INTRODUCTION

With the continued expansion of the European Union and the free movement of persons, there is potential for increased cross-border crime and the associated difficulties with concurrent prosecutorial jurisdictions for the same criminal offence. This dilemma may result in diplomatic resourcefulness through interstate relations and for the criminal justice professional (and academic alike) there is the increased likelihood for violations of the principle of ne bis in idem in criminal proceedings. This is particularly so in the absence of an international legal instrument for jurisdictional claims by more than one state (multiple or concurrent) pertaining to the prosecution of transnational crimes.

The principle of ne bis in idem (double jeopardy) in the criminal law and EU criminal justice systems is a legal protection against multiple criminal proceedings for the same (or substantially the same) criminal offence following an acquittal or conviction by a court of competent criminal jurisdiction. The rationale for the principle is the protection against repeated prosecutions and the imposition of multiple punishments (ne bis poena in idem) for the same criminal offence. It also serves to respect procedural safeguards for accused persons in criminal proceedings throughout the EU. The proscription against retrials also reflects the broader principle of finality of judgments as expressed by the maxim res judicata pro veritate accipitur.

Legal protection against retrials is firmly entrenched in civil law jurisdictions and international human rights instruments. It has gained increased significance in the prosecution of crimes extending beyond national boundaries and also where more than one state claims jurisdiction for the prosecution of an offender. The protection against multiple trials and punishments for the same offence is provided for in many European civil codes and it is also provided for by international conventions.

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1 Transnational organised crime is steadily increasing across European states. The free movement of persons throughout the EU in addition to the technological resources available to criminal organisations facilitates the perpetration of crimes. Thus, police and judicial cooperation in combating transnational criminal activity is faced with greater challenges in the fight against crime. Consequently, both law enforcement and prosecutors within the EU must devise alternative mechanisms in the prosecution of offenders whose crimes extend beyond national borders. This development in cross-border criminal activity resulted in the establishment of Europol in 2001 whose function is to address the procedural difficulties associated with the investigation and prosecution of cross-border crime and concurrent prosecutorial jurisdictions.
1 The following is a representative list of provisions against retrials for the same criminal offence in continental legal systems: Charter of Fundamental Rights and Freedoms of the Czech Republic, Art. 40(5); Basic Law of the Federal Republic of Germany, Art. 103(3); Constitution of the Republic of Estonia, Art. 23(3); Constitution of the Republic of
While the origins of this principle may be traced to Greek and Roman civil law, it is also an established common law principle against multiple trials and prosecutions for the same criminal offence where it is known as the rule against double jeopardy, as expressed by the common law pleas in bar, autrefois acquit and autrefois convict.6

This article evaluates the principle of ne bis in idem as provided for by the European Convention on Human Rights and the International Covenant on Civil and Political Rights and associated jurisprudence. It also considers the Commission’s Green Paper on “Conflicts of Jurisdiction and the Principle of Ne Bis In Idem in Criminal Proceedings” and implications for the Irish criminal justice system.7

EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention on Human Rights established the European Court of Human Rights thus providing a mechanism whereby residents of signatory states may petition the ECtHR for redress where a state party or an emanation of a state has allegedly infringed their rights under the Convention. The ECtHR has recently observed that its jurisprudence pertaining to the principle of ne bis in idem is “relatively sparse.”8 Nevertheless, there have been pronouncements by that Court determining the scope of the application of the principle as a fundamental human right in the criminal justice process.

With the enactment of the European Convention on Human Rights Act 2003 in Ireland, the jurisprudence emanating from the ECtHR is now more influential in domestic proceedings. However, this legislation does not purport to incorporate the ECHR directly into domestic Irish law.9 In accordance with the provisions of the 2003 Act, courts and tribunals are now required to take “judicial notice of declarations, decisions, advisory opinions and judgments” of the ECtHR and to take “due account” of the principles established by those instruments.10 Consequently, Irish courts are obliged to interpret “any statutory provision or rule of law” in accordance with the ECHR11 and the superior courts may issue a “declaration of incompatibility” where a national law “is incompatible with the State’s obligations under the Convention provisions.”12

Article 6(1) of the ECHR guarantees the right to a fair trial within a reasonable period of time before an independent and impartial tribunal, and the ECtHR has inferred certain rights in

Lithuania, Art. 31; Constitution of Malta, Article 39(8); Constitution of the Portuguese Republic, Art. 29(5); Constitution of the Republic of Slovenia, Art. 31; Constitution of the Slovak Republic, Art. 50(5).
7 The terms res judicata and ne bis in idem are also employed in common law jurisdictions, which may tend to lead to some confusion as to the scope of the protection as these terms translate to slightly different meanings than the common law principle against double jeopardy. See further Costa, J.E., “Double Jeopardy and Non Bis In Idem: Principles of Fairness” (1998) 4 University of California Davis Journal of International Law and Policy, 181.
9 Goktan v France [2002] ECHR 33402/96, at para. 44.
11 European Convention on Human Rights Act 2003, s. 4.
12 European Convention on Human Rights Act 2003, s. 2.
accordance with this provision. Article 6(1) might be relevant to the principle of *ne bis in idem* for the reason that if an order for retrial is made this should proceed within a reasonable period of time from the accused’s arrest, detention and being charged with the commission of a criminal offence.

It was initially considered that Art.6(1) inferred the right not to be prosecuted twice for the same criminal offence, however this contention has since been rejected. In circumstances where a trial does not proceed within a reasonable period of time, this would not *per se* justify a bar against a trial subsequently proceeding against the accused. However, the question as to whether Art.6(1) ECHR included the principle of *ne bis in idem*, arose at a time before the adoption of Protocol 7 to the ECHR. Consequently, the inclusion of the protection against retrials within the same state was a subsequent addition to the Convention. This would suggest that the protection was not covered by Art.6(1), and furthermore, Protocol 7 was designed “to bring the Convention into line with the broader range of rights protected under the International Covenant on Civil and Political Rights.”

Article 4(1) of Protocol 7 to the ECHR stipulates for the principle of *ne bis in idem* in the following terms:

“No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state.”

A final verdict of acquittal or conviction following a trial on the merits is an essential prerequisite for the application of *ne bis in idem* as a plea in bar against a second trial for the same criminal offence. The Explanatory Report to Protocol 7 provides that a decision will only be regarded as final:

“… if … it has acquired the force of *res judicata*. This is the case when it is irrevoicable, 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.”

Consequently, the principle of *res judicata* would only be applicable to criminal proceedings where either: the national laws of a state do not provide for an appeal; the appellate process has been exhausted; or the statutory time limit for appeals has expired.

The termination of criminal proceedings (*nolle prosequi*) before verdict would not *per se* prevent the continuance of the criminal trial against the accused, as this does not constitute an acquittal or conviction. This procedure is operative in the Irish criminal procedure where the entry of a *nolle prosequi* by the prosecution will not, as a general rule, be determinative of the issues involved.

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13 For example in *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 further Blom-Cooper, L., “Article 6 and Modes of Criminal Trial” (2001) (1) European Human Rights Law Review, 1


15 In *S v Federal Republic of Germany* (1983) 39 DR 43 at 47 it was decided that Article 6 assures “neither expressly nor by way of implication the principle of *ne bis in idem*."

16 The issues of concern with the elongation of the trial process has been examined by the ECtHR: *Corigliano v Italy* (1983) 5 EHRR 334 (breach of Article 6.1). The Court will consider the complexities of the case but the workload of the courts or insufficient state resources would not *per se* justify a delay: *Zimmermann and Steiner v Switzerland* (1984) 6 EHRR 17.


19 *The State (Walsh) v Lennon* [1942] IR 112 (SC); *The State (O’Callaghan) v Ó hUadhaigh* [1977] IR 42 (HC); *The State (Coveney) v Members of the Special Criminal Court* [1982] ILRM 284 (HC).
Article 4(1) prohibits the trial and punishment of an accused in criminal proceedings within the same state for the same offence for which the accused has previously been acquitted or convicted following a trial on the merits. In *Nikitin v Russia*, the ECtHR noted that:

“… 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 right of the prosecution to appeal against decisions of the trial court would be considered part of the “law and penal procedure” of signatory states and therefore would not constitute an infringement *per se* of Art.4(1). Appellate proceedings are part of the normal progress of a case through the criminal justice process and would not constitute a new criminal trial in violation of the principle of *ne bis in idem*. In the Irish criminal justice system, the prosecution authorities are permitted to appeal against an unduly lenient sentence, or appeal on a point of law without prejudice to a verdict in favour of the accused.

The objective of Art.4(1) of Protocol 7 is to prevent the repetition of criminal trials (and the imposition of multiple punishments for the same crime) that have been formerly concluded by a final determination by the trial court. A significant feature of this provision is that the accused must have been acquitted or convicted “under the jurisdiction of the same state”, in other words it is not applicable between states *inter se* but only against multiple prosecutions within the same jurisdiction *i.e.* domestic proceedings. Consequently, this provision of the ECHR would not prevent an accused from being prosecuted, convicted and punished for the same (or comparative) offence in another jurisdiction.

There is no legal impediment *per se* under the provisions of Art.4 of Protocol 7 against multiple proceedings for different criminal offences arising out of the same transgressions of the criminal law. Permitting multiple prosecutions based on the same criminal transgression will depend on the definition of criminal offences, and this will inevitably differ according to the criminal law of individual states.

The application of the principle of *ne bis in idem* in accordance with Art.4 of Protocol 7 is not *per se* concerned with the same conduct or transgression, but rather the prevention of retrials for the same criminal “offence.” This requirement has led to some uncertainty by the ECtHR pertaining to the prosecution of separate offences arising from the same criminal activity. In *Gradinger v Austria*, the ECtHR held that where the defendant had been punished twice (by two different courts) for causing death by negligence while intoxicated, this procedure constituted a violation of Art.4 of Protocol 7. However, in *Oliveira v Switzerland*, the ECtHR distinguishing *Gradinger*,...
held that a single act constituting more than one criminal offence did not infringe Art.4 of Protocol 7 where the accused was prosecuted separately for each criminal offence. The ECtHR explained:

“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 was influenced in its decision by the fact that the two sets of proceedings, based on a single criminal transaction, were not cumulative in effect thus not infringing Article 4(1) of protocol 7. The Court explained that:

“….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 Court distinguished Oliveira from Gradinger where in the latter case “two different courts came to inconsistent findings on the applicant’s blood alcohol level.”

What constitutes the same criminal offence is fundamental to determining the applicability of the principle of ne bis in idem, thus preventing retrial for the same offence. In Fischer v Austria, the ECtHR again dealing with a situation where two convictions arose out of the same set of facts observed that:

“…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, on the basis 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.”

The same criminal offence requirement is at the core of double jeopardy jurisprudence and has also proven to be a contentious issue in common law jurisdictions. This issue is further exacerbated with the application of ne bis in idem between states, with each state applying domestic criminal

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law. Indeed, this dilemma may further necessitate the approximation of criminal laws within the EU.\footnote{34}

It is also worth nothing that there is no legal impediment in Article 4(1) that would prevent a collateral challenge to a former acquittal or conviction in relation to the same criminal conduct, for instance, civil proceedings, administrative proceedings, appeals against sentence or indeed a disciplinary inquiry into the alleged criminal conduct upon which the former criminal trial was based. In \textit{Ponsetti and Chesnel v France},\footnote{35} the ECtHR held that the imposition of a (fiscal) fine by the tax authority and the imposition of a (criminal) penalty by a court of criminal jurisdiction did not infringe the principle of \textit{ne bis in idem} in Article 4 of Protocol 7. Thus, it appears that parallel proceedings may proceed against the accused without infringing the principle of \textit{ne bis in idem}, typically where the state proceeds against the (criminal) assets of the accused subsequent to a criminal trial. This procedure is also applicable in common law jurisdictions where (civil) proceedings to confiscate the proceeds of crime\footnote{36} and criminal assets\footnote{37} may also be instigated against the accused in conjunction with a criminal trial, so long as the civil proceeding is deemed civil and remedial as opposed to criminal and punitive, the latter being indicative of a criminal proceeding.\footnote{38}

The stipulation in Article 4(1) is not absolute however, in view of the fact that it is subject to exception where fresh and compelling evidence of the accused’s guilt subsequently emerges or where the criminal trial was in certain respects defective thus vitiating the fundamental requirement of a trial on the merits. Article 4(2) of Protocol 7 provides:

“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, this provision envisages the likelihood of a second trial in accordance within the domestic law of a state in the light of fresh and compelling evidence of the accused’s guilt. This presupposes the possibility of new evidence of guilt being discovered subsequent to a criminal trial as new methods of gathering evidence are made available to the police and prosecuting authorities.

In addition to the new evidence exception, Article 4(2) of Protocol 7 provides for an exception to the protection against retrials in circumstances where there has been a procedural defect during the course of the first criminal trial. This provision was considered in \textit{Nikitin v Russia},\footnote{39} where the ECtHR observed that:

“…art 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.”\footnote{40}
The new evidence exception is particularly apposite in the light of new techniques in forensic science for gathering evidence, most notably, DNA, facial mapping and voice recognition technology. Amendments to the law of evidence might also result in evidence now being admitted against the accused where this evidence had been excluded at the initial criminal trial.

Article 4(3) of Protocol 7 provides that the principle of *ne bis in idem* is given an enhanced level of protection. The principle is an absolute right in accordance with Article 15 ECHR, consequently, the protection cannot be derogated from by signatory states.

**INTERNATIONAL COVENENT ON CIVIL AND POLITICAL RIGHTS**

The rights protected by the International Covenant on Civil and Political Rights are broadly similar to those of the ECHR, and complaints brought within the jurisdiction of the ICCPR are dealt with by the United Nations Human Rights Committee. The ICCPR, as augmented by the First Optional Protocol, provides a mechanism whereby complainants may petition the Human Rights Committee for redress against alleged violations of the Covenant’s provisions. The Human Rights Committee observes the implementation of the ICCPR and its protocols, and signatory states are obliged to take the necessary measures to comply with the Covenant.

However, the Human Rights Committee is not empowered to make judicially binding decisions analogous to judgments by courts of law in the legal systems of signatory states. Notwithstanding this deficiency, the relevant provisions of the ICCPR pertaining to the principle of *ne bis in idem* in criminal proceedings may have persuasive authority before the national courts of signatory states.

The principle of *ne bis in idem* in criminal proceedings is provided for by Article 14(7) of the ICCPR which stipulates that:

“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.”

Consequently, a final determination of the criminal charges against the accused in accordance with the criminal law and procedure of signatory states is an essential prerequisite for the application of

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42 Protocol No. 7, Article 4(3) provides that: “No Derogation from this Article shall be made under Article 15 of the Convention.”

43 This United Nations Treaty was signed by Ireland on 1 October 1973 and subsequently ratified on 8 December 1989. The rights protected by the ICCPR, and the First Optional Protocol (the first Optional Protocol was ratified by Ireland on 8 December 1989) are broadly similar to those of the ECHR. The Human Rights Committee deals with cases brought within the jurisdiction of the ICCPR.

44 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.”

45 Article 40.1 of the ICCPR provides: “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.”

46 See McGoldrick, D., *The Human Rights Committee: Its 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.”
this provision.\textsuperscript{47} The second indictment must be for the same offence both in fact and in law,\textsuperscript{48} and must be an offence in accordance with the criminal law of a state.\textsuperscript{49}

Article 14(7) by definition excludes the possibility of a new trial notwithstanding the fact that the former criminal proceeding was defective or in consideration of fresh and compelling evidence of guilt following an acquittal. By analogy, it would also prevent the quashing of an erroneous conviction with an order for a retrial on the merits. Because of the apparent restrictive wording of Article 14(7), many state parties submitted reservations which prompted a response by the Human Rights Committee in the following terms:

“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 by exceptional circumstances and a re-trial prohibited pursuant to the principle of \textit{ne bis in idem} as contained in paragraph 7. This understanding of the meaning of \textit{ne bis in idem} may encourage States parties to reconsider their reservations to article 14, paragraph 7.”\textsuperscript{50}

Thus, Article 14(7) is not without exception and may be circumvented in the appropriate circumstances: where fresh and compelling evidence of the accused’s guilt subsequently emerges or in the case of a tainted acquittal.\textsuperscript{51} With this in mind, the Human Rights Committee has inferred that the reopening of criminal proceedings, where this procedure is “justified by exceptional circumstances”, would not \textit{per se} constitute an infringement of the \textit{ne bis in idem} principle.

The right of the prosecution to appeal a decision of the trial court, in accordance with the domestic law of a state, would be considered part of the “law and penal procedure” of signatory states. Consequently this would not constitute a violation of Article 14(7) as this is not a retrial \textit{per se}. This procedure is deemed part of the normal progress of a case through the criminal justice system rather than distinct or new proceedings amounting to a second prosecution.

Article 14(7) stipulates a final verdict of acquittal or conviction is a prerequisite before the accused may raise the plea in bar, \textit{ne bis in idem}, to a second indictment for the same criminal offence. Moreover, as with Article 4(1) of Protocol 7 to the ECHR, this provision is only applicable “in accordance with the law and penal procedure of each country” \textit{i.e.} domestic proceedings within the same state and therefore is not applicable between states \textit{inter se}. In \textit{AP v Italy},\textsuperscript{52} it was held that this provision only applies domestically \textit{i.e.} it operates to prohibit multiple prosecutions for the same criminal offence on one State. The Committee observed that:

“…since article 14, paragraph 7, of the Covenant…does not guarantee \textit{non bis in idem} with regard to the national jurisdictions of two or more states. The Committee observes that this

\textsuperscript{47} In \textit{Schweizer v Uruguay} (Communication No. 66/1980), at para. 18.2 the Human rights Committee observed 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.”

\textsuperscript{48} In \textit{Jijón v Ecuador}, (Communication No. 277/1988), at para. 5.4, the Human Rights Committee noted that: “…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 \textit{ne bis in idem}. Accordingly, the Committee finds that there has been no violation of article 14, paragraph 7, of the Covenant.”

\textsuperscript{49} See the decision of the Human Rights Committee in \textit{Strik v The Netherlands} (Communication No. 1001/2001), at para. 7.3.

\textsuperscript{50} United Nations Human Rights Committee, General Comment 13 (Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law), para. 19.

\textsuperscript{51} It is only where there has been a \textit{bona fide} acquittal that double jeopardy provisions in international law as enunciated by the principle of \textit{ne bis in idem}, should have the force of \textit{res judicata}.

\textsuperscript{52} \textit{AP v Italy} (Communication No. 204/1986).
provision prohibits double jeopardy only with regard to an offence adjudicated in a given State”.\(^{53}\)

The Human Rights Committee made this determination in the case of an Italian national who was indicted in Italy following a conviction in Switzerland for the same criminal act. However, this deficiency in the application of Article 14(7) may be circumvented where the “law and penal procedure” of signatory states has made provision for the mutual recognition of the principle of *ne bis in idem*, either in domestic legislation or being party to international conventions on the prevention of multiple trials and punishments for the same offence.\(^{54}\)

**COMMISION GREEN PAPER ON NE BIS IN IDEM**

Article 54 of the Convention Implementing the Schengen Agreement, 1985, provides for the principle of *ne bis in idem* in the following terms:

“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.”

This is the only provision against multiple criminal prosecutions within Member States of the EU, provided that the criminal proceeding has been completed in another state. Consequently, where a criminal trial is ongoing in one Member State, this will not prevent further criminal proceedings for the same criminal acts in another Member State.\(^{55}\)

The Schengen Agreement requires member states to recognise ‘final judgments’ in each others jurisdictions to prevent a situation of double jeopardy. The principle is binding within the Schengen Area. Whereas Ireland and the United Kingdom are not signatories to the CISA, these jurisdictions have indicated their intention to “take part” in Articles 54 to 58 of CISA implementing the principle of *ne bis in idem*.\(^{56}\)

The aforementioned provisions of the ECHR and the ICCPR pertaining to the principle of *ne bis in idem* in criminal proceedings are applicable only in domestic proceedings of signatory states and are not applicable between states *inter se*. This deficiency in the scope of the protection against *ne bis in idem* in criminal proceedings, which is confined to the domestic proceedings of signatory states, leaves open the possibility of multiple trials and punishments of an accused in several states for what is essentially the same crime. The concern here is that with increased movement of persons

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\(^{53}\) *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.

\(^{54}\) European Communities Convention on Double Jeopardy of 1987; Charter of Fundamental Rights of the European Union, Art. 50; Convention implementing Schengen Agreement, Art. 54; European Convention on the International Validity of Criminal Judgments 1970, Arts. 53-55; European Convention on the Transfer of Proceedings in Criminal Matters 1972, Arts. 35-37. The latter two conventions were precursors to the inclusion of the principle of *ne bis in idem* in the Schengen Accord.


within the EU there is greater propensity and opportunity for cross-border crime and consequently the prosecution of (cross-border) offences by several states.\footnote{57}

In response to this deficiency in the application of \textit{ne bis in idem}, the EU Commission published a Green Paper on “Conflicts of Jurisdiction and the Principle of \textit{Ne Bis in Idem} in Criminal Proceedings.”\footnote{58} The Green Paper and prospective EU legislation, purports to address the issue of conflicts of jurisdictions in the prosecution of criminal offences where the double jeopardy provisions in international human rights instruments do not prohibit the prosecution authorities of individual states from proceeding with parallel prosecutions, or indeed re-prosecution on one state following a trial in another state. It is anticipated that prospective EU legislation for the inter-state application of the protection would address the problems of concurrent criminal jurisdictions in the prosecution of offenders for what is essentially the same criminal offence. Proposed EU legislation\footnote{59} on conflicts of jurisdiction and \textit{ne bis in idem} would establish a mechanism for the allocation of cases where more than one Member State claims jurisdiction over the prosecution of crimes extending beyond national borders.\footnote{60} The proposed tripartite procedure would make provision for:

- the initiating State to inform competent authorities where the crime has ‘significant links to another Member State’;
- a consultation (discussion) procedure to consider ‘best place’ to prosecute the case;
- a procedure for ‘dispute settlement’ where agreement cannot be reached between Member States \textit{i.e.} mediation by Eurojust or newly established EU-level body (such as an EU Prosecutor).

As this procedure for the prosecution of transnational crimes may impinge on the sovereign authority of Member States in the prosecution of criminal offences, diplomatic resourcefulness will undoubtedly have a significant role in this process.

\textbf{IMPLICATIONS FOR THE IRISH CRIMINAL JUSTICE SYSTEM}

The common law principle against double jeopardy is an established principal of criminal justice in Ireland and is expressed by the pleas in bar \textit{autrefois acquit},\footnote{61} and \textit{autrefois convict}.\footnote{62} There are three prerequisites for pleading double jeopardy against a subsequent trial and the imposition of punishments for the same criminal offence: final verdict of acquittal or conviction; the appellate process has been satisfied; the second trial is for the same criminal offence.\footnote{63}

The principle of \textit{ne bis in idem} is a civil law concept and is also used in international conventions, however it is not \textit{per se} used in the common law jurisdictions. The provisions of the

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\footnote{57} Article 50 of the Charter of Fundamental Rights of the European Union provides: “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.” 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’. See Council of the EU, \textit{Charter of Fundamental Rights of the European Union: Explanations Relating to the Complete Text of the Charter}, December 2000, pp. 69, 76.


\footnote{59} In accordance with the Treaty on European Union, Art. 31.


\footnote{61} The People (Director of Public Prosecutions) v O’Shea [1982] IR 241; Attorney General (O’Maonaigh) v Fitzgerald [1964] IR 458.


ECHR and the ICCPR stipulate for a final verdict of acquittal or conviction for the principle to be applicable within the same state. This accords with the prerequisites for pleading the common law principle against double jeopardy. The domestic law of the state determines issue of the finality of criminal proceedings and conversely if and under what circumstances the criminal proceeding against the accused may be reopened, such as in the case of double jeopardy law reform (and proposed reforms) in many common law jurisdictions.

Ireland’s obligations under these international conventions pertaining to the principle of *ne bis in idem* in international law is reflected in domestic legislative provisions. Individuals will not be surrendered from this jurisdiction for an offence where the accused has previously been convicted or acquitted in this jurisdiction or in another Member State. Indeed, as additional measures are put in place to combat cross-border and international crimes, the principle of *ne bis in idem* will have increased significance between signatory states. This is particularly relevant in Ireland where a “trial in due course of law” is a constitutional mandate.

The former Minister for Justice has indicated that in the programme for rebalancing the Irish criminal justice system that the common law principle against double jeopardy might be reformed in due course, thus providing for an exception where fresh and compelling evidence of the accused’s guilt is subsequently discovered following an acquittal. The common law principle against double jeopardy has recently been reformed in the United Kingdom and New South Wales and proposed reforms are also being considered in Australia and New Zealand. In view of the fact that the ECHR is now directly applicable in Irish law, the exception to the principle against double jeopardy (*ne bis in idem*) as provided for by Article 4(2) of Protocol 7 ECHR may enhance proposals for a relaxation of the common law protection against double jeopardy under Irish law.

With regard to the prosecution of offences in the Irish criminal justice jurisdiction, there are many statutory provisions for specific instances where the accused has been acquitted or convicted of a similar offence by a criminal court in another jurisdiction. These domestic provisions, respecting the principle of *ne bis in idem*, indicate Ireland’s acceptability of the principle applicable between states *inter se*. Consequently, there should be no legal impediment *per se* against the implementation of the proposed framework decision in the Irish criminal justice system, to address the issue of *ne bis in idem* in criminal proceedings applicable between Member States.

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64 European Arrest Warrant Act 2003, s. 41.
67 Constitution of Ireland, Art. 38.1.
69 Criminal Justice Act 2003, Part 10 (UK).
73 See for example: Criminal Justice (Terrorist Offences) Act 2005, s. 46; Criminal Justice (Safety of United Nations Workers) Act 2000, s. 10; Sexual Offences (Jurisdiction) Act 1996, s. 9; Criminal Law (Jurisdiction) Act 1976, s. 15; Extradition Act 1965, s. 17. These provisions afford statutory protection against retrials in accordance with the principle of *ne bis in idem*.
CONCLUSION

*Ne bis in idem* is a fundamental principle of criminal justice and procedure. With increased levels of criminal activity extending beyond national borders protection against multiple trials and punishments for the same offence within the EU is greatly enhanced. Indeed, mutual recognition of judgments will also be significant in the application of the principle of *ne bis in idem* between Member States.

The jurisprudence on the principle of *ne bis in idem* in the ECHR and the ICCPR illustrates that a former acquittal is required for the same offence within the same state and the second trial must be for the same criminal offence. The most problematic criterion for the application of *ne bis in idem* between states is the same criminal offence requirement with each state applying national criminal laws, and claiming jurisdiction for the prosecution and punishment of offenders. Nevertheless, this raises concerns over multiple prosecutions by different states for the same criminal act. If the same criminal act constitutes more than one criminal offence in one state, there is no legal impediment *per se* against a single trial for each separate offence. This procedure is more problematic with inter-state prosecutions where the accused’s transgression may constitute a crime on more than one jurisdiction, or alternatively more than one jurisdiction may claim jurisdiction for the prosecution of an offence. Therefore, a framework decision or other legal measure is necessitated for the protection against multiple prosecutions in different states for what is essentially the same criminal offence.

Provisions in the ECHR and ICCPR pertaining to the principle of *ne bis in idem* are applicable only within the same jurisdiction and do not operate to prevent multiple trials for substantially the same offence 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 accused is purported to be tried for a criminal offence. This deficiency might be circumvented through the provision of EU legislation governing mutual recognition of criminal judgments and the principle of *ne bis in idem*.

The purpose of the Commission Green Paper and prospective EU legislation is to address this deficiency in human rights instruments where conflicts of jurisdiction arises in the prosecution of criminal offences. The principle of *ne bis in idem* in human rights instruments is applicable only in the domestic proceedings of the same state and are not applicable between states *inter se*. This dual application of the principle against retrials is necessitated for accused persons where the acquittal occurred within the same state or alternatively where the acquittal occurred in another jurisdiction. To this end, domestic legislation in Ireland provides for the principle of *ne bis in idem* in criminal proceedings where an accused has already been tried and convicted or acquitted for substantially the same criminal offence in another jurisdiction.

The provisions of the ECHR and the ICCPR governing the principle of *ne bis in idem* envisage the possibility of reopening proceedings where new and compelling evidence is discovered. This would conceivably include DNA, voice recognition and facial mapping technology, and other means for gathering forensic evidence of criminal activity and the identification of suspects in accordance with international best practice. This is particularly apposite in view of the fact that the common law principle against double jeopardy has recently been reformed in several common law jurisdictions and proposed reforms are currently being considered in several other jurisdictions. It is reasonable to assume, therefore, that this fundamental principle of criminal justice and procedure could be reconsidered in this jurisdiction, in due course.

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