Concurrent nationaland international criminal jurisdiction and the principle 'ne bis in idem

draft resolution

Dans **Revue internationale de droit pénal** 2002/3-4 Vol. 73, pages 1179 à 1184
Éditions **érès**

ISSN 0223-5404
ISBN 2-7492-0241-8
DOI 10.3917/ridp.733.1179

Article disponible en ligne à l'adresse
https://droit.cairn.info/revue-internationale-de-droit-penal-2002-3-page-1179?lang=fr

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SECTION IV

CONCURRENT NATIONAL AND INTERNATIONAL CRIMINAL JURISDICTION AND THE PRINCIPLE '*NE BIS IN IDEM*'

Draft Resolution[1]

The participants in the Preparatory Colloquium of the IVth Section of the XVIIth International Congress of the International Association of Penal Law, held in Berlin/Germany (1-4 June 2003),

Recognizing that the prohibition of double jeopardy, as expressed in the principle of "*ne bis in idem*" is a demand of justice, legal certainty, and proportionality,

Keeping in mind that the application of *ne bis in idem* shall not impede legitimate interests of the victim,

Recalling that, thus, the *ne bis in idem* principle appears at the domestic level as an exigency of individual justice and a citizen's guarantee forbidding all multiple prosecutions and sanctions of an individual on the same facts and bases,

Mindful that due to increasing globalization and border-crossing crime, concomitant or subsequent prosecutions by different national jurisdictions may increasingly occur, although there is still reluctance or even opposition to recognize foreign decisions as *res judicata* and, thus, to refrain from a new prosecution,

Considering that the recent establishment of *Ad Hoc* International Criminal Tribunals and the permanent International Criminal Court entails new sources of double jeopardy problems in vertical concurrence between national (courts) and international jurisdictions, as well as by horizontal concurrence between different international jurisdictions,

Recalling the resolution of Section IV B.4, adopted by the XVIth International Congress of Penal Law (1999), according to which *ne bis in idem* as a human right shall be "also applicable on the international or transnational level,"

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[1] In this Draft Resolution the terms "international" and "supranational" are employed taking in consideration that "international" refers to the source of creation of the jurisdiction (by an international treaty) and "supranational" is much more related to the effects of the decisions of international jurisdictions over national ones.

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Propose to the XVIIth International Congress of the International Association of Penal Law the adoption of this Resolution.

I.
General Principles and Requirements

1. Transnational *ne bis in idem* presupposes internal prohibition of double prosecution. For reaching transnational recognition of *ne bis in idem*, it is therefore necessary already within the national-internal legal order to guarantee this principle as a human right and, if necessary, to assure it by clear rules.

2. With regard to the nature of proceedings, at a minimum, double proceedings and sanctions of a criminal nature have to be avoided.

With regard to the fact, however, that criminal sanctions may not be the only means of sanctioning violations of the law (as, in particular, administrative sanctions), non-criminal prosecutions and decisions with an equivalent punitive function should likewise bar a new prosecution.

3. The *"idem,"* in terms of the object of the concurrent proceedings, should be identified with regard to substantially the same facts, provided that the first court or authority had the legal competence to examine and decide on all penal aspects of them.

In case of *ideal concurrence of infractions*, multiple penal charges are possible on the same facts if they constitute several offences, but it should, as a general rule, be only admitted in the course of the same prosecution; *ne bis in idem* should therefore exclude all new penal prosecutions (at least by a similar jurisdiction) on the already tried same historical facts.

4. The "*bis,"* in terms of double jeopardy to be prevented, shall not only refer to a new sanction; it should already bar a new prosecution.

5. With regard to the phase the first proceeding must have reached in order to bar a new one, as a general rule, any final judgment delivered by a criminal court convicting or acquitting the defendant or definitely terminating the prosecution shall bar a new prosecution.

5.1. A definitive termination of the prosecution may also be found in an extrajudicial mediated settlement or any other administrative, prosecutorial, or judicial decision that would permit a continuation, deferral, or reopening of the case on exceptional conditions only.

5.2. As not definitely decided upon and, thus, not barring a continuation of the proceeding are cases in which ordinary remedies (such as complaints or appeals), both in favor or against a defendant, are available, particularly in consideration of the fact that a jurisdiction may not consider a case as *res judicata* prior to the exhaustion of ordinary remedies.

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5.3. After the aforementioned stage, the reopening of a matter that is *res judicata* and, thus, an exception to *ne bis in idem*, may be allowed only on extraordinary grounds, clearly regulated by law and, specially, in favor of the defendant.

6. The demands of *ne bis in idem* are best served by the principle of recognition according to which the prohibition and inadmissibility of subsequent prosecutions and convictions, and even of preliminary investigations, should be the main aim and consequence at the domestic level.

7. As long and to the extent that this status of recognition is not reached, a new proceeding, where exceptionally admitted, should, according to the principle of accounting or deduction, take into consideration a former sanction or should at least grant adequate mitigation.

II.
Horizontal transnational *"ne bis in idem"*

1.1. Increasingly, concurrence of national criminal jurisdictions

- creates a risk of multiple prosecutions on the same factual basis,
- can be detrimental to the human rights of the individual concerned,
- might result in the non-identification of transnational crimes in their entirety,
- may have a negative impact on legitimate interests and the sovereignty of the states involved.

It is therefore necessary to prevent, in principle, horizontal concurrent jurisdictions or -if it is not possible- to settle those problems arising from conflicting jurisdictions by international legal instruments.

1.2. For this reason, recognition of the principle of *ne bis in idem* in various international instruments, such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and various instruments of the Council of Europe and the European Union, deserves appreciation, as well as Resolution Section IV B.4, adopted by the XVIth International Congress of Penal Law (1999), according to which *ne bis in idem* as a human right shall be "also applicable on the international or transnational level."

1.3. Noting the number of conventions, including existing *ne bis in idem* clauses, which are not yet signed or ratified by all States, all countries having access to these conventions are invited to revise their policy to attain an as-complete-as-possible common standard in the application of this principle.

In this regard, it would be desirable that States limit or retire the reservations made to these conventions.

1.4. With due respect to these efforts, however, an international *ne bis in idem* regulation should go further and, at least in regional areas determined by the same political-social structure and legal culture, and to the greatest extent possible,

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strive for mutual recognition of penal judgments and decisions and ensure a uniform application of transnational *ne bis in idem*.

2. Although the requirements for transnational *ne bis in idem* are basically the same as on the national-internal level (*supra* I.), certain peculiarities must be observed.

2.1. The *idem*, in terms of the "same act" the proceedings at issue are the object of, should, in principle, be identified according to the facts established in the preceding process and, in particular, by the indictment and/or the final decision as governed by the applied law. This factual approach provides much more objective and clearer criterion than that of juridical equivalence, which is very much affected by the differences between the respective national penal provisions and the rules on concurrence of offences.

2.2. If the same facts constitute additional serious offences according to the second law applicable pursuant to Section II.3, which offences are not punishable and, thus, have not been dealt with in the first proceeding, a new proceeding may be admissible only if, according to the principle of deduction, the first sentence, in as far as fully or partly enforced, is accounted for.

3. With regard to the character of the concurrent proceedings and sanctions systems, national differences should not allow a new proceeding *per se* but only on a strict territorial basis or if the first proceeding does not cover legitimate security interests of the other State or where the act was committed by a civil servant of that State in breach of his or her official duties.

4. Whether the same case was finally terminated should, in principle, be determined in the light of the first decision.[2]

5. If the person concerned has been convicted in the first jurisdiction and the enforcement of the sanction is a condition for applying *ne bis in idem*, enforcement of the previous sentence should not be required if it can be recognized and enforced in the second state, as well as if the convicted person can not be held responsible for the non-enforcement of the first sanction.

6. For avoiding concomitant or subsequent concurrent national proceedings, as well as for preventing "forum shopping" by the prosecuting authorities or the defense, both domestic measures and international agreements on certain priorities should be provided for.

6.1. Whenever there are relevant indications of a former or concomitant foreign proceeding on the same act, an *ex officio* examination should be performed and mutual information disclosed.

[2] Minority opinion: add a new sentence: *In any case, the most favorable regulation to the person concerned should be applied and the respect for human rights should be assured.*

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6.2. If an investigation is about to start or has already started in another foreign jurisdiction, preference shall be given to the jurisdiction that will better guarantee the proper administration of justice, taking account of the following criteria:

(a) the State on whose territory the offence has been committed;

(b) the State which the perpetrator is a national or resident of;

(c) the State of origin of the victim;

(d) the State in which the perpetrator was found.

6.3. If a conflict of jurisdictions cannot be resolved, a former foreign sentence should, at least, be accounted for according to the principle of deduction.

7. To avoid abuses in case of serious crimes, *ne bis in idem* shall not apply if the first proceeding was for the purpose of shielding the person concerned from criminal responsibility or was not conducted independently or impartially in accordance with the norms of due process recognized by international law and was conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

In this respect, access to an international or supranational impartial authority should always be available.

8. *Ne bis in idem* should be recognized as a human right in the field of extradition, as it is already provided for in several international instruments.

9. International agreements should also address problems of compatibility in the prosecution of individuals and legal entities for the same crime, as well as the indirect or secondary effects of foreign judgments.

III.
Vertical national-supranational concurrence

1. The question of the applicability of *ne bis in idem* in the vertical international concurrence, *i.e.*, between national courts and International Tribunals, to some extent needs specific regulation.

2. With due consideration to existing international statutes, “downwards,” due to the specialized jurisdiction of the international courts, an *idem* has to be determined with regard to both the legal qualification according to which the defendant has been prosecuted and tried by the International Tribunal and the historical facts.[3]

So, if the historical facts may also qualify as other crimes under national law, further prosecutions by the national courts over the same historical facts already tried by the International Tribunals are not barred.

[3] Minority position: *only historical facts*.

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3. "Upwards," on the other hand, the application of *ne bis in idem* should be governed by the general rules as set out by this Resolution in Section II.

4. Domestic jurisdictions should identify possible *ne bis in idem* conflicts in the vertical international concurrence and regulate them following the principles approved by this Resolution.

IV.
Horizontal inter(supra)national concurrence

1. Horizontal concurrence regulations between international jurisdictions should also follow the general rules.

2. Procedures should be established in particular with the aim of guaranteeing the prosecution by the jurisdiction that will better assure the proper administration of justice.

Berlin, 4th June 2003.