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Ne Bis in Idem in International Law

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Introduction

The principle that a person should not be prosecuted more than once for the same criminal conduct, expressed in the maxim *ne bis in idem* and also referred to as the rule against double jeopardy,[1] is prevalent among the legal systems of the world. The rule is the criminal law application of a broader principle, aimed at protecting the finality of judgments, encapsulated in the doctrine *res judicata*. To date, the thrust of opinion among writers[2] denies that the principle of *ne bis in idem* can be recognized either as a rule of

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[1] The phrase is derived from the Roman law maxim *nemo bis vexari pro una et eadam causa* (a man shall not be twice vexed or tried for the same cause). The term double jeopardy is derived from the wording of the Fifth Amendment to the US Constitution, which states, inter alia, "... [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb".

[2] One recent commentary, for example, offered the view that despite the prevalence of the principle in national laws (which might be thought to ground a claim for the status of the rule as a general principle of international law), the disparities of approach to the rule present a serious obstacle to its formulation in international law: *M. N. Morosin*, Double Jeopardy and International Law: Obstacles to Formulating a General Principle (1995), 64 Nordic Journal of International Law 261. See also, e.g., *D. Oehler*, 'The European System', in *M. C. Bassiouni* (ed.), International Criminal Law, Vol. 2, Procedural and Enforcement Mechanisms (2nd edn., 1999), pp. 617–618; and *Council of Europe*, Explanatory Report on the European Convention on the Transfer of Proceedings in Criminal Matters (1972), para. 38. More generally, for a recent overview of *ne bis in idem* in international law, see also, *M. El Zeidy*, The Doctrine of Double Jeopardy in International Criminal and Human Rights Law (2002), 6 Mediterranean Journal of Human Rights 183.

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custom or a general principle of international law;[3] in this regard, the most commonly argued objection to a recognition of the rule is the disparities of approach to it in different legal systems. This in turn may reflect a belief that recognition of an international *ne bis in idem* principle would adversely affect the sovereignty of states. Although many principles of international law limit national sovereignty, *ne bis in idem* operates in the context of criminal jurisdiction, an area of sovereignty that states tend to be particularly keen to protect against any encroachment.[4] Especially in the area of criminal liability, many states appear to have traditionally held to the view that they are best placed to protect their own interests through the application of the criminal law; in contrast, the effect of an international *ne bis in idem* principle would be to restrict the application of national criminal law (where a previous trial has taken place abroad).

A number of recent developments place in relief the practical importance of the rule in the international legal order, in particular, the signing of the Statute of the International Criminal Court (ICC) (Article 20 of which incorporates the principle with respect to the crimes within the jurisdiction of the ICC) and the inclusion of the principle in the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) (in Article 10) and the International Criminal Tribunal for Rwanda (ICTR) (in Article 9).[5]

[3] As to the latter see, Article 38(1)(b) and (c) respectively of the Statute of the International Court of Justice. *Res judicata* in its application to civil matters appears to have long been accepted as a general principle of international law: see *Chorzów Factory Case (Interpretation)* (1927) PCIJ Ser. A 9, at p. 27 (Judge Anzilotti) (cited in *B. Cheng*, General Principles of Law as Applied by International Courts and Tribunals (1993) (first published 1953), p. 336). See also, *I. Brownlie*, Principles of Public International Law (5th edn., 1998), pp. 52–54. Although *Ronald Dworkin*, for example, distinguishes between 'rule' and 'principle' (see, e.g., Taking Rights Seriously (1977)), the terms are not meant in this article in the technical or particular sense of *Dworkin's* usage, but are used more or less interchangeably.

[4] See the opinion of *Advocate General Mayras* in Case 45/69, *Boehringer v. Commission*, [1972] ECR 1281, at p. 1296. See also, the Explanatory Report on the European Convention on the Transfer of Proceedings in Criminal Matters (1972), para. 38.

[5] *Ambos* remarks that the extent of international support for the Statute of the ICC, which incorporates *ne bis in idem* in Article 20, represents the universalisation of the principle: *K. Ambos*, The International Criminal Court and the Traditional Principles of International Cooperation in Criminal Matters (2000), 9 Finnish Yearbook of International Law 413, p. 420. Articles 2–5 respectively of the ICTY Statute (UN Sec. Council Res. 827 (1993), 32 International Legal Materials 1203 (1993)) give the Tribunal jurisdiction for grave breaches of the Geneva Conventions of 1949 (75 United Nations Treaty Series 31, United Kingdom Treaty Series 39 (1958)), violations of the laws and customs of war, genocide, and crimes against humanity. Articles 2–4 respectively of the ICTR Statute, UN Sec. Council Res. 955 (1994), 33 International Legal Materials 1600 (1994), give the Tribunal jurisdiction for genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions 1949, and of Additional Protocols of 1977, I (The Protocol of Victims of International Armed Conflicts)

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The principle had previously been incorporated in the Harvard Draft Convention on Jurisdiction with respect to Crime 1935 (Article 13, which provides for the application of the principle in the case of aliens);[6] the International Covenant on Civil and Political Rights (ICCPR) (Article 14(7));[7] Protocol 7, Article 4 of the European Convention on Human Rights and Article 8(4) of the American Convention on Human Rights;[8] the Schengen

and II (The Protocol of Victims of Noninternational Armed Conflicts) (16 International Legal Materials 1391 (1977), 1977 United Nations Juridical Yearbook 95). Article 5(1) of the Rome Statute (UN Doc. A/CONF. 183/9, 1998) gives the ICC jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression. Art 5(2) provides that the Court shall exercise jurisdiction over the crime of aggression when, pursuant to Articles 121 and 123 of the Statute, the elements of the crime are defined and the conditions under which the Court may exercise jurisdiction with respect to it are determined. See, e.g., *K. D. Askin*, Crimes Within the Jurisdiction of the International Criminal Court (1999), 10 Criminal Law Forum 1. While the Statute of the ICC is a multilateral international treaty, the Statutes of the ICTY and ICTR are, strictly speaking, not treaties, but annexes to UN Security Council resolutions; nonetheless, the ICTY and ICTR Statutes are clearly instances of state practice comparable to a multilateral treaty. Article 9 of the Statute of the recently formed Special Court for Sierra Leone, which was established to try serious violations of international humanitarian law and of Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, contains a *ne bis in idem* provision in more or less identical terms to those of the Statutes of the ICTY and ICTR. In terms of its form, the Statute of the Special Court is an international treaty between a state, i.e., Sierra Leone, and an international organisation, i.e., the UN.

[6] Harvard International Law Research (1935), 25 American Journal of International Law Supp. 439. It is generally accepted that the Convention represents a statement of the law *de lege ferenda*, rather than *de lege lata* (see, e.g., the discussion in *D. Harris*, Cases and Materials on International Law (5th edn., 1998), pp. 264–267). *Ne bis in idem* is also expressed in principle 9 of The Princeton Principles on Universal Jurisdiction (2001).

[7] United Nations Doc. A/6316 (1966), 999 United Nations Treaty Series 171. In *A.P. v. Italy*, the Human Rights Committee held that Prot. 14 (7) only operated intra-state and had no effect on *erga omnes* level (Communication No. 204/1986, CCPR/C/31/D/204/1986, para. 7.3). Article 14(7) of the ICCPR states that: "... [n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

[8] 4 November 1950, Rome, European Treaty Series No. 005, 213 United Nations Treaty Series 222 and Organisation of American States Treaty Series No. 36, 1144 United Nations Treaty Series 123 respectively. On *ne bis in idem* and the European Convention of Human Rights, *Chiavario* points out: "The principle of *ne bis in idem* is established explicitly in Article 4 of Protocol 7 to the ECHR. This, indeed, is one of the rare clauses providing a right to 'absolute protection', as there can be no derogation from it, even in exceptional circumstances, as otherwise permitted under Article 15 of the Convention (footnotes omitted)": *M. Chiavario*, Private parties: The rights of the defendant and the victim, in *M. Delmas-Marty and J. R. Spencer*, European Criminal Procedures (2002), p. 573. However, a number of cases are authority that the Convention does not guarantee the application of *ne bis in idem* between states (i.e., *erga omnes*), among the more recent of which is *Gestra v. Italy* (1995) 80-A Decisions and Reports 89 (1995) 111 International Law Reports 147 (which discusses both Article 6 of the Convention on the right to a fair trial and Protocol 7, Article 4(1)). For recent

Accord (Article 54),[9] the integration of which into the framework of EU law has been provided for by the Treaty of Amsterdam;[10] Article 16 of the Arab Charter on Human Rights;[11] at least fifty national constitutions;[12] and

authority from the European Court of Human Rights on the application of *ne bis in idem* intrastate, see *Oliveira v. Switzerland*, infra n. 36 and *Fischer v. Austria*, infra n. 36.

[9] Schengen, Implementation Convention of 14 June 1990, 30 International Legal Materials 184 (1991).

[10] Protocol B.2 of the Treaty of Amsterdam (and see Title VI Article 40 (ex Article K12)) provides for the incorporation into the framework of EU law of the Schengen *acquis*, i.e., the collection of instruments adopted under the Schengen framework. These provisions are essentially unchanged by the Treaty of Nice. For a discussion of the operation of the *ne bis in idem* principle within the Schengen framework and in Europe, see *C. Van Den Wyngaert and G. Stessens*, The International *Ne Bis In Idem* Principle: Resolving Some of the Unanswered Questions (1999), 48 International & Comparative Law Quarterly 779; *S. Peers*, Human Rights and the Third Pillar in *P. Alston* (ed.), The EU and Human Rights (1999), pp. 185–186; and, for an older discussion, *D. Paridaens*, Negative effects of Foreign Criminal Judgments in Europe (1988), 6 Netherlands Quarterly of Human Rights 35, pp. 38–42. Two Council of Europe conventions between the then EC member states within the framework of European political cooperation were precursors to the inclusion of the principle in the Schengen Accord. The Council of Europe conventions (which enshrined the principle on an intrastate level only) – the 1970 European Convention on the International Validity of Criminal Judgments 1970 European Treaty Series No. 70 (Articles 53–55) and the 1972 European Convention on the Transfer of Proceedings in Criminal Matters European Treaty Series No. 73 (Articles 35–37) – remained unratified by most member states of the Council. The European Convention on Offences Relating to Cultural Property 1985 European Treaty Series No. 119, 25 International Legal Materials 44, contains a *ne bis in idem* provision (Articles 17–19) identical to those of the 1972 Transfer of Proceedings Convention. The European Convention on Double Jeopardy, Commission Document (1987) 438, adopted similar provisions, but in addition provided for the *erga omnes* application of the principle. Only five of the EC states ratified the Convention – Denmark, France, Italy, Germany, and the Netherlands. Two further EU instruments also contain the principle in an *erga omnes* or international sense – the 1995 Convention on the Protection of the European Communities' Financial Interests (Article 7) (Official Journal 95/C 316/49) and the 1997 Convention on the Fight Against Corruption (Article 10) (Official Journal 97/C 195/2). See Communication from the Commission to the Council and European Parliament: Mutual Recognition of Final Decisions in Criminal Matters, Brussels, 26 July 2000 Commission Document (2000) 495 final, Section 6.2. In addition, numerous international conferences have underlined the importance of the operation of the principle on an international level (e.g., Resolution of the 13th AIDP Congress, Strasbourg, 1983 (1984), 55 Revue Internationale de Droit Pénal 60, cited in *I. Cameron*, The Protective Principle of International Criminal Jurisdiction (1994), p. 85, n. 178 and see also, *Oehler*, supra n. 2, p. 613, n. 29).

[11] Adopted by the League of Arab States, 15 September 1994, reprinted in 18 (1997) Human Rights Law Journal 151 (which post-dates the Statutes of the ICTY and ICTR).

[12] See, e.g., *M. C. Bassiouni*, Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions (1993), 3 Duke Journal of Comparative & International Law 247. Among the national constitutional documents containing the principle are the US Constitution, Fifth Amendment, supra n. 1; the Canadian Charter of Rights and Freedoms, Article 11(h) (incorporated within

numerous extradition treaties.[13]

Of these, only the Schengen Convention expressly recognises the principle at an *erga omnes* or inter-state level, rather than merely intra-state.

The argument proposed in this article is that a core of double jeopardy protection can be identified from the different approaches to the principle to be found in different legal systems. These elements of the principle could form the basis of a future international or *erga omnes*/inter-state *ne bis in idem* principle whether as a rule of custom or a general principle of law.[14] First, the background, context, and rationale for the rule are outlined and discussed. The actual practice of the principle in the international legal order is then considered. Finally, elements of a potential international rule of custom or a general principle of international law are proposed and justified. These elements, it is proposed, could form the basis of a general international rule of *ne bis in idem*; the argument is made *de lege ferenda*, rather than *de lege lata*. However, it appears to be more generally accepted that *ne bis in idem* is a rule of *lex lata* in the particular context of extradition, discussed below.

Ne bis in idem in context

Historical background

As mentioned above, the maxim *ne bis in idem* is derived from the Roman law principle *nemo debet bis vexari pro una et eadam causa*.[15] The

the Canadian Constitution by Section 52(2) of the Constitution Act 1982); the Constitution of the Federal Republic of German (Article 103); the Constitution of Japan (Article 39); the Constitution of India, Article 20(2); the Constitution of Mexico (Article 23); the Constitution of the Republic of Macedonia (Article 14); the Constitution of the Republic of Paraguay (Article 17(4)); the Constitution of Papua New Guinea, Section 37(8)–(9); the Constitution of the Portuguese Republic (Article 29(5)); the Constitution of the Russian Federation (Article 50(1)); the Constitution of the Republic of South Africa, Chap. 3, Section 25(3)(g); the Constitution of the Republic of South Korea (Article 13(1)); the Constitution of the Solomon Islands, Section 10(5)–(6); and the New Zealand Bill of Rights 1990 (Section 26(2)) (see also Sections 358 and 359 of the New Zealand Crimes Act 1961).

[13] See, e.g., the European Convention on Extradition 1957 European Treaty Series No. 24 (Article 7) and see review of bilateral treaties in *S. D. Bedi*, Extradition in International Law and Practice (1966), p. 172, n. 26.

[14] International custom and general principles of law as listed in the Statute of the ICJ, Articles 38(1)(b) and (c) respectively.

[15] The maxim appears in *Starry's Case* (1589) 5 Co Rep 61a [77 English Reports 148], cited by the High Court of Australia in *Pearce v. The Queen* (1998) 72 Australian Law Journal Reports 1416, 156 Australian Law Reports 684, at p. 1425, 693.

origins of the rule can be traced back to Greek,[16] Roman,[17] and Biblical sources.[18]

The double jeopardy clause of the Fifth Amendment to the US Constitution was the first major constitutional document to include the principle and was inspired largely by the operation in English law of what are referred to as pleas in bar.[19] Two of these pleas – *autrefois acquit* or *autrefois convict* – serve to prevent the continuation of a trial where the defendant has already been acquitted or convicted of the same offence.

Rationale for the rule – national and international contexts

At an intuitive level, the validity of the notion that an individual should only be punished once for the same offence seems self-evident. It might be argued that a prohibition on successive trials, as opposed to punishment as such, is less so. However, important values are protected by the prohibition of successive trials for the same conduct. A useful starting point for a discussion of the rationale underlying *ne bis in idem* is the decision of the US Supreme Court in *Crist v. Bretz*.[20] Speaking for the Court, *Justice Stewart* identified four policy factors justifying the rule against double jeopardy:[21]

1. respect for the finality and conclusiveness of judgments,
2. avoidance of continuing embarrassment and stress to the accused through the application against him or her of the far greater resources and might of the state,
3. avoidance of the increased possibility that the accused will be found guilty, though he or she is actually innocent, and

[16] According to *J. W. Jones*, Law and Legal Theory of the Greeks (1956), p. 148; *US v. Jenkins*, 490 Federal Law Reports 2d 868 (1973), at p. 870; 420 United States Reports 358 (1975); and *Pearce*, supra n. 15, p.1428, 696 and n. 92 therein.

[17] See, e.g., Digest of Justinian, Book 48 (*Theo Mommsen and P. Kreuger* (eds.); English translation by *A. Watson*) (1985), (Title 2) Accusations and Indictments, n. 7; *M. Radin*, Handbook of Roman Law (1927), p. 475; *Bartkus v. Illinois* 359 US 121 (1959), pp. 151–152; and *Pearce*, supra n. 15, p. 1428, 696 and 93 therein.

[18] See, I Nahum 9, 12 (The Bible King James Version) as referred to in *Bartkus v. Illinois*, supra n. 17, at p. 152 and *Pearce*, supra n. 15, p.1428, 696 and n. 94 therein.

[19] See, e.g., the dissenting judgment of *J. Powell* in *Crist v. Bretz*, 437 United States Reports 28 (1978), at pp. 34–42; *W. Blackstone*, Commentaries (21st ed. by *W. N. Welsby*) (1844), at p. 111; and generally *J. Sigler*, A History of Double Jeopardy, 7 American Journal of Legal History 283 (1967).

[20] Supra n. 19. See also, *E. D. Dickenson*, Introductory Comment to the Harvard Research Draft Convention on Jurisdiction with Respect to Crime 1935 (1935), 29 American Journal of International Law Supp. 443, Draft, p. 603; and *J. Black* in *Green v. US* 355 United States Reports 184 (1957), at pp. 187–188 (quoted by the Irish Supreme Court in *The People (DPP) v. O'Shea* [1982], Irish Reports 384, p. 439).

[21] *Crist v. Bretz*, supra n. 19, pp. 30–31.

4. the valued right of the accused to complete the trial with the jury originally chosen.

To a greater or lesser extent, these reasons, with the exception of the last, are also applicable in the international context. The finality and conclusiveness of judgments is a concern of the global community as it is of the national one. Various forms of cooperation in the field of international criminal law or mutual legal assistance are testament to this.[22] Two elements can be identified in this context. First, from the perspective of the individual, knowledge that a judgment is final removes the constant threat and anxiety of a renewed prosecution (and so the second ground above is intertwined with this first ground). In effect, the anxiety and disruption associated with repeated prosecutions could become a second form of punishment of an accused (who, even after successive trials, may ultimately be found innocent). Secondly, from the point of view of the state, the values of certainty and predictability are upheld by the knowledge that a legal issue has been definitively disposed of.[23] Further, the knowledge that a prosecution can only once bring a case against an accused may prevent sloppiness in the work of prosecutors, who might otherwise be more prone to less thorough prosecutions safe in the knowledge that they could always make another attempt at a future date.

Some writers propose that respect for the finality of judgments does not offer as forceful an argument in favor of *ne bis in idem* in the international context as it does in a national context.[24] However, in view of the increasingly internationalised nature of the prosecution of criminal offences, respect for the finality of judgments would seem now to be of increasing importance in the international setting. This is all the more so in the case of such international crimes as genocide, crimes against humanity generally, war crimes, and crimes against peace, which are of concern to the global community as such and not just to individual states. In this context, the finality of judgments helps to ensure stability in international legal relations by preventing the interminable pursuit of international criminals between jurisdictions.

More generally in this context, the finality of judgments rationale raises a fundamental issue in international law, that is, the importance to the international legal order of a sense of the international community, or how one conceives of the international legal order. One such conception, that of a *civitas maxima*, hypothesises a general and genuine moral community composed

[22] For a recent discussion, see, e.g., *R. J. Currie*, Human Rights and International Mutual Legal Assistance: Resolving the Tension (2000), 11 Criminal Law Forum 143. See also, e.g., *O. Höffe*, More Reasons for an Intercultural Criminal Law: A Philosophical Attempt (1998), 11 Ratio Juris 206; and *Lyal S. Sunga*, The Emerging System of International Criminal Law: Developments in Codification and Implementation (1997).

[23] See, e.g., *Paridaens*, supra n. 10, p. 36.

[24] *Van Den Wyngaert and Stessens*, supra n. 10, p. 782.

of all of humanity, which has an interest in seeing that all crimes, wherever committed, are punished, and by extension, in a way that is procedurally fair and humane.[25] *Bassiouni and Wise* identify two alternative paradigms, in addition to a *civitas maxima* conception, for explaining international law and practice: the anarchical view, whereby no international or global community exists and all states act out of naked self-interest and an intermediate view, whereby the world community is viewed as a society of states, not in the idealised sense of a *civitas maxima*, but in a more functional way that would still provide a viable theoretical basis for international cooperation in criminal matters. On this view, generally, cooperation is justified by considerations of reciprocal self-interest and respect for the sovereign equality of states.[26] A number of more recent developments provide support for this latter view and point to the increasingly internationalised and interdependent nature of states' concern with criminal prosecution, in particular, the establishment of international criminal tribunals and the trend toward increased mutual legal assistance in criminal matters. In addition, the increasing importance of international human rights documents generally lends support for a more moral and mutually interdependent conception of the international order, if not, given the current state of development of international human rights law, for a full *civitas maxima*.[27] An implication of such an international order is that respect will be accorded to foreign penal judgments, both as an acknowledgment of the sovereignty of other states and as a recognition of what the individual concerned has already undergone for having committed a crime.

Both the second and third reasons identified in *Crist v. Bretz* have arguably all the more force in an international context, in that stress and anxiety to the accused and the likelihood of a false conviction are increased when, first, the accused is dislocated to a new state of trial and secondly not one, but two (or more) states apply their resources to prosecuting the accused.

The final reason for double jeopardy protection identified by *Justice Stewart* appears particular to the US and reflects the historical importance in that country of the role of the jury in criminal trials. In international tribunals, juries are not part of the trial process.[28]

[25] The discussion here takes from the analysis presented by *C. M. Bassiouni and E. M. Wise*, Aut Dedare Aut Judicare (1997), pp. 26–42. For a recent critical contribution in this area, see *I. Tallgren*, The Sensibility and Sense of International Criminal Law (2002), 13 European Journal of International Law 561.

[26] Ibid, pp. 36–42.

[27] See, generally, *P. Alston and H. J. Steiner*, International Human Rights in Context: Law, Politics, Morals: Text and Materials (2nd edn., 2000).

[28] See, generally, *M. Hill and D. Winkler*, Juries: How Do They Work and Do We Want Them? (2000), 11 Criminal Law Forum 397.

Ne bis in idem and jurisdiction

The operation and significance of a *ne bis in idem* rule are intertwined with the exercise of states' criminal jurisdiction in international law. The effect of the multiplicity of jurisdictional principles recognised by international law – the territorial principle, the universal principle, the effects doctrine, and the passive and active personality principles[29] – is to create, in many cases, concurrent jurisdiction of two or more states. Two or more states may be entitled, therefore, under international law, to exercise jurisdiction against a suspect for the same offence or actions.[30] In the absence of any hierarchy of jurisdictional claims[31] that would privilege or trump a particular jurisdictional basis over competing bases, an international *ne bis in idem* principle would protect the values discussed above.[32] The attack on the World Trade Centre in New York on 11 September 2001 starkly illustrates the potential for multiple

[29] Of the large body of literature on the subject, see, e.g., the collection in *W. Michael Reisman*, (ed.), Jurisdiction in International Law (1999).

[30] On this point in the context of the international criminal tribunals, see also, e.g., *K. Oellers-Frahm*, Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions (2001), 5 Max-Planck Yearbook of United Nations Law 67.

[31] There does not appear to be general support for the concept of such a hierarchy, although it is generally agreed that the territorial principle is the most important (*Dickenson*, supra n. 20, p. 445 and also The Princeton Principles on Universal Jurisdiction, supra n. 6, p. 53) and some writers have proposed such a ranking of jurisdictional claims is possible (*C. L. Blakesley and O. Lagodny*, Competing National Laws: Network or Jungle? in Principles and Procedures for a New Transnational Criminal Law (1992), pp. 94–100 and n. 176 therein and The Princeton Principles of Universal Jurisdiction, supra n. 6, p. 32 (Principle 8) and commentary at p. 53). Increasing reliance on extraterritorial claims to jurisdiction would seem to make more likely the existence of concurrent or multiple jurisdiction (see, generally, e.g., *R. Higgins*, Problems and Process (1994), pp. 57–77; and *C. L. Blakesley*, Extraterritorial Jurisdiction in Bassiouni (ed.), supra n. 2). The traditional preeminence of the territorial principle is reflected in the fact that national laws are much more likely to recognise the *res judicata* effect of a foreign criminal judgment where the offence has been committed exclusively abroad. In *Boehringer*, supra n. 4, *Advocate General Mayras* commented that "... the *non bis in idem* rule disappears where criminal jurisdiction is based on the principle of territoriality" (p. 1295). See also Commission Communication: Mutual Recognition of Final Decisions in Criminal Matters, supra n. 10, Section 13 and *Van Den Wyngaert and Stessens*, supra n. 10, pp. 782–784. Similarly, the universal principle of international criminal jurisdiction, if accepted, could lead to multiple prosecutions for the same offence. Generally, on universal jurisdiction, see the Joint Separate Opinion of *Higgins*, *Kooijmans*, and *Buergenthal* in *The Democratic Republic of the Congo v. Belgium*, ICJ judgment of 14th February 2002, at paras. 19–52; *M. Henzelin*, Le Principe de l'Universalité en Droit Pénal International: Droit et Obligation Pour Les États de Poursuivre et Juger Selon le Principe de l'Universalité (2000); *A. Hays Butler*, The Doctrine of Universal Jurisdiction: A Review of the Literature (2000), 11 Criminal Law Forum 353; and The Princeton Principles on Universal Jurisdiction, supra n. 6 (and accompanying commentary).

[32] See, e.g., Dickenson, supra n. 20, p. 603.

or concurrent claims to jurisdiction by different states in the context of trans-border crime. An array of countries could have asserted jurisdiction against the attackers and their accomplices – those whose nationals were killed in the attacks (passive personality principle), the countries of which the attackers were nationals (active personality principle), any country in which the attack was prepared or planned (territorial principle), and even countries that could claim to have been adversely affected by the attacks in some more general way (effects doctrine).

Ne bis poena in idem

A related principle to *ne bis in idem* is that of *ne bis poena in idem*.[33] The latter principle provides that sentencing and penalties already served or paid by an accused for the same offence or set of facts should be discounted in the imposition of any subsequent penalty relating to the same offence or facts (see below, 1.6). The principle of *ne bis poena in idem*, which imposes less of a restriction on a state's sovereignty than the full operation of a *ne bis in idem* rule, may less controversially be used to take into account foreign decisions. The principle may, therefore, mitigate the harshness of a refusal to recognise the full rule.[34]

It appears that more widespread support exists for the international operation of *ne bis poena in idem*. For example, the principle is generally recognised in the civil law tradition as applicable by domestic courts passing sentence in a case where there has already been a foreign penal judgement.[35] Clearly, *ne bis poena in idem* represents less of an infringement on states' sovereignty than would recognition of a full international *ne bis in idem* principle, whereby states would entirely forego their jurisdiction in a given case. The principle is more flexible in that national courts can fashion their own approaches to recognising that a penalty has already been served for an offense that need not necessarily be in a simple arithmetical fashion of deducting the prior sentence from any subsequent sentence. In this way, the principle could be applied *in concreto* (see next) without it being overly expansive in terms

[33] The phrase is derived from the Latin maxim *nemo debet bis puniri pro uno delicto*. In German terminology, the general rule of *ne bis in idem* is referred to by the term "*Erledigungsprinzip*" (principle of exhaustion of proceedings) and *ne bis poena in idem* by the term "*Anrechnungsprinzip*" (principle of taking into account) (on German terminology, see, e.g., Commission Communication: Mutual Recognition of Final Decisions in Criminal Matters, supra n. 10, at Section 6.2).

[34] *Van Den Wyngaert and Stessens*, supra n. 10, p. 793. See also *Boehringer*, supra n. 4, p. 1284 (although the Court did not rule on the matter) and *Cameron*, supra n. 10, pp. 88–89.

[35] As noted by *Oehler*, supra n. 2, p. 618 and see also Communication from the Commission to the Council and the European Parliament: Mutual Recognition of Final Decisions in Criminal Matters, supra n. 10, pp. 8–9.

of the requirements placed on national courts to defer to foreign judgments and decisions.

In abstracto or in concreto

A primary issue in the jurisprudence and literature on double jeopardy is whether the principle operates to preclude further prosecution on the same *facts* as were the basis of an existing conviction or acquittal (i.e., an *in concreto* application, focused on the identity of the conduct) or if only further prosecution for the same *offence* or legal head of liability is precluded (i.e. an *in abstracto* application, focused on the identity of the offences).[36] The latter is more restrictive of the principle in that the same set of facts could ground a further prosecution so long as the subsequent prosecution charges the accused with a different offence, e.g., a first prosecution charging the accused with common assault would not preclude a subsequent prosecution for assault occasioning grevious bodily harm. The Anglo-Saxon tradition has been to apply *ne bis in idem* in its *in abstracto* sense, whereas many continental or civil law countries apply the principle *in concreto*.[37] To some extent at least, the practical difference between the two views could be diminished by the

[36] As noted in the dissenting opinion of Judge Repik in the European Court of Human Rights decision in *Oliveira v. Switzerland* [1999] 28 European Human Rights Reports 289. In *Touvier* (1992) 100 International Law Reports 337, for example, the Court of Appeal of Paris applied *ne bis in idem* in its *in abstracto* sense (and held that the accused could be tried for crimes against humanity, though he had previously been tried and sentenced to death in absentia for maintaining contacts with a foreign power or its agents for the purpose of assisting its undertakings against France (at pp. 347–349)). In *Fischer v. Austria*, judgment of 29 May 2001, the Court of Human Rights refused to apply a strict *in abstracto* test to Article 4 of Protocol 7, instead approving a test based on a similarity to the essential elements of the legal categorization (at para. 25): "Thus, while it is true that the mere fact that a single act constitutes more than one offence is not contrary to this Article [Article 4], the Court must not limit itself to finding that an applicant was, on the basis of one act, tried or punished for nominally different offences . . . Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements".

[37] See *Oehler*, supra n. 2, pp. 616–617. The ICCPR adopts an *in abstracto* application. In *Pearce*, supra n. 15, *J. Kirby* noted that attempts to modify the potential harshness of an *in abstracto* application (by applying a rule that the offences charged had to be 'substantially' the same, rather than identical, for double jeopardy protection to arise) lead to much confusion in common law cases (at pp. 1420–1, 688–9). In *Pearce*, the Court retreated from any tendency to so modify an *in abstracto* approach and preferred the strict test (*McHugh*, *Hayne*, and *Callinan JJ.* at pp. 1420–1, 688–9). The English courts tend to adopt a similarly narrow approach (see, e.g., *Connelly v. DPP* [1964] Appeal Cases 1254, 2 All England Reports 401 and *R v. Beedie* [1998] Queen's Bench 356), as do the courts in New Zealand (see, e.g., *R. v. Brightwell* [1995] 2 New Zealand Law Reports 435).

operation of a *ne bis poena in idem* rule applied *in concreto* where *ne bis in idem* as such is not accepted.

Common law and civil law conceptions

In the context of double jeopardy, a greater reliance in the common law family on procedural safeguards for the individual[38] is reflected in the traditional prohibition on appeals by the prosecution against an acquittal or a lenient sentence; no such prohibition is to be found in the civil law tradition, which views an appeal as simply a continuation of the original trial.[39] Conversely, as mentioned previously, the common law tradition has been to apply the principle of *ne bis in idem in abstracto*, whereas the civil tradition has generally favoured the more expansive *in concreto* application.[40] The common law tradition against prosecution appeals to a certain extent follows on from the role of the jury in the Anglo-American legal tradition. The thinking behind the jury system, that a representative group from society provides the greatest likelihood of a fair and humane decision, would be undermined by the possibility that the verdict of a jury could be set aside by an appellate court comprised solely of professional judges.[41]

A further difference between the criminal law systems of the civil and common law worlds concerns their respective perception of the status of nationals and the significance of nationality. In the civil law tradition, extradition of nationals has traditionally been prohibited because of a conception of the criminal law and criminal jurisdiction as relating to the community of which the offender is a member. This approach contrasts with the common law tradition of relating to criminal law and jurisdiction in territorial, rather than national, terms.[42] The civil law reluctance to extradite nationals[43] may

[38] *Van Den Wyngaert and Stessens*, supra n. 10, p. 780.

[39] See, e.g., *Chiavario*, supra n. 8, pp. 573–574; *Christoph J. F. Safferling*, Towards an International Criminal Procedure (2001), p. 332.

[40] Ibid, pp. 791–792 and *Oehler*, supra n. 2, pp. 616–617. *Van Den Wyngaert and Stessens* note, supra n. 10, p. 789, that in Belgium, for example, the broad definition (i.e., an *in concreto* application) applies to Belgian judgments only; *ne bis in idem* is applied narrowly or *in abstracto* to foreign penal judgments. The same authors note the ambiguity of Article 54 of the Schengen Convention (which is virtually identical to the provisions of the 1987 European Convention on Double Jeopardy, supra n. 10) in that the English text appears to adopt an *in abstracto* rule, while the Dutch, French, and German versions appear to adopt an *in concreto* rule: see, ibid, p. 790 and references therein.

[41] *Safferling*, supra n. 39, pp. 334–335.

[42] See, e.g., *Ambos*, supra n. 5, pp. 420–421.

[43] See, generally, *M. Plachta*, (Non-)Extradition of Nationals: A Never-Ending Story? (1999), 13 Emory International Law Review 77.

operate to prevent the extradition of a national who might otherwise have sought to rely on a *ne bis in idem* principle.

Ne bis in idem as a rule of international law

Introduction

The significance of the principle of *ne bis in idem* being a rule of general principles or custom in international law would be at least twofold: first, it would, in many countries, automatically become part of domestic law[44] and second, it would be binding as a matter of international law on states outside of any treaty context. The thrust of opinion denies the status of *ne bis in idem* as a rule of general international law, notwithstanding the near universal prevalence of *ne bis in idem* rules in national laws.[45] The principal argument made against according such status to the principle is that the divergences of approach in national laws are too great to allow the abstraction of a principle at an international level. It is argued here that the latter position is not as convincing as it may first seem and that notwithstanding such disparities of approach, a workable formulation of the principle at an international level is possible. Moreover, a substantial body of international practice in the context of extradition law appears to lend tacit support to the international application of the principle that serves as a counterweight to the diversity of national approaches to the issue. In addition, recent developments in the field suggest that a new, more comprehensive framework of international criminal law is emerging that further points to the importance of the application of the principle at an international level.

[44] That is in relation to monist countries. Although the United Kingdom and many other common law countries are essentially dualist, customary international law is a part of the common law in so far as it does not conflict with statute or constitutional law: see, e.g., *R. v. Keyn* [1876] 2 Exchequer Division 63; *The Paquete Habana*, 175 United States Reports 677 (1900); *West Rand Central Gold Mining Co. Ltd. v. The King* [1905] 2 King's Bench 391; *Chung Chi Cheung v. R* [1938] All England Reports 786; and *Thakrar v. Secretary of State for the Home Department* [1974] 2 All England Reports 261. Judicial views in the area are not always consistent; some opinion (e.g., see *Lord Denning M. R.*, in *Thakrar*, at p. 67) confines the application of customary rules in this context to inter-state cases, precluding reliance by individuals on international custom, although the judgment of *Lawton L. J.* in the same case appears to operate on the assumption that an individual could potentially rely on customary rules. This reflects the ongoing debate concerning the viability of the traditional view that only states could be subjects of international law (for discussion, see, e.g., *R. Higgins*, Problems and Process (1994), pp. 39–56; *C. Leben*, Hans Kelsen and the Advancement of International Law (1998), 9 European Journal of International Law 287, pp. 299–305).

[45] See, supra n. 2.

The remainder of this article first surveys examples of the manifestation of *ne bis in idem* in current international practice. The following are discussed: the *Boehringer* decision of the European Court of Justice (ECJ) and a decision of the Italian Constitutional Court;[46] common law authority; extradition law and practice; the relevance to the issue of the emerging overall framework of international criminal law; and academic opinion or doctrine. Following this survey, a number of core elements of the principle are identified that, it is submitted, could form the basis of an international rule.

Ne bis in idem: a survey of practice and opinion

The Boehringer case

In *Boehringer*, the applicant sought an order from the ECJ directing the European Commission to take into account, in imposing a fine on the applicant for breach of Community competition laws, the fine already paid to the US authorities for what the applicant alleged were the same activities or offences. The Court ultimately did not consider the status of *ne bis in idem* in international and Community law, deciding that the applicant had, in any case, failed to establish that the activities or illegal effects in both cases were identical. However, *Advocate General Mayras* did discuss the general issue of *ne bis in idem* and observed: "The national law of four of the six member States at present recognises, in principle, the preclusive power of *res judicata* which is such as to bar further proceedings in the case of foreign criminal judgments. But in three of these States, Belgium France, and Luxembourg, this principle only holds good if the offence, or at least the principal offence, has been committed exclusively abroad. In fact, the *non be in idem* rule disappears where criminal jurisdiction is based on the principle of territoriality ... In Dutch law alone is the *non bis in idem* rule applied without reservation ... Thus the *non bis in idem* rule, which is stated and applied in domestic law, is far from being accepted as a general principle of law in international relations".[47]

[46] Corte Costituzionale of 18 April 1967, No. 48 (1967) 3 Rivista Di Diritto Internazionale Privato E Processuale 580 (cited in *Oehler*, supra n. 2, p. 616, n. 43). Other decisions to similar effect from national courts are *E. v. Police Inspector of Basle*, 75 International Law Reports 34 (cited in *Cameron*, supra n. 10, p. 85, n. 179); the Belgian Supreme Court (Hof van Cassatie-Cour de Cassation), 20 February 1991, Rechtskundig Weekblad (1991–1992), p. 131; and the German Federal Court (Bundesgerichtshof), 13 May 1997 (both cited in *Van Den Wyngaert and Stessens*, supra n. 10, p. 781, n. 9).

[47] Supra n. 4, at pp. 1295–1296. Venezuela and Portugal are examples of two states that do recognise the principle in its international application (*Cameron*, supra n. 10, p. 85, n. 177). See also Case C-11/00, *Commission v. European Central Bank*, European Court of Justice, 10 July 2003; Case C-15/00 *Commission v. European Investment Bank*, European Court of Justice, 10 July 2003; Communication from the Commission to the Council and the

The conclusion asserted here on the basis of the pattern of laws in national states seems open to dispute. While it is reasonable to infer from the national laws referred to in the Opinion that *ne bis in idem* is not recognised internationally in the case of territorial jurisdiction, this is not the same as saying that the rule is not recognised as a "general principle of law in international relations." The latter would preclude the recognition of the rule in the case of *any* of the jurisdictional principles, whereas the evidence offered by the Advocate General only stretches to cover the territorial principle. On the contrary, the Advocate General cited four of the six states discussed as recognising the preclusive power, in principle, of foreign criminal judgments.[48]

The 1967 Italian Constitutional Court decision

In a 1967 decision, the Court accepted that a foreign judgement will bar a renewed prosecution when the social and legal-political valuation of human acts in the different countries is equal or equivalent.[49] *Oehler* concludes that: "Obviously, because of differences in tradition and legal conscience, the ideas among the various nations concerning the extent to which their legal order has been disturbed will *always* [emphasis added] differ."[50]

However, it is not obvious why the rationale for the decision presents the obstacle *Oehler* describes to the international application of *ne bis in idem*. A parallel might be drawn between the Italian Constitutional Court's requirement of equivalence for the recognition of *ne bis in idem* and the requirement of double criminality in extradition law. The latter rule is to the effect that a requested state is only under a duty to extradite in fulfilment of a treaty obligation where the offence for which extradition is sought is also an offence in the requested state.[51] This may be regarded as a rule of equivalence somewhat comparable to the test proposed by the Italian Constitutional Court and it has not prevented the effective functioning of extradition, despite substantial differences in the criminal law systems of states that have concluded extradition

European Parliament: Mutual Recognition of Final Decisions in Criminal Matters, supra n. 10, p. 8: "Current legislation in member States appears to be aligned with one of the following two forms of this principle ... [and went on to refer to *in abstracto* and *in concreto* applications of *ne bis in idem*] ..."; and the Opinion of *Advocate General Tesauro* in Case 224/87, *Koutchoumoff v. Commission* [1989] ECR 99.

48 See also *Van Den Wyngaert and Stessens*, supra n. 10, pp. 782–784, who comment that civil law countries are much more inclined to observe the principle in the case of extraterritorial offences, and that common law countries (with the exception of the US) more generally recognise the *res judicata* effects of foreign criminal judgments.

49 Corte Costituzionale of 18 April 1967, supra n. 46.

50 *Oehler*, supra n. 2, p. 616.

51 On which, see, *Bedi*, supra n. 13, pp. 69–77 (and see also, ibid, the discussion of the concept of reciprocity in international law and relations, pp. 48–53); and *N. Jareborg* (ed.), Double Criminality (1989).

treaties with one another. Whether or not a requirement of equivalence, as outlined in the Italian decision, would effectively prevent the operation of *ne bis in idem* is arguably not inevitable, therefore, but would depend on how strictly the concept was applied or construed. Moreover, such a requirement may meet the objection that *ne bis in idem* cannot be recognized internationally because the prior prosecutions of other states do not adequately protect the interests of the state now prosecuting; if a requirement for equivalence is met before *ne bis in idem* is applied, the level of criminal sanction (which can be taken as a measure of protection of state interests) must have been comparable in a prior prosecution in another state.

Common law authority

Although the doctrine of dual sovereignty in the US denies double jeopardy protection in federal trials to an accused where a previous trial has been conducted at a state level (and vice versa) (as the federal and state prosecutions are considered to be by two different governments),[52] a strong line of common law authority exists in favour of the international application of *ne bis in idem*, i.e., to prevent successive trials by different states. In *R. v. Van Rassel*,[53] *J. McLachlin* of the Canadian Supreme Court, speaking for the Court, concluded that the common law authorities (including *R. v. Thomas*,[54] *R. v. Stratton*,[55] and *Libman v. The Queen*[56]) have accepted that double jeopardy may apply in cases between sovereign states where the offences are the same.[57] In *Libman, J. La Forest* of the Canadian Supreme Court stated: "I am also aware that the view I have taken leaves open the possibility that a person could be prosecuted for the same offence in more than one country, but any injustice that might result from this eventuality could be avoided by resort to the pleas of *autrefois acquit* and *autrefois convict*, which have been applied to persons tried in other countries".[58]

[52] See, e.g., *US v. Wheeler*, 345 United States Reports 313 (1978). US courts have held that the dual sovereignty rule operates to exclude double jeopardy protection in an international extradition context too (although such a case has never been addressed in the Supreme Court): see, e.g., *US v. Rezaq*, 134 Federal Law Reports 3d 1121, 1128 (DC Cir. 1998) (as noted in *C. L. Blakesley*, Criminal Law: Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond – Human Rights Clauses Compared to Traditional Derivative Protections Such as Double Criminality (2000), 91 Journal of Criminal Law & Criminology 1, pp. 49–50 and n. 203).

[53] [1990] 1 Supreme Court Reports (Can.) 225.

[54] [1985] Queen's Bench 604 (C.A.).

[55] (1978) 3 Canadian Reports (3d) 289.

[56] [1985] 2 Supreme Court Reports (Can.) 178.

[57] Supra n. 53, p. 232.

[58] Supra n. 56, at p. 212.

Other such common law authorities include *R v. Aughet*,[59] confirmed, *obiter*, in *Treacy v. DPP*,[60] where *Diplock L. J.* stated that the doctrine of *autrefois acquit* and *convict* "... has always applied whether the previous conviction or acquittal ... was by an English court or by a foreign court."[61]

Extradition law and practice

Ne bis in idem has actually been practised at an international level most obviously in the context of extradition. Many extradition treaties contain *ne bis in idem* provisions.[62] Ordinarily, such treaties only provide for *ne bis in idem* as a ground for refusing extradition where the accused has already been prosecuted in the courts of the requested state.[63] However, some treaties provide for *ne bis in idem* as a ground for refusing extradition where the prior prosecution has taken place in either the requested or requesting states' courts.[64] Although it is rare for treaties to provide for *ne bis in idem* as a ground for refusal when the prior prosecution has taken place in a third state, *Bedi* comments that "... it is hoped that the general application of the doctrine *non bis in idem* would prevent extradition in such a contingency."[65]

Moreover, some related rules of international extradition law illustrate how international cooperation in criminal prosecution is possible and how the divergences in national systems can be accommodated to this end. In particular, the principles of *aut dedare aut judicare* (a rule contained in many treaties that requires parties to the treaty to either extradite or prosecute someone who has committed offence under the treaty) and double criminality illustrate how such cooperation can be achieved without the comprehensive harmonisation

[59] (1919) 13 Criminal Appeal Reports 101: see the discussion in *M. L. Friedland*, Double Jeopardy (1969), p. 380.

[60] [1971] AC 537.

[61] Ibid, at p. 562D: cited in *The Law Commission of England and Wales*, Consultation Paper No. 156, Double Jeopardy: A Consultation Paper (2001), paras. 9.10–9.15 and n. 13 therein. See also, *S. Williams*, Human Rights Safeguards and International Cooperation in Extradition (1992), 3 Criminal Law Forum 191, p. 216. For a discussion of recent Italian jurisprudence, see *M. Paglia*, "*Ne bis poena in idem*" e continuazione: nuove prospettive processuali penali internationali (1999), 6 Giurisprudenza Italiana 1263 (discussing Decision of the Cassazione Penale of 2 December 1998).

[62] See, e.g., supra n. 13.

[63] *Bedi*, supra n. 13, p. 174.

[64] For example, the Israel-Austria Extradition Treaty 448 United Nations Treaty Series 161 (signed 10 October 1961), Article 8(2), cited ibid, p. 174, n. 34.

[65] Ibid. One treaty that does provide for prior prosecution in a third state as a ground for refusing extradition is the Netherlands-Israel Extradition Treaty 276 United Nations Treaty Series 153 (signed 18 December 1956), Article 4(2.1), cited ibid, p. 174, n. 36. See also the First Additional Protocol to the European Convention on Extradition, opened for signature 15th October 1975, Article 2, European Treaty Series No. 86 (Article 2, supplementing Article 9 of the European Convention on Extradition 1957 European Treaty Series No. 24).

or approximation of national laws. As discussed above, the double criminality requirement of extradition law indicates how a test of equivalence for the operation of *ne bis in idem* may be fulfilled at an international level.[66]

In terms of its practical operation, the principle of *aut dedare aut judicare* could be viewed as offering further support for an international *ne bis in idem* principle.[67] Specifically, a conjunctive reading of the rule would appear to preclude the possibility of a state *both* extraditing and prosecuting an accused in that a state's treaty obligations have been fulfilled once it has done one *or* the other. *Bassiouni and Wise* comment that the principle leaves open to a requested state two possibilities: "The principle *aut dedare aut judicare* . . . imports an obligation to do one of two things: either extradite or prosecute. As the four-judge joint declaration points out [i.e., in *Libyan Arab Jamahiriya v. United Kingdom*, [1992] International Court of Justice Reports 3, at pp. 24–25, and in *Libyan Arab Jamahiriya v. USA*, [1992] International Court of Justice Reports 114, at pp. 137–137 (*Evensen*, *Tarassov*, *Giullaume*, *and J. J.*

[66] As *The Law Commission of England and Wales* noted: ". . . failure to apply the double jeopardy rule to acquittals and convictions in another country would imply a critical stance towards that country's criminal justice system, which would sit uneasily with our obligations to extradite people accused to the majority of foreign jurisdictions . . ." in Double Jeopardy: A Consultation Paper, supra n. 61, para. 9.13. In this context, the rule of speciality in extradition law is a further safeguard for the individual and as such facilitates international cooperation (as well as constraining it, as *Plachta* observes: *M. Plachta*, The Role of Double Criminality in International Cooperation in Penal Matters, in *Jareborg*, supra n. 51, pp. 128–129). The rule prevents the requesting state trying the extradited person for any offence other than the offence(s) specified when the extradition request is first made.

[67] Conventions that contain *aut dedare aut judicare* provisions include the Convention on the Protection of the Environment through Criminal Law 1998 European Treaty Series No. 172 (Article 5); UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted 20 December 1988, 28 International Legal Materials 493 (1989) (Article 9); Annex (1984), reprinted in 23 International Legal Materials 1027 (1984) (Article 7); Convention on the Physical Protection of Nuclear Material, opened for signature 3 March 1980, 18 International Legal Materials 1422 (1979) (Article 8); International Convention on the Taking of Hostages, done 17 December 1979, TIAS No. 11081, GA Res. 34/146, UN GAOR, 34th Sess, Supp. No. 46, at 245, UN Doc. A/C.6/34/L.23 (1979), reprinted in 18 International Legal Materials 1456 (1979) (Article 5); New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents, adopted 14 December 1973, 28 United States Treaties 1975, 1035 United Nations Treaty Series 167, 13 International Legal Materials 41 (1974) (Article 7); Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aviation, done 23 September 1971, 24 United States Treaties 564, 974 United Nations Treaty Series 177 (Article 7); Hague Convention for the Suppression of Unlawful Seizure of Aircraft, done 16 December 1970, 22 United States Treaties 1641, 680 United Nations Treaty Series, 10 International Legal Materials 133 (1971) (Article 7); and the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 United Nations Treaty Series 277 (Articles 4 and 7 of which approximate *aut dedare aut judicare* provisions).

Aquilar Mawdsley, joint declaration)], there was no such obligation under old customary law. Although such an obligation had been proposed by *Grotius* (and Covarruvias), it never became part of positive law. While a requested state was free to extradite or prosecute, as it preferred, it also had a third choice: to do neither. Conventions like the Montreal Convention eliminate this third option. They do not impose an absolute obligation to extradite. They leave a state free to refuse extradition. But, unlike prior customary law, they require prosecution whenever extradition is not granted."[68]

Although this statement is not judicial authority, it does illustrate well that a third choice to neither extradite or prosecute implies the exclusion, in practice, of a fourth choice of *both* prosecuting and extraditing.[69]

The recent agreement between the Libyan and the United Kingdom governments[70] to establish a trial under Scots law and presided over by Scottish Lord Justices of Justiciary in the neutral territory of the Netherlands may provide an illustration of the practical operation of *aut dedare aut judicare* in the sense in which the principle is presented here, i.e. as consistent with an international *ne bis in idem* rule. The standoff between the Libyan and United States and United Kingdom governments concerning Libya's refusal to hand over the suspects for trial was eventually resolved by the agreement to hold a trial of the accused under Scots law in the Netherlands, for which the Libyan government agreed to surrender custody of the suspects.[71] Although it is perhaps theoretically possible that the Libyan government could at a later date, resume its independent prosecution, it appears to have disposed of the case

[68] *Bassiouni and Wise*, supra n. 25, p. 64 (footnotes omitted).

[69] An unusual scenario whereby a *ne bis in idem* requirement and the principle of *aut dedare aut judicare* could conflict, rather than coinicide as presented here, is illustrated by *Plachta*: "One could argue that the traditional maxim *aut dedare aut punire* (*aut dedare aut judicare*) should be supplemented by a rule *aut dedare aut poenam prosequi* (either surrender or enforce the sanction). The need for such a supplement becomes clear in cases where a foreign prisoner has escaped from prison and fled to his home country. In the vast majority of states, an extradition request submitted by the sentencing state will be refused because the national is a national of the requested state. The principle *aut dedare aut judicare* would mandate that he be prosecuted in the latter state. However, because the rule *ne bis in idem* would be violated as a result, it might be preferable that the requested state, rather than bring a new case against him, enforce a sanction imposed on him by the requesting state": *Plachta*, supra n. 43, p. 139 (footnotes omitted).

[70] See Agreement Between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning a Scottish Trial in the Netherlands concluded in September 1998 and the High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998 (Statutory Instrument 1998 No. 2251).

[71] Ibid, Article 3(2). Scots law on double jeopardy is broadly similar to that of England and Wales. For recent authority, see, e.g., *Tees v. HM Advocate* 1994 Scots Law Times 701. See the review in Double Jeopardy: A Consultation Paper, supra n. 61, paras. B 22–26.

from the point of view of its own legal system as a result of the agreement. The Libyan government appointed a magistrate to investigate the case with a view to a possible prosecution, but because the US and United Kingdom governments refused to supply any evidence to or to cooperate with the investigation, the Libyan prosecution could not proceed. [72] Indeed, if Libya did intend to continue the prosecution later, it would seem self-defeating for it to have agreed to the trial under Scots law, since that would deprive it of its jurisdiction for an indefinite period (potentially until life sentences had been completed in the event of a conviction).[73]

The emerging framework of international criminal law

The emerging framework and development of a more comprehensive and sophisticated system of international criminal law additionally point to the importance of *ne bis in idem* in an international context. Although it has long been acknowledged that international law implies a certain interdependence of nation states,[74] the growth in international criminal cooperation suggests that this interdependence has reached a much greater level than has been the case before. A number of developments point to this trend – the establishment of international war crimes tribunals this century, culminating in the international tribunals for Rwanda and the former Yugoslavia and the signing of the Statute of the International Criminal Court; the continuing growth of international extradition law; and a pattern of increased cooperation generally in criminal matters across the world.[75] As discussed previously, while these developments may not justify the somewhat idealised conception of the global legal order as a *civitas maxima*, they do point to a more interde-

[72] I am grateful to *Prof. Roger Black*, Faculty of Law, University of Edinburgh, for providing this information.

[73] One of the accused was found guilty (*Al Megrahi*) by the Court and the second accused was acquitted (*Fhimah*) in a verdict delivered on 31 January, 2001. *Al Megrahi* lodged an appeal, which was held under Scots law before five judges of the Scottish High Court of Justiciary. In a judgment of 14 March, 2002, the appeal court upheld his conviction for the murder of the 270 people killed in the Lockerbie tragedy. Under the terms of the international agreement reached prior to the trial, *Al Megrahi* will spend his prison sentence in Scotland. As well as giving rise to individual responsibility, the Lockerbie incident also engaged the state responsibility of Libya; see *A. Nollkaemper*, Concurrence Between Individual Responsibility and State Responsibility in International Law (2003), 52 International Comparative Law Quarterly 615, pp. 627–628.

[74] For example, Pufendorf observed that "The mutual dependence and relationship which nature has constituted between man, demand the exercise of mutual duties . . . " in *S. Pufendorf*, De Jure Naturae at Gentium Libri Octo, Book 3 (trans. *by C. H. and W. O. Oldfather*) (1934), Chapter 3, Section 1, cited in *Bedi*, supra n. 13, p. 49.

[75] For an overview of some recent developments, see, e.g., *Currie*, supra n. 22; *W. Gilmore* (ed.), Mutual Assistance in Criminal and Business Regulatory Matters (1995); and *C. Murray and L. Harris*, Mutual Assistance in Criminal Matters (2000).

pendent and ethically oriented view of international law. In such a context, the possibility of multiple prosecutions of an accused for the same offence seems inconsistent with what can be described as 'postulates' of international law: mutual respect for the exercise of sovereignty and a shared or common interest in the application of criminal laws.[76]

The growing threat from international terrorism[77] dramatically illustrates the international dimension of criminal justice. For example, as a direct result of the attacks in New York on September 11 2001, the states of the European Union accelerated the adoption of new procedures in the area of extradition and criminal cooperation.[78]

The views of writers

A substantial body of academic opinion has been sceptical about the recognition of *ne bis in idem* as rule of custom or general international law. *Nerep*, for example, concludes that the principle is not recognised in international law, and offers in support the Opinion of the Advocate General in the *Boehringer* case and the views of a number of other writers.[79] However, as argued above, the *Boehringer* Opinion only really offers support for the conclusion that *ne bis in idem* is not recognised as a rule of international law in the case of assertions of territorial jurisdiction. *Oehler* concludes that *ne bis in idem* will never become a rule of international law until a greater approximation of laws on the issue among individual states is achieved.[80] However, a number of arguments can be made in favour of a contrary view. First, the principle has achieved, in admittedly different forms, near universal recognition in national systems. Acceptance of the general principle behind *ne bis in idem* is, therefore, widely shared; that the exact operation and contours of the principle are open to debate does not necessarily preclude recognition of it internationally at a more general level. It may be possible, as is argued below, to identify a

[76] See the discussion in *Bassiouni and Wise*, supra n. 25, pp. 47–48.

[77] For a pre-September 11 discussion of some aspects of international terrorism, see, e.g., *Benjamin R. Barber*, *Jihad vs. McWorld* (1996).

[78] European Arrest Warrant, Brussels, 25 September 2001, COM (2001) 522 final/2. See also, e.g., *D. Dubois*, The Attacks of 11 September: EU-US Cooperation Against Terrorism in the Field of Justice and Home Affairs (2002), 7 European Foreign Affairs Review 317.

[79] *E. Nerep*, Extraterritorial Control of Competition under International Law: Vol. 2 (1984), pp. 620–621. See also, e.g., *Morosin*, supra n. 2; *Ambos*, supra n. 5, p. 420, who notes: "The recognition of the *ne bis in idem* principle by the Rome Statute implies the universalisation of the principle as was implied by Article 54 et seq. of the Schengen Agreement on a regional level. One should recall, however, that traditional international criminal law did not recognise the principle as such" (footnotes omitted); and Explanatory Report on the on the Transfer of Proceedings in Criminal Matters, supra n. 2: "... At an international level, on the other hand, the principle of *ne bis in idem* is not generally recognised" (at para. 38).

[80] *Oehler*, supra n. 2, p. 618.

lowest common denominator among applications of the principle to determine the scope of a future rule on the international level. Secondly, the view that national laws are too diverse to accommodate an effective operation of the principle internationally arguably pays inadequate attention to the high level of cooperation in such matters actually achieved, e.g., in the context of extradition law and the principle of double criminality.

Some writers offer a view more favourable to the operation of the rule at an international level. *Bedi*, for example, observed that although the principle was normally confined to intra-state offences, it was frequently invoked in the context of extradition proceedings.[81] *Bassiouni* has concluded in favor of a full recognition of the status of the rule, albeit as a general principle of international law, rather than as a rule of custom, in view of its importance in the criminal law generally.[82]

Formulating a general international ne bis in idem *principle*

The scope of an international rule

The following elements can, it is submitted, be abstracted from the diverse approaches to *ne bis in idem* in different legal systems as constituting a core of double jeopardy protection:

1. an *in abstracto* application,
2. the assertion of the rule in the case of jurisdiction other than the territorial and protective principles of international criminal jurisdiction,
3. the non-exclusion of prosecution appeals of an acquittal,
4. the applicability of the rule only where there has been a trial on the merits,
5. the non-exclusion of a retrial following acquittal where decisive new evidence emerges.

In the context of extradition, it appears that the rule may have status in customary law; otherwise, however, the abstraction of an international rule presented here is probably best characterised as a statement *de lege ferenda*, rather than *de lege lata*.

[81] *Bedi*, supra n. 13, p. 171. See further below on extradition.

[82] *M. C. Bassiouni*, International Extradition Law: United States Law and Practice (2nd edn., 1987), p. 107. To similar effect, see the Commentary to the Princeton Principles of Universal Jurisdiction, supra n. 6, p. 54. See also the comments in *M. C. Bassiouni and P. Manikas*, The Law of the International Criminal Tribunal for the Former Yugoslavia (1996), pp. 334-335. In this context, *Kittichaisaree* observes that the reason *ne bis in idem* is contained in Part 2 (Article 20) of the ICC Statute, rather than in Part 3 relating to general principles of criminal law (in which grounds for excluding criminal responsibility are found), is that *ne bis in idem* is closely related to the Articles in the Statute on admissibility; *ne bis in idem* is a bar to the jurisdiction of the ICC, rather than a basis for excluding criminal responsibility: see *K. Kittichaisaree*, International Criminal Law (2001), p. 291.

(a) In abstracto application

A recognition of the principle *in abstracto* represents a narrower formulation than an *in concreto* application, and so one that will be more widely accepted as consistent with national laws (see Chap. 1.6). Some difficulty may arise with the operation of an *in abstracto* rule internationally in that different legal systems may legally classify similar conduct in a different way. However, it is submitted, this need not present an insurmountable obstacle to the international operation of the rule. As argued above, a comparable concept of equivalence exists in extradition law in the rule of double criminality. The 'test of equivalence' here should relate to the substance of the offence, i.e., whether the offences in two given jurisdictions are roughly comparable in terms of their relative seriousness within the respective national systems, as suggested by analogies with other offences and the penalties imposed. The European Court of Human Rights adopted an approach along these lines in the recent case of *Fischer v. Austria*.[83] With respect to double criminality, for example, although it is generally a formal requirement in extradition law that an offence be stated or listed in an extradition treaty for it to be extraditable, it is not necessary that the crime charged in the extradition proceedings be described identically by the laws of the requested and requesting state; it is enough if the act charged is criminal in both states though under different headings or names.[84]

A further analogy might be drawn here with the distinction between major and minor offences in national laws; if, in an international context, an offence is treated as a major offence in two jurisdictions, prosecution for the offence in one system would bar a second prosecution in the second system (though the details of the offences may be differently expressed in the two systems).[85]

[83] Supra n. 36.

[84] See, e.g., *Bedi*, supra n. 13, p. 81 and, generally, *Jareborg* (ed.), supra n. 51.

[85] In Ireland, for example, a number of factors have emerged as considerations in determining whether an offence is minor or non-minor (the significance in Irish law being that minor offences may be tried summarily, under Article 38 of Bunracht na hÉireann/the Constitution of Ireland): the state of the law at the time of the enactment of the statute providing for the offence, the severity of the offence involved, the moral quality of the act, and the relation of the offence to other crimes (see *Melling v Ó Mathghamhna* [1962] Irish Reports 1, especially the judgment of *J. Lavary*, at pp. 13–14). Later cases have tended to confine the test to the severity of the penalty and, to a lesser extent, the morality of the acts involved (see, e.g., *The State (Rollinson) v. Kelly* [1984] Irish Reports 248 and for detailed discussion, *G. Hogan and G. Whyte*, The Irish Constitution (by J. M. Kelly), 3rd edn., 1994, pp. 627–638). In the US, where the Sixth Amendment to the Constitution establishes a right to jury trial of 'non-petty offences', the intention of the legislature, as expressed primarily in the length of the sentence (an offence carrying a penalty of six months or less being presumptively a petty offence), is the decisive factor in terms of distinguishing petty from non-petty offences: see, for more recent authority, e.g., *Ray A. Lewis v. United States*, 518 United States Reports 322 (1996).

(b) Jurisdictional bases

State practice does not tend to lend support to the operation of *ne bis in idem* where territorial jurisdiction is asserted.[86] This exception can be construed broadly or narrowly. Under the doctrine of ubiquity (whereby a State may take jurisdiction over acts or omissions committed partly within the State, even though the part committed within the State is less than an attempt and punishable only because of its association with acts or omissions committed outside the State),[87] many offences that would conventionally be regarded as extraterritorial in nature can be localised.[88] Clearly, application of the ubiquity doctrine could limit the scope of a *ne bis in idem* rule outlined above.[89] It is submitted that, given the artificiality of the ubiquity doctrine (although state practice appears to support its assertion),[90] claims to jurisdiction on this basis should not form an exception to *ne bis in idem* and that only territorial jurisdiction *stricto sensu* should be excepted from a *ne bis in idem* rule. The rationale that territorial jurisdiction be an exception to a *ne bis in idem* rule, apart from the practice of states being consistent on the point, would seem to be that territorial offences generally involve a more intimate and pressing invasion of a state's interests than arguably do extraterritorial offences; the same is less likely to be true of offences that, in substance, take place without a state's territory, but which may be 'localised' by applying a concept of ubiquity.[91]

It is generally accepted that the protective principle of international criminal jurisdiction is a further exception to the operation of a *ne bis in idem* rule.[92] As with the exception for territorial jurisdiction, this exception may be narrowly or broadly formulated.[93] A narrower formulation seems more consistent with the human rights dimension to the operation of *ne bis in idem*; the broad formulation of the exception would allow considerable scope

[86] See, supra n. 31.

[87] So defined in the Harvard Draft, supra n. 6, p. 495, cited in *Cameron*, supra n. 10, p. 57.

[88] See, ibid: "Nonetheless, the general acceptance of the doctrine of ubiquity should not blind us to the fact that it is capable of localising a great deal of crime which older authorities, and the laymen today, would consider to have been committed abroad".

[89] Ibid, pp. 57–58.

[90] Ibid. The ubiquity principle is widely relied on in European states; the US tends to assert extraterritorial jurisdiction where the territorial principle cannot be exercised.

[91] See, the Schengen Agreement, supra n. 9, Article 55 of which provides that *ne bis in idem* does not apply to territorial assertions of jurisdiction, but that this exception will not apply if the acts concerned took place in part in the territory of the contracting party where the judgment was given.

[92] See *Cameron*, supra n. 10, pp. 86–87.

[93] As to different approaches to the application of the protective principle of criminal jurisdiction, see, ibid, pp. 87–89.

for governments to interpret it widely and to abuse the concept of protective jurisdiction in order to circumvent a *ne bis in idem* rule.

In the case of these jurisdictional bases, the application of *ne bis poena in idem* could help compensate for the non-applicability of a full *ne bis in idem* rule.

(c) Prosecution appeals

The exclusion of a prohibition on prosecution appeals from the scope of an international *ne bis in idem* rule reflects the divergent approaches to this question between common and civil law systems. While the former are generally strongly opposed to the concept of prosecution appeals, civil law systems tend to treat an appeal as a continuation of the original trial and, therefore, no violation of double jeopardy protection. Although it has been suggested that this divergence of approaches militates against an international recognition of *ne bis in idem*,[94] it need not necessarily prevent the international recognition of that degree of *ne bis in idem* protection that straddles both common and civil law systems; this approach would allow for the application of double jeopardy protection beyond a prosecution appeal (i.e., in the event of subsequent trials of first instance).

(d) A trial on the merits

The fourth element of the rule proposed here reflects the tendency of common law systems to exclude from the scope of double jeopardy protection proceedings that were so defective that no real trial can be said to have taken place and the proceedings can be struck out in a judicial review procedure.[95] Likewise, interlocutory or preliminary proceedings could not be treated as a trial the effect of which will be to bar a future prosecution.[96] Similarly, sham trials will be excepted from the application of *ne bis in idem* by this criterion, reflecting the provisions on *ne bis in idem* of the Statutes of the international criminal tribunals.[97] This exception protects the interests of the

[94] *Morosin*, supra n. 2, quoting, at p. 268, the US Supreme Court decision in *United States v. Martin Linen Supply Co*., 430 United States Reports 564 (1977), p. 571, quoting *United States v. Ball* 163 United States Reports 662 (1896), p. 671: "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution'."

[95] See, e.g., *H. W. R. Wade and C. F. Forsyth*, Administrative Law (7th edn., 1994), p. 718; *The People (Attorney General) v. O'Brien* [1963] Irish Reports 92; and *The State (Tynan) v. Keane* [1968] Irish Reports 348, especially *J. Walsh* at p. 355.

[96] Such an approach was adopted by the ICTY in *Prosecutor v. Tadic*, ICTY Trial Chamber II, Case No. IT-94-1-T, Decision 14 November 1995, paras. 10–11.

[97] See Article 17(2)(a) of the Rome Statute of the ICC, Article 10(2)(b) of the Statute of the ICTY, and Article 9(2)(b) of the Statute of the ICTR. In contrast, the European Court of Justice

second prosecuting state by providing an avenue of scrutiny where the prior prosecution was so inadequate as to not be a justifiable basis for limiting the exercise of sovereignty of the second prosecuting state in foregoing a full criminal prosecution itself.

(e) Decisive new evidence

The fifth limitation proposed reflects the approach taken to *ne bis in idem* in a number of international instruments. For example, the Statutes of the ICTY and ICTR permit a revision of proceedings where new evidence comes to light within one year of the final judgment.[98] The European Convention on Human Rights contains a similar provision.[99] This approach could be viewed as reflecting a balancing of the interests of the State and the accused. Double jeopardy protection in general is aimed at protecting the accused (although it also serves to uphold the more general values of legal certainty and definitiveness); however, where decisive new evidence emerges, the interests of the community in having a guilty person charged and punished take priority.

adopted a broad interpretation of the scope of the *ne bis in idem* provision of Article 54 of the Convention Implementing the Schengen Agreement in *Joined Cases C-187/01 and C-385/01, Article 35 TEU Reference, Gözütok and Brügge*, European Court of Justice, 11 February 2003. The ECJ held that the *ne bis in idem* principle laid down in Article 54 of the Convention also applies to procedures whereby further prosecution is barred by which the public prosecutor in a member state discontinues, without the involvement of a court, a prosecution brought in that state once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the public prosecutor, i.e., in other words, *ne bis in idem* under the Convention encompassed out-of-court settlements with the public prosecutor.

[98] See Article 25 of the Statute and Rule 120 of the Rules of Procedure and Evidence of the ICTR and Article 26 of the Statute and Rule 119 of the Rules of Procedure and Evidence of the ICTY, which follow the civil law tradition. In contrast, the Rome Statute of the ICC only permits revision of a decision in light of new evidence on behalf of the accused; the prosecution may not seek such revision (reflecting the position generally in the common law world (Article 84 of the Statute)).

[99] Protocol 7, Article 4(2). See also, *The Law Commission of England and Wales*, Report on Double Jeopardy and Prosecution Appeals (2001), Part IV. The Commission recommended a limited exception to double jeopardy protection where reliable and compelling new evidence emerges (Recommendation 3, p. 127). The United Kingdom has declared its intention to reform this aspect of double jeopardy law. In a speech delivered on 18 June 2002, the Prime Minister, *Tony Blair M.P.*, stated: "We need to look again at the double jeopardy rule, in place to prevent people being tried twice for the same crime. For serious offences, if there is overwhelming new evidence that implicates the accused again, they should go back to court. That is the case in Germany, Finland and Denmark. If it makes sense there, it should make sense here too" ('Re-balancing the criminal justice system', speech available at <http://www.number-10.gov.uk/output/page5358.asp>).

Extradition

In the context of extradition law, it appears to be accepted that *ne bis in idem* has status in general international law, independently of treaties. *Oehler* concludes: "Yet a special legal position can arise in the law of extradition whenever a country requests extradition because the acts committed and deemed an offense fulfill the legal requirements of its statute as well as those of the requesting country. This satisfies the requirement of 'double criminality' and the request for extradition will be granted. Accordingly, the maxim *ne bis in idem* will apply to prohibit the prosecution of the offender who was extradited to the requesting state."[100] However, some authority rejects the view that there is a general rule of international law prohibiting the extradition of a suspect between two states where a prior prosecution or trial has taken place in a third state.[101]

Although the thrust of opinion has confined such international recognition to date to extradition proceedings, the operation of the principle in the extradition context points, it has been argued here, to the potential for a broader international rule. In particular, a test of equivalence between prior sanctions in one country and the proposed sanction in the second state of trial, as is entailed in an *in abstracto* application of *ne bis in idem*, would approximate in practice the requirement for double criminality in extradition law.

Ne bis poena in idem

Friedland observes that some Continental writers deny the necessity for the principle of *ne bis in idem* in international affairs and consider that a rule against multiple punishments (*ne bis poena in idem*) is sufficient.[102] However, in favour of a contrary view it can be argued that the full rule protects interests

[100] *Oehler*, supra n. 2, p. 617, citing Symposium on Extradition and National Reports in Preparation of X International Penal Congress of Rome 1969 (1968), 39 Revue Internationale de Droit Pénal 375. See also, *Bedi*, supra n. 13, p. 171; *Friedland*, supra n. 59, pp. 391–392; *D. Poncet and P. Gully-Hart*, The European Approach, in Bassiouni (ed.), supra n. 2, pp. 284–285; and *M. C. Bassiouni*, International Extradition and World Public Order (1974), p. 459: "The historical recognition given the principle *ne bis in idem* in various legal systems, its enunciation in human rights conventions and its embodiment in bilateral and multilateral extradition treaties make it part of all sources of international law and as such, it operates as a bar to extradition. The problem however lies in its application since each state will, of course, apply its (*sic*) subject to its judicial interpretation and public policy. There is no more exactitude to the principle under international law". This paper seeks to identify an application of the principle that would provide enough exactitude to render the principle workable in an international law context.

[101] See, e.g., the decision of the German Federal Constitutional Court in BverfGE 75, 12 BvM 2/86 (English translation available on the Internet at University College London website <http: www.ucl.ac.uk/laws/global_law/cases/german/constitutional/constitutional_1html>

[102] *Friedland*, supra n. 59, p. 358, n. 3 (citing Harvard International Law Research, supra n. 6, p. 611 et seq.).

that are not equally addressed by *ne bis poena in idem*, including the interest of the accused not to be subjected to the anxiety of repeated prosecution and to an increased likelihood of a flawed guilty verdict. A recognition of *ne bis poena in idem* is not, therefore, a complete alternative to *ne bis in idem* in that *ne bis poena in idem* only partially protects these interests – the anxiety of repeated prosecution may be mitigated by the knowledge that punishment will be determined with reference to previous sentences, but there remains the increased likelihood of a flawed guilty verdict and the anxiety of a second trial. The point can further be seen in incremental terms: a willingness to recognise *ne bis poena in idem* is a step toward a recognition of the full rule, rather than an implied rejection of it.

Conclusion

Ne bis in idem represents an important procedural safeguard for the individual in legal systems throughout the world. In particular, it ensures that the resources of the state can only be applied once to the prosecution of an individual; this can ensure both that prosecutions are conducted as thoroughly as possible and that an individual cannot be harassed by repeated prosecution and, in effect, made subject to a punishment additional to the sentence handed down following a conviction if, in fact, there is a conviction. In the international law context, the scope for the relevance of the rule is clear in that more than one state may have an interest in prosecution of the same individual, with the result that the individual may be punished repeatedly and disproportionately for the same conduct. However, to date, opinion has tended to confine the principle in international law in the main to treaty provisions. The increasingly internationalised dimension of criminal prosecution, evidenced most dramatically in recent times in matters of terrorism, makes all the more likely the potential future relevance of international double jeopardy protection. Notwithstanding divergences of approach to the rule in different legal systems, arguably a workable formulation can be abstracted from the practice of the principle worldwide as representing a common core of double jeopardy protection and the basis of a potential, general international rule. Such a rule could encompass, it has been argued here, the following elements:

1. an *in abstracto* application,
2. the assertion of the rule in the case of jurisdiction other than the territorial and protective principles of international criminal jurisdiction,
3. the non-exclusion of prosecution appeals of an acquittal,
4. the applicability of the rule only where there has been a trial on the merits,
5. the non-exclusion of a retrial following acquittal where decisive new evidence emerges.

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