RESOLVING CONFLICTS OF JURISDICTION IN CRIMINAL PROCEEDINGS: INTERPRETING NE BIS IN IDEM IN CONJUNCTION WITH THE PRINCIPLE OF COMPLEMENTARITY

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ABSTRACT

The manner of establishing criminal jurisdiction by domestic courts of competent criminal jurisdiction presents the most important aspect of the relation between states and international tribunals. The analyses of the jurisprudence of international courts and tribunals pertaining to the principle ne bis in idem has resulted in the conclusion that this principle can be fully understood and applied in conjunction with the principle of complementarity.

Keywords: ne bis in idem; complementarity; double jeopardy; positive/negative conflicts of criminal jurisdiction; transnational crimes

1. INTRODUCTION

Criminal law is one of the most rapidly changing areas of EU law and integration between Member States, and has been elevated to a central place in the European Constitution by the Treaty of Lisbon within the dynamic area of freedom, security and justice. In consequence of the extended scope and extraterritorial reach of

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national legal systems and technological advancements, national criminal justice systems are becoming increasingly confronted with the dilemma where several countries might have jurisdiction to investigate and prosecute the same or substantially the same crime. In circumstances where several states might establish prosecutorial jurisdiction for the same crime, or facts and circumstances pertaining to the planning and commission of the crime, this state of affairs possibly will bring about positive conflicts of jurisdiction when two or more states assert criminal jurisdiction. Conversely negative conflicts of jurisdiction might arise when none of the states concerned is willing to investigate and prosecute the perpetrators and vindicate the rights of victims.

The article examines the body of case law on the ne bis in idem principle concerning the substance, rationale, scope, elements of, as well as the exceptions to, the procedural defence. It posits that the principles of ne bis in idem and complementarity requires the EU legislator to lay down definitive rules to resolve conflicts of jurisdictions in criminal matters and necessitates proper guidelines from international courts, tribunals and relevant EU level bodies on dispute mechanism procedures while respecting due process rights of defendants. Given the promotion of victims rights, the aims of conviction and punishment of offenders and same crime dilemma, the

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2 The dilemma pertains to situations where the planning and commission of crimes transgress the territory of several nation-states, or the effects of a crime are impacted in the territory of several states, or where serious crimes are being committed in a state but the nationality or place of residence of the perpetrators or victims points to another EU Member State.

3 The Hague Programme (The Hague Programme: Strengthening Freedom, Security and Justice in the European Union) 2005/C53/01, OJ C 53/1, requires Member States to enact legislation managing conflicts of jurisdiction, with the aim of increasing the efficiency of prosecutions while guaranteeing the proper administration of justice, in order to complete the comprehensive programme of measures designed to implement the principle of mutual recognition of judicial decisions in criminal matters. Approximation of the criminal laws of Member States will have a significant impact on Member States’ legal cultures and traditions and on national sovereignty. The Hague Programme views such approximation as being necessary only if it facilitates mutual recognition. However, the more progress that is made on developing the mutual recognition programme, the greater the need will be for a minimum standard across the EU of procedures in the legal processes for which mutual recognition will be claimed. Approximation of criminal laws is necessary to not only facilitate mutual trust and justify mutual recognition but also to protect the rights of the individuals affected. See Weyembergh, ‘Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme’ (2005) 42 CML Rev 1567.


centrality of the dispute resolution mechanism and the authority of international courts, tribunals and EU level bodies the decisive role in dispute resolution mechanism over national jurisdictions needs clarification.

2. TRANSNATIONAL CRIMES

The membership enlargement of the Council of Europe and EU may inadvertently facilitate the potential for transnational crimes, and a corresponding number of prosecutorial jurisdictions will inevitably give rise to procedural dilemmas and conflicts of jurisdiction in criminal matters.\(^6\) While freedom of movement is one of the basic aims of EU integration, this in addition to the technological resources available to criminals operating on a transnational basis inadvertently facilitates the progress of transnational crimes.\(^7\) Police and judicial cooperation in the fight against organised cross-border crime must accordingly adapt to this phenomenon. Law enforcement agencies and prosecution authorities must deal with the challenge of devising alternative procedures in the investigation and prosecution of offences that extend beyond national borders. With the globalisation of crime, national law enforcement agencies are increasingly obliged to cooperate in order to bring criminals to justice. Effectively combating transnational crime requires national and international efforts including cross-border and international efforts to effectively deal with this phenomenon. Cooperative efforts to combat transnational crime are necessary at all stages of the criminal justice process including substantive criminal law, policing, courts of justice, prisons and places of detention.\(^8\)

Transnational crimes generate procedural dilemmas concerning investigation and prosecution with sovereignty of nation-states inevitably being the most restrictive factor.\(^9\) These offences transcend more than one country in their planning, execution, impact, and because of their multinational characteristics, application and scope are


\(^7\) The right to free movement is one of the basic rights of EU citizens. A common travel area operates between Ireland and the UK (including the Channel Islands and the Isle of Man), which means that there are no passport controls in operation for Irish and UK citizens travelling between the two countries.


\(^9\) Transnational crimes are transgressions that have actual or potential effect across national borders and crimes that are intra-State but offend fundamental values of the international community. Examples of transnational crimes include human trafficking, smuggling and trafficking of goods, sex slavery, terrorism offences, torture and apartheid. Transnational organized crime (TOC) refers specifically to transnational crime carried out by organised criminal organisations. Cf.
clearly distinguished from national crimes. The scale and frequency of transnational organised crimes and gross human rights violations creates unique problems as regards understanding their causes, developing prevention strategies, and devising effective negotiation procedures pertaining to jurisdictional conflicts and transfer of proceedings in criminal matters.

Domestic criminal justice systems are facing the ever-increasing globalisation of crime. Transnational organised criminal groups are trafficking increasing quantities of drugs, firearms, counterfeit products, stolen natural resources and people, as well as smuggling more migrants across borders and engaging in maritime piracy and cybercrime. The response in many nations has been to expand the extraterritorial application and enforcement of domestic criminal laws and to increase mechanisms of international cooperation in the areas of extradition, mutual legal assistance and information sharing. At the multi-lateral level, a permanent international criminal court has been established. Diplomatic resourcefulness will undoubtedly play an integral part in deciding claims by multiple jurisdictions in the prosecution of transnational crimes.

3. PRINCIPLES OF NE BIS IN IDEM AND COMPLEMENTARITY

The manner of establishing criminal jurisdiction by nation-states and the commencement of criminal proceedings is a sovereign right and an important aspect of diplomatic relations between Member States. The scope and application of the European principle ne bis in idem may need clarification in comparison to the principle commonly known in the national law of states. Analyses of the jurisprudence emanating from international courts and tribunals leads to the conclusion that ne bis in idem can only be fully understood, and applied, in conjunction with the principle of complementarity.  

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10 Although the terms ‘international crime’ and ‘cross-border crime’, often referred to as ‘transnational crime’ are used interchangeably, these terms can be differentiated: ‘transnational’ has the sense of transcending borders (almost a borderless idea) whereas ‘international’ retains the concept of clearly defined borders intact. Moreover, ‘transnational’ describes crimes that are not only international (that is, crimes that cross borders between countries), but crimes that by their nature involve border crossings as an essential part of the planning and commission of the crime. Transnational crimes also include crimes that take place in one state, but whose consequences significantly affect another state. Cf. Boister, ‘Transnational Criminal Law?’ (2003) 14 EJIL 953; Passas, ‘Cross-Border Crime and the Interface between Legal and Illegal Actors’ (2003) 16 Security Journal, 19.


3.1. **NE BIS IN IDEM**

A basic principle of European and international criminal justice and the law of national criminal jurisdictions is that a defendant should not be prosecuted or punished more than once for the same criminal offence. The *ne bis in idem* principle (European equivalent of the common law principle against double jeopardy) means that it is prohibited to initiate criminal proceedings or reopen a judgment against the same defendant a second time for the same criminal offence by the prosecution authorities or by courts of the same State. There is not only a breach of *ne bis in idem* when a defendant is tried or punished twice for nominally the same crime but also when a defendant is prosecuted twice for multiple crimes of which the essential elements overlap. The principle is respected by legal systems that are concerned to secure protection for fundamental rights.

Criminal law and procedure inevitably varies according to the law and penal procedure of the state with jurisdiction over the prosecution of crimes extending beyond national borders. Substantive and procedural rights in criminal proceedings are enhanced by the principle of *ne bis in idem*, which is a fundamental right against multiple criminal trials or the imposition of multiple punishments (*ne bis poena in idem*) for the same crime. The principle is a fundamental constitutional right in civil law jurisdictions and is respected by international human rights conventions.

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13 Mutual recognition is expressed by the *ne bis in idem* principle, which provides that a person may not be tried in another Member State for materially the same facts that have been subject to judicial decision in another Member State or which the prosecution has definitely disposed. *Cf.* Mitsilegas, ‘The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU’ (2006) 43 *CMLR* 1277.


15 *Fisher v Austria*, infra.

16 Among the procedural guarantees afforded to every accused person in constitutional democracies is the principle of *ne bis in idem*; see Bravo, ‘*Ne Bis in Idem* as a Defence Right and Procedural Safeguard in the EU’ (2011) 12 *NJCL* 393. *Cf.* Blackstock, ‘Procedural Safeguards in the European Union: A Road Well Travelled?’ (2012) 2 *EuCLR* 20.


18 Charter of Fundamental Rights and Freedoms of the Czech Republic, Article 40(5); Basic Law of the Federal Republic of Germany, Article 103(3); Constitution of the Republic of Estonia, Article 23(3); Constitution of the Republic of Lithuania, Article 31; Constitution of Malta, Article 39(8); Constitution of the Portuguese Republic, Article 29(5); Constitution of the Republic of Slovenia, Article 31; Constitution of the Slovak Republic, Article 50(5).

issue of concurrent claims by prosecutorial jurisdictions over the prosecution of transnational crimes has increased the importance of this protection against multiple criminal trials and punishments for the same criminal transgression.  

3.2. COMPLEMENTARITY

The principle of complementarity pertains to the co-existence of two or more equally authoritative systems or sources of law. With regard to EU criminal justice, three key conditions necessary to enhance consultation are cooperation and complementarity between the European and national criminal jurisdictions, strong political and diplomatic will, operational coordination, and development strategy for the recipient countries.

Complementarity is the corner stone for the operation of European and international criminal justice and coordinates the functional relationship between domestic courts, international courts and tribunals, and EU level bodies such as Eurojust.  

The principle of ne bis in idem is a corollary of the complementarity principle, which prevents an EU or international court or tribunal from asserting jurisdiction when a competent national criminal justice system has already tried the defendant. Thus, when a domestic court of competent criminal jurisdiction has already tried the defendant the complementarity mechanism, reflected in ne bis in idem, points to a test as to whether the national criminal proceedings were genuine.

Key issues pertaining to ne bis in idem in conjunction with complementarity include the problem of defining the substance of the guarantee, the scope and application of the procedural defence, mechanisms for coordinating the allocation of cases between Member State authorities and the mediation role of Eurojust, enhanced cooperation between States in criminal matters, extraterritoriality of national criminal justice systems and convergence issues.

4. EUROPEAN CONVENTION ON HUMAN RIGHTS

The protection of human rights and fundamental freedoms is enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. While the ECtHR, has observed that its jurisprudence on the principle of ne bis in idem is ‘relatively sparse’, the Court has pronounced on the scope and application of the principle.

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23 Göktan v France [2002] ECHR 33402/96, at para. 44.
4.1. SCOPE OF PROTECTION AND APPLICABILITY OF ARTICLE 6

Article 6(1) guarantees the right to an expeditious criminal trial by an independent and impartial tribunal. The ECtHR has identified fundamental procedural rights in accordance with this provision.\textsuperscript{24} In \textit{X v The Netherlands},\textsuperscript{25} the ECtHR considered the scope of Article 6(1) and inferred a procedural right against multiple trials for the same crime. However, this ruling was somewhat tenuous and subsequently overruled in \textit{S v Federal Republic of Germany}\textsuperscript{26} where the ECtHR declared that Article 6(1) ‘neither expressly nor by way of implication [provides for] the principle of \textit{ne bis in idem}\textsuperscript{27}.

4.2. SEVENTH PROTOCOL

Protocol No. 7 to the ECHR is designed to take further steps to ensure the collective enforcement of certain rights and freedom.\textsuperscript{28} Article 4(1) provides:

‘No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an \textit{offence} for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state.’\textsuperscript{29} (emphasis added)

Since the provision refers to these two distinct prohibitions, this suggests that the two prohibitions form different aspects of the \textit{ne bis in idem} principle. Indeed, the ECtHR has clearly distinguished between the prohibitions on double prosecution and double punishment, and its jurisprudence has developed a threefold distinction namely, the right not to be liable to be retried, the right not to be retried, and the right against multiple punishments for the same crime.\textsuperscript{30}

In order to successfully raise the procedural defence, the defendant must have been finally acquitted or convicted for the same, or substantially the same crime following a trial on the merits by a court of competent criminal jurisdiction. In \textit{Nikitin}\textsuperscript{24} In \textit{Golder v United Kingdom} (1975) 1 EHRR 524, the ECtHR inferred a fundamental right of access to the courts in accordance with the provisions of Article 6(1). See Blom-Cooper, ‘Article 6 and Modes of Criminal Trial’ (2001) 1 EHRLR 1; Mahoney, ‘Right to a Fair Trial in Criminal Matters under Article 6 ECHR’ (2004) 4 Judicial Studies Institute Journal, 107.

\textsuperscript{25} (1981) 27 DR 233.

\textsuperscript{26} (1983) 39 DR 43.

\textsuperscript{27} \textit{Ibid}. at 47.

\textsuperscript{28} Emmerson, Ashworth, and Macdonald, \textit{Human Rights and Criminal Justice} (2\textsuperscript{nd} ed., Sweet & Maxwell, London, 2007), p. 423 note that Protocol No. 7 is designed ‘to bring the Convention into line with the broader range of rights protected under the International Covenant on Civil and Political Rights’.

\textsuperscript{29} In \textit{Limburgse Vinyl Maatschappij (LVM) v Commission} [2002] ECR I-8375 at para. 59, the ECJ observed: ‘the principle of \textit{non bis in idem} … is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR …’.

\textsuperscript{30} This threefold distinction was upheld in \textit{Zolotukhin}, infra.
v Russia, the applicant claimed that supervisory review proceedings conducted after his final acquittal constituted a violation of his right not to be tried again in criminal proceedings for a crime of which he had been finally acquitted. The prosecution authorities contended that the applicant was at least liable to be tried again on the same counts. The ECtHR stated:

‘... the protection against duplication of criminal proceedings is one of the specific safeguards associated with the general guarantee of a fair hearing in criminal proceedings ... [T]he aim of art 4 of Protocol No 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision...The Court further notes that the repetitive aspect of trial or punishment is central to the legal problem addressed by art 4 of Protocol No 7.'

The ECtHR observed that the applicant was not ‘tried again’ and was not liable to be ‘tried’ twice; the supervisory review could be considered a re-opening of a finally decided criminal case (on the grounds of new or newly discovered evidence or a fundamental defect) that was in accordance with Article 4(1).

In Gradinger v Austria, the ECtHR found a violation of the non bis in idem principle because in a penal order concerning the applicant an administrative authority determined a specific blood alcohol concentration as given while in the antecedent litigation the criminal court did not. According to the ECtHR both legal norms varied in their character, purpose and description of the crime, but both controversial decisions were based on the same conduct. The ECtHR noted:

‘... the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision. That provision does not therefore apply before new proceedings have been opened.'

The Explanatory Report to Protocol 7 stipulates that a verdict will not be final unless:

‘... it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them.'

The applicability of the res judicata principle is dependent on the following criteria: the domestic laws and procedure of a signatory state do not provide for an appeal in specified circumstances; the appellate process has been satisfied; and the deadline for appeals specified by domestic legislation has expired.

33 Ibid. at para 53.
A final verdict of acquittal or conviction is an essential prerequisite to invoke *ne bis in idem* as a procedural defence against a second prosecution for the same, or substantially the same, crime. Consequently, if the former criminal trial had been terminated before verdict, there is no legal impediment *per se* against retrials for the same criminal offence. Typically, this would occur in the case where the prosecution enters a *nolle prosequi* or in circumstances where a mistrial is declared. Article 3, para. 22, of the explanatory report to Protocol No. 7, which refers to the Explanatory Report of the European Convention on the International Validity of Criminal Judgments, provides that:

‘… a decision is final “if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them”. It follows therefore that a judgment by default is not considered as final as long as the domestic law allows the proceedings to be taken up again. Likewise, this article does not apply in cases where the charge is dismissed or the accused person is acquitted either by the court of first instance or, on appeal, by a higher tribunal. If, however, in one of the States in which such a possibility is provided for, the person has been granted leave to appeal after the normal time of appealing has expired, and his conviction is then reversed on appeal, then subject to the other conditions of the article … the article may apply.’

The application and scope of Article 4(1) is confined to the jurisdiction of the same signatory state, and therefore is not applicable between states *inter se*. The principle is applicable only in accordance with the law and penal procedure of the same state, consequently there is no legal impediment against a second prosecution in another Member State for what is essentially the same crime. The Explanatory Report to Protocol No. 7, at para. 27, states:

‘The words “under the jurisdiction of the same State” limit the application of the article to the national level. Several other Council of Europe conventions, including the European Convention on Extradition (1957), the European Convention on the International Validity of Criminal Judgments (1970) and the European Convention on the Transfer of Proceedings in Criminal Matters (1972), govern the application of the principle at international level.’

This commentary considered that the interstate application of *ne bis in idem* is adequately provided for by other international instruments. However, these conventions are more concerned with procedural inter-state cooperation in the prosecution of offences extradition and related matters, rather than the substantive protection against a prosecution of a defendant who is already within the jurisdiction of the prosecuting state or where extradition is sought. These instruments are directly applicable to the prevention of multiple prosecutions for the same crime. They are, however, limited to

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inter state cooperation pertaining to the procedures governing the prosecution of crimes that extend beyond the jurisdiction of one state. Consequently, they are restricted to procedural issues as opposed to providing for a procedural defence against repeated criminal trials in more than one state for substantially the same criminal offence.

The *ne bis in idem* principle is a legal protection against multiple prosecutions for the same criminal offence, which inevitably gives rise to jurisdiction conflicts in determining the issue of sameness of criminal offences. This is further exasperated in view of the diversity of national criminal laws. A single criminal episode, or transaction, may involve the commission of multiple crimes. In *Gradinger v Austria*, the ECHR determined that as the defendant had been punished twice in separate proceedings for the same crime, namely causing death by negligent driving while under the influence of intoxication, this infringed Article 4(1). *Gradinger* was distinguished in *Oliveira v Switzerland*, where Article 4(1) was not infringed notwithstanding the fact that a single criminal act was deemed to have constituted two offences and separate prosecutions ensued for each offence. The ECtHR explained that a defendant’s criminal act might constitute more than one offence and consequently a separate prosecution for each offence may proceed without violating the principle of *ne bis in idem*:

“That is a typical example of a single act constituting various offences…The characteristic feature of this notion is that a single criminal act is split up into two separate offences, in this case the failure to control the vehicle and the negligent causing of physical injury. In such cases, the greater penalty will usually absorb the lesser one. There is nothing in that situation which infringes Article 4 of Protocol No. 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 ECtHR also considered whether multiple prosecutions and punishments imposed were cumulative in effect, and as they were not, the applicant’s right under Article 4(1) had not been infringed:

‘… Article 4 of Protocol No. 7 … does not preclude separate offences, even if they are all part of a single criminal act, being tried by different courts, especially where, as in the present case, the penalties were not cumulative, the lesser being absorbed by the greater.’

The ECtHR differentiated *Oliveira* and *Gradinger*, and concluded that in *Gradinger* ‘two different courts came to inconsistent findings on the applicant’s blood alcohol level.’

In Oliveira, the ECtHR found that one single act fulfilled the definition of multiple criminal offences, whereas the heavier penalty absorbed the lesser offence. In the absence of repeated prosecution of the same crime, the ECtHR found no violation of Article 4 given. The repetitive aspect of trial or punishment is central to the legal problem addressed by Article 4. The fact that the penalties in the two sets of proceedings were not cumulative was relevant to the finding that there was no violation of the provision where two sets of proceedings were brought in respect of a single act.

The same crime dilemma was also under consideration in Fischer v Austria, where the ECtHR had to determine if two convictions based on the same criminal transaction violated Article 4(1). The applicant caused a lethal traffic accident while driving intoxicated and subsequently absconded. Initially he received an administrative penalty for drunk driving and subsequently was convicted by the criminal court for involuntary manslaughter. According to the ECtHR, Article 4 had been violated because the adopted legal norms did not enough vary in their essential elements:

‘… the wording of Article 4 of Protocol No. 7 does not refer to ‘the same offence’ but rather to trial and punishment ‘again’ for an offence for which the applicant has already been finally acquitted or convicted. Thus, while it is true that the mere fact that a single act constitutes more than one offence is not contrary to this Article, the Court must not limit itself to finding that an applicant was, because of one act, tried or punished for nominally different offences. The Court…notes that there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others … An obvious example would be an act which constitutes two offences, one of which contains precisely the same elements as the other plus an additional one. There may be other cases where the offences only slightly overlap. Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements.’

An indictment for the same criminal offence is key to the application of ne bis in idem, and this requirement could be determined in accordance with the law and penal procedure of signatory states. However, the interstate application of ne bis in idem raises procedural dilemmas in the determination of this issue as the elements of crimes with differs with each state’s penal laws.

In Zolotukhin v. Russia, the Grand Chamber marked a clear departure from the previous case law of the ECtHR and the Court seems to have followed the case law of the ECJ pertaining to Article 54 CISA by adopting a broad and objective approach to

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42 Ibid. at para. 35. See also WF v Austria [2002] ECHR 38275/97; Sailer v Austria [2002] ECHR 38237/97.
44 Application No. 14939/03.
the interpretation of the same crime element in the protection under in Article 4. A Russian national rampaged inside a police station and received an administrative penalty for insulting a public official as well as a criminal conviction for civil disorder. The ECtHR found that the defendant's rights under Article 4 had been violated. In a review of its previous case law, the ECtHR found three approaches pertaining to the dilemma of resolving the same offence dilemma. The first approach focuses on the 'same conduct' on the applicant's part irrespective of its classification in law. The second emanates from this intention but posits that the same conduct may constitute several crimes that may be tried in separate proceedings. A third approach puts the emphasis on the 'essential elements' of the two offences. For the reason of legal certainty, the ECtHR found it necessary to harmonise these approaches. The Court initially followed the ECJ and the Inter-American Court of Human Rights, both of which found that an analysis of the international instruments incorporating the non bis in idem principle in one or another form would reveal the variety of terms in which it is couched and suggested an approach solely based on the material acts irrespective their legally qualification. According to the ECtHR an approach focusing on the legal classification of two crimes would be too restrictive for individual rights. The ECtHR noted that the ECHR is a 'living instrument' and should be interpreted in terms of practicality and effectiveness in addition to the object and purpose of its provisions. Therefore, Article 4 prohibits the prosecution or punishment for a second offence if the elements of facts in both proceedings are either identical or essentially the same.

In Oliveira, the ECtHR declared that the crimes and not the actual conduct are decisive. The decision in Fischer was a continued renunciation from the case law of Gradinger. Further, in Asci v Austria, the ECtHR emphasised the need to determine 'same essential elements'. The ECtHR refined this doctrine and determined it more precisely in Zolotukhin so that the established legal certainty allowed implementing the case law of the ECtHR especially in accordance with the basic principle of the separation of powers.

Article 4(1) is concerned with the prevention of multiple prosecutions for the same crime, but this provision would not preclude separate proceedings based on the same criminal transgression. Typically, these would include civil proceedings to recover criminal assets or the proceeds of crime. In Ponsetti and Chesnel v France, the ECtHR determined that where the national tax authorities imposed a fine, Article 4(1) was not deemed to have been infringed where a court of competent criminal jurisdiction subsequently imposed punishment.

45 Gradinger v Austria, op.cit.
46 Oliveira v Switzerland, Gauthier v France (Application No. 4483/02); Öngün v Turkey (Application No. 15737/02).
47 Fischer v Austria, op.cit. Sailer v Austria, op.cit., fn. 41.
48 Application No. 4483/02.
49 Application Nos. 36855/97 and 41731/98.
Protection against a second prosecution is not absolute however, and may be circumvented where the criminal law and procedure of a signatory state provides for a legal mechanism to re-prosecute in the light of fresh and compelling evidence of guilt, or tainted acquittal. Article 4(2) states:

'The provision of the preceding paragraph [Article 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 new or newly discovered facts, or there has been a fundamental defect in the proceedings, which could affect the outcome of the case'.

Consequently, where fresh and compelling evidence of the defendant’s guilt is discovered following an acquittal then a re-prosecution may proceed in accordance with the domestic law of the signatory state.

The criminal law and procedure of signatory states may also permit the re-opening of a criminal trial in circumstances where the first trial had been tainted due to witness or jury intimidation or where the trial court is declared a corum non judice. In Nikitin v Russia, the ECtHR stated:

‘... Article 4 of Protocol No 7 draws a clear distinction between a second prosecution or trial which is prohibited by the first paragraph of this Article, and the resumption of a trial in exceptional circumstances, which is provided for in its second paragraph. Article 4(2) of Protocol No 7 expressly envisages the possibility that an individual may have to accept, in accordance with domestic law, prosecution on the same counts where a case is re-opened following the emergence of new evidence or the discovery of a fundamental defect in the previous proceedings.’

Whether the exceptions to ne bis in idem would have the effect of narrowing the procedural defence is unlikely.

The ne bis in idem principle is augmented by virtue of Article 4(3) of Protocol 7, which provides that ‘No derogation from this Article shall be made under Article 15 of the Convention’.

4.3. CRIMINAL PROCEEDINGS

The principle of ne bis in idem only relates to a right not to be tried twice in criminal proceedings. However, the term criminal is given an autonomous meaning under the Convention and includes particular competition and administrative proceedings. The principle is violated not only when a defendant is prosecuted and convicted for the same crime but also if the defendant is tried and convicted for two nominally

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51 Ibid. at para. 45.
different crimes that have the same essential elements. Multiple prosecutions in addition to multiple punishments are prohibited therefore a prosecuting state cannot stay within the scope of the protection by simply reducing the amount of the second punishment by the amount of the first.

5. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The fundamental rights protected by the ICCPR are broadly similar to the ECHR. The ICCPR and its First Optional Protocol make provision for applicants to petition the Human Rights Committee to investigate complaints pertaining to alleged violations of the ICCPR's provisions. Signatory states are obliged to put in place the necessary procedures in order to comply with the Covenant. The Committee determines applications for alleged violations of its provisions but, that body is not empowered to make binding decisions on state parties. Despite this deficiency, signatory states may consider the provisions of the ICCPR as persuasive authority in the domestic courts.

Article 14(7) provides:

‘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.’ (emphasis added)

The stipulation that there has been a final verdict of acquittal or conviction in accordance with the domestic criminal law and procedure of signatory states is a fundamental prerequisite. In Schweizer v Uruguay, the Committee noted that Article 14(7) ‘… is only violated if a person is tried again for an offence for which he has been finally convicted or acquitted.’ In Jijón v Ecuador, the Committee stated:

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53 Fisher v Austria, op cit., at para 25.
54 Ibid. at para. 30.
55 Article 2 of the First Optional Protocol inter alia provides ‘… individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration’.
56 Article 40.1 provides that ‘The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights.’
57 See McGoldrick, The Human Rights Committee: It’s Role in the Development of the International Covenant on Civil and Political Rights (Clarendon Press, 1994), p. 151, para. 4.39 stating: ‘It is clear from the drafting work that the views of the HRC do not constitute a legally binding decision as regards the State party concerned.’
58 (Communication No. 66/1980), at para. 18.2.
59 (Communication No. 277/1988), at para. 5.4.
‘… article 14, paragraph 7, proscribes re-trial or punishment for an offence for which the person has already been convicted or acquitted. In the instant case, while the second indictment concerned a specific element of the same matter examined in the initial trial, [the defendant] was not tried or convicted a second time, since the Superior Court quashed the indictment, thus vindicating the principle of ne bis in idem. Accordingly, the Committee finds that there has been no violation of article 14, paragraph 7, of the Covenant.’

Crimes must be the same in both fact and law, that is, a factual and legal nexus. Moreover, the crime charged must accord with the penal law of the signatory state concerned.

Article 14(7) is applicable only to crimes and not to disciplinary measures that do not constitute a sanction for a crime within the meaning of this provision. In Strik v The Netherlands, the Committee stated:

‘With regard to the author’s claims that he was punished several times for the same act, in decisions of 25 September 1990, 5 January and 8 June 1993 by his employer, that this was not repaired in spite of the Central Board of Appeal’s ruling in his favour, and that the Central Board of Appeal by combining the penalty of resignation with other penalties, imposed a heavier penalty on him, than the one that was applicable at the time of the criminal offence, in violation of articles 14, paragraphs 6 and 7, and 15 of the Covenant, the Committee notes that these articles of the Covenant relate to criminal offences, whereas in the author’s case only disciplinary measures were imposed and the material before the Committee does not show that the imposition of these measures related to a ‘criminal charge’ or a ‘criminal offence’ in the meaning of article 14 or 15 of the Covenant.’

The Committee determined that only disciplinary measures were imposed on the author and that the imposition of these measures did not relate to a ‘criminal charge’ or a ‘criminal offence’ within the meaning of Article 14 or 15 of the Covenant.

In contrast with Article 4 of Protocol No. 7 to the ECHR, Article 14(7) ICCPR does not expressly provide for the re-opening of a criminal trial in the light of new evidence of the defendant’s guilt or where the former criminal trial was tainted. In response to this lacuna, reservations were submitted by many states parties, which resulted in the Committee issuing a declaratory statement pertaining to the application and scope of this provision:

‘In considering State reports differing views have often been expressed as to the scope of paragraph 7 of article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified

60 (Communication No. 1001/2001), at para. 7.3.
by exceptional circumstances and a re-trial prohibited pursuant to the principle of *ne bis in idem* as contained in paragraph 7. This understanding of the meaning of *ne bis in idem* may encourage States parties to reconsider their reservations to article 14, paragraph 7.\(^{61}\)

This would accord with Article 4(2) of Protocol 7, which stipulates for the re-opening of criminal proceedings in circumstances where fresh evidence of guilt is subsequently discovered, or if the former criminal trial was in defective or the acquittal was tainted.

The deficiency in the scope and application of Article 14(7) lies in the fact that it is only applicable ‘in accordance with the law and penal procedure of each country’ that is within the jurisdiction of the same signatory state. Consequently, it is not applicable between states *inter se*. This issue was considered in *AP v Italy*,\(^{62}\) where the Committee declared that Article 14(7) operates to prevent the multiplicity of criminal trials and punishments for the same offence:

‘… since article 14, paragraph 7, of the Covenant…does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more states. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State’.\(^{63}\)

The *lacuna* might be circumvented where Member States of the EU are signatories to international conventions, or provisions thereof, pertaining to the application of the principle of *ne bis in idem* between states *inter se*.\(^{64}\)

6. **CONVENTION IMPLEMENTING THE SCHENGEN AGREEMENT**

The *ne bis in idem* principle raises a number of questions of interpretation because of the divergent rules of evidence, procedure and elements of crimes applying nationally and internationally. In the legal systems of some Member States, the principle is applied only in the national context, that is, vertically in the country’s domestic


\(^{62}\) *AP v Italy* (Communication No. 204/1986).

\(^{63}\) *AP v Italy* (Communication No. 204/1986), at para. 7.3. See also *AR J v Australia* (Communication No. 692/1996), at para. 6.4.

\(^{64}\) European Communities Convention on Double Jeopardy of 1987; Charter of Fundamental Rights of the European Union, Article 50; Convention implementing Schengen Agreement, Article 54; European Convention on the International Validity of Criminal Judgments 1970, Articles 53–55; European Convention on the Transfer of Proceedings in Criminal Matters 1972, Articles 35–37; the latter two conventions were precursors to the inclusion of the principle of *ne bis in idem* in the Schengen Accord.
criminal procedure. Articles 54 to 58 CISA are devoted to the *ne bis in idem* principle to apply in the international context, that is, horizontally.

The absence of inter-state application in the scope of the *ne bis in idem* principle as provided for by the ECHR and the ICCPR pertains to the non-application of the protection between states *inter se*. Consequently, a defendant could potentially be prosecuted, convicted and punished by more than one state for what is essentially the same crime. This deficiency is somewhat circumvented by Article 54 CISA:

'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.' (emphasis added)

On first reading, the scope of Article 54 seems narrow in that it only seems applicable to a defendant who had already been subject to a criminal trial. It seems to be a prohibition only against multiple trials, which in itself is not absolute in that a person could still be prosecuted if the penalty had been waived. However, this seemingly narrow interpretation was rejected in *Gözütok and Brügge*, where the ECJ gave its first ruling on the interpretation of CISA. *Gözütok* owned a coffee shop in The Netherlands and was charged with being in possession of large amounts of marijuana. He entered into a plea agreement with the Dutch prosecution authorities under which in return for making a financial settlement the criminal charges were dropped. *Brügge* was charged with assault and wounding by the Belgian authorities and the criminal charges were dropped in return for making an out of court settlement. *Gözütok and

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65 The Schengen Agreement was integrated to the framework of the EU with the Treaty of Amsterdam by the Schengen Protocol, and stipulates that Contracting Parties give formal recognition to final judgments in another jurisdiction to facilitate the implementation of the *ne bis in idem* principle. Cf. Thym, ‘The Schengen Law: A Challenge for Legal Accountability in the European Union’ (2002) 8 ELJ 218.

66 While Ireland and the United Kingdom are not parties to the Schengen Agreement, they can, with the approval of the EU Council, apply the Schengen *acquis* in whole or in part and participate in its further development. Ireland and the United Kingdom have applied to take part only in the police and criminal judicial co-operation measures and not the common border control and visa provisions. See Commission Staff Working Document: Annex to the Green Paper on ‘Conflicts of Jurisdiction and the Principle of *Ne Bis In Idem* in Criminal Proceedings’ SEC(2005) 1767, p. 45.


Brügge subsequently went to Germany and were charged with the offences, the German prosecution authorities argued that they were not bound by Article 54 as both cases had not been disposed of by a court but rather discontinued by the prosecution authorities. The judgment was rendered after the national courts of Belgium and Germany requested a preliminary ruling interpreting Article 54. In both cases, the proceedings already brought against the two defendants had been definitively discontinued by prosecutors in other Member States. The ECJ also stated that a necessary implication of the principle is that the Member States have mutual trust in their criminal justice systems and that each recognises the criminal law of other Member States even when the outcome would be different if its own national law were applied. This represents considerable progress over Protocol 7 to the ECHR. The judgment is clearly centred around securing free movement of persons.

In Miraglia, the ECJ held that Article 54, the purpose of which is to ensure that no defendant is prosecuted on the same facts in several Member States on account of having exercised the right to free movement, is not applicable to a decision of the judicial authorities in one Member State declaring a case closed if the prosecution authorities did not initiate a prosecution on the sole ground that criminal proceedings have commenced in another Member State against the defendant for the same acts. Such a decision will not constitute a decision finally disposing of the case within the meaning of Article 54. The consequence of applying the principle of ne bis in idem to a decision to close criminal proceedings would render it virtually impossible to penalise in the Member State concerned the defendant’s unlawful conduct.

7. CHARTER OF FUNDAMENTAL RIGHTS

The Charter of Fundamental Rights sets out in a single text the range of civil, political, economic and social rights of European citizens and all persons resident in the EU. The ne bis in idem principle is enshrined in Article 50, which extends the principle throughout Union territory.
‘No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.’ (emphasis added)

This provision is intended to have similar effect as Article 4 of Protocol 7 to the ECHR but is broader in scope to the extent that it operates ‘between the Courts of the Member States’.

While international treaties establish this guarantee within national borders, Article 50 applies to the national level and in accordance with the legal rights of the EU, between the jurisdictions of several Member States.

8. LEGISLATIVE FRAMEWORK

The Council Framework Decision on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings aims to prevent situations where a defendant is subject to parallel criminal proceedings in several Member States in respect of the same facts. It aims to prevent an infringement of ne bis in idem as set out in Article 54 CISA.

The Framework Decision has the objective of establishing a system of free movement of judicial decisions in criminal matters within an area of freedom, security and justice, and the mutual recognition of judicial decisions between Member States. It establishes the framework for Member States to exchange information and enter into direct consultations.

It lays out the procedure whereby competent national authorities shall contact each other when they have reasonable grounds to believe that parallel proceedings are being conducted in another Member State. It also establishes the framework for these authorities to enter into direct consultations when parallel proceedings exist, in order to find a solution aimed at avoiding the negative consequences arising from these proceedings.

8.1. EXCHANGE OF INFORMATION

If the competent authority of a Member State has reasonable grounds to believe that parallel proceedings are ongoing in another State, it must seek confirmation on the

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existence of such parallel proceedings from the competent authority of that State. The contacted authority must reply without undue delay or within the deadline set by the contacting authority.

The contacted authority must indicate whether criminal proceedings are or have been conducted in its country concerning some or all of the same facts and the same defendants as those in the criminal proceedings in the country of the contacting authority.

8.2. DIRECT CONSULTATIONS

In the case of parallel proceedings, the relevant authorities shall enter into direct consultations with the aim of resolving the dilemma. The relevant authorities must consider all the facts and merits of and all other relevant factors pertaining to the case. If no solution is found, the case shall be referred to Eurojust if appropriate and provided that the offences and circumstance falls under its competence.

In cross-border cases involving several jurisdictions, the best practice is for prosecutors and investigators to consider and balance the different factors that should be considered when reaching a decision where to prosecute, including: whether the prosecution can be divided into separate cases in two or more jurisdiction; the location and interests of the victim or victims; the location and interests of witnesses; the location and interests of the accused; effect of delays.

8.3. EUROJUST TO MEDIATE IN CASES THAT SEEM TO BE DEADLOCKED

The Eurojust Annual Report 2003 produced some guidelines that prosecutors can refer to when considering such issues, which may also be used when dealing with non-EU Member States.77

There should be a preliminary presumption that a prosecution should take place in the jurisdiction where the majority of the criminality occurred or where the majority of the loss was sustained. Prosecutors should balance carefully and fairly all the factors for and against commencing a prosecution in each jurisdiction where it is possible to do so. Some of the factors, which should be considered, are:

- Location of the accused: the possibility of a prosecution in that jurisdiction and whether extradition proceedings or transfers of proceedings are possible.
- Extradition and surrender of persons: the capacity of the competent authorities in one jurisdiction to extradite or surrender a defendant from another jurisdiction to face prosecution in their jurisdiction.

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Dividing the prosecution into cases in two or more jurisdictions: the investigation and prosecution of complex cases of transnational crime will often lead to the possibility of a number of prosecutions in different jurisdictions.

Attendance of witnesses: securing a just and fair conviction is a priority for every prosecutor. Prosecutors will have to consider the willingness of witnesses both to give evidence and, if necessary, to travel to another jurisdiction to give that evidence.

Protection of witnesses: prosecutors should always seek to ensure that witnesses or those who are assisting the prosecution process are not endangered.

Delay: a maxim recognised in all jurisdictions is that ‘justice delayed is justice denied’. Whilst time should not be the leading factor in deciding which jurisdiction should prosecute, where other factors are balanced then prosecutors should consider the length of time, which proceedings will take to be concluded in a jurisdiction.

Interests of victims: prosecutors must take into account the interests of victims and whether they would be prejudiced if any prosecution were to take place in one jurisdiction rather than another.

Evidential problems: prosecutors can only pursue cases using reliable, credible and admissible evidence.

Legal requirements: prosecutors must not decide to prosecute in one jurisdiction rather than another simply to avoid complying with the legal obligations that apply in one jurisdiction but not in another.

Sentencing powers: the relative sentencing powers of courts in the different potential prosecution jurisdictions must not be a primary factor in deciding in which jurisdiction a case should be prosecuted.

Proceeds of crime: prosecutors should not decide to prosecute in one jurisdiction rather than another only because it would result in the more effective recovery of the proceeds of crime.

Resources and costs of prosecuting: the costs of prosecuting a case, or its impact on the resources of a prosecution office, should only be a factor in deciding whether a case should be prosecuted in one jurisdiction rather than in another when all other factors are equally balanced.

The role of Eurojust is to facilitate co-operation in the investigation of cross-border crime, particularly transnational organised crime. Where prosecutors cannot reach an agreement, the case will be referred to Eurojust, which can be used as a final arbiter.

9. INTERNATIONAL CRIMINAL LAW: LESSONS TO BE LEARNED?

In its 2011 report on EU efforts to support the International Criminal Court, and its 2012 report on the Annual Report on Human Rights in the World and the European Union’s policy on the matter, Parliament emphasised the importance of enhancing
the capacity and willingness of national judicial systems to investigate and prosecute crimes under the jurisdiction of and in accordance with the principle of complementarity enshrined in the Rome Statute of the International Criminal Court.

The ICC is intended to complement, not to replace, national criminal justice systems.78 Paragraph 10 of the Preamble and Article 1 of the Rome Statute defines the ICC as an international organisation that 'shall be complementary to national criminal jurisdictions.' The ICC does not have primary jurisdiction over national prosecuting authorities but rather is subsidiary to and supplements the investigation processes and prosecution of offences within the jurisdiction of the ICC, and should only act when national authorities fail to investigate and prosecute offenders.79 The principle of complementarity is the cornerstone for the operation of the ICC and is the underlying theory of international criminal law in the prosecution of human rights violations.

The principle of *ne bis in idem*80 directly affects the functioning of international criminal justice between States Parties and international criminal law, either separately or in conjunction with each other.81 The principle governs the functional relationship between national courts and the ICC, which is pivotal to the operation of international criminal law and prosecution of fundamental human rights violations.82 The significance of the principle is evidenced by the fact that it is not only a principle of criminal law and procedure but also one of fundamental human rights.83

The process of establishing prosecutorial jurisdiction by the ICC and commencement of criminal proceedings is one of the most important aspects of the relationship between the ICC and States Parties. The principles of complementarity and *ne bis in idem* inevitably will be modified vis-à-vis the principle commonly understood under the national law of States Parties. The analyses of the principle as applied in the Rome Statute has led to the conclusion that the principle of *ne bis in idem* can be understood and applied only in conjunction with the principle of complementarity.84

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79 Article 5.

80 Article 20.

81 Consider the following jurisdictional dilemma: what happens if a state prosecutes for an ‘ordinary crime’ such as murder or rape, rather than for an ‘international crime’ such as genocide, crimes against humanity, aggression or war crimes?


83 ECHR, Protocol 7, Article 4(1) and (2); ICCPR Article 14(7).

The issues that arise before the ICC are not generally unique to the jurisdiction of that Court and it is always useful to see how cognate jurisdictions view problems. While analysis provided and the solutions suggested by jurisprudence of the ICC on the principle of *ne bis in idem* and complementarity will hold their own intrinsic interest they may also shed light on similar matters that will inevitably come before European courts, tribunals, and EU level bodies (such as Eurojust) pertaining to conflicts of jurisdiction.

10. CONCLUSION

National criminal justice systems are realising the challenges of existing within a European and international legal framework, and Member States response to all forms of transnational crime includes the challenges of combating new emerging forms of crime, effectiveness of international cooperation in criminal matters and the dimensions of the development of the security and justice agenda.

The principle of complementarity is based on the rationale that national criminal justice systems should have an opportunity to deal with criminal matters adequately and effectively, and the failure of domestic criminal justice systems to deal with transnational crimes opens the door for Eurojust to mediate a case at the international instance. The principle is relevant to the regulation of European criminal justice as there is no universally accepted *ne bis in idem* provision available at the international level, although it is to some extent recognised and respected via Article 54 CISA, Article 4 of Protocol 7 to the ECHR and Article 14(7) ICCPR. These provisions are applicable only within the jurisdiction of the same state and do not operate to prevent multiple trials for substantially the same crime between states. This may be explained by the generally accepted protocol against human rights instruments imposing a duty on signatory states to recognise judgments by criminal courts in other jurisdictions as binding in the state where the defendant is purported to be tried for a criminal offence. The purpose of the Framework Decision is to address this deficiency and makes provision for a dispute resolution mechanism where conflicts of jurisdiction arise in criminal proceedings between several Member States.

The obstacles to a single, autonomous and uniformly applicable EU *ne bis in idem* principle include differently worded provisions within the respective international conventions, a measure of confusion and conflict within the jurisprudence of international courts and tribunals pertaining to the same crime dilemma, and the vague possible exceptions specified in Article 55 (derogation from application of the *ne bis in idem* principle) CISA. An overview of the basic terminology and concepts used identifies a clear difference between a narrow definition that uses ‘offence’ or ‘elements’, and a broad definition that uses ‘conduct,’ ‘acts,’ or ‘facts.’ Understanding the fundamental dilemmas and issues associated with the interpretation and application of *ne bis in idem* principle in conjunction with complementarity necessitates developing and refining the principle within the EU legal order.