Prohibition against subsequent prosecution in international law: An overview

By Segun Jegede

The concept of double jeopardy is founded upon the legal principle that a man should not twice suffer for the same wrong. It is expressed in the maxim nemo debet bis vexari pro una et eadem causa and constitutes an important feature of criminal procedure law in virtually all-modern legal jurisdictions. The universal application of the concept is a mark of the important role ascribed to it, particularly that of being a strong pillar of protection of the citizenry against prosecutorial oppression. In International law the concept, which is, replicated in the principle of ne bis in idem plays no less a significant role. It has as its central tenet the time worn ideal that no one should be twice judged for the same offence. Apart from its procedural importance, this principle is clothed with additional dignity by its elevation to the status of a fundamental human right in the constitutions of old and emerging democracies, the Statutes of international tribunals and the International Criminal Court.

In the international realm, the prohibition against trying an accused twice for the same offence, cited as the non bis in idem principle is a recognized legal principle of international law. While the autrefois acquit and autrefois convict rules apply in domestic conflicts in a legal jurisdiction, the non bis in idem principle protects an accused from successive prosecution by two separate courts or sovereigns. Though, differences exist in application, similar considerations of fairness, just treatment and respect for an individual's dignity lie at the foundation of both principles.

International Instruments

In recognition of the existence of criminal acts that have multi-state effects which are simultaneously or concurrently pursued by more than one state, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) expressly prohibit the bringing of a second prosecution for the same offence.

Similarly, Article 14(7) of the ICCPR, which came into force in 1976, provides as follows:

No 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.

For autrefois acquit purposes the operative words in Article 4(1) are "finally acquitted". The implication is that a reprosecution of an accused on the same set of facts is possible if his acquittal is set aside on appeal and a retrial ordered. The provision does not therefore become operative until the decision has become res judicata that is "when no further ordinary remedy exists or when the parties have exhausted such remedies or have permitted the time limit to expire". Article 14 applies to the reopening of a conviction and the reopening of an acquittal. The plain meaning "prohibits even the power of an appellate court to quash a criminal conviction and to order a retrial if new evidence or a procedural defect is discovered after the ordinary appeals process has been concluded".

The United Nations Human Rights Commission charged with the implementation of the ICCPR has also expressed the view that the reopening of criminal proceedings "justified by exceptional circumstances" does not infringe the principle of double jeopardy. One central issue concerns a determination of what constitutes "same offence" for purposes of the application of the provision. From the pronouncements of the European Court of Human Rights in relevant case law, it would be safe to conclude for now that the position of the law is not settled.

In Gradinger v Austria the court held the provision to apply where the second charge is for a different offence based on the same set of facts. In that case, the applicant while driving his car caused an accident, which caused the death of a cyclist. He was convicted of causing death by negligent driving, but acquitted of negligence while under the influence of alcohol, which carried a heavier sentence. In course of the trial the court had accepted medical evidence, which placed his blood-alcohol level below the prescribed limit.

On the basis of a new report, the local administrative authorities later imposed a fine for driving under the influence of alcohol, which the applicant challenged on autrefois acquit grounds. The court held Article 4 (1) to be applicable following the acquittal in the first proceedings and concluded that there had been a violation of the provision since both charges were based on the same conduct.

However in Oliveira v Switzerland, a case based on facts similar to Gradinger the court held that a subsequent charge will not violate Article 4(1) if it relates to separate offences arising out of the same conduct. The court held that "there is nothing, in that situation which infringes Article 4 of Protocol 7 since that provision prohibits people being tried twice for the same offence whereas in cases concerning a single act constituting various offences one criminal act constitutes two separate offences". The court's view in Gradinger seems to be a more purposive application of Article 4(1) because it offers the accused more protection from prosecutorial oppression and reflects the spirit of the treaty.

The Gradinger case also proved to be a landmark decision in its wide conceptualization of "competent court". In the court's view the consideration should involve not only the status of the court but the question whether there was a "criminal charge."

For purposes of the convention, the crucial issue is not whether an offence is described in terms of national law as a crime but whether it can be viewed, objectively, in terms of its true nature as criminal. In this case the court noted, "although the offences in issue and the procedures followed ...fall within the administrative sphere, they are nevertheless criminal in nature". It follows, therefore, that where the accused was tried on an offence, which can reasonably be viewed as criminal in nature, a subsequent trial based on the same facts would be barred by a plea of autrefois acquit.

Though the European Convention of Human Rights prohibits successive prosecution for the same offence, it also provides for the reopening of an acquittal in certain circumstances. Hence article 4(2) of Protocol 7 provides:

The provision of Art.4(1) shall not prevent the reopening of the case in accordance with the law and penal procedure of the state concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

It is argued, that the application of this provision already exists in certain jurisdictions. However, in other jurisdictions it represents a departure and a negation of the autrefois acquit rule and its underlying values.

Non Bis in Idem and the Ad Hoc Tribunals.

One of the criticisms of the Nuremberg Tribunal, a precursor of the Yugoslavia and Rwandan Tribunals, is that some of the accused tried and acquitted by that tribunal were subsequently retried and convicted by national courts thereby violating the non bis in idem principle. Determined to avoid this pitfall, the framers of the Statutes of the ICTR and ICTY incorporated this principle, which was only explicitly recognized as a matter of international human rights law in the wake of the adoption of the International Covenant on Civil and Political Rights in 1966. Thus, Article 9 (1) of the ICTR Statute provides;

"No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda".

Under the Statute of the ICTR, for instance, the Tribunal has concurrent jurisdiction with national courts on crimes prosecuted by the tribunal. In that context, a person may be tried by a national court for a crime covered by the Statute resulting in a conviction or an acquittal prior to the exercise of jurisdiction or the assertion of primacy by the Tribunal. The non bis in idem principle may preclude the Tribunal from exercising jurisdiction on the basis of the prior national decision provided the conditions stated in Article 9(2) of the Statute are met. Therefore, for the Tribunal to be barred from re-prosecuting a person previously indicted in a national jurisdiction, he must have been "tried" by a court of competent jurisdiction. If the case before the national

court was not completed before the exercise of primacy by the Tribunal pursuant to rule 13 of the rules of Procedure and Evidence, a subsequent trial before the Tribunal would not violate

the non bis in idem principle. This principle is not violated if the previous proceedings before the national court were not in respect of an offence covered by the ICTR Statute.

Thus, in The Prosecutor v. Laurent Semanza, the Appellant, a former Mayor of Bicumbi commune in Rwanda alleged that the proceedings before the Tribunal violated the principle of non bis in idem because proceedings had already been brought against him in Cameroun. The core question for the Appeals Chamber was whether in Cameroun the Appellant was the subject of a trial in the sense of Article 9(2) of the Statute, that is, whether the trial was for acts constituting serious violations of international humanitarian law and whether a final judgment on those offences was delivered. The Appeals Chamber found that proceedings were raised against the Appellant in Cameroun following the extradition request from the Parquet general (Public Prosecutor's Office) of the Republic of Rwanda. However, in view of the extradition law of Cameroun, and the Decision by the Yaounde Court of Appeal the Appeals Chamber concluded that the action against the appellant in

Cameroun did not constitute a trial in the sense of the statute. Therefore the proceedings before the Tribunal did not violate the principle of non bis in idem.

In The Prosecutor v. Augustine Ndindiliyimana, a Trial Chamber of the ICTR was called upon to decide whether a previous hearing conducted by an Asylum Review Board constituted a "trial" for purposes of article 9(2) of the Statute. Dismissing the argument of the accused in that case, the chamber held:

"A simple test of double jeopardy recalled by the Prosecutor is where the accused could have been convicted at the first trial of the offence with which he is now charged. The answer to this query in the present case is plainly negative. The Accused was not charged with any crime in the proceedings before the Commission and the commission could not have convicted him of

any crime, much less of any or all of the crimes with which he is charged before the Tribunal. Therefore, because the Accused was not tried before a court for acts constituting serious violations of international humanitarian law, the Tribunal may try him without offending Article 9 (2) of the Statute."

It may, therefore, be asserted with some confidence that it is now settled law in the jurisprudence of the ICTR that for purposes of article 9(2) of the ICTR Statute, a second prosecution before the Tribunal is not necessarily ousted on non bis in idem grounds because the accused had previously undergone a 'trial'. For the plea to be successful, the first trial must not only have been conducted before a court of competent jurisdiction, the accused must have been tried not for acts characterized as an ordinary crime(s) but for acts constituting serious violations of international humanitarian law as prescribed in the ICTR Statute.

The same conclusion was reached by a Trial Chamber of the ICTY in the The Prosecutor v Tadic. The accused in that case had challenged his trial before the Chamber on grounds that it violated the principle of non bis in idem because proceedings commenced against him in Germany before deferral and transfer had reached a "final phase", the Trial Chamber dismissed the Defence's contention, stating that "there can be no violation of non bis in idem under any known formulation of that principle, unless the accused has already been tried. Since the accused has yet been the subject of a judgment on the merits on any of the charges for which he has been indicted, he has not yet been tried for those charges".

Even if an accused indicted before the tribunal has been once tried and acquitted by a national court, in virtue of the provision of Article 9(2), the non bis in idem principle would not bar a subsequent prosecution by the tribunal if the act for which the person was tried by the national court was characterized as an "ordinary crime". This implies that a person tried for a crime under national law as distinct from the more serious crime sanctioned by international law risks a second prosecution by the Tribunal. The principle would also not operate to prevent prosecution by the Tribunal where the previous trial before the

national court was not impartial or independent, was not diligently prosecuted, or was a "sham proceeding" designed to shield the person from prosecution or punishment.

Finally, in the same way that non bis in idem operates to bar a second prosecution by the Tribunal after a successful prosecution by a national court of competent jurisdiction, given the primacy of the Tribunal over national courts, the non bis in idem principle also operates to bar national courts from prosecuting a person who has been once convicted or acquitted by the Tribunal.

Non Bis In Idem and the International Criminal Court.

As a clear manifestation of the status the principle of non bis in idem has acquired in international law, and perhaps reflecting the practical experience of the international community in the Yugoslavia and Rwandan Tribunals, the principle is enshrined in the Statute of the International Criminal Court which entered into force on 1 July 2002. Article 20 of the Statute provides:

Non bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct, which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also prescribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by

international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

The protection afforded by non bis in idem assumes greater importance in the legal regime of the ICC because its Statute operates on the principle of complementarity. Both the preamble to the Statute and article 1 express a fundamental principle of the Rome Statute that the Court is to be "complementary" to the national criminal jurisdictions. While complementarity is not defined in the Statute, an analysis of the articles on admissibility demonstrates that complementarity does not mean "concurrent" jurisdiction nor is it an extension of national criminal justice systems. Instead the court may exercise jurisdiction if: (1) national jurisdictions are "unwilling or unable" to prosecute; (2) the crime is of sufficient gravity; and (3) the person has not already been tried for the conduct on which the complaint is based. Thus, under the principle of complementarity, the ICC's authority to exercise jurisdiction in a case which has already been prosecuted before a national court is strictly limited.

Though untested in any case since the Statute came into force, the jurisprudence of the ICC with regard to the application of the non bis in idem principle is not expected to be markedly different from the regime established by the Yugoslavia and Rwanda Tribunals. This is so because, not only is Article 20 of the ICC Statute almost a verbatim recapitulation of Article 9(2) and 10 of the ICTR and ICTY respectively, the underlying values protected by the principle are the same. The only drawback in the case of the ICC appears to be that, in light of the fact that its Statute binds States parties only, the court will have no power over other States which are not party to the Statute and which decide to prosecute someone acquitted or convicted by the ICC. However, it is hoped that as more States ratify the Statute of the ICC, persons who appear before the Court would be assured a more complete non bis in idem protection in consonance with its lofty ideals.

Conclusion

The principle of non bis in idem which is an aspect of the common law notion of double jeopardy has as its central tenet the fundamental value that no one should be twice judged for the same offence. Though its origin may be traced to the common law, there is now nearly universal agreement with the general constitutional principle that an individual, once tried for an offence and acquitted should, not be compelled again to defend himself against the same charge. In international law, the non bis in idem principle is widely recognized as a fundamental right open to an accused confronted with a second prosecution based on the same conduct. The principle is enshrined in international legal instruments, including the Statutes of the International ad-hoc Tribunals and the International Criminal Court. Although, it has been contended that this principle has not attained the status of a general rule of international law, particularly as regards retrials by

different, as opposed to the same jurisdiction, the recognition by States of the obligation to ensure the fair and dignified treatment of all citizens clearly demonstrates a collective will to promote the principle of and enable it crystallize as an enduring norm of customary international law.