention, 11 August 1874, 19 Stat 572, TS 270, art 1.
54 Convention between Her Majesty and the French Republic for the Mutual Surrender of Criminals, 28 May 1852. See Clarke, *Treatise* 1874 (n. 31), Appendix, (vii).
the 1872 UK Germany Treaty\textsuperscript{56} and the 1872 UK Belgium Treaty,\textsuperscript{57} and in consequence disseminated double criminality globally as these treaties applied to colonies and dependencies.\textsuperscript{58} The UK responded to the challenge of extraditing to a requesting state exercising extraterritorial jurisdiction by provisions such as article 1 of the 1873 UK Sweden/Norway Treaty,\textsuperscript{59} which confined extradition to offences that occurred ‘in the territory’ of the other party (rather than within its jurisdiction), thus imposing jurisdictional double criminality.

By the mid-19th century, civil law states did not include an explicit double criminality clause in their extradition treaties with other civil law states. At most it was implied from either the listing of an offence as extraditable in a treaty, since it was unlikely to be listed unless criminalised by both parties,\textsuperscript{60} or from the fact that many extradition treaties expressly excluded offences that had prescribed under the requested states law.\textsuperscript{61} However, civil law states slowly began to embrace the explicit inclusion of double criminality in extradition treaties. Article 3 of the 1853 Brazil Ecuador Treaty,\textsuperscript{62} for example, made extradition conditional on the crime having ‘been proved in such a manner that the laws of the country from which the extradition of the criminal is claimed would justify the arrest and accusation, if the crime had been committed with its jurisdiction.’ Similar language was used in the 1881 Mexico Spain Treaty.\textsuperscript{63} The final paragraph of article 2 of the 1869 the France Belgium Treaty,\textsuperscript{64} listed extraditable offences and then clarified:

\begin{center}
Dans tous les cas, crimes ou délit, l'extradition ne pourra avoir lieu que lorsque le fait similaire sera punissable d'après la législation du pays à qui la demande est adressée.
\end{center}

\begin{enumerate}
\item Treaty between Her Majesty and the Emperor of Germany, for the Mutual Surrender of Fugitive Criminals, 14 May 1872, reproduced in Clarke, \textit{Treatise} 1874 (n. 31), appendix (lviii), art. viii.
\item Treaty between Her Majesty and the King of the Belgians, for the Mutual Surrender of Criminals, 31 July 1872, reproduced in Clarke, \textit{Treatise} 1874 (n 31), appendix, (lxxiii), art. I.
\item Treaty between Her Majesty and The King of Sweden and Norway, for the Mutual Surrender of Fugitive Criminals, 26 July 1873, 63 British and Foreign State Papers 175, reproduced in Clarke, \textit{Treatise} 1874 (n 31), Appendix, (cxlii).
\item Wise, ‘Some Problems’ 1969 (n. 5), 716.
\item See, e.g., article vii of the Extradition Convention Between Italy and Portugal, 18 March 1878, 152 CTS 425.
\item Extradition Treaty between Brazil and Ecuador, 3 November 1853, 111 CTS 173.
\item Extradition Treaty between Mexico and Spain, 17 November 1881, 159 CTS 225, art 3.
\item \textit{Convention d'extradition France Belgique}, 29 April 1869, reproduced in Billot, Traité 1874 (n. 4), 486.
\end{enumerate}
In some treaties, the adoption of double criminality was undertaken in more limited fashion. For example, the 1874 Swiss German Extradition Treaty only expressly required double criminality in regard to a number of specified offences. But by 1909, Germany too was coming on board. The 1909 German Paraguay Treaty provided in the final paragraph of article 2:

Extradition can be demanded for one of the offences enumerated above only if the act is punishable according to the law of the party requisitioned, and if, according to the legislation of both parties, the maximum penalty is not less than one year’s imprisonment.

These provisions illustrate double criminality’s development from its procedural origins in the ‘Jay proviso’ to the substantive condition (or perhaps more accurately the procedural matching of substantive elements) familiar today; there is no mention of sufficiency of evidence, only of the existence of a crime recognised as such in the requesting state.

Civil law states, although comfortable with extraterritorial jurisdiction, adjusted extradition commitments in regard to extra-territorial offences to suit their treaty partners thus reinforcing jurisdictional double criminality. For example, the 1874 Belgium Monaco Treaty, while explicitly requiring double criminality in article 4, added the rider in article 1 that if the offence was committed outside of the territory of the requesting country, extradition would be granted only if the requested state also allowed prosecution of the same offences outside its territory. The 1897 France Liberia Treaty was to similar effect in article 1(3).

Pioneering regional developments in extradition in the Americas replaced listing of extraditable crimes with an innovative evaluative threshold, usually based on potential imprisonment. These extraditability provisions implied double criminality although were not identical to it. Article 1 of an 1879

65 24 January 1874.
66 Procuring, embezzlement and fraud under article 1(1), para. 9, 12, 13. These offences did show marked variation in definition in different states at that time.
68 Convention to ensure the extradition of criminals between the Principality of Monaco and the Kingdom of Belgium, 29 June 1874, Journal de Monaco no. o842, 18 August 1874.
69 Treaty on Extradition between France and Liberia, 5 July 1897, 185 CTS 403.
70 Costa’s argument that double criminality was developed as a consequence of this shift in the eligibility criteria is only true for those states which had not embraced double criminality prior to the shift in eligibility criteria, see Costa, Miguel João. Extradition Law: Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond (Leiden: Brill, 2019), 452.
Regional Extradition Treaty, 71 for example, made extradition of its list of crimes conditional upon meeting a threshold penalty of death or two years’ incarceration in the requesting state. More vaguely, article 19(2) of an 1889 International Penal Law Treaty 72 based extradition on ‘kind and gravity of the offence’ sufficient to justify extradition. Extradition in article 1(11) of the 1902 Treaty for Extradition of Anarchists 73 used an old idea, an ‘offence of the common order’, but then subject it to a two-year threshold penalty although in both states. Double criminality first appeared explicitly at a regional level in article 1 of the 1911 Extradition Agreement, 74 which made extradition conditional on proofs of the crime ... such that the laws of the place where the fugitive or condemned man is located would justify his detention or delivery to justice if the actual committing of, attempt at, or frustration of the crime or transgression had taken place in it.

In 1912, the International Commission of Jurists that met at Rio De Janeiro 75 drafted a Convention for Extradition which merged the eligibility threshold with double criminality, requiring in article 2 that the individual sought be ‘guilty, as principal or accomplice, of a violation of a penal law punishable by both nations with a penalty not under two years imprisonment.’ This provision adopted an in abstracto approach that does not require specific matching of offences. Article 3 adopted a jurisdictional double criminality innovation already in use by some European states, stipulating that if the offence had been


committed extraterritorially ‘extradition shall not be granted unless the law of the nation of refuge authorizes, under identical conditions, punishment of the same offense when committed outside its territory.’ Unsurprisingly, as the conference was held in Washington, article 2(1) of the 1923 Central American Convention on Extradition76 employed an updated ‘Jay proviso’ requiring sufficient evidence for committal according to the requested state’s law. The 1928 Bustamante Code,77 however, approved a substantive requirement of double criminality in article 353 ‘... that the act which gives rise to the extradition be a criminal offence in the legislation of the state making the request and in that upon which it is made.’ Even more succinctly, the 1934 Central American Extradition Convention78 provided in article 11 that extradition shall not be granted if, in the requested state, ‘the act for which extradition is asked, is not considered a crime’. Similar language had been used in article 1 of the 1933 Montevideo Extradition Convention79 although it also required ‘a) That the demanding State have the jurisdiction to try and to punish the delinquency which is attributed to the individual whom it desires to extradite’.

In the early part of the 20th Century, even broader multilateral support for double criminality became evident when it was tacitly recognised that double criminality of conduct was a necessary condition of extradition in multilateral conventions designed to suppress transnational crime. Article 1–3 of The 1910 International Convention for the Suppression of the ‘White Slave Traffic’80 set out offences and then obliged states parties to add the convention offences to their domestic law (thus meeting double criminality requirements), then article 5 deemed the offences to be among those for which the states parties granted extradition, a provision that was to become common in this type of convention. A more developed provision in article 10 of the 1929 International Convention for the Suppression of Counterfeiting Currency81 divided states parties into those that required a treaty to extradite and those that did not. The deeming provision pioneered in 1910 applied to the former; the latter were obliged to recognise the convention offences as extraditable among

76 7 February 1923, reproduced in Zanotti, Multilateral 2006 (n. 71), 113.
79 26 December 1933, 16 LNTS 45.
80 4 May 1910, 211 Consol TS 45.
81 20 April 1929, 112 LNTS 371.
themselves. The 1929 Convention also recognised that extradition had to be granted in accordance with the requested state’s law, which in many cases by that time included requiring double criminality.

In the inter-war period, international organizations recognised double criminality and used model treaties to guide its general recognition and growth. In 1926, a sub-committee report by Brierly and De Visscher for the League's Committee of Experts for the Progressive Codification of International Law, accepted double criminality as necessary for a model extradition treaty.\(^{82}\) Article 2 of the International Law Association’s 1928 Draft Extradition Convention contained a list of extraditable crimes which were to be defined ‘by each of the High Contracting Parties in accordance with local law’.\(^{83}\) The 1931 International Penal and Penitentiary Commission’s Model Draft of an Extradition Treaty\(^{84}\) contained an elaborate double criminality requirement, which under article 1 applied to extraditions for the purpose of prosecution and enforcement of existing convictions, under article 2 to attempts and participation, though under article 3 was subject to a ‘special external circumstances’ exception (e.g. to landlocked states without the offence of piracy).

By this time, civil law treaty-making was also exploring the nuances of double criminality. While the 1926 Poland Czechoslovakia Treaty\(^{85}\) tersely restricted extradition to acts ‘punishable as offenses in both states concerned’, the 1928 France Czechoslovakia Treaty\(^{86}\) made extradition conditional on double criminality in article 1, ‘even if the [crime or delict was] ... applicable to part of their territories only’. Article 1 also applied jurisdictional double criminality, while under article 2 complicity and attempts meeting double criminality were extraditable. Article 3 of the 1930 Germany Turkey Treaty\(^{87}\) applied double criminality generally as well as to attempts and complicity, while article 6(3) made jurisdictional double criminality a mandatory ground.

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84 Ibid., 399.
86 114 LNTS 132.
87 3 September 1930, 133 LNTS 334.
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for refusing extradition. Article 2 of the 1931 Belgium Poland Treaty followed suit in regard to offences and attempts and complicity, although making no provision for jurisdictional double criminality. Article 11 of the 1932 Brazil Italy Treaty was expansive, stipulating that double criminality applied to ‘principals, partners and accessories in the commission of, or an attempt to commit, offences against the ordinary law of the land ...’, while article 111 more cautiously made jurisdictional double criminality a discretionary ground for refusal. Similar provisions were included in article 1 of the Finland Netherlands Treaty of 1933. By the early 1930s then, a trend could be discerned in bilateral treaty-making in civil law states towards making eligibility for extradition dependant on double criminality and defining it expansively to include inchoate and accessory liability but without reference to evidential thresholds. Jurisdictional double criminality was a tentative requirement.

The US continued to insist in its treaty-making on double criminality linked to evidence along the lines of the ‘Jay proviso’. Article 1 of the Austria US Treaty of 31 January 1930 was typical requiring ‘evidence of criminality, as according to the laws of the place where the fugitive or the person so charged shall be found, would justify his apprehension and commitment for trial if the offense had been they are committed’. However, it avoided any requirement of jurisdictional double criminality when it also provided that the relevant listed offences only had to be ‘within the jurisdiction of one of the High Contracting Parties’. The US’s approach left double criminality hitched to a procedural wagon, which, as we shall see, led to ambiguity in its judicial interpretation.

5.2 Double Criminality in Extradition Legislation

Treaty obligations influenced the inclusion of double criminality in a new wave of extradition legislation enacted to try to standardise and control extradition obligations to other states, and this legislation in turn began to influence treaty-making. British treaties, for example, echoed section 8 of the UK’s Extradition Act 1870, which, retaining the evidential threshold in the ‘Jay’ proviso, provided for the issuing by a magistrate of a warrant for a fugitive for a list of crimes ‘on such evidence as would in his opinion justify the issue
of the warrant if the crime had been committed or the criminal convicted in England.\textsuperscript{94} Section 26 mixed extraditability and double criminality when it defined an ‘extradition crime’ as ‘a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule of this Act.’ The introduction to the Act’s First Schedule provided that ‘the following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be), at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act.’ The latter provision is an early manifestation of the rule for temporal double criminality: the action had to be criminal in the UK at the time it was committed, not when the request was made. An 1873 Amendment broadened the scope to include accessories.\textsuperscript{95} British officials interpreted lists of crimes in bilateral treaties as limited by the analogues in their domestic criminal law, even where the specific treaty forms of conduct on the list did not expressly require (as some did) that they be ‘made criminal by the laws of both countries’.\textsuperscript{96}

At the turn of the century, double criminality dispersed rapidly through domestic legislation. Peru (1888); Italy (1889), Cuba (1901); Chile (1902); Venezuela (1904); Russia (and Estonia, Latvia and Lithuania) (1914), Yugoslavia (1929), and Ecuador (1921), all either stipulated double criminality in their domestic law or set minimum penalties in both states as a condition for extradition thus implying the necessity for double criminality.\textsuperscript{97} Through judicial interpretation\textsuperscript{98} similar laws were also applied by judicial decision in 1897 in

\begin{footnotesize}
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\item \textsuperscript{94} Hafen, ‘Issues’ 1992 (n. 13) 191, 194 considers it to be the first step in standardisation of double criminality.
\item \textsuperscript{95} 36 & 37 Vict c60.
\item \textsuperscript{96} Pyle, ‘Extradition, Politics and Human Rights’ 2002 (n. 35); Hudson ‘The Factor Case’ 1937 (n. 55), 298–299.
\item \textsuperscript{97} Peruvian Extradition Law, 23 October 1888, art. 2; Italian Penal Code 1889, art 13, appendix vi, No 10; Cuban Military Order number 45, 4 February 1901; Chile 1902 Código Penal, art. 230(4); Venezuela 1904 Código Penal, art. 6; Russian Penal Code 1914, art. 852(1); Yugoslavia Criminal Code 1929, art 494; Ecuador Law of 8 October 1921, chapter vi, art. 37, 11; see generally Harvard Research on International Law, Draft Convention on Extradition, Text with Comment, Article 2, Extraditable Acts, in ‘Codification of International Law: Part 1: Extradition’, \textit{American Journal of International Law, Supplement: Research in International Law} 29 (1935), 72–85, 78; Pente, Julius 1. ‘Principles of International Extradition in Latin America’. \textit{Michigan Law Review} 28(6) (1930), 665–722, 707.
\item \textsuperscript{98} Pente, ‘Principles of International Extradition in Latin America’ 1930 (n. 97), 707.
\end{itemize}
\end{footnotesize}
Brazil\textsuperscript{99} and in 1926 in Chile.\textsuperscript{100} The adoption of article 4 of the 1927 French law for the Extradition of Foreigners,\textsuperscript{101} was by that stage unexceptional: ‘\textit{En aucun cas l’extradition n’est accordée par le Gouvernement français si le fait n’est pas puni par la loi française d’une peine criminelle ou correctionnelle.}’ Article 5, though, did not explicitly require jurisdictional double criminality for outgoing requests in regard to extra-territorial offences of foreigners. France’s 1927 Act played a guiding role as a basic law in the absence of a treaty or as a supplementary law when there were lacunae in treaties.\textsuperscript{102} Of interest is the fact that the 1927 Act was justified in the French Senate as necessary for the preservation of the public order of the State,\textsuperscript{103} indicating an acceptance of the sovereign-centric model of extradition underpinned by double criminality.

Legislative limits on double criminality were atypical.\textsuperscript{104} Article 4 of the Swiss Federal Law Concerning Extradition to Foreign Countries of 22 January 1892 is an example:

\begin{quote}
\textit{L’extradition pourra être accordée pour une infraction comprise dans l’enumération de l’article 3 et punissable d’après la loi de l’état requérant, lors même qu’elle ne sevait pas spécialement prévue par le droit du canton de refuge, si cette omission provient uniquement de circonstances extérieures, telles que la différence des situations géographiques des deux pays.}
\end{quote}

Scandinavian states were the other outliers on double criminality. The Norwegian Extradition Law of 13 June 1908 (as amended in 16 June 1922),\textsuperscript{105} did not require double criminality to other Scandinavian states, and the Swedish

\textsuperscript{99} \textit{In Re Isidore Klopper} (1897), 70 Fallos Sup Ct, cited by Pente, ‘Principles of International Extradition in Latin America’ 1930 (n. 97), 707.


\textsuperscript{101} Loi du 10 mars 1927 relative à l’extradition des étrangers (still in force in Côte-d’Ivoire).

\textsuperscript{102} Blakesly, ‘The Practice’ 1981 (n. 16), 55.

\textsuperscript{103} See Altamimi, \textit{La condition} 2018 (n. 24), 59, citing Rapport Vallier, 4 mars 1926, Doc. Parlementaires, Sénat 1926, annexe 114, 160.


\textsuperscript{105} Lov 13 Juni 1908 om utlevering av lovforbrytere (utleveringsloven 1908), 24 Norsk Loftvidende 154/08 and 26/290/1.
Extradition Law of 4 June 1913, required double criminality for extradition of non-Swedish nationals to any state except Denmark and Norway.¹⁰⁶

5.3 Double Criminality in Judicial Decisions
In many states judicial vetting of extradition requests followed the intrusion of the legislative branch into extradition during the latter half of the 19th Century, and these tribunals applied double criminality. In 1879, Phillimore noted that in all cases of extradition he had surveyed¹⁰⁷:

1. That the country demanding the criminal must be the country where the crime is committed.
2. That the act done, on account of which his Extradition is demanded, must be considered as a crime by both States.

However, while some national tribunals took in concreto interpretations of double criminality that insisted on strict matching of offences others began to adopt flexible in abstracto interpretations driven by the desire to foster cooperation.

Strict interpretations preserved the integrity of the principle of double criminality but tended to frustrate extradition. In 1869, a Canadian court noted in Smith’s case that ‘if not an offence of the character charged according to our law, the person is not to be apprehended, committed, or delivered over to the foreign State.’¹⁰⁸ In the Affaire Malignon et Alexandre reported in 1889, the Netherlands refused a Swiss request for the extradition of an individual sought for fraud and abuse of trust because the facts provided did not constitute an offence under the Penal Code of the Netherlands, provoking the following comment by the editors of the Journal du Droit International Privé¹⁰⁹:

*On comprend toutefois que le gouvernement hollandais ait refusé de consentir l’extradition d’un individu recherché pour un délit in existant sur le territoire de refuge. C’est là un principe en matière d’extradition. Ce*


¹⁰⁸ 4 Can 11, 18; 3 Amer Law Rev 178; see Clarke, Treatise 1874 (n. 31), 107.

qu'il faut accusere, ce n'est pas la procédure adoptée par le gouvernement hollandais dans l'espèce, mais l'insuffisance de la loi pénale hollandaise en matière d'escroquerie.

Despite the fact that Switzerland pointed out that double criminality was not a condition in the relevant extradition treaty, the Netherlands persisted in its refusal to extradite based on the express provisions of its Extradition Act of 8 April 1875 and on the general acceptance of the principle by jurists. The authors of the comment were critical of Dutch criminal law’s narrow scope but accepting of what they termed ‘un principe en matière d’extradition.’ Some jurisdictions pursued a strict approach to double criminality well into the 20th Century. In 1913, the Swiss Federal Court In re von Petersdorf\(^\text{110}\) rejected an extradition request, applying an in concreto approach to interpretation of the condition requiring the accurate use of terminology. And in 1933, In re Insull,\(^\text{111}\) the Greek Court of Appeals applied an in concreto approach, insisting that all the elements of the corresponding offence under Greek law including a sufficient degree of criminal intent be satisfied.

At a relatively early stage of double criminality’s judicial development, however, the courts of common law states embraced a flexible interpretation to ensure it did not afford too great a hurdle to extradition. A similar phrase to the ‘Jay’ proviso in Canadian law\(^\text{112}\) was interpreted in 1860 in the notorious Anderson case by the Queen’s Bench of Canada (Ontario)\(^\text{113}\) as requiring conformity only with Canadian procedural rules, and not with Canada’s definition of the substantive crime.\(^\text{114}\) Anderson, a former slave who had escaped from the US to Canada, had killed Diggs in Missouri, when Diggs attempted to prevent Anderson from escaping. In response to a US request for Anderson’s extradition for murder, the Queen’s Bench in Toronto refused to discharge Anderson because on a literal interpretation neither the Webster Ashburton Treaty nor the Canadian statute made allowance for the fact that he was escaping from slavery, they only provided for the extradition of murderers. Despite the fact that under Canadian law the homicide would have been justifiable, a 2-1 majority of the court took a narrow view holding that Diggs was acting under legal authority and an arrest under legal authority could not be resisted with deadly force. Anderson was discharged, however, when the Court of Common

\(^\text{110}\) BG 39 I 390 (1913).
\(^\text{111}\) Court of Appeal Athens, 1933, (1933–1934) 7 Annual Digest and Reports of Public International Law Cases, case no. 146, 344–351, 344.
\(^\text{112}\) 22 Vict c 89, see Clarke, Treatise 1874 (n. 31), 82.
\(^\text{113}\) 20 QB 124, see Clarke, Treatise 1874 (n. 31), 85.
\(^\text{114}\) 10 Canadian CP 60, see Clarke, Treatise 1874 (n. 31), 88.
Pleas in Toronto intervened and found the warrant of commitment to extradition flawed.\textsuperscript{115} A flexible approach was also adopted in 1865 in England in the \textit{Windsor Case},\textsuperscript{116} when a majority decided that ‘false accounting’ in the State of New York amounted to ‘forgery’ under the Webster Ashburton Treaty. Applying double criminality, Lord Chief Justice Cockburn held ‘[w]e must assume that the terms are used in a sense common to both parties to the Treaty’, although Justice Blackburn dissented, saying ‘[t]he mere fact that the law of one country, or of one part of it, described an act as being an offence which, in its own nature, in any sense common to both countries, it was not, did not bring the case within the Treaty.’

Embrace of an \textit{in abstracto} approach by common law tribunals led them to discard the strict matching of offences in favour of identifying a criminal offence in the requested state’s law that could be established on the evidence offered by the requesting state. In 1891, \textit{In re Bellencontre},\textsuperscript{117} the Queen’s Bench in England responded to a French request for extradition for embezzlement under article 408 of the French Penal Code by requiring only ‘evidence of an act committed ... in the foreign country amounting to an offence against the law of such country, and which, if committed in England would amount to an offence against English law.’ The Ontario Court of Appeal came to similar conclusion in \textit{Re Murphy}\textsuperscript{118} in 1895, and in 1898 the Supreme Court of Ontario in \textit{Re Gross}\textsuperscript{119} clarified that so long as there was ‘evidence of the commission of an act which is recognized as a crime by the law of Canada and the law of the country demanding the extradition of the accused person’ it did not matter if the offence was ‘referred to by the wrong name’. In England in 1896, Lord Russell CJ in the Queen’s Bench \textit{In re Arton}\textsuperscript{120} took a similarly flexible approach when he held:

\begin{quote}
We are here dealing with a crime alleged to have been committed against the law of France; and if we find, as I hold that we do, that such a crime is against the law of both countries and is, in substance, to be found in each version of the treaty, although under different heads, we are bound to give effect to the claim for extradition.
\end{quote}

\textsuperscript{115} 11 UCCP 9; see Finkelman, ‘Fugitive Slaves’ 1992 (n. 37), 771.
\textsuperscript{117} [1891] 2 QB 122; 7 TLR 315.
\textsuperscript{118} 1895 CarswellOnt 54, (1895) 2 CCC 578 (Can.).
\textsuperscript{119} (1898) 25 OAR 83; 2 CCC 67.
\textsuperscript{120} \textit{In Re Arton (no 2)} [1896] 1 QB 509, 517.
The US Supreme Court in 1903 in Wright v Henkel\textsuperscript{121} had to decide whether falsification of accounts and statements amounting to corporate fraud in England fell within the scope of article 1 of the 1889 UK-US Extradition treaty (fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company made criminal by the laws of both countries) and within the scope of forgery in the third degree within the New York Penal Code.\textsuperscript{122} Adopting the \textit{in abstracto} approach used in 1893 in the US \textit{In Re Adut},\textsuperscript{123} Chief Justice Fuller noted that ‘absolute identity is not required’; it was enough that ‘the essential character of transaction is the same, and made criminal by both statutes’\textsuperscript{124}. In the 1905 Canadian case \textit{Re Collins},\textsuperscript{125} Justice Duff introduced the doctrine that the laws and institutions of the requesting state can be transposed in some degree into the requested state when engaging in a normative comparison in order to assess double criminality:

One may look at [double criminality] in two ways. One may take it that one is to apply one’s mind to the conditions existing in the demanding state; or that one is to conceive the accused, and the acts of the accused, transported to this country: in the first case, one is to take the definition of the imputed crime in accordance with the laws of Canada, and apply that to the acts of the accused in the circumstances in which those acts took place. If in those acts you find that the definition of the crime is satisfied, then you have the statutory entreaty requisites complied with. In the second case, if you are to conceive the accused pursuing the conduct in question in this country, then along with him you are to transplant his environment; that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws affecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting, of course, the laws supplying the definition of the crime which is charged.

Justice Brandeis’ opinion for the US Supreme Court in 1922 in \textit{Collins v Loisel},\textsuperscript{126} also reflects a move away from a strict matching of laws and titles of crimes:

\begin{itemize}
\item \textsuperscript{121} 190 US 40 (1903).
\item \textsuperscript{122} Sec 514 and 611(3) of New York Penal Code.
\item \textsuperscript{123} 55 F 376, 379 (1893).
\item \textsuperscript{124} 190 US 40 (1903), 58.
\item \textsuperscript{125} (1905) 2 WLR 164, 183.
\item \textsuperscript{126} 259 US 309 (1922), 312.
\end{itemize}
The law does not require that the name by which a crime is described in the two countries shall be the same; nor that the scope of liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.

Justice Brandeis also highlighted the implicit relationship between sufficiency of evidence and proof of criminality integral to the original Jay proviso and still operative in common law states when he held that ‘[t]he phrase “such evidence of criminality” as used in the treaty refers to the scope of the evidence or its sufficiency to block out those elements essential to conviction.’127 Flexible approaches to interpreting double criminality were also followed in civil jurisdictions. In 1932 In re Hugo,128 for example, the Venezuelan Supreme Court held that ‘unlawful appropriation’ under Venezuelan law covered the same ground as ‘abuse of trust’ in Colombia and could establish double criminality. The judicial apogee of flexibility in the US came in 1933 in Factor v Laubenheimer.129 The US Supreme Court avoided a strict application of double criminality when it voted 6-3 to permit extradition to England for conduct considered fraudulent in England but not an offence against the laws of Illinois, where Factor sought refuge. Justice Stone held that it did not matter the foreign offence was not an offence in the local law; it was ‘generally’ an offence in both countries (either in Federal law or in the law of most states).130 The decision provoked debate, Hudson criticising it as a step too far into flexibility, arguing it was dismissive of the UK’s strict adherence to double criminality,131 Borchard responding that it was in the interests of the administration of justice and in accordance with the intended purpose of the treaty to suppress crime.132 The Factor case indicated a trend towards a flexible application of double criminality in US law that began to erode something of the essence on the doctrine, a trend supported by the push for more effective transnational law enforcement cooperation that has even greater impetus today.

Tension between rigid and flexible interpretations can also be found in judicial discussions of jurisdictional double criminality during this period, although rigid applications still had the upper hand. In a rare early example, in

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127 Collins v Loisel 259 US 309 (1922), 317.
128 (1931–32) ILR no 173, 4 April 1932, 310.
129 290 US 276 (1933), 287.
130 Ibid, 299–300.
the 1873 US federal case *In Re Stupp*,\(^{133}\) the court was content to extradite under the 1852 Prussia US Treaty,\(^{134}\) which provided for extradition of offences committed ‘within the jurisdiction’ of either party, on the basis of Prussia’s assertion of nationality jurisdiction over the offender. However, the US Secretary of State, following the Attorney General’s advice, interpreted jurisdiction restrictively requiring that the *locus delicti* occur within the territory of the requesting state, and declined surrender because the offence had occurred in Belgium. Double criminality as a limitation on extraterritorial jurisdiction was growing in importance around the turn of the century, and this appeared to support its use in extradition.\(^{135}\) In 1933, a German court refused extradition on the basis of a lack of jurisdictional double criminality.\(^{136}\)

Accepting double criminality’s role as a general principle of law, courts began to read it into treaties. In 1902, in *Rex v Dix*,\(^ {137}\) an English court assumed that double criminality applied even though the 1889 Extradition Treaty with the US did not contain an express requirement of double criminality. In the US Supreme Court in 1903 in *Wright v Henkel*, Chief Justice Fuller made went further and held that double criminality is a rule of general international law:

> The general principle of international law is that, in all cases of extradition, the act done on account of which extradition is demanded must be considered a crime by both parties, and, as to the offense charged in this case, the treaty of 1889 embodies that principle in terms. The offense must be ‘made criminal by the laws of both countries’.\(^ {138}\)

Also, in 1903, the German Reichsgericht declared that

> according to rules of international law it must be recognised as a governing principle that the extradition of a person and his prosecution

\(^{133}\) 23 Fed Case 281 (1873).

\(^{134}\) Convention for the Extradition of Criminals, Fugitive from Justice, between the United States and Prussia and other States of the Germanic Confederation in Buckeburg, 16 June 1852, 8 Bevans 105.


\(^{138}\) 190 US 40 (1903), 58.
following extradition presupposes an act punishable under the legislation of both states in question.\textsuperscript{139}

Furthermore, in 1936 in \textit{In re Zanini}\textsuperscript{140} the Reichsgericht explained that the treaty contained gaps that had been filled in by agreement of the parties and by practice in the courts under the influence of the general development of the law of extradition including the principle of double criminality. Though the earlier practice had been to grant extradition even when double criminality was not complied with, the court clarified that it had come to be regarded as a principle of general application in Germany and Switzerland.

In 1933 in \textit{Factor v Laubenheimer},\textsuperscript{141} however, the majority of the US Supreme Court read the relevant extradition treaty proviso, modelled on the Jay proviso, as referring to the ‘procedure to be followed’, throwing the precise nature of double criminality in US law into some confusion.\textsuperscript{142} Borchard argued that it was correct to do so as the rule of double criminality was not a rule of general international law because many states engaged in voluntary surrender without insisting on reciprocity and because decisions to apply double criminality did not imply a rule of general international law.\textsuperscript{143} By 1933, however, there was sufficient evidence in state practice that double criminality had been transformed from a process norm into a norm of a substantive character requiring that the act charged be criminal in the requesting state. This slippage from a process norm to a substantive norm, driven by notions of sovereign control over public order, formed the modern principle of double criminality.

5.4 \textit{Double Criminality in Scholarly and Official Commentary}

Nonetheless, through the period under discussion, scepticism about double criminality persisted among some commentators. Their adherence to cosmopolitanism guided their concern about double criminality’s disruptive potential in international relations. In 1852, Villefort, for example, argued that extradition in the modern sense depended only on the precondition of


\textsuperscript{140} (1936) 8 Annual Digest and Reports of Public International Law Cases, 1935–1937, case no. 173, 372.

\textsuperscript{141} 290 US 276 (1933), 287.

\textsuperscript{142} Hudson ‘The Factor Case’ 1937 (n. 55), 279.

\textsuperscript{143} Borchard, ‘The Factor Extradition’ 1934 (n. 133), 744.
a ‘moral solidarity’ among nations. Double criminality was only a presumptive requirement for extradition. Crimes recognised by all as serious were extraditable without the necessity for an internationally affronting inquiry in the loco deprehensionis, while others, recognised only locally and trivial, were not. In 1893, Hawley, contemptuous of any common interest, argued that extradition was dictated only by a reciprocal acknowledgement of pure self-interest and was thus to be determined by the law of the state demanding extradition without reference to the law of the state of apprehension. In 1922, Travers also thought double criminality unnecessary; all that was required of the requested state was the conviction that it was rendering justice to the requesting state. In 1929, Glaser returned to the notion of moral cohesion among states when he called for the abandonment of double criminality on the basis that a violation of the interests of one state amounted to a violation of the common interests of justice, in which all states had an interest. By 1943, Donnedieu de Vabres, who recognised double criminality’s origins in treaty relations, simply thought it fecund with complications because of differences relating to prescription, suspicion, and the like.

The balance of opinion though, was in favour of double criminality. In 1867, Westlake thought it ‘generally admitted’, although it had only to be applied in an in abstracto fashion, which he did not think unjust to the individual:

Extradition shall be granted whenever the facts, if they had occurred in the country to which the criminal had escaped, would constitute any

145 Hawley, John G. The Law and Practice of International Extradition (Chicago: Callaghan, 1893), 7.
150 Ibid., 150.
crime or offence other than treason or sedition. It need be thought of no consequence that the denomination of the crime may be different, or the penalty attached to it more severe, in the one country than in the other. In matters which in both countries are admitted to be criminal, there can be no injustice in binding the offender to that measure of guilt and punishment which is meted to his deed in the country where he has chosen to commit it.

Westlake did, however, limit the transposition of legal facts from the requesting state to the requested state during a double criminality inquiry:\textsuperscript{151}

I am perhaps bound to explain what is involved in the fact being appreciated throughout by our own law. Take, as an example, the case of the slave Anderson, whose extradition was claimed for a so-called murder, committed on his owner who tried to arrest him while making his escape from slavery. The killing was unlawful in the United States, because slavery was there recognized at the time, and the arrest of the escaping slave was consequently lawful, the resistance to it unlawful. But, by the provision I have proposed-namely, that, the facts must be estimated as if they had occurred in the country in which the demand for extradition is made – we should not stop at the circumstance that the resistance was unlawful; we should examine the bare facts, stripped of all the legal colouring which any laws, existing in the United States, but different from ours, would give them. So examined, the relation of owner and slave would be eliminated; we should see only a lawful resistance, and should refuse to give up the fugitive.

Double criminality's basis was considered to be in a shared interest in the suppression of serious, common, non-political, non-parochial offences recognised by both states. In 1866, Wheaton noted that 'extradition treaties should not include power of extradition of purely political or local crimes, or of slight offences but should confine the provision to such acts as are, by common accord, regarded as grave crimes.'\textsuperscript{152} This view was echoed in the 1878 Report of the Royal Commission on Extradition\textsuperscript{153} when it recommended that extradition 'should embrace all those offences in which it is in the common interest of all nations to suppress, to the exclusion of offences of a political or

\textsuperscript{151} Ibid.
\textsuperscript{152} Wheaton, Elements 1866 (n. 116), 159, para. 120.
\textsuperscript{153} Cmnd. 2039, 1878.
local character." Already known to the law of all civilized states, these common offences were distinguishable from parochial offences unknown to the common law of nations. Double criminality functioned to exclude the latter from extradition. The Commissioners were also supporters of flexibility in the application of double criminality, recommending that extradition should be granted for offences against person and property without distinction as to degree of criminality "and irrespective of any divergence between the facts of the case and the character of the offence covered in English law by the foreign description or denomination set out in the requisition for surrender."

Commentators claimed that double criminality had a settled legal status as a law. In 1873, during the negotiation with the US of a treaty to replace the 1842 Webster Ashburton Treaty, the British minister Sir Henry Thornton, referred to double criminality as a 'universal rule'. In 1874, Billot called the inclusion of double criminality in the 1869 French Belgian Treaty an innovation in French law that was also an 'axiome du droit extradition'. In 1876, Field included double criminality in article 221 of his Outline of an International Code. In 1880, the Institute of International Law treated double criminality as a rule in paragraph 11 of its resolutions on extradition:

As a rule, it should be required that the acts to which extradition applies be punishable by the law of both countries, except in cases where by the reason of particular institutions or of the geographical situation of the country of refuge the actual circumstances constituting the offence cannot exist.

In an early recognition that the rights of individuals underpin double criminality, Renault, commenting on the Institute's view, argued that double
criminality’s roots lay in a reasonable and just use by the requested state of its coercive power.\textsuperscript{160}

\textit{En principe, l’extradition ne se conçoit que pour les faits punis par la législation des deux pays; comment un État pourrait-il prêter son assistance pour la répression d’un acte qu’il considère comme licite, peut-être même comme l’exercice d’un droit naturel? Cela serait injuste et déraisonnable.}

Although the Institute noted that extradition could take place in the absence of any contractual link,\textsuperscript{161} and Billot thought the threshold method of defining extraditable offences was certain to replace listing,\textsuperscript{162} the US in particular remained wedded to the stability of obligation afforded by listing extraditable crimes in a treaty. In 1886, Spear explained that listing served to constrain extradition to the listed offences and prevented states parties from introducing new crimes in legislation and then claiming they were extraditable.\textsuperscript{163}

By the turn of the century, double criminality’s status was widely acknowledged. Writing in 1891, Moore thought it an ‘accepted principle’\textsuperscript{164} though he favoured limiting jurisdictional double criminality to territoriality.\textsuperscript{165} In 1903, Biron and Chalmers went further than Renau, conceiving of double criminality as a right of the fugitive against the state of asylum, which right was only exceptional if it could be proved ‘that had his act taken place therein, it would have involved the transgression of the laws of that state.’\textsuperscript{166} In 1905, Diena branded double criminality an expression of a ‘règle juridique internationale’.\textsuperscript{167} In 1909, Rintelen stated that ‘\textit{das Prinzip der identischen Norm}’ was a rule of general international law to be applied even if not found


\textsuperscript{162} Billot, \textit{Traité} 1874 (n. 4), 133.

\textsuperscript{163} Spears, \textit{Law of Extradition} 1885 (n. 26), 44.

\textsuperscript{164} Moore, \textit{Treatise} 1891 (n. 30), 112–113.

\textsuperscript{165} Ibid., 135–138, citing inter alia a statement by US Attorney General Cushing in 1856.


in domestic criminal law, but qualified this by saying that the rule required only that criminal liability of the act in question be established ‘in abstracto’.\footnote{Rintelen, Victor. \textit{Die Grundsätze des heutigen Völkerrechts über die Auslieferung von Verbrechern} (Leipzig: Robert Nöske, 1909), 16–17.} In 1933, Mercier, pointed out that ‘double incrimination’ was a condition based on reciprocity.\footnote{Mercier, André. ‘L’extradition’. \textit{Receuil des Cours de l’Academie de Droit International de la Haye} 33 (1933), 167–240, 189–191.} In 1934, Hudson concluded that double criminality was an ‘underlying principle’ of extradition which ‘now commanded almost universal acceptance’, and which should be applied when a treaty was silent.\footnote{Hudson ‘The Factor Case’ 1937 (n. 55), 285.} He rounded off the principle’s rationale when he recognised it expressed a social interest, arguing it was necessary to take ‘the moral sense of the community in which an accused has taken refuge into account’ and that ‘the surrender of a person for trial in another country for an act not condemned in the country of asylum might prove to be a shock to the people of the latter country, especially if the accused were a national of the requested state’.\footnote{Ibid., 282–283.}


Except as otherwise provided in this Convention, a requested State shall extradite a person claimed, for an act

(a) For which the law of the requesting State, in force when the act was committed, provides a possible penalty of death or deprivation of liberty for a period of two years or more; and

(b) For which the law, in force in that part of the territory of the requested State in which the person claimed is apprehended, provides a possible penalty of death or deprivation of liberty for a period of two years or more, which would be applicable if the act were there committed.

Article 3 provided for double criminality of conduct and time, but also of place. It allowed the requested state to refuse extradition ‘for an act committed wholly outside the territory of the requesting State, unless in that part..."
of the territory of the requested State in which the person claimed is apprehended, its law would make such act punishable under similar circumstances, though committed wholly outside the territory of the requested State. The authors of the Harvard Research claimed that this test of double criminality was recognised by modern writers on international law as ‘accepted and basic’. Commenting on the near abrogation of double criminality in Factor, they noted:

The decision of the United States Supreme Court gives too much importance to the express provisions for double criminality in certain categories under the treaty, and too little importance to the general principle of double criminality which that court had previously recognised.

The Harvard Research also adopted the increasingly popular practice (forty treaties had by then abandoned lists) of extraditing based on a maximum possible penalty threshold rather than on a list. Finally, they recognised double criminality’s evolution into a procedural test of a substantive character when they treated establishing evidence of the offence to a prima facie case as separate from the normal requirement of double criminality.

Despite those who opposed double criminality as undermining international cooperation, by the middle of the 20th Century most commentators considered double criminality a general principle of law, with a rationale based on sovereign, social, and individual interests. They thought though that while double criminality of conduct could be interpreted flexibly, a more rigid approach had to be applied to jurisdictional double criminality, while temporal double criminality was still largely ignored.

6 Conclusion

In its modern form, double criminality emerged as positive law in the late-18th Century treaty-making of common law states. It sprang from their requirement of sufficient proof of fault or culpability in order to commit an individual

173 See ibid., 92–4 for survey of practice.
174 Ibid., 81 and fn. 3.
175 Ibid., 82.
176 Ibid., 76–77.
177 Ibid., 194.
to trial before a domestic tribunal. The idea of making return dependent on proof of culpability, traceable to the utterances of the English Privy Council in the 16th Century, was transferred by means of the ‘Jay proviso’ in the 1794 Jay Treaty between the US and UK into committal for extradition, which was considered akin to committal for trial. The fact that it too would commit to trial, provided the requested state with the assurance necessary to return the fugitive. The ‘Jay proviso’ was the first clear treaty formulation of double criminality and it has had a significant impact on subsequent state practice; a version was used in article 4 of the 1953 India Nepal Treaty. Many common law jurisdictions still link double criminality to sufficiency of evidence. Critics consider this as a category error because of their view that extradition is exclusively a process of legal assistance rather than quasi-criminal.

Transferred through treaty-making, double criminality spread, with states from other legal traditions adopting and adapting it. Negotiating extradition treaties with common law states, from the 1850s France and then Belgium stripped the ‘Jay proviso’ of much of its procedural nature and transformed it into a matching of crimes by the states parties. This more substantive form of double criminality was clarified through domestic legislation and judicial practice in the late 19th and early 20th century. As state practice evolved, support grew for an in abstracto application, which developed into the identification of a crime in the requested state that can be established on the facts alleged to establish a crime in the requesting state, an approach still popular today. Like the shift to an evaluative model away from listing of extraditable offences, this reform indicated a desire to soften double criminality to remove obstacles to cooperation. By the middle of the 20th Century double criminality had achieved the status of general international law, as a general principle of law and arguably as a rule of custom, given that so many state officials had seen fit to include it in their domestic law as well as treaties.

178 A residue of the Jay Treaty still in use is its placing of a burden on a requesting state to tender sufficient evidence to a particular standard (most controversially the common law prima facie case); see further Boister, Neil, Robert Currie and Joanna Harrington. The General International Law of Extradition (Oxford University Press, forthcoming 2026).
181 Costa, Extradition Law (n. 79), 454.
Double criminality’s rationale altered as extradition evolved. Double criminality’s early history reveals the influence of sovereign nationalists sceptical of foreign law and the idea that states hold all crimes in common. Burgeoning sovereignty and concerns about retention of sovereign control over coercive legal processes like extradition appears to have had more to do with the initial adoption of double criminality than enlightened liberalism.\textsuperscript{183} Sovereignty did not, however, remain the sole reason for asserting double criminality. As its practice matured, double criminality was also justified by reference to the rights of a society to control what is considered criminal within that society. Law-makers became aware that the modern criminal law consists of two fields, the first a few easily recognised core crimes and the second the residue containing all other offences,\textsuperscript{184} and the many thousands of offences in this residue could not plausibly be claimed to be held in common by states. Finally, double criminality was justified by reference to the rights of the individual subject to the extradition requests not to be subject to injustice. These ideas won out over the beliefs of internationalists who argued that transnational processes like extradition should be entirely trust-based, either as a product of international solidarity or even more radically of recognition of the self-interest of other states, and thus unencumbered by double criminality.

Double criminality has come to be recognised as a necessary condition for extradition in a system of cooperation against crime where states neither apply a uniform criminalisation policy nor enjoy the mutual trust necessary to permit the unconditional use of their system at the instance of another state in order to extradite an individual. As Verzijl put it in 1972\textsuperscript{185}:

Only the growth of a universal consciousness of international interdependence also in the field of criminal jurisdiction, coupled with the increasing recognition of basic legal principles which gradually softened the exaggerated feeling of national sovereignty unfettered by law, could pave the way for a true international law on extradition, able to balance the need for cooperation in the repression of crime with that just protection of individual rights and interests.

We are still a long way from that position. Given the fraught state of international relations, patchy human rights protections and the fact that states do

\textsuperscript{185} Verzijl, ‘Historical Perspective’ 1972 (n. 182), 271.
not share a normative self-concept, the general substantive restriction placed on extradition by double criminality remains necessary and arguments common in the late nineteenth and early twentieth centuries that extradition is simply a mutual recognition of self-interest that should not be restricted by double criminality, must be rejected now, as they were then.

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