Ne Bis in Idem in International Law

GERARD CONWAY*

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 writers² denies that the principle of ne bis in idem can be recognized either as a rule of

* BA (Limerick), M. Juris (Uppsala), Barrister-at-Law (King’s Inns, Ireland), currently Legal Research Officer, Office of the Director of Public Prosecutions, Ireland. This article is a modified version of the first part of a thesis submitted for the Master of International and Comparative Law program at the University of Uppsala, Sweden, 2000–2001. I am very grateful to Prof. Iain Cameron of the Faculty of Law, University of Uppsala, for his help and suggestions during the preparation of the article. I am also grateful to Prof. Roger Black, Faculty of Law, University of Edinburgh, for providing information on the Lockerbie trial. All views expressed and errors are solely the responsibility of the author. The author can be contacted at conbhaig@hotmail.com.

¹ The phrase is derived from the Roman law maxim nemo bis vexari pro una et eadem 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”.

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.
