THE INTERNATIONAL *NON BIS IN IDEM* PRINCIPLE: RESOLVING SOME OF THE UNANSWERED QUESTIONS

CHRISTINE VAN DEN WYNGAERT and GUY STESSENS*

A. Introduction

Can a person who has agreed to an out-of-court settlement for a certain offence in country A still be prosecuted for the same offence in country B? What if a person is found guilty of theft in country C and is subsequently prosecuted in respect of the same facts, but under the charge of swindling in country D? Suppose two persons are suspected of having set up a money-laundering scheme, which involves financial transactions in several countries. Can the offenders still be prosecuted in one country concerned, after they have been acquitted for money-laundering in one of the other countries?

These and many other questions go to the heart of one the most essential guarantees for a person who is charged with an offence involving a foreign element: the international *non bis in idem* principle. Given the international nature of contemporary society, many offences, including so-called single jurisdiction crimes, contain a foreign element. Perhaps one of the offenders or a victim, for example, has foreign nationality.

This article will scrutinise some of the aspects of the international *non bis in idem* principle and will try to answer some of the most pressing questions, especially as to what constitutes an "*idem*" and which foreign decisions can be taken into account for attaching a *non bis in idem* effect. In doing so special attention will be paid to the Schengen Convention,[1] the first multilateral convention to succeed effectively in establishing an international *non bis in idem* principle. Before turning to these questions, however, it is instructive to examine the rationales and functions of the *non bis in idem* principle on an international level and to give an overview of the attempts at establishing an international *non bis in idem* principle.

* Law Department, University of Antwerp (UIA).

1. Convention of 19 June 1990, applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders (1991) 30 I.L.M. 84, reprinted in C. Van den Wyngaert and G. Stessens, *Criminal International and European Instruments* (1996), p.343, hereafter referred to as the Schengen Convention.

https://doi.org/10.1017/S0020589300063685 Published online by Cambridge University Press

B. *Rationales and Functions of the* Non Bis in Idem *Principle on an International Level*

When considering the various functions of the *non bis in idem* principle on an international level (i.e. where more than one State is involved), it is important to examine the rationales of the principle, on both a domestic and an international level.

1. *Rationales of the* non bis in idem *principle on a domestic level*

Almost every domestic criminal justice system seems to be familiar, under some form or another, with the *non bis in idem* principle. The principle is often codified in legislation and/or acknowledged as a general principle of law by the courts. At least three rationales seem to support the *non bis in idem* principle in a purely domestic context.[2] The first of these is, expressed by the Latin maxim *nemo debet bis vexari pro una et eadem causa*: no one should have to face more than one prosecution for the same offence. The protection of the individual seems to be especially emphasised by common law criminal justice systems.[3] The principle, however, protects not only the interests of the individual concerned, but, to a certain extent, also those of society.

This reveals a second, more pragmatic rationale. After criminal proceedings with regard to an offence have been finally disposed of, the prosecution cannot—exceptional circumstances apart[4]—take action against the same persons with regard to the same facts.[5] Certainly in some continental law systems, this rationale seems also linked to the idea that a "criminal claim" (*action pénale*) with regard to a certain offence can be used only once and is then extinguished.[6] German-speaking lawyers refer

2. See G. J. M. Corstens, *Het Nederlands strafprocesrecht* (1995), p.187; sometimes, only two rationales are retained the protection of individual freedom and the importance of social peace. See e.g. *The "anon bis in idem" principle in criminal law in the EEC*, Report of the Legal Affairs Committee of 20 Feb. 1984 (Doc. 1–1397/83), published in (1984) *Human Rights L.J.* 391.

3. H. G. M. Krabbe and H. M. Poelman, "Enkele aspecten van bet ne bis in idem-beginsel in een intediationaal verband", in *Liber Amicorum Th. W. Van Veen* (1985), p.126.

4. Art.4, para.3 of the Seventh Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (E.T.S. No.117) makes explicit provision for the reopening of the case 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.

5. Of course the *non bis in idem* principle in no way prohibits, after an acquittal, other persons being prosecuted for the same fact.

6. See e.g. in respect of Dutch law: Hazewinkel-Süringa/J. Remmelink, *Inleiding tot de studie van het Nederlandse Strafrecht* (1981), pp.462–463; in respect of Belgian law R. Declercq, *Beginselen van Strafrechtspleging* (1994), pp.91–93 and in respect of German law, D. Oehler, *Internationales strafrecht: Geltungsbereich des Strafrechts, internationales Rechtshilferecht, Recht der Gemeinschaften, Völkerstrafrecht* (1983), p.573.

to the *Erledigungprinzip*, whereby a first judgment is deemed to have "emptied" the "criminal claim" with regard to a certain offence.

Third, the principle also embodies the respect for judicial decisions that have been rendered in the past. Once a case has been disposed of, it should not be reopened (*factum praeteritum*). The final outcome of a judicial proceeding should be accepted by other courts (*res judicata pro veritate habetur*) in order to prevent conflicting judgments. Respect for judicial proceedings and the judiciary in general could be seriously undermined if the outcome of criminal proceedings that have been definitely disposed of could still be questioned by other proceedings.

2. *Rationales of the* non bis in idem *principle on an international level*

We will now investigate whether these rationales can be transposed from a purely domestic context to an international one.

The first rationale of the *non bis in idem* principle, the protection of the individual, seems as valid on an international plane as on a domestic one. As far as an individual is concerned, it matters little whether or not a second prosecution or judgment takes place in the same jurisdiction as the first. Nevertheless, the relevant human rights instruments offer no protection in this respect. Article 4 of the Seventh Additional Protocol to the European Convention on Human Rights[7] explicitly stipulates that it offers protection only as far as proceedings in the same State are concerned, and the Human Rights Committee has held the same in respect of Article 14, paragraph 7 of the International Covenant on Civil and Political Rights.[8] Domestic courts have also ruled in the same way.[9] It

7. The European Convention itself is silent on the subject. The need for a provision on *non bis in idem* became painfully clear when the European Commission on Human Rights declared inadmissible a request concerning *non bis in idem* (*Yearbook of the European Convention on Human Rights*, Vol.6, p.346 and Krabbe and Poelman, n.3, at p.131).

8. In its decision of 16 July 1986 in the case of *A.P.* v. *Italy* the Committee held that the guarantee of *non bis in idem* is not applicable with regard to the national jurisdictions of two or more States and added that the "provision prohibits double jeopardy only with regard to an offence adjudicated in a given state" (Communication No.204/1986, CCPR/C/31/D/204/1986, para. 7.3.). See also M. J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), p.316.

9. See e.g. the Belgian Supreme Court (Hof van Cassatie-Cour de Cassation), 20 Feb. 1991 *Rechtskundig Weekblad* (1991–92), p.131 and German Federal Court (Bundesgerichtshof), 13 May 1997, not yet published. See also Tribunal of First Instance Brussels, 21 Nov. 1990, *Jurisprudence de Liège, Mons et Bruxelles* (1991), p.24. See in general also the opinion of Advocate General Mayras before the ECJ, *Boehringer* v. *Commission* [1972] E.C.R. 1297–1298.

should be noted, however, that proposals have been put forward to insert an international *non bis in idem* provision in these human rights treaties.[10]

The second rationale seems less convincing from an international point of view. The fact that a foreign judicial authority has "exhausted" its power to take action against a person in relation to certain facts should not hamper the functioning of another State's criminal justice system. In some situations, it can even be argued that criminal proceedings in one State should not be hampered by the law of or the proceedings undertaken in another State. In an extreme version of this argument, refusing to take criminal proceedings because another State has already done so amounts to an abdication of sovereignty.

Although the third argument has less force in an international context than in a domestic one, the risk of conflicting judgments should as far as possible be avoided, even if the first judgment emanates from a foreign State.[11] Any form of conflict between legal systems is detrimental, not only to the persons concerned but also to the coexistence of the legal systems as such.

3. *Functions of the* non bis in idem *principle in an international context*

This brings us to the question of what functions the *non bis in idem* principle can fulfil on an international level. An international *non bis in idem* principle can have three different functions. The outcome of foreign procedures can be taken into account (a) when prosecuting a person for a crime committed on the territory of the State concerned, (b) when prosecuting a person for a crime committed on the territory of another State, i.e. when exercising extraterritorial jurisdiction and, (c) when taking of part in an international co-operation procedure in criminal matters.

(a) Bar to prosecutions for territorial offences. As far as prosecutions for a crime committed on the territory of the State are concerned, most legal systems refuse to attach any weight to foreign judgments. Foreign judgments may have three kinds of international consequence. Undoubt-

10. See Res.B.4 of the Draft Resolutions of the Fourth Section of the XVI International Congress on Penal Law of the International Association of Penal Law and the report by C. Van den Wyngaert, "The Transformations of International Criminal Law as a Response to the Challenge of Organised Crime", *Rev. int. de dr. pénal* (1999), 169–178. Cf. W. Schomburg, "Aspects from A German/European Perspective", *Nouvelles Etudes Pénales* (1998), pp.175–177 and "Die Rolle des Individuums in der Internationalen Kooperation in Strafsachen", Strafverteidiger (1998), pp.156–157.

11. At the Bath Session (1950) of the Institut de droit international, the *rapporteur général* H. Donnedieu de Vabres viewed the respect of *res judicata* as the bedrock of any *non bis in idem* protection on an international level (1950) II *Ann. Inst. dr. int.* 259–261, 280–281. His view met with fierce opposition, however, from other renowned scholars, such as Fitzmaurice (*idem*, pp.278–280). See also G. J. M. Corstens, annotation with Hoge Road, 13 Dec. 1994, *Ars Aequi* (1995), p.723.

edly, the most far-reaching consequence that can be attached to a foreign judgment is that it has international validity to the extent that foreign States can or even should enforce it. A less far-reaching consequence is the authority of *res judicata* of a foreign judgment. As with domestic judgments, this *res judicata* is two-fold. Not only can a judgment constitute a bar to a prosecution for an offence that has already been judged (*autorité négative de la chose jugée*), it can be taken into account by judicial authorities in the context of other cases (*autorité positive de la chose jugée*), for example when determining the sentence.[12] We are, however, concerned only with the second consequence, namely the question whether and under what circumstances a foreign judgment constitutes a bar to new prosecutions for the same offence.

In many continental jurisdictions courts have consistently refused to recognise the *res judicata* effect of foreign judgments in the case of territorial offences. This is, for example, the case in Belgium, where courts have allowed new prosecutions for the same offences in the face of a foreign acquittal or conviction of the same persons.[13] The same position has also been adopted in other European countries,[14] for example Austria,[15] France[16] and Germany.[17] A notable exception in this respect is the Netherlands, where Article 68 of the Dutch Penal Code contains a general *non bis in idem* provision that is applicable to domestic and foreign judgments, regardless of the place where the offence was committed.[18]

It is striking that many common law legal systems—with the notable exception of the United States—do recognise the *res judicata* effect of foreign judgments.[19] This seems to demonstrate that common law systems attach relatively more weight to the first rationale of the *non bis in idem*

12. See on this distinction the interesting study by D. Flore, "Le jugement répressif au-delà des frontières nationales" (1998) *Ann.Dr.Louv.* 105–146

13. See e.g. Belgian Supreme Court, 15 Dec. 1952 (1953) I Pasicrisie 262 and 20 Feb. 1991, *supra* n.9.

14. See in general Legal Affairs Committee, *op. cit. supra* n.2.

15. See Art. 65 of the Austrian Code of Criminal Procedure, discussed by H. Epp, "Der Grundsatz 'Ne bis in idem' im internationalen Rechtsbereich", *Österreiches Juristenzeitung* (1979), pp.36 *et seq*. Foreign judgments are, however, always imputated in Austria.

16. See M. Pralus, "Etude en droit pénal international et en droit communautaire d'un aspect du principe *non bis in idem: non bis*", *Revue des sciences criminelles* (1996), pp.559–564.

17. See W. Schomburg, "Das Schengener Durchführungsübereinkommen. Anmerkungen und Bewertungen zu Titel III (Polizei und Sicherheit) aus einer deutschen justitiellen Sicht" (1997) *J.B.I.* 556–557.

18. See P. Baauw, "Non bis in idem", in B. Swart and A. Klip, *International Criminal Law in The Netherlands* (1997), pp.75–84.

19. See e.g. in England: *Aughet* (1919) 13 Cr.App.R. 101 and *Treacy* v. *DPP* [1971] A.C. 537, cited by P. Murphy (Ed.), *Blackstone's Criminal Practice* (1996), p.1212; or in South Africa: *Pokela* 1968 (4) S.A. 702 (OK), cited by J. C. Ferreira, *Strafprocesreg in de laer howe*, p.351.

principle. This is also reflected in the fact that the principle, at least in its domestic form, was cast into a constitutional principle (see e.g. the Fifth Amendment to the United States Constitution).[20]

(b)—Bar to the exercise of extraterritorial jurisdiction. The *res judicata* effect of foreign judgments is more generally respected when it comes to exercising extraterritorial jurisdiction. Because extraterritorial jurisdiction is considered an exception to territorial jurisdiction, it is felt that primacy should be given to the outcome of proceedings conducted before the courts of the State where the offence took place. In Belgium, for example, Article 13 of the Preliminary Title to the Criminal Procedure Code recognises foreign judgments rendered in respect of offences committed outside Belgium under the following conditions: the defendant must have been tried abroad for the same offence and must have been acquitted, or, in case he has been convicted, must have served his sentence. The recognition is also applicable when the foreign sentence cannot be enforced because of limitation statutes, amnesty or pardon.[21] Here, the *non bis in idem* rule functions as a compensation for the fact that Belgian courts have extraterritorial jurisdiction in respect of these crimes and that, therefore, the jurisdiction of the Belgian courts usually coincides with the jurisdiction of the courts of the State where the crime was committed. This compensation does not function everywhere, however. In some countries' legal systems, for example Germany and Italy, a *non bis in idem* bar in the case of extraterritorial offences is not provided. In many countries, for example France,[22] the *non bis in idem* principle does not provide protection in the case of extraterritorial jurisdiction claimed on the basis of the protective principle.[23]

It should be noted, however, that the protection which is thus afforded is sometimes circumvented because prosecutorial authorities succeed in convincing courts to localise offences on the territory of their own State, whereas in reality these offences took place on the territory of another State. In that hypothesis, courts usually do not have to pay heed to foreign judgments.

(c) Exception in the context of international co-operation. Foreign judgments can also be invoked in the context of international co-

20. The constitutional protection afforded to the *non bis in idem* principle is not a monopoly, however, of common law countries. Germany, for one, also constitutionalised the principle (see Art. 103 of the German Constitution).

21. Art.13 stipulates: "lorsque l'inculpé, jugé en pays étranger du chef de la même infraction, aura été acquitté ou lorsqu'après été condamné il aura prescrit sa peine ou aura été gracié ou amnistié". See G. Vermeulen, "Het beginsel ne bis in idem in het internationaal strafrecht. Een evaluatie van de nationale en verdragsrechtelijke waarborgen in het strafrechtsverkeer met onze buurlanden", *Panopticon* (1994), pp.219–220.

22. See Pralus, *op. cit. supra* n.16, at pp.561–562.

23. I. Cameron, *The Protective Principle of International Criminal Jurisdiction* (1994), pp.84–89.

operation in criminal matters. Here *non bis in idem* functions as a ground for refusal to co-operate. The exact scope of *non bis in idem*, however, always depends upon the relevant provision in the co-operation treaty and/or in the domestic legislation. There is indeed no rule of international law prohibiting a State from extraditing a person who has already been convicted and sentenced in a third State for the same offence. This was explicitly held by the German Constitutional Court.[24] The application of the *non bis in idem* principle also varies from one type of international co-operation in criminal matters to another.

In addition, it is material to draw a distinction between the operation of the *non bis in idem* principle, *inter partes* and *erga omnes*. In most cases, *non bis in idem* can be invoked in the course of an international co-operation procedure only if the requested State itself has already undertaken criminal action with regard to the offences at issue. Thus, there are examples of cases in which persons who had already been convicted abroad, were nevertheless extradited by Belgium.[25] Rarely, however, are States willing to refuse co-operation because the person has already been convicted or acquitted in a third State (i.e. a State not taking part in the international co-operation procedure). Even if some multilateral conventions, such as the Schengen Convention, allow the *non bis in idem* exception in cases where the first judgment emanates from a State not taking part in the co-operation procedure, the scope of this international *non bis in idem* protection is still limited to the respect for the outcome of procedures that took place in contracting States.

It is impossible to give an exhaustive overview of all the multilateral conventions in the field of international co-operation in criminal matters, let alone of bilateral treaties. Our attention will therefore be confined to some instruments which were drafted under the aegis of the Council of Europe and the United Nations. Some conventions, like the 1957

24. German Constitutional Court (Bundesverfassungsgericht), 31 May 1987, BVerfGE, 75, 1, *Neue Juristische Wochenschrift*, 1987, 2155. The case concerned an extradition request concerning a person who had been convicted and sentenced to a custodial sentence of 8 years in Turkey. Despite the fact that the fugitive had already served a three-year sentence for the same facts in Greece, the Constitutional Court nevertheless held that he could be extradited to Turkey.

25. It is impossible to give an adequate account of Belgian extradition practice on this point, as extradition decisions (both judicial and executive) are in practice almost never published. One therefore has to rely on press reports. An example is the case of a truck diver, Joseph Aumeier, who had been given a one-year custodial sentence in the Netherlands for drug trafficking. He was also sought by the German authorities, who wanted to prosecute him again for the same facts. Germany first requested his extradition from the Netherlands. The Netherlands refused extradition on the basis of the *non bis in idem* exception to extradition (judgment of the Court of Amsterdam, 22 Jan. 1980). According to press reports, when Aumeier was later arrested in Belgium and his extradition was again requested by Germany, Belgium granted his extradition: *Laatste Nieuws*, 5 Nov. 1990.

European Convention on Extradition (Article 9),[26] the 1970 European Convention on the International Validity of Criminal Judgments (Article 53)[27] and the 1972 European Convention on the Transfer of Proceedings in Criminal Matters (Article 35)[28] contain a mandatory *non bis in idem* provision, whereas others, like the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Article 18, paragraph 1 (e))[29] retain *non bis in idem* only as an optional ground of refusal. Still other instruments, such as the 1959 European Convention on Mutual Assistance in Criminal Matters, do not contain a *non bis in idem* provision, but some States have made an explicit declaration in this respect, allowing them to refuse co-operation on this ground.[30]

C. *The International* Non Bis in Idem *Protection under Article 54 of the Schengen Convention*

Because the domestic legislation of most European countries does not always guarantee that the *res judicata* effect of foreign criminal judgments will be respected, efforts were undertaken to create a multilateral international *non bis in idem* system. The aim was to put in place a multilateral treaty system which would prohibit States putting a person in double jeopardy after he had already been judged by another State.

The first attempt took place at the beginning of the 1970s, when identical *non bis in idem* provisions were inserted in two co-operation treaties of the Council of Europe (the 1970 European Convention on the International Validity of Criminal Judgments (Articles 53–55) and the 1972 European Convention on the Transfer of Proceedings in Criminal Matters (Articles 35–37)). Although both Conventions deal with international co-operation, the provisions are also intended to function outside that context.[31] In spite of the requirement that the first judgment emanates from a party to the convention, the *non bis in idem* rule is also intended to function outside the context of international co-operation in criminal matters. It was nevertheless thought that the insertion of the international *non bis in idem* provisions in these co-operation treaties stood a better chance of succeeding than drafting a protocol to the

26. Paris, 13 Dec. 1957, reprinted in Van den Wyngaert and Stessens, *op. cit. supra* n.1 at p.199.

27. The Hague, 28 May 1970, text in *idem*, p.391.

28. Strasbourg, 15 May 1972, text in *idem*, p.373.

29. See on the function of *non bis in idem* in the context of international co-operation in respect of money laundering: G. Stessens, *De nationale en internationale bestrijding van het witwassen. Onderzoek naar een meer effectieve bestrijding van de profijtgerichte criminaliteit* (1997) pp.580–582.

30. See e.g. the declarations of Belgium (*Belgisch Staatsblad—Moniteur belge*, 23 Oct. 1975) and of the Netherlands (Krabbe and Poelman, *op. cit. supra* n.3, at p.133).

31. See J. J. E. Schutte, "Overdracht en overname van strafvervolging", *Ars Aequi* (1986), p.35.

European Convention on Human Rights. The latter alternative inevitably implied an international *erga omnes non bis in idem* rule, not limited to judgments emanating from contracting parties. It was—probably rightly—thought that the mutual confidence between states, required for an international *erga omnes non bis in idem* rule, was lacking.[32] But even this modest attempt at establishing an international *non bis in idem* rule failed, however, because most members of the Council of Europe did not ratify the conventions concerned.

In the second half of the 1980s a renewed attempt was made to establish a system of *non bis in idem* protection, this time in the more restricted club of EC countries. In 1987 the then EC member States, acting within the framework of European political co-operation (the predecessor of the "third pillar" under the Treaty on European Union), concluded a convention specifically addressing the *non bis in idem* principle. This Convention was signed by Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom. Despite the fact that the convention was the brainchild of the Belgian EC presidency in 1987, Belgium has not proceeded to ratification. Only Denmark, France, Germany, Italy and the Netherlands have ratified the Convention. It is only in respect of these States that the convention has provisionally entered into force.[33] The Convention is, to a large extent, copied from the provisions on *non bis in idem* in the European Convention on the International Validity of Criminal Judgments (Article 54) and the European Convention on the Transfer of Proceedings in Criminal Matters (Article 35), the only difference being that *non bis in idem* applies *erga omnes*, not only *inter partes*.

A third attempt to establish a system of international *non bis in idem* protection was more successful. The 1990 Schengen Convention, which was intended to compensate for the effects of the lifting of internal border controls as from 1 January 1993, effectively realised an international *non bis in idem* protection. At present, ten EU member States are party to the Schengen Convention: Belgium, the Netherlands, Luxembourg, France, Germany, Spain and Portugal, Greece, Italy and Austria. Denmark, Finland and Sweden have acceded to the Convention, but not yet ratified it. Iceland, Norway, Greenland and the Faroes have become associated partners.

32. See e.g. Explanatory Report to European Convention on the Transfer of Proceedings in Criminal Matters (Council of Europe: Strasbourg, 1972), p.61.

33. W. Schomburg and O. Lagodny, *Internationale Rechtshilfe in Strafsachen* (1998), p.888.

The content of the *non bis in idem* provision of the Schengen Convention is almost identical to that of the 1987 Convention.[34] Article 54 of the Schengen Convention stipulates that:

> A person who has been finally judged by a Contracting Party may not be prosecuted by another Contracting Party for the same offences provided that, where he is sentenced, the sentence has been served or is currently being served or can no longer be carried out under the sentencing laws of the Contracting Party.

Even under the Schengen Convention the international *non bis in idem* protection is, however, far from perfect and a number of important questions as to the functioning of this principle remain. Some of these questions flow from the drafting of the *non bis in idem* provision and from the fact that the drafters of the Schengen Convention have explicitly allowed States to make reservations in a number of cases. Many questions are, however, not specific to the Schengen Convention and also arise in respect of the *non bis in idem* protection afforded under other instruments, namely in the context of international co-operation in criminal matters. In what follows, we endeavour to make a structural analysis of some of the most important questions and examine possible answers.

The aim of providing the individual with an effective remedy against double jeopardy may suffer both from a restrictive concept of the object of double prosecution and from restrictions with respect to the measures that entail a prohibition on taking action a second time. Questions with regard to the international *non bis in idem* system can therefore be divided into two categories. The first relates to the pivotal question of what should be considered an *idem*. A second category of question concerns the type of procedures that are taken into account for the purpose of attaching a *non bis in idem* effect.

*D. What Should Be Considered an "*Idem*"?*

Different questions can be raised under this heading. A first question, which is of the utmost importance, is whether the *non bis in idem* effect should attach to facts or to offences. A second area of difficulty arises with regard to the concept of continuing crimes. This concept, which is known in many legal systems, covers offences of which the perpetration continues over a certain period of time. In cases where these continuing crimes take place in more than one country, the question inevitably arises whether the *res judicata* effect of a judgment relating to a continuing offence in one country also relates to the part of the offence that took place in another country.

34. A. H. J. Swart, "Politie en veiligheid in het Akkoord en de Overeenkomst van Schengen", *Nederlands Juristenblad* (1991), pp.214–215.

1. Offences or facts?

In respect of both domestic and international rules on *non bis in idem*, a distinction can be drawn between "offences" and "facts". If the recognition of prior judgments is said to apply to offences only, a first judgment or acquittal for a fact under a particular charge does not preclude a second prosecution for the same fact under another charge. For example, if X takes prohibited drugs over the border between countries A and B, he may be guilty of illegal export in A and of illegal import in B. A *non bis in idem* rule applicable to offences only would not preclude B from prosecuting X for illegal import, even if X has already been convicted and sentenced on account of illegal export in A.

If, however, the rule is said to apply to the facts, then the applicable scope is much wider. It would, in the example above, mean that B would be precluded from prosecuting X again because the first conviction, although for a different offence (illegal export), relates to the same fact, that is, taking the goods over the border.

It is not certain whether the distinction between offences and facts exists in all legal systems, but it does, for example, in the Netherlands and in Belgium. Dutch courts apply the broad definition of the *non bis in idem* rule, meaning that, in the example above, the Netherlands, if in the position of country B, would not be able to prosecute.[35] In Belgium, a distinction is made between Belgian and foreign judgments: the broad definition applies only to Belgian judgments,[36] foreign judgments being given a narrow *non bis in idem* effect.[37] This means that, if Belgium were in the position of country B in our example, a second prosecution would

35. Dutch Supreme Court (Hoge Raad), 13 Dec. 1994, *Ars Aequi* (1995), p.720. See, however, the interesting remarks by Poelman and Krabbe, *op. cit. supra* n.3, at pp.139–144, on the historical evolution of Dutch law by this respect.

36. The general rule on *non bis in idem* is laid down in Art.360 of the Belgian Code of Criminal Procedure, which states: "The accused who has been acquitted by a court of assize cannot be prosecuted again for the same facts, regardless of their legal description." It is nearly impossible to give an adequate and thus accurate English translation of the authentic text, which runs as follows: "L'accusé acquitté par une cour d'assises ne pourra plus être poursuivi pour les mêmes faits, quelle que soit la qualification juridique attribuée à ceux-ci." Although this text is formulated in respect of the courts of assize only, it is generally accepted to be applicable to all judgments, also those of the non-jury courts.

37. Art.13 of the Preliminary Title to the Criminal Procedure Code uses the word "offences", not "facts". This means that a person, who has already been convicted abroad for a "fact" under a particular charge, may be prosecuted again for the same fact in Belgium under another charge. For example, if a person has been convicted abroad on charges of receiving stolen property, he may be prosecuted again for the same fact in Belgium, under the charge of theft: Court of Appeal of Antwerp, 24 June 1982, *Rechtskundig Weekblad* (1982–83), p.1812.

be possible.[38] At least in domestic law situations, most continental systems seem to be inclined towards a broad concept of the *non bis in idem* principle, precluding new prosecutions for facts that have already been tried.[39]

The distinction between offences and facts seems less clear in common law. Although the plea of *autrefois acquit* or *autrefois convict* in principle relates only to identity of offences and not of facts, the plea will also succeed when the crime for which the defendant has to stand trial is in effect the same, or is substantially the same as the crime for which he has previously been convicted or acquitted.[40] This involves a delicate test, examining whether the proof of an offence for which the defendant has already stood trial is used again.[41] It is, therefore, immaterial that the facts under examination are the same as those in earlier proceedings.

On an international level, the situation is also somewhat confused. A literal interpretation of the English text of Article 54 of the Schengen Convention would seem to lead to the conclusion that the drafters opted for the narrow meaning of the *non bis in idem* rule, as the text refers to offences, not facts. However, the Dutch, French and German versions of Article 54, which are the authentic versions, use the word "facts",[42] not "offences".

The question how Article 54 of the Schengen Convention is to be construed is not easily answered. Given the absence of *travaux préparatoires*, it is not even certain whether the drafters of the Schengen Convention had this distinction between the broad or the narrow meaning of the *non bis in idem* rule in mind when they put together Article 54. Since the Schengen Convention is not a "first pillar instrument" of the European Union, it is not possible for national courts to seek preliminary rulings from the European Court of Justice (Article 177 of the EC Treaty).[43] As a consequence of the Treaty of Amsterdam, this may

38. Belgian Supreme Court, 29 Nov. 1989 (1989) I Pasicrisie 386; Court of Appeal of Brussels, 23 Dec. 1991 (1992) Journal des Tribunaux 314; Belgian Supreme Court, 22 Feb. 1994 (1994) Pasicrisie 195. See S. Brammertz, "Traffic de stupéfiants et valeur internationale des jugements répressifs européens à la lumière de Schengen" *Rev. de dr. pénal et de criminologie* (1996) 1063–1081.

39. See Oehler, *op. cit. supra* n.6, at p.584.

40. See *Connelly* v. *DPP* [1964] A.C. 1254, cited by Murphy, *op. cit. supra* n.19, at pp.1209–1210.

41. This procedural test seems also very important in the US where the double jeopardy clause of the Fifth Amendment refers to the "same offence".

42. Dutch version: "kan terzake niet meer worden vervolgd wegens dezelfde *feiten*". French version: "ne peut, pour les mêmes *faits*, être poursuivie". German version "darf ... wegen derselben *Tat* nicht verfolgt werden" (emphasis added).

43. Unlike with some "third pillar instruments" such as the 1995 EU Anti-fraud Convention (Council Act of 26 July 1995 Drawing up the Convention on the Protection of the European Communities' Financial Interests (1995) O.J. C316/48, reprinted in Van den Wyngaert and Stessens, *op. cit. supra* n.1, at p.145) no dispute-settlement mechanisms exist.

change if the Schengen Convention is integrated into the body of EU legislation.[44]

This lacuna creates the risk of diverging interpretations of the *non bis in idem* provision in different member states. In some countries (for example Belgium) an official interpretation of Article 54 exists. In the opinion of the Belgian Minister of Justice, expressed in his circular letter implementing the Schengen Convention, Article 54 has a broad meaning and requires only identity of facts, not identity of charges.[45] This interpretation has been followed by the courts[46] and is also accepted in legal doctrine.[47] However, in view of the differing language versions of Article 54 and of the diverging legal traditions in this respect, it is perfectly possible that courts in other states may adopt a more restrictive position.

Without expressing an opinion as to the exact meaning of Article 54 of the Schengen Convention, any general international *non bis in idem* provision should, in principle, bar only new prosecutions for the same offence, not for the same facts.[48] Even on a purely domestic level, an overly broad definition of the "same fact" may result in unjust effects, in that prosecutions have to be declared inadmissible because a person has been prosecuted on the same facts but for a lesser charge.[49]

This view may be supported by referring to the texts of Article 14, paragraph 7 of the International Covenant on Civil and Political Rights and of Article 4 of the Seventh Protocol to the European Convention on Human Rights, which both use the term "offence" (*infraction*) rather than "fact". In addition, this proposal can be further substantiated by referring to the common law practice in this respect, or to Article 14 of the Harvard Draft Convention on Jurisdiction,[50] which uses the phrase "a crime requiring proof of substantially the same acts or omissions".

44. See R. Barents, "Het Verdrag van Amsterdam en het Europees gemeenschapsrecht. De materieelrechtelijke en institutionele veranderingen", *Sociaal-economische Wetgeving* (1997) pp.362–363 and J. P. H. Donner, "De derde pijler en het Amsterdamse doolhof", *idem*, p.377.

45. In the circular letter, the minister draws the attention to the fact that Art. 54 has considerably widened the application of the *non bis in idem* rule as compared to the situation under Art.13 of the Preliminary Title to the Criminal Procedure Code. According to the minister, the fundamental difference is that Art. 54 is also applicable to foreign judgments relating to facts occurring in Belgium. See Circulaire interministérielle sur l'incidence de la convention de Schengen en matière de contrôle frontalier et de coopération policière et judiciaire, 10 Dec. 1998. *Belgisch Staatsblad—Moniteur belge*, 29 Jan. 1999.

46. Tribunal of First Instance of Eupen, 3 Apr. 1996 (1996) Rev. de dr. pénal et de criminologie 1159.

47. Brammertz, *op. cit. supra* n.38, at pp.1075–1080

48. See, however, the Resolutions of the Fourth Section of the Ninth Congress of Penal Law, held at The Hague (1964), which seem to suggest the contrary view (*Zeitschrift für Strafrechtswissenschaften* (1965), p.686).

49. See Poelman and Krabbe, *op. cit. supra* n.3, at pp.140–144.

50. (1935) A.J.I.L. Supp. 613–615.

This choice seems all the more justified when one takes stock of a number of vague and potentially very wide offences, which seem increasingly popular with legislators, especially in the fight against organised crime. It would seem unjust and disproportionate to attach an international *non bis in idem* effect to all the facts which can be "caught" by such offences. Because of the broad and vague character of some of these offences (for example membership of an organised crime group, instigating offences) this might result in a *de facto* immunity for many offences.

It would seem overzealous, precisely in view of the diverging legal traditions, to bar any new prosecution for facts that were already tried in an earlier foreign procedure. One has to bear in mind that, even in those domestic criminal justice systems, such as Belgium, where the *non bis in idem* effect attaches to facts, prosecutorial authorities are not barred from prosecuting a fact under the heading of different offences at the same time. The *non bis in idem* rule precludes only consecutive prosecutions of the same fact. To impose the same rule in an international context is out of place in the sense that prosecutorial judicial authorities cannot prosecute a fact under the heading of an offence under foreign legislation that might apply to the facts at issue. Courts can apply only their own criminal law. It would seem inappropriate to preclude prosecutions for offences that simply could not have been prosecuted by the foreign court that rendered the first judgment.[51] Even in a purely domestic context, the *non bis in idem* principle sometimes does not apply to offences that could not have been charged at the time of the first trial, for example because of the limited powers of the prosecution.[52]

In this sense the traditional objection against an international *non bis in idem* rule, namely that the prerequisite unification of the legal system—the foundation upon which the respect for *res judicata* rests in a domestic context—is absent,[53] holds true. A similar comment may be made in respect of the relation between international or, as the case may be, supranational procedures and domestic procedures, or between federal and national procedures. The coexistence of two distinct levels on which criminal prosecutions may be brought obviously creates a risk of double jeopardy. In both types of relation, watertight *non bis in idem* protection is often lacking. Thus, the US Supreme Court, in strongly criticised case law, has held that the double jeopardy clause in the US Constitution applies only to the federal level and does not bar a subsequent State trial for an offence that has already been examined at a federal trial (dual

51. See also Oehler, *op. cit. supra* n.6, at pp.584–585.

52. See e.g. as far as Belgium is concerned Declercq, *op. cit. supra* n.6, at p.95.

53. At the Bath Session (1950) of the Institut de droit international, this view was defended by Fitzmaurice, *loc. cit. supra* n.11.

sovereignty doctrine).[54] The statutes of the international tribunals for Yugoslavia and Rwanda contain a *non bis in idem* provision, which does not, however, exclude double prosecution in all circumstances. In the limited context of this article, this delicate matter, which is also closely linked to the nature of the offences that can be brought before an international criminal tribunal,[55] will not be subjected to scrutiny. The question is also dealt with in the Rome Statute of the International Criminal Court.[56]

The somewhat harsh consequences of restricting the scope of an international *non bis in idem* rule to judgments relating to the same *offence* can be softened by deducting the sentence, imposed abroad for the same facts, from the sentence to be imposed for the same facts under a different charge. This practice, for which the Germans coined the term *Anrechnungsprinzip* (the principle of deduction), is already embedded in the legal practice of many countries. In the interests of justice and equity,[57] this principle traditionally functions as a safety net with regard to foreign sentences pertaining to the same offence, the *res judicata* effect of which is not recognised. Thus Article 13 of the Preliminary Title to the Belgian Criminal Procedure Code obliges judges to deduct from the sentence they want to impose any deprivation of liberty served abroad in relation with the same offence. Also, in Austria[58] and Germany,[59] the sharp edges of the limited *non bis in idem* rule in respect of foreign criminal judgments can partly be removed this way. The *Anrechnungsprinzip* is also laid down in Article 56 of the Schengen Convention and other European conventions, such as the 1997 EU Anti-Corruption Convention (Article 10(3)).[60] Other EU conventions, for example the 1995 Anti-Fraud Convention, lack such a provision.[61]

The operation of the *Anrechnungsprinzip* should be broadened to include not only sentences with regard to the same offences but, more

54. *US* v. *Lanza* (1922) 260 U.S. 227; *US* v. *Bartkus* (1959) 359 U.S. 121. For a critical analysis of the US case law in this respect: M. A. Dawson, "Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine" (1992) Yale L.J. 281–303.

55. See in this respect also the discussion held at the Bath Session, *supra* n.11, at pp. 301 *et seq.*

56. See Art.20 of the Rome Statute of the International Criminal Court.

57. See e.g. de Vabres, in *op. cit. supra* n.11, at p.261.

58. Para.66 of the Austrian Penal Code. See Epp, *op. cit. supra* n.15, at p.37.

59. Para.51 III of the German Criminal Code. Oehler, *op. cit. supra* n.6, at p.575.

60. Council Act of 26 May 1997 drawing up, on the basis of Art.K.3(2)(c) of the TEU, the convention on the fight against corruption involving officials of the European Communities or officials of EU member States (1997) O.J. C195/1.

61. Council Act of 26 July 1995 drawing up, on the basis of Art.K.3(2) of the TEU, the Convention on the Protection of the European Communities' Financial Interests (1995) O.J. C316/48. In the case of this Convention the *Anrechnungsprinzip* may still be applicable, as Art.7(4) contains an explicit provision for other multilateral agreements concluded between Member States. The Schengen Convention is precisely such a convention, but of course it is applicable only between those member States that have ratified it.

generally, sentences with regard to the same facts.[62] This is, as has also been recognised by the preparatory colloquium on organised crime of the International Association of Penal Law,[63] a minimum requirement, if a full international *non bis in idem* protection cannot be realised. This should, however, be done only in so far as sentences with regard to the same facts are also taken into consideration in meting out the punishment in a purely domestic situation.[64] It is true that the operation of the *non bis in idem* principle would thus depend on the state of domestic legislation, but there is no international obligation in this respect as the scope of the relevant human rights provisions is limited to procedures for the same offence.

2. *Continuing transnational offences*

Some offences take place over a longer period of time, either because a criminal situation continues (for example kidnapping) or because several individual facts form part of one scheme, as a consequence of which they are considered to constitute one offence. This type of situation may create various delicate problems from a domestic criminal law point of view, but one particularly knotty question arises when this type of criminal behaviour takes place on the territory of more than one State. If authorities of one State decide to take judicial action against the alleged perpetrators of this continuing crime, is the outcome of this procedure (acquittal or conviction) then binding on the judicial authorities of the other State(s)?

Of course, a foreign acquittal or conviction can only possibly have a *non bis in idem* effect if it relates to the same offence as the one envisaged in the "second" proceedings. Assuming, therefore, that the first judgment relates both to the part of the criminal behaviour that took place on the territory of the State where it was rendered, and to the part of the behaviour that occurred on the territory of another State, the question has to be asked whether a State can be bound by foreign, judicial action undertaken with regard to facts that took place on its own territory.

One might argue that such a proposition would run counter to the generally recognised primacy of the territoriality principle. In 1950 this view was defended by H. Donnedieu de Vabres in his function of *rapporteur général* at the Bath Session of the Institut de droit inter-

62. Given the ambiguity surrounding the *non bis in idem* provisions in the Schengen Convention, it is unclear whether Art.56 lays down the *Anrechnungsprinzip* merely in respect of the same offences, as the English version seems to suggest or also in respect of the same facts, as the French version seems to suggest.

63. See also Res.B.4, and Van den Wyngaert, both *supra* n.10.

64. See also Res.3, adopted by Fourth Section of the Colloquium of Young Penalists on "Organised Crime and International Cooperation", held at Syracuse, 21–27 Sep. 1997.

national.[65] One of the exceptions that is built into almost every international *non bis in idem* protection system, including the Schengen Convention (Article 54(1)(a)), indeed relates to acts that took place on the territory of the State which wishes to start proceedings against the persons who have already stood trial for these acts.[66] This view is, however, contradicted by the fact that in the Schengen Convention this safety valve does not apply when the facts also took place on the territory of the State where the first judgment was given. At least as far as this Convention is concerned, the present state of international law does not seem to support the proposition that States are not allowed to sanction those parts of continuing crimes that took place on the territory of another State and that other States are hence not obliged to recognise the *res judicata* effect of extraterritorial judgments in this respect.

Problems of this type may arise when drugs or other contraband are exported from one country to another. The same, continuing offence will be considered illegal import in one country and illegal export in the other. Specifically in respect of drugs, the problems are made even more complex by Article 36, paragraph 2(a) of the Single Drug Convention of 1961, which states that each of the offences envisaged in the Convention shall be considered distinct offences if they are committed in more than one country. This provision was applied, for example, by the Belgian Supreme Court in a case concerning the illegal import of drugs from France into Belgium,[67] but was, surprisingly, not invoked by the Dutch Supreme Court in a similar case, concerning the export of drugs from the Netherlands into Belgium.[68]

The application of this provision entails that a judgment in respect of the part of the import or export scheme that took place on foreign territory does not have any *res judicata* effect on the prosecution of the conduct in another State, as it simply does not concern the same offence, although the provision seems to be construed in a different way by the French Supreme Court.[69] One might argue that the entry into force of the Schengen Convention[70] has not brought about any change in this situation, which is governed by Article 36, paragraph 2(a) of the Single

65. *Supra* n.11, at p.260.

66. The same exception can be found in the European Convention on the International Validity of Criminal Judgments (Art.53, para.3) and the European Convention on the Transfer of Proceedings in Criminal Matters (Art.35, para.3).

67. Belgian Supreme Court (1989), *supra* n.38. See Brammertz, *op. cit. supra* n.38, at pp.1066–1072.

68. See, Dutch Supreme Court *supra* n.35.

69. French Supreme Court (Cour de cassation), 13 Dec. 1983, Bull., No. 340 cited by Pralus, *op. cit. supra* n.16, at p.565.

70. As far as Belgium is concerned this is explicitly confirmed by the Belgian Circulaire, *supra*. n.45. See, however, the criticism voiced by Brammertz, *op. cit. supra* n.38, pp.1076–1077.

Drug Convention of 1961. At least in one case, however, a Belgian court, after having considered a transnational drug offence (participation in drug trafficking between Belgium and Germany) as two separate offences, nevertheless recognised the *res judicata* effect of a German judgment because the German court had explicitly referred to acts carried out on Belgian territory.[71] If it is indeed established that an offence has already been judged in another State party to the Schengen Convention, then the *non bis in idem* rule under Article 54 of the Schengen Convention applies.

In the past Belgian courts have, however, also refused to recognise the *res judicata* effect of other import/export offences (for example in respect of gold or butter smuggling[72]), where Article 36, paragraph 2(a) of the Single Drug Convention did not apply. In these cases the refusal seems more linked to the scope of the *non bis in idem* principle, which is restricted by Article 13 of the Belgian Code of Criminal Procedure to procedures regarding the same "offences". As these cases obviously pertained to the same facts, the lack of *non bis in idem* protection has been severely criticised.[73] Whether the entry into force of the Schengen Convention will bring about a change of the case law in this respect, will depend on the construction of Article 54 of the Convention ("offences" or "facts").

When the Belgian Supreme Court invoked Article 36, paragraph 2(a) of the Single Drug Convention of 1961 in order to explain the refusal of the lower courts to apply the *non bis in idem* principle, it made, however, a proviso in its judgment, stating that its holding might have been different that had the case concerned a so-called *infraction collective*, meaning that different criminal acts are considered one offence because they all constitute the execution of one criminal intent. In that case the *res judicata* effect of the foreign judgment would have needed to be respected as it would have concerned the same offence.[74] Nevertheless, the point has correctly been made that the lower courts have consistently chosen not to consider import/export schemes for what they in fact are: the continued execution of one criminal intent.[75]

71. Tribunal of First Instance of Eupen, *supra* n.46, commented on by Brammertz, *idem*, pp.1078–1079.

72. See Belgian Supreme Court, 28 Feb. 1955 (1955) I Pasicrisie 711 and 20 Feb. 1961 (1961) Pasicrisie 664.

73. See e.g. Flore *op. cit. supra* n.12, at p.150 F. Rigaux, "L'exercice de la justice répressive" *Ann. de dr. de Louvain* (1985) 37–38. See also C. Van den Wijngaert, "Structures et méthodes de la coopération internationale en matière pénale" *Rev. de dr. pénal et de criminologie* (1984) 524.

74. See on this case law Brammertz, *op. cit. supra* n.38, at pp.1069–1071.

75. *Idem*, p.1078.

In this context it is also useful to refer to the ruling of the European Court of Human Rights in the case of *Gradinger* v. *Austria*.[76] In that case, it was held, albeit in a domestic context, that *non bis in idem* provision of Article 4 of the Seventh Protocol to the European Convention on Human Rights prohibited an administrative fine after the person concerned had been acquitted in a criminal proceeding for what were partly the same facts. It follows from this judgment that the *non bis in idem* principle should be applied in such a way that new proceedings are excluded in respect of facts which, even only partly, have already been tried. In an international context this means that offences, which have already been tried, even only partly, cannot be tried anew by a court in another country. This does not follow from Article 4 of the Seventh Protocol as such, the scope of which is limited to procedures within the same State, but any treaty provision on international *non bis in idem* should be construed in this way.

E. Questions as to which Foreign "Decisions" can be Taken into Account for Attaching a Non Bis in Idem *Effect*

A properly functioning international *non bis in idem* system not only presumes a common concept of what is an "*idem*", but also requires an agreement on which foreign "final decisions" can be taken into account for the purposes of attaching a *non bis in idem* effect. A foreign judicial decision will have to meet various conditions before the *non bis in idem* effect attaches or, conversely, several exceptions are available to refuse such *non bis in idem* effect.

The type of judgments that can be taken into account, the enforcement of a possible sanction, the possibility that out-of-court settlements may have a *res judicata* effect, are questions that may arise in this respect. Other thorny issues concern the jurisdictional basis of the offence and the type of offence in question.

1. Type of foreign judgments that qualify for a non bis in idem *effect*

Not all foreign judgments are liable to have a *non bis in idem* effect. Article 54 of the Schengen Convention refers to a "person who has been finally judged by a Contracting Party". The European Convention on the International Validity of Criminal Judgments refers to a European criminal judgment, meaning a "final decision delivered by a criminal court of a Contracting State as a result of criminal proceedings" (Articles 53 j° 1) and the European Convention on the Transfer of Proceedings in

76. E.C.H.R., *Gradinger* v. *Austria*, judgment of 23 Oct. 1995, E.C.H.R., Ser. A, No.328.

Criminal Matters concerns "a final enforceable criminal judgment" (Article 35). This makes clear that the judgments have to be rendered in the course of a criminal proceeding. Unlike the case—at least in domestic context—under Article 4 of the Seventh Protocol to the European Convention on Human Rights,[77] sanctions imposed by administrations or even by administrative courts cannot bar a prosecution with regard to the same offence.

In addition, these various wordings are similar in that they restrict the operation of the *non bis in idem* principle to final judgments (excluding provisional judgments). The provisions do not provide a definite answer to the question whether the *non bis in idem* effect attaches only to decisions on the merits of the case, or also to those that have acquitted the suspect for procedural reasons. In the Netherlands, one of the few countries—if not the only one—whose domestic law generally recognises the *res judicata* effect of foreign criminal judgments, the application of the *non bis in idem* provision is limited to cases where judgment has been given on the substance of the charges.[78] It is noteworthy that the Harvard Draft Convention on Jurisdiction refused to regard dismissal for want of jurisdiction or a procedural technicality as an acquittal barring subsequent prosecution.[79] Notwithstanding the lack of clarity of Article 54 of the Schengen Convention in this respect, the provision should also be construed in this way. This, of course, presumes a thorough knowledge of foreign legal systems in order to differentiate between decisions on the merits of the case and procedural, intermediary decisions.[80]

2. *Enforcement of sentence*

The conventions also contain requirements regarding the enforcement of these judgments. In the case of an acquittal this obviously poses no problem, but with regard to sentences it is required that the sentence has been completely enforced or can no longer be enforced under the sentencing laws of the State where the judgment was rendered (Article 54 of the Schengen Convention). The treaties of the Council of Europe also mention pardoned or amnestied sanctions, which seem to be covered by Article 54 of the Schengen Convention as well. Furthermore, *non bis in idem* also attaches when the sentence is currently being enforced, which may sometimes give rise to interpretation problems. A case in point is when a person has been sentenced conditionally and his probationary period is still running. If, on the other hand, a person has been both

77. See the discussion above of the *Gradinger* judgment, *ibid.*
78. See Baauw, *op. cit. supra* n.18, at p.76.
79. *Supra* n.50.
80. See in this respect the well-founded criticism voiced by H.-H. Kühne, "Ne bis in idem in den Schengener Vertragsstaaten" *J.Z.* (1998) 876–880.

sentenced conditionally and been fined and he has not paid his fine, his sentence has not been enforced.[81]

This requirement, which is usually not posed in a domestic context, is a logical one in an international context. If a person succeeds in escaping from justice in the State where he was first convicted, it would be grossly unjust to allow him to rely on the first judgment when faced with a second prosecution for the same offence. This is all the more so as the second State will seldomly be in a position to enforce the first judgment. Donnedieu de Vabres correctly pointed out that the *res judicata* effect of a foreign judgment should be respected only when its legal consequences have been enforced.[82]

3. *Do foreign out-of-court settlements have a* non bis in idem *effect?*

Under the conventions[83] mentioned above the *non bis in idem* effect is confined to judgments and does not extend to out-of-court-settlements, although in a domestic context the latter often bar new prosecutions with regard to the offence at issue.

This is, for example, the case in Belgian and Dutch law, which both use the *transactie*-system, under which the public prosecutor can propose a settlement to the defendant in the form of the payment of a sum of money, in return for which the public prosecution drops the case. Notwithstanding the term "transaction", there is no negotiated agreement between the public prosecutor and the defendant, but, rather, a unilateral proposal emanating from the public prosecutor. If the defendant accepts the proposal, and the agreed amount of money is paid, the public prosecutor loses his right to prosecute.[84] Although a "transaction" does not have the same value as a judgment in relation to the *non bis in idem* rule and some authors refuse to place it on the same footing as a judgment,[85] it does have final character: no prosecution can be started after the money has been paid. This has led one authoritative commentator to write that a *transactie* has the same effect as a judgment as far as *non bis in idem* is concerned.[86]

Whereas the Belgian Code of Criminal Procedure features special rules determining the effect of foreign criminal judgments, no such rules exist

81. This was decided by a German court in Saarbrücken, cited by Schomburg, *op. cit. supra* n.17, at p.557.

82. *Supra* n.11, at p.261

83. Art.54 of the Schengen Convention; Art.53 of the European Convention on the International Validity of Criminal Judgments and Art.35 the European Convention on the Transfer of Proceedings in Criminal Matters.

84. In this respect, there is a fundamental difference from a public prosecutor's decision not to prosecute: a decision not to prosecute is never final, the defendant can always be prosecuted at a later stage if the prosecutor wishes to do so.

85. See M. Franchimont, A. Jacobs and A. Masset, *Manuel de procédure pénale*, p.933; C. Van den Wyngaert, *Strafrecht en het strafprocesrecht in hoofdlijnen* (1994), p.511.

86. R. Verstraeten, *Handboek Strafprocesrecht* (1993), p.83.

for "transactions" entered into abroad. Consequently, foreign "transactions" have no effect in Belgium and do not "extinguish the public action".

Dutch law is very different in this respect. The *non bis in idem* provision in the Dutch Penal Code (Article 68) was supplemented in 1985 with a paragraph saying that prosecution in the Netherlands is barred when an out-of-court settlement has been reached in a foreign country and the accused has fully complied with the conditions set out in the settlement.[87] Also in this respect, Dutch *non bis in idem* rules seem to be the most liberal in the European Union.

(a) The Schengen Convention: does a "transaction" qualify as a judgment in the sense of Article 54? The text of Article 54 of the Schengen Convention does not refer to out-of-court settlements, only to judgments. A crucial question is whether the first decision must necessarily be a judgment, or whether an out-of-court settlement, for example a *transactie*, also qualifies. Another way to phrase the same question is to ask whether the first decision must necessarily emanate from a court of law, or whether a decision emanating from a prosecutorial authority or an administrative authority also qualifies for the application of the *non bis in idem* rule.

At first sight, Article 54 is very clear in this respect. The English,[88] Dutch[89] and French[90] versions of Article 54 seem to point in the direction that only judgments emanating from a court of law would qualify. However, the German text[91] seems to leave room for a wider interpretation that would also include out-of-court settlements. This may explain why the Austrian government, when ratifying the Schengen Convention, has stated that it understood the term *Rechtskräftige Aburteilung* in the sense of a final judgment of a court of law.

The relevance of this question has come to the forefront in a recent case before the German Federal Court, concerning a "transaction" concluded by the Belgian Customs and Excise with a German. The German Federal Court compared the different equally authentic versions of Article 54 and reached the conclusion that it could not decide the legal value of a *transactie*.[92] It therefore rendered a very unusual decision: the Federal Court postponed its own judgment and requested the German government to ask the Belgian government for an interpretation.[93] The absence of a supranational interpretation or dispute-settlement mechanism

87. Baauw, *op. cit. supra* n.18, at p.80.
88. "person who has been finally judged".
89. "persoon die bij onherroepelijk vonnis is berecht".
90. "personne définitivement jugée".
91. "Rechtskräftige Aburteilung".
92. See Schomburg, *op. cit. supra* n. 17, at pp.558–559.
93. German Federal Court, 13 May 1997 (1998) N.St.Z 149 with annotations by C. Van Den Wyngaert and O. Lagodny.

makes it indeed difficult, if not impossible, for courts to assess the legal value of mechanisms that have no equivalent in their own judicial system, as the German Federal Court explicitly acknowledges. After the Belgian Ministry of Justice had replied to the request by the German government, the German Federal Court handed down its final decision on 2 February 1999. In view of the fact that the Belgian Ministry of Justice had indicated that a Belgian Customs "transaction" extinguished the "criminal action" only in respect of the persons literally cited in the "agreement" with the Customs authorities, and this was not the case for the two accused in the case pending before the German Federal Court, the Court ruled that the accused could not avail themselves of any protection afforded by Article 54 of the Schengen Convention. The Court thus eschewed the principal question whether an out-of-court settlement could have international *non bis in idem* effect under Article 54 of the Schengen Convention, although it indicated in the judgment that it would be very reluctant so to hold.

This question may become more acute in the future as a consequence of a trend in criminal justice, which is at least in part promoted by the European Union itself. In the larger framework of the fight against organised crime, many States are now devising legal mechanisms that allow them to conclude "deals" with suspects, by which these suspects are promised (partial) immunity if they collaborate with law enforcement authorities in bringing to justice other members of organised crime groups (to which the suspect belongs). This type of co-operation with so-called *pentiti* originated in Italy, in the fight against organised crime, but is now being adopted in other European countries as well and is in fact being promoted by the European Union.[94] It is of course also known in the United States, whose criminal justice system has long accepted the practice of plea bargaining. A particularly complex side-effect of this type of deal with suspects arises when they face prosecution in more than one jurisdiction. The inevitable question that arises in this respect is what the international value of these deals is; in other words, whether they have an international *non bis in idem* effect.

Unlike the Schengen Convention, other instruments on international co-operation in criminal matters distinguish between judgments emanating from courts of law and decisions not to prosecute. Both the 1957 European Convention on Extradition (Article 9) and the 1990 United Nations Model Convention on Extradition (Articles 3(d) and 4(b)) make refusal to extradite mandatory where there is a first judgment (conviction or acquittal), and optional in the case of a decision not to prosecute. Although both instruments make provision for judgments and decisions

94. See Council Resolution of 20 Dec. 1996 on individuals who co-operate with judicial process in the fight against international organised crime (1997) O.J. C10/1.

of prosecutorial authorities, they are not placed on the same footing. The term "decisions not to prosecute" in the first place refers to decisions taken by the courts (for example a so-called *ordonnance de non-lieu*),[95] but seems wide enough to cover out-of-court settlements concluded by the prosecution as well.

By contrast, the European Convention on the International Validity of Criminal Judgments (1970) and the European Convention on the Transfer of Proceedings in Criminal Matters (1972) seem to leave no room for out-of-court settlements.

Even though the German version of Article 54 of the Schengen Convention seems to leave some doubts about whether out-of-court settlements qualify for the application of the *non bis in idem* rule, the position under other international conventions clearly is that sentences and out-of-court settlements are not placed on an equal footing. The conclusion seems to be that a *transactie* is not a sentence and that it is therefore not covered by Article 54 of the Schengen Convention.

Furthermore, it is one thing to allow (not to oblige) States to refuse to extradite a person because the decision was taken by the requested State not to prosecute him, but it is quite a different matter to prohibit a State from prosecuting an offence because the alleged offender has already accepted an out-of-court settlement in another State with respect to the offence. A limited, *inter partes* international *non bis in idem* effect of out-of-court settlements can be envisaged only if these settlements have been negotiated on an international level, that is, involving the authorities of various States and taking into account the various State interests.[96]

4. *Jurisdictional basis of the decision*

Both on a domestic and on an international treaty level, the *non bis in idem* rule is restricted with regard to the jurisdictional bases that were used when the first judgment was rendered.[97] It has been shown that States are often unwilling to accept any *res judicata* effect with regard to foreign decisions that relate to facts that occurred on their territory. The *non bis in idem* provisions in the Schengen Convention and in the 1970 and 1972 Conventions of the Council of Europe allow for States to make reservations in this respect. Article 54 of the Schengen Convention goes further in that it does not allow such an exception if the facts in part also took place on the territory of the State where the first judgment was rendered. Within the limited group of countries constituting the "Schengen Club", this exception should surely have been abolished all together.

95. See Explanatory Report to the European Convention on Extradition (Strasbourg: Council of Europe, 1969), pp.19–20.

96. See Res.B.3 and D.4 and C. Van den Wyngaert, all *supra* n.10.

97. See in general Oehler, *op. cit. supra* n.6, at p.579.

States cling to their power to sanction any breach of criminal law on their territory, this power often being regarded as one the most essential aspects of a State's sovereignty.[98] In addition, the argument is sometimes advanced that the State on whose territory an offence has been committed is in a better position to assess the offence, given the availability of evidence, which might not have been available to the foreign court that rendered the first judgment. Although the argument holds true, it can be countered by allowing an exception to an international *non bis in idem* provision, such as the one contained in Article 4, paragraph 3 of the Seventh Protocol to the European Convention on Human Rights.[99] This provision makes explicit provision for the reopening of the case 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.

5. *Type of offences*

Non bis in idem provisions often make an exception for a limited number of offences, for which States are in any event unwilling to give up their sanctioning power (i.e. their sovereignty). These offences concern the public interests of the State, such as State security, and often coincide with those offences for which they have jurisdiction on the basis of the protection principle.[100] Donnedieu de Vabres linked these exceptions to the right of every State to combat political offences.[101]

The *non bis in idem* treaty mechanisms[102] and domestic provisions[103] alike also feature exceptions to this end. Even though these exceptions afford States a large margin to refuse to recognise the *non bis in idem* effect of foreign judgments, they seem justified, certainly in respect of those conventions (for example the Schengen Convention) that do not provide an *ordre public* clause allowing a State to refuse to recognise the *non bis in idem* effect of foreign criminal judgments when the interests of the State concerned are at stake.

F. Conclusions

An international *non bis in idem* principle constitutes an essential guarantee for an individual facing criminal charges in a world which is

98. See e.g. Pralus, *op. cit. supra* n.16, at pp.559–560.
99. See *supra* n.4.
100. See in this respect Cameron, *op. cit. supra* n.23, at pp.84–89.
101. De Vabres, *supra* n.11, at pp.259–261.
102. See Art.55(1)(b) of the Schengen Convention; Art.53(2) of the European Convention on the International Validity of Criminal Judgments and Art.35(2) of the European Convention on the Transfer of Proceedings in Criminal Matters.
103. See e.g. on French law Pralus, *op. cit. supra* n.16, at pp.561–562.

increasingly internationalised. The Schengen Convention is the first truly successful multilateral attempt to establish such a principle.

We have shown that the international *non bis in idem* principle is still surrounded by a number of unanswered questions and have endeavoured to resolve some of the ambiguities. Some of the proposals that have been put forward may seem rather restrictive, but are inspired by the acknowledgment of the existing diversity between the various legal systems and the still limited mutual confidence between State.[104] Confidence in the functioning of another State's criminal justice system is a prerequisite, not just for any form of international co-operation in criminal matters but also for attaching legal consequences to foreign procedures. Given the limited nature of this confidence, any international *non bis in idem* rule will have inherent limitations. This is especially true as far as the *res judicata* effect of decisions rendered in States outside the European Union is concerned, respect for which still depends on domestic provisions, but also for States party to the Schengen Convention. At least in some respects, the time seems ripe to move ahead and to adopt a broader concept of *non bis in idem*. The Schengen Convention put in place the skeleton of a European *non bis in idem* protection. It is now time to put some more flesh to its bones.[105]

104. Cf. *idem*, pp.560, 574.

105. At the time of the writing of this article, the authors had not yet had the benefit of reading the judgment of the European Court of Human Rights of 30 July 1998 in *Oliveira* v. *Switzerland*. They have accordingly not been able to incorporate the consequences of this judgment into their article.