Double Jeopardy and International Law: Obstacles to Formulating a General Principle

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Introduction

The principle of non bis in idem, or double jeopardy, protects defendants from repeated prosecution for offences arising out of one event. However unambiguous this principle appears, there is a good deal of disagreement over the interpretation and application of double jeopardy.

While some legal systems interpret double jeopardy as prohibiting successive prosecution for a single act following acquittal, other systems allow the government to appeal an acquittal. Within both international and domestic communities, there is also the question of what constitutes the same act for purposes of double jeopardy. As international committees draft statutes addressing acts of genocide, crimes against humanity, war crimes and other issues relevant to the world community, debate on non bis in idem provisions is a certainty.

This paper discusses the application and obstacles involving the principle of double jeopardy within three international instruments, the International Law Commission’s Draft Statute for an International Criminal Court, the Draft Code of Crimes Against the Peace and Security of Mankind (hereinafter the Draft Code of Crimes) and the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (hereinafter the Tribunal for the Former Yugoslavia). Article 33 of the draft Statute for an International Criminal Court lists the law which the Court shall apply: (a) the Statute; (b) applicable treaties and the principles and rules of general international law; and (c) to the extent applicable, any rule of national law. The phrase “principles and rules of general international law” includes general principles of law, whether found in national forums or international practice. Thus, examination of international documents, such as the International Covenant on Civil and Political Rights (hereinafter the ICCPR), transnational documents, such as extradition trea-
ties, and domestic statutes and case law is useful for understanding, interpretation and operation of *non bis in idem* by international courts.

**Formulating a General Principle of *non bis in idem* from International and Domestic Law**

Article 14(7) of the ICCPR\(^2\) contains a general provision of double jeopardy which has been interpreted by the Human Rights Committee as limited to second trials within a single jurisdiction, as opposed to adjudications in several states.\(^3\) Thus, applied to the situation where an international court hears a case subsequent to a domestic trial, article 14(7) of the ICCPR may not impose any constraint on the second trial in an international court.

Extradition treaties also recognize the double jeopardy issue. Article 3(d) of the Model Treaty on Extradition prohibits extradition "if there has been a final judgement rendered against the person in the requested State in respect of the offence for which the person's extradition is requested."\(^4\) Many adopted treaties provide that a state is not required to extradite an individual if that state has already tried him or her for the offence in question.\(^5\)

The United States Supreme Court holds that an applicable extradition treaty is necessary for legal rendition of an individual.\(^6\) It is unclear whether rendition of a fugitive to an international tribunal rather than another state constitutes an extradition.\(^7\) The operation of double jeopardy in extradition treaties is another indication of how the international community could formulate this principle in international criminal codes.

Another method of formulating general principles or customary law in the international context is through study of domestic legal systems in a comparative manner, identifying commonalities to the "major legal systems of the world."\(^8\) After examining 139 constitutions, one commentator identified some fundamental rights which are protections granted to individual defendants in criminal justice proceedings.\(^9\) Both domestic constitutions and international instruments recognize these rights, and each is "basic to fairness in the criminal process", without which there is greater potential for abuse.\(^10\) Among these fundamental rights is the principle of *non bis in idem*.\(^11\) At least fifty national constitutions include the right to protection from double jeopardy.\(^12\)

However, there is not uniformity among countries as to the interpretation of this principle. While many continental European nations allow the state to appeal an acquittal due to errors of law or questions of fact,\(^13\) other countries, such as the United States, do not allow the state to appeal an acquittal.\(^14\) Others limit double jeopardy to punishment, and do not exclude