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## ‘Transnationalising’ *Ne Bis In Idem*: How the Rule of *Ne Bis In Idem* Reveals the Principle of Personal Legal Certainty

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### 1. Introduction

With the increasing frequency of transnational criminal cases,<sup>1</sup> an important issue for courts and legal scholars has become whether the prohibition on prosecuting the same person more than once for the same conduct, better known as *ne bis in idem*, can be applied in international legal relationships. May a person who has been tried in State A be prosecuted again in State B, which also has jurisdiction to try this person on the same transnational facts? If not, what are the requirements for applying *ne bis in idem* transnationally?

Many countries recognise the transnational dimension of *ne bis in idem*, though they generally subject it to the requirement that the facts judged by a foreign tribunal were not committed, in whole or part, within their territory.<sup>2</sup> It was therefore not surprising or dramatic that the parties to the 1990 Convention implementing the Schengen Agreement (CISA)<sup>3</sup> agreed on Article 54. According to Article 54, ‘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.’<sup>4</sup> The next stipulation, Article 55, makes it possible for Contracting Parties to recognise exceptions to that rule, especially when ‘the acts to which the foreign judgment relates took place in whole or in part in [their] own territory.’<sup>5</sup> Since the Treaty of Amsterdam

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1 Transnational criminal cases can be defined as cases involving more than one jurisdiction.

2 For example, the French Code of Criminal Procedure Art. 692. The Dutch *ne bis in idem* goes further, as it prohibits a new prosecution after a foreign judgment for the same facts even if those facts took place on Dutch territory. It is however an isolated provision. According to the Swiss Penal Code Art. 3(3), the same solution is applicable provided that the prosecution abroad took place at the request of the Swiss authorities.

3 This Convention was adopted on 19 June 1990.

4 S. Stein, *Zum europäischen ne bis in idem nach Art. 54 des Schengener Durchführungsübereinkommens. Zugleich ein Beitrag zur rechtsvergleichenden Auslegung zwischenstaatlich geltender Vorschriften*, 2004; B. Hecker, ‘Das Prinzip „ne bis in idem“ im Schengener Rechtsraum’, 2001 *Strafverteidiger*, pp. 306-311; H.-H. Kühne, ‘Ne bis in idem in den Schengener Vertragsstaaten. Die Reichweite des Art. 54 SDÜ im deutsch-französischen Kontext’, 1998 *Juristen Zeitung*, pp. 876-880; M. Mayer, *Ne-bis-in-idem-Wirkung europäischer Strafscheidungen*, 1992.

5 Art. 55(1) stipulates: ‘A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:

- (a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered;
- (b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party;
- (c) where the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office.’

incorporated the so-called ‘Schengen acquis’ into EU law in 1999, all Member States of the European Union are bound by the provision of Article 54 of the CISA. Moreover, ten years after the adoption of the CISA, the European Union’s Charter of Fundamental Rights<sup>6</sup> stated in its Article 50 that, ‘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’.

In this rich normative context, it appears natural to refer to a general principle of transnational *ne bis in idem* when first looking for ‘general principles of transnational criminal justice’ via an inductive-comparative approach.<sup>7</sup> It has indeed become very common to hear about the two dimensions of the ‘*ne bis in idem* principle’: a national *ne bis in idem* principle, on the one hand, and a so-called ‘internationalised’ or ‘transnationalised’ principle (otherwise known as the ‘transnational *ne bis in idem* principle’) on the other.<sup>8</sup> The existence of a *principle* – sometimes even a *general principle*<sup>9</sup> – of transnational *ne bis in idem* is fully accepted in the legal literature, even by those who are more reluctant to see it applied in sensitive cases and who are more scrupulously concerned with its possible conflict with the principle of state sovereignty.<sup>10</sup> The existence of such a principle would certainly serve the ideal of building a ‘law to handle individual interests in transnational criminal law’.<sup>11</sup> However, every policy decision in the area of law is obviously open to criticism. It is therefore astonishing that transnational *ne bis in idem* has been welcomed as a new *principle* of law without any further discussion.

Many technical difficulties arise when transnational *ne bis in idem* is applied in practice. For example, should *ne bis in idem* apply in State B if the first proceedings in State A have not ended with a traditional judgment<sup>12</sup> but with a deal between the prosecutor and the perpetrator that bars further prosecutions on the same facts under the law of State A? Should it also apply to matters in which states A and B have very different political approaches to the facts? State A might punish the possession and sale of ‘soft’ drugs with very light financial penalties, whereas State B might subject these perpetrators to long custodial sentences. In other words, might *ne bis in idem* have the power to prevent State B from implementing its criminal law with respect to persons it otherwise has jurisdiction to try and perhaps punish? The Court of Justice of the European Union has had to resolve this kind of sensitive issue,<sup>13</sup> and its case law has led to further fundamental questions concerning the roots of *ne bis in idem*, that is, its origin: Why do we have *ne bis in idem*? Where does it come from? The need for a teleological-deductive approach<sup>14</sup> is obvious. This approach must be based on the domestic dimension of *ne bis in idem*, as this dimension is the one in which *ne bis in idem* was first recognised.

## 2. The traditional foundations of *ne bis in idem*

Even at the national level, there has been a change in the reasons why a person may not be prosecuted several times for the same conduct. Roman law did not have just one conception of the prohibition.<sup>15</sup> As Roman procedural law was built around the system of the *legis actions*, a case – be it civil or criminal – could be brought to court only once. Once this legal action had been extinguished, it was not possible for

6 The Charter was adopted on 7 December 2000.

7 S. Gless & J. Vervaele, ‘Law Should Govern: Aspiring General Principles for Transnational Criminal Justice’, 2013 *Utrecht Law Review* 9, no. 4, pp. 1-10.

8 See for example J. Vervaele, ‘The transnational *ne bis in idem* principle in the EU. Mutual recognition and equivalent protection of human rights’, 2005 *Utrecht Law Review* 1, no. 2, pp. 100-118; R.M. Kniebühler, *Transnationales ‘ne bis in idem’. Zum Verbot der Mehrfachverfolgung in horizontaler und vertikaler Dimension*, 2005; B. Specht, *Die Zwischenstaatliche Geltung des Grundsatzes ne bis in idem. Zugleich ein Beitrag zur Auslegung des Art. 103 III GG*, 1999; H. Jung, ‘Zur „Internationalisierung“ des Grundsatzes „ne bis in idem“’, *Festschrift für H. Schüler-Springorum zum 65. Geburtstag*, 1993, pp. 493-502.

9 Gless & Vervaele, supra note 7.

10 K. Eckstein, ‘Grund und Grenzen transnationalen Schutzes vor mehrfacher Strafverfolgung in Europa’, 2012 *Zeitschrift für die gesamte Strafrechtswissenschaft* 124, no. 2, pp. 490-527; Ch. van den Wyngaert & G. Stessens, ‘The international *non bis in idem* principle: resolving some unanswered questions’, 1999 *International and Comparative Law Quarterly* 48, pp. 779-804.

11 Gless & Vervaele, supra note 7.

12 Art. 54 requires that the ‘trial’ of the person in State A be ‘finally disposed of’.

13 Cases C-187/01 and C-385/01, *Gözütok and Brügger*, 11 February 2003.

14 Gless & Vervaele, supra note 7.

15 For further details, see J. Lelieur, *La règle ne bis in idem. Du principe de l'autorité de la chose jugée au principe d'unicité d'action répressive. Etude à la lumière des droits français, allemand et européen*. Doctoral dissertation, University Panthéon-Sorbonne, Paris I, 2005, pp. 55-57 and the literature cited therein.

the same case to be retried. As expressed in the maxim *bis de eadem re ne sit action*, there was no action that enabled the tribunal to hear the same event again. In other words (and simply put): *ne bis in idem*.

The idea of the extinction of the action was retained during the period of the so-called 'new Roman Law', when the formulary procedure was introduced. It provided for a written file (*formula*) that was transmitted to a judge after the investigation of the case was terminated. For each *formula*, an agreement about the content of the case (*litis contestatio*) was taken. This had the consequence of preventing any other legal action regarding the same case. Not until litigants made excessive use of the principle of the extinction of the action did the classical *jurisconsults* introduce the *exceptio rei judicata*. Some litigants objected to the fact that the extinction of the action constituted a means by which the outcome of a case that had already been judicially determined could be enforced against them, even though the first case had nothing to do with the second. To prevent litigants from escaping justice in this way, the courts had to assess the contents of the cases they had already resolved. In other words, it was considered necessary to determine the 'thing that had been judged', the *res judicata*. It is important to underscore that the *exceptio rei judicata* had the purpose of preventing an *absence* of judgment for a given case, but not the repeated judgment of a case. However, a maxim linked to the notion of *res judicata* already existed in Roman Law: *res judicata pro veritate habetur* (the judgment is held for truth). Although the two elements were originally unrelated, they were joined under the system of the extra-ordinary procedure.

Under the Law of Justinian, the principle of the extinction of the action was finally abandoned; only the *exceptio rei judicata* was retained to prevent a second proceeding on the same facts. It was justified by the presumption that the first judgment 'speaks the truth'. The result of this process is that European legislation that is inspired by Roman Law bases the prohibition on prosecuting the same person more than once for the same conduct on the maxim *res judicata pro veritate habetur*. However, the reason why *this* maxim exists is, intellectually speaking, totally external to the problems underlying *ne bis in idem*.

Why, then, is *res judicata* afforded a presumption of truth? The answer certainly has to do with legal certainty (*sécurité juridique, Rechtssicherheit*). Consider, for example, that a couple have divorced. Both partners legitimately believe that they are free to marry again, as do the persons they want to remarry. So, to serve personal *and* collective legal certainty, further decisions regarding the individuals in the former couple must take the first judgment (the divorce order) into account; they must consider that the couple are no longer married. Here, one speaks of the positive effects of *res judicata* – and the negative effect of *ne bis in idem*: the same facts *shall not* be the subject of another proceeding. If the law of criminal procedure allowed for new proceedings against a person who had already been tried and acquitted on the same facts, there would clearly be a problem of legal certainty in his/her environment: Should a firm employ him/her or withhold its offer because he/she may soon be incarcerated?

Another reason why earlier judgments cannot be ignored by the courts hearing later cases is that the judicial system would risk contradicting itself. A judgment must speak the truth. In the above example, a court that ignored the divorce and, consequently, considered the woman's remarriage to amount to polyandry, would definitely put the credibility of the system of justice in doubt. This aspect is also present in the second example: What credibility does an institution have if it has decided that a person is not guilty and then allows the case to be heard again? Worse, what if the second court finds that the person is guilty? Was the first judgment wrong? Were the first judges bad judges? It is fundamental for the judicial system to maintain (and protect) its internal consistency and thus to preserve not only its credibility, but also its authority.

At this stage, it is clear that the principle of the extinction of the action (*ne bis in idem*) objectively serves collective legal certainty as well as the credibility of the judicial system. These are the primary goals of the presumption that the judgment is true (*res judicata pro veritate habetur*). The key question is whether *ne bis in idem* has only these goals, or whether it may be given another purpose.

Fast forwarding to the 18th century confirms our intuition.<sup>16</sup> Since the Enlightenment, *ne bis in idem* has not been just an instrument to make the maxim of *res judicata pro veritate habetur* concrete,

16 The need to protect individuals against multiple prosecutions for the same facts had already been pointed out in the literature of the 16<sup>th</sup> century: 'May Your Grace be careful that', said Sancho Panza to Don Quixote, 'if a vanquished knight has complied with the order he received, in going to present himself to Madame Dulcinea del Toboso, he must be acquitted and discharged, and merits no further punishment if he commits no other crime'. Cervantes, *Don Quixote*, 1597.

it has been a fundamental guarantee for the individual against the possible abuse of criminal procedure by prosecutors – and by civil parties with the right to prosecute. If the same facts justified unlimited prosecutions, a person suspected of having committed a crime would be subjected to unlimited criminal inquiries and investigations. His/her personal situation under the law would be plagued by permanent uncertainty. The possibility that he/she could freely conduct his/her life would be significantly reduced.

For this reason, some of the first constitutional instruments protecting human rights recognised, in a more or less similar way, the prescription of *ne bis in idem*. The seventh amendment to the U.S. Constitution of 1787 read ‘nor shall any person be subject to be twice put in jeopardy of life or limb’; the French Constitution of 1791 provided that ‘*tout homme acquitté par un jury légal ne peut plus être repris ni accusé à raison du même fait*’.<sup>17</sup> The second wave of human rights enactments that took place after the Second World War confirmed that *ne bis in idem* is the expression of a fundamental right under international and domestic law. According to Article 103(3) of the German Basic Law, ‘[*darf*] *niemand wegen derselben Tat auf Grund der allgemeinen Strafgesetze mehrmals bestraft werden*’. Adopted in 1984, Protocol No. 7 to the European Convention on Human Rights provided, in Article 4(1), that ‘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’.<sup>18</sup>

When applying *ne bis in idem*, however, national courts continued to refer to the later Roman Law and to define its scope of application by reference to the maxim *res judicata pro veritate habetur*. A detailed examination of the French and German criminal procedural laws<sup>19</sup> shows that, even today, in the 21st century, courts consider *ne bis in idem* as a mere side-effect of the juridical prescription set by the maxim *res judicata pro veritate habetur*. With very few exceptions,<sup>20</sup> French criminal legal literature sees *ne bis in idem* as a consequence of the *autorité de la chose jugée*;<sup>21</sup> German legal scholars take the same position on the *materielle Rechtskraft*.<sup>22</sup> In neither case do the authors separate the examination of *ne bis in idem* from *res judicata pro veritate habetur*. The textbooks generally affirm that *ne bis in idem* has a negative effect in France (*l'effet négatif de l'autorité de la chose jugée*) and a foreclosing effect in Germany (*die Sperrwirkung der materiellen Rechtskraft*). This understanding seems to be common to many national legal systems. Even the European Court of Human Rights mentions *res judicata* in its case

17 Constitution of 3-14 September 1791, Title III, Chapter V, Art. 9.

18 Art. 4(2) and 4(3) complete this provision. Art. 4(2) states: ‘The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case’, and Art. 4(3) ‘No derogation from this Article shall be made under art. 15 of the Convention’.

19 Lelieur, *supra* note 15, pp. 163-331.

20 In Germany, W. Sauer clearly stated in his textbook on procedural law that *ne bis in idem* has nothing to do with the *materielle Rechtskraft*: W. Sauer, *Grundlagen des Prozeßrechts*, 1919 (new edition in 1929 and *post mortem* in 1970), § 25 ‘Grundsatz der Einmaligkeit’, p. 483. It based *ne bis in idem* on the idea that a legal act that has already occurred may not occur again (*‘Was ist geschehen, kann nicht noch einmal geschehen’*), *ibid.* p. 484. In France, A. Légal first made clear that the link commonly made between *ne bis in idem* and *res judicata pro veritate habetur* was not obvious at all: ‘*il y a là deux principes voisins, qui s'étaient, se complètent l'un l'autre et concourent, le cas échéant, au même résultat: le renouvellement des poursuites, mais qui n'ont cependant ni un fondement exactement semblable, ni une portée identique*’, comment on the judgment Cass. crim. 30 January 1937, 1939 *Sirey* I, pp. 193-195. R. Gassin was the only author to pay attention to this remark, in ‘Les destinées du principe de l'autorité de la chose jugée au criminel sur le criminel dans le droit contemporain’, 1963 *Revue de science criminelle et de droit pénal comparé*, pp. 239-278. He explained that the rule of *ne bis in idem* has not always been confused with the *autorité de la chose jugée*. The distortion (*‘gauchissement’*) of this rule towards the general theory of *res judicata* has ended up with a modification of its foundation and has produced serious consequences for its field of application. The verification of the pertinence of this assertion in the case law was made in Lelieur, *supra* note 15, pp. 163-331. It is true to say that the reference to *res judicata pro veritate habetur* has considerably reduced the impact of *ne bis in idem* in practice. Examples of this phenomenon will be given in Section 4.2, *infra*.

21 S. Guinchard & J. Buisson, *Procédure pénale*, 2012, nos. 2652 et seq.; B. Bouloc, *Procédure pénale*, 2012, nos. 970 et seq.; J. Pradel, *Procédure pénale*, 2011, nos. 1023 et seq.; R. Merle & A. Vitu, *Traité de droit criminel. Procédure pénale*, tome 2, 2001 no. 885; P. Bouzat & J. Pinalat, *Traité de droit pénal et de criminologie. Procédure pénale. Régime des mineurs. Domaine des lois pénales dans le temps et l'espace*, tome 2, 1970, nos. 1055 and 1529 et seq. The same reasoning is adopted by the authors of textbooks on international criminal law: A. Huet & R. Koering-Joulin, *Droit pénal international*, 2005, pp. 254 et seq.; Cl. Lomblois, *Droit pénal international*, 1979, nos. 396-405; H. Donnedieu de Vabres, *Les principes modernes du droit pénal international*, 1928, pp. 307 et seq.

22 C. Roxin & B. Schünemann, *Strafverfahrensrecht*, 2012, § 52, pp. 437-438; L. Meyer-Goßner, *Strafprozeßordnung mit GVG und Nebengesetze*, 2012, Einleitung, no. 171; H.-H. Kühne, *Strafprozeßrecht. Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrechts*, 2010, § 38, nos. 639 et seq.; H. Radtke, *Zur Systematik des Strafklageverbrauchs verfahrenserledigender Entscheidungen im Strafprozeß*, 1994; D. Spinellis, *Die materielle Rechtskraft des Strafurteils unter besonderer Berücksichtigung des Grundsatzes ne bis in idem*, 1962; Th. Vogler, *Die Rechtskraft des Strafbefehls. Ein Rechtskraftsproblem*, 1959.

law: 'The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*'.<sup>23</sup>

The almost undisputed reasoning that ends up with *res judicata pro veritate habetur* being the legal basis of *ne bis in idem* raises a serious question: can *ne bis in idem* be analysed as a general principle of law?

### 3. Is *ne bis in idem* a general principle of law?

Given the common understanding of *ne bis in idem* as a procedural side-effect of *res judicata pro veritate habetur*, it is doubtful whether *ne bis in idem* is a principle of law and, consequently, a general principle of law. Maybe *res judicata*... is the principle and *ne bis in idem* is a rule drawn from this principle? This at least seems to be the correct way to express the substantive legal position in the terminology of legal theory.

Ronald Dworkin's distinction between a principle and a rule of law confirms this assertion. According to Dworkin:

'(...) the difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted or is not, in which case it contributes nothing to the decision.'<sup>24</sup>

In order to illustrate the way rules operate, Dworkin refers to baseball rules, which are fortunately similar to *ne bis in idem*: 'In baseball a rule provides that if the batter has had three strikes, he is out. An official cannot consistently acknowledge that this is an accurate statement of a baseball rule and decide that a batter who has had three strikes is not out.'<sup>25</sup> Is the core statement of *ne bis in idem* anything other than that justice has one strike, after which it is out? A judge cannot decide that prosecutorial authorities that have had one strike are 'in', otherwise *ne bis in idem* would not apply. It is very clear that *ne bis in idem* is an all-or-nothing rule. Nonetheless, there might be exceptions to rules. As Dworkin also explains: 'the batter who has had three strikes is not out if the catcher drops the third strike.'<sup>26</sup> In the same way, the law recognises that prosecuting authorities in State B might again prosecute a person who has been condemned on the same facts in State A if State A has not executed the penalty against that person in that country.

Dworkin describes the way principles operate as completely different:

'Even those which look most like rules do not set out legal consequences that follow automatically when the conditions provided are met. We say that our law respects the principle that no man may profit from his own wrong, but we do not mean that the law never permits a man to profit from wrongs he commits. In fact, people often profit, perfectly legally, from their legal wrongs. (...) We do not treat [this] as showing that the principle about profiting from one's wrong is not a principle of our legal system, or that it is incomplete and needs qualifying exceptions.'<sup>27</sup>

Another difference between rules and principles is that

'principles have a dimension that rules do not – the dimension of weight or importance. When principles intersect (...), one who must resolve the conflict has to take into account the relative

23 *Zolotukhin v Russia*, Grand Chamber, 10 February 2009, appl. no. 14939/03, Para. 83.

24 R. Dworkin, *Taking Rights Seriously*, New edition with a Reply to Critics, 1977, p. 24.

25 *Ibid.*, p. 25.

26 *Ibid.*

27 *Ibid.*

weight of each. (...) Rules do not have this dimension. (...) If two rules conflict, one of them cannot be a valid rule. The decision as to which is valid, and which must be abandoned or recast, must be made by appealing to considerations beyond the rules themselves.<sup>28</sup>

Those considerations might be contained in principles. In the case of the person who sold soft drugs and was offered a plea bargain in State A, in which this behaviour is considered as a minor offence, at least two principles conflict. We see this when we ask whether State B, which also has territorial jurisdiction over the case, should be allowed to prosecute the trafficker again on the same facts. On the one hand, the principle of sovereignty implies that states have absolute legitimacy to prosecute offences that have been committed on their territory, even if only in part. On the other hand, our intuition tells us that there must be a principle, at least of natural law, according to which individuals are protected against multiple prosecutions for the same conduct, something that has to do with legal certainty.

This detour into Dworkin's legal theory<sup>29</sup> shows that *ne bis in idem* is not a principle. Consequently, it cannot be a general principle. It is simply a procedural rule and this is why, from now on, I will call it 'the rule of *ne bis in idem*'.

As we have seen before, according to the common understanding, *ne bis in idem* is based on *res judicata*... (material foundation). We can now complete the architectural picture of the rule of *ne bis in idem*: at least in the civil law tradition, the rule of *ne bis in idem* finds its foundation in the principle of *res judicata*... (structural foundation). The precise foundations of the rule of *ne bis in idem* having been identified, we will now use these findings in order to answer the core question of this article: How can this rule be transnationalised?

#### 4. How can the rule of *ne bis in idem* be 'transnationalised'?

As the rule of *ne bis in idem* is based on the principle of *res judicata*..., at first glance the question of how to transnationalise this rule leads to the question of how to transnationalise its underlying principle. Considering the rationale for the principle of *res judicata*..., it is doubtful that this principle may be transnationalised at all (Section 4.1). This is why it will be necessary to follow another approach, based on the proposal to separate the rule of *ne bis in idem* from its traditional foundation (Section 4.2).

##### 4.1. Transnationalising the principle of *res judicata*?

Is it possible to transnationalise the principle of *res judicata*... with the aim of transnationalising the rule of *ne bis in idem*? An example built on a fictive case will help to determine the problems that may arise.

I will first consider the case in a purely national dimension. A person called Max has been prosecuted for fraud and tried but has been acquitted. Can another prosecution be commenced against him in the same country on the same facts? The mere existence of such a prosecution would bring the veracity of the first judgment into question. There would be a violation of *res judicata pro veritate habetur*. This is why, in order to avoid this situation, the second prosecution is prohibited. In other words, the principle of *res judicata*... leads to the application of the rule of *ne bis in idem*, and Max may not be prosecuted again in the same country.

Now, let us say that Max is a German citizen and that he has committed the fraud on French territory. Both states have jurisdiction: France because of the territoriality principle; Germany because of the active personality principle (provided that French law also criminalizes Max's conduct).<sup>30</sup> The first prosecution takes place in France, the French court acquitting Max. May a second prosecution take place in Germany? According to Article 54 of the CISA, the answer is in the negative. But we will leave this aside for the moment as the aim of this exercise is to follow the reasoning of the principle of *res judicata*.... Given that the second prosecution would take place in Germany, German criminal law would apply, whereas the

28 Ibid., pp. 26-27.

29 French authors have a similar approach as to the difference between rules and principles: J. Boulanger, 'Principes généraux du droit et droit positif', in *Le droit privé français au milieu du XX<sup>ème</sup> siècle, Etudes offertes à G. Ripert*, 1950, pp. 51-74, especially pp. 55-57; M. Delmas-Marty, *Pour un droit commun*, 1994, pp. 121-135.

30 German Penal Code Section 7(2) No. 1.

French court rendered its judgment according to French criminal law. Does a German court discredit the decision of a French court merely because it examines the same facts under German law and therefore might come to a different conclusion? In other words, would the second prosecution necessarily violate the French *autorité de la chose jugée*?

Obviously this is not the case. Even if the German court finds that Max is guilty and should be punished for fraud, this does not mean that the French court that heard the case did not speak the truth and that the principle of *res judicata*... has been violated: it simply means that different laws possibly lead to different solutions when applied to the same case. After all, French and German criminal laws are different – the German '*Betrug*' (German Penal Code Section 263) is broader than the French '*escroquerie*' (French Penal Code Article 313-1). Many other offences differ significantly from one side of the Rhine to the other, as do the rules of general criminal law and, above all, of criminal procedure. Moreover, the judicial systems are still very nationally oriented and, most the time, consistency with the findings of courts in other countries in relation to a single set of facts is not a concern: how could it be, since the courts apply different rules? The concern with avoiding conflicts of judgments to protect the authority of judicial institutions is a national concern, as these institutions are strictly national. The same observation is unfortunately valid for the concern of preserving collective legal certainty.

This analysis shows that transnationalising the principle of *res judicata*... will not make it possible to achieve the aim of avoiding multiple prosecutions against the same person for the same facts. This is why the rule of *ne bis in idem* cannot satisfactorily be transnationalised so long as it is considered a side-effect of the principle of *res judicata pro veritate habetur*.

#### 4.2. Separating the rule of *ne bis in idem* from the principle of *res judicata pro veritate habetur*

In order to establish the transnational dimension of the rule of *ne bis in idem*, it is necessary to completely separate it from the principle of *res judicata pro veritate habetur*. Going further into this thesis, this author argues that the transnational dimension of the rule of *ne bis in idem* should be handled independently of the principle of the mutual recognition of criminal judgments.

In legal scholarship, it is common to read that the transnationalisation of the rule of *ne bis in idem* is a consequence of the development of the principle of mutual recognition.<sup>31</sup> This idea is in fact very similar to the reasoning explained above, according to which transnationalising the rule of *ne bis in idem* first requires transnationalising the principle of *res judicata*... Recognising a foreign judgement in order to execute it in another country is indeed nothing other than giving a transnational dimension to the principle of *res judicata*. In the context of the creation of a European area of freedom, security and justice, of course, the extension of the principle of mutual recognition of criminal judgments as such is a good thing. But for our purposes the question is whether it is appropriate to make the transnational rule of *ne bis in idem* dependant on the principle of the mutual recognition of criminal judgments. In the opinion of this author, such an approach would considerably slow down the development of transnational *ne bis in idem*. Recognising a foreign judgement is still a difficult process. It will remain so as long as national criminal law and criminal procedures largely differ from each other and as long as criminal justice remains a matter of national authorities focussing on national legal consistency.

Obviously, it is not by chance that instruments aiming at adopting a unified rule of transnational *ne bis in idem* in the European Union preceded, by more than ten years, the decision to base judicial cooperation in criminal matters on the principle of mutual recognition. The former goes back to the adoption of a Convention in 1987,<sup>32</sup> the latter to the Summit of Tampere of 1999. The development of a transnational rule of *ne bis in idem* can be seen as a consequence of the increase in mutual trust between Member States, but mutual trust and the mutual recognition of foreign judgements must be

31 See for example W. Schomburg, 'Criminal matters: transnational *ne bis in idem* in Europe – conflicts of jurisdiction – transfer of proceedings', 2012 *ERA Forum* 13, no. 3, pp. 311-324, <<http://link.springer.com/article/10.1007/s12027-012-0270-z>>, p. 4: the author expresses the view that the internationalisation of *ne bis in idem* 'was only a consequent extension of the idea of mutual recognition in criminal matters within the European Union, treating the individual as an inhabitant in one single area of justice'; Eckstein, supra note 10, p. 513: '*Soweit transnationaler Strafklageverbrauch eintritt, ist das – ebenso wie Rechtshilfe, Auslieferung und Vollstreckungsübernahme – Ausdruck wechselseitiger Anerkennung strafrechtlicher Entscheidungen und generell der zwischenstaatlichen Integration*'. K. Ligeti, 'Rules on the application of *ne bis in idem* in the EU. Is Further Legislative Action Required?', 2009 *eu crim*, no 1-2, pp. 37-43, especially p. 38.

32 The Convention between the Member States of the European Communities on Double Jeopardy was adopted in Brussels on 25 May 1987.

strictly distinguished: Mutual trust between Member States is a political assertion, whereas the mutual recognition of foreign judgments is a legal mechanism.<sup>33</sup>

The separation of the rule of *ne bis in idem* from the principle of *res judicata*... – given the historical evolution of the rule under Roman Law, one might even speak of its liberation from the principle – implies that *res judicata* should no longer be referred to as the basis for interpreting *ne bis in idem*. Doing so and focussing on the objective of protecting the individual has the enormous advantage of solving many of the technical problems that arise when the rule of *ne bis in idem* is applied.

#### 4.2.1. The definition of *idem*

The first point relates to the definition of '*idem*': should it be understood as '*idem factum*' (the same fact) or of '*idem crimen*' (the same offence)? The consequences of this choice are extremely important, since the same facts might qualify as offences under several national laws that differ greatly from each other. Even if the offences have the same name, the elements of the crime may differ significantly. Hence, if the requirement of an '*idem*' is fulfilled only when all the national offences for which a person may be prosecuted are the same, the chances that the rule of *ne bis in idem* applies will be very low indeed.

In contrast to a mere fact, an offence is a legal qualification that fits human conduct. Only a court is in the position to make that legal qualification, except in some simplified criminal proceedings or quasi-criminal administrative proceedings in which this power is given to another institution. So, moving back to our example, only a court or equivalent institution may state: 'Max has committed fraud'. The offence of fraud cannot be considered to have been committed until this has been determined through the rendering of a judgment by a court of law;<sup>34</sup> in other words, through the rendering of a *res judicata*. It appears that the words '*idem crimen*' (same offence) indirectly refer to the principle of *res judicata pro veritate habetur*. There is indeed a risk of contradicting the legal designation made by the first court and of thereby weakening the idea that 'the judgment is held to be the truth'; dealing with the same facts again does not otherwise harm the interest of the judicial system in preserving its reputation for consistency and credibility. Consequently, if we exclude an interpretation inspired by the principle of *res judicata pro veritate habetur*, we implicitly reach the conclusion that '*idem*' refers only to '*idem factum*', the same facts.

Both the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) have opted for the '*idem factum*' interpretation in their recent case law. This development should be warmly welcomed, as only this interpretation guarantees the effective protection of the individual against undue multiple prosecutions. It is not surprising that the ECJ distanced itself first from the reasoning of *res judicata pro veritate habetur* in the case of *Van Straaten* of 2006,<sup>35</sup> as it was called upon to decide the applicability of the transnational rule of *ne bis in idem* (the ECtHR deals only with the rule's national dimension). It is in transnational situations that the principle of *res judicata*... shows its weaknesses most clearly in terms of protecting individuals against multiple prosecutions. In purely national situations, only one criminal law applies. Consequently, a new prosecution for the same conduct would likely be a new prosecution for the same offence and would thus violate the principle of *res judicata*.... In transnational situations, the various offences concerned almost *always* differ. After the ECJ decision in the *Van Straaten* case, the European Court of Human Rights revised its former case law<sup>36</sup> and clearly adopted the '*idem factum*' approach in its 2009 case *Zolotukhin v Russia*.<sup>37</sup>

#### 4.2.2. The decision barring further prosecution

It is important to determine the procedural stage that must have been reached for one proceeding to bar another against the same person concerning the same facts. The earlier the procedural stage, the broader the protection afforded the accused by the rule of *ne bis in idem* will be.

33 Ligeti, *supra* note 31, explains that the European Court of Justice refers to the concept of mutual *trust* in order to underscore that 'the application of Art. 54 of the CISA [is not] made conditional upon harmonisation (...) of the criminal laws of the Member States'. Then she unfortunately draws the conclusion that '[t]he argumentation of the ECJ makes clear that the Court considers the *ne bis in idem* principle enshrined in Art. 54 of the CISA to be based on the concept of mutual *recognition*' (emphasis added).

34 Or the rendering of a final decision by an equivalent institution.

35 Case C-436/04, *Van Esbroeck*, 9 March 2006; see also Case C-261/09, *Mantello*, 16 November 2010.

36 See, *inter alia*, *Oliveira v Switzerland*, 30 July 1998, appl. no. 25711/94 and *Fischer v Austria*, 29 May 2001, appl. no. 37950/97.

37 *Zolotukhin v Russia*, Grand Chamber, 10 February 2009, appl. no. 14939/03.

However, protection would be too broad if a proceeding were barred merely because a case is being investigated in a given state. A case touching upon several jurisdictions must first trigger investigations in all the states concerned, because there might be elements of evidence to be found in all of them. Those must be collected as widely as possible. The next relevant procedural stage could be the initiation of a prosecution. It may be argued that the existence of a prosecution in one country bars the initiation of prosecutions in other countries. However, the point at which a prosecution begins varies significantly from one national legal system to another and from one procedure to another in the same national legal system. In some countries, the prosecution begins no earlier than when the case is submitted to the court that will issue the judgment. But in others, the prosecution must be initiated before the investigation itself can be launched (this is the case in France with respect to felonies: the investigating judge (*juge d'instruction*) cannot investigate until the prosecutor has initiated a prosecution by filing an indictment (*réquisitoire introductif d'instance*). Hence, the initiation of a prosecution is also too early a stage to necessarily trigger the prohibition on prosecuting a person more than once on the same facts. There must be a final decision on the case.<sup>38</sup>

The next step is to clear up what may qualify as a final decision. Shall a new prosecution on the same facts be barred only by a judgment reached after a full trial in one of the countries having jurisdiction, or can a summary judgment or even an out-of-court settlement be a bar? The existence of simplified judgments and out-of-court settlements shows that the state may respond to criminal behaviour through many different procedures: nowadays, it is not just a judgment of a court that triggers a criminal sanction. Yet, the notion of *res judicata* ('the thing that has been judged') refers to a trial verdict. In Germany, for example, judgments that are not preceded by hearings but are made strictly on the basis of a file (*Strafbefehl*, i.e., a summary order of punishment) do not have the same legal force as trial verdicts: their legal effect is limited (*beschränkte Rechtskraft*).<sup>39</sup> Hence, a new prosecution may take place when new facts or new evidence come to light at a later date.<sup>40</sup> Similarly, in France, the Code of Criminal Procedure had to explicitly provide that a judicial order that finalised an agreement between the prosecutor and the accused 'has the effects of a conviction,'<sup>41</sup> for it was not at all obvious that this kind of order qualifies as *res judicata*.

After the link between the rule of *ne bis in idem* and the principle of *res judicata*... has been broken, the nature of the final decision is no longer a point of discussion. It is only the definitive character of the decision that matters: it must be, according to national law, a decision that terminates the procedural action and, consequently, triggers the *ne bis in idem* effect. As Article 54 of the CISA stipulates, the trial must have been 'finally disposed' of.

It is not only judgments that terminate actions in criminal procedure; when we remove the reasoning based on the principle of *res judicata pro...*, there is no reason why other final decisions could not bar further prosecution against the same person on the same facts. This is why the European Court of Justice could convincingly state that the rule of *ne bis in idem* 'also applies to procedures whereby further prosecution is barred (...), by which the Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court (...)',<sup>42</sup> although Article 54 of the CISA refers to a 'trial' in the English version and uses the verb '*juger*' in the French one.

#### 4.2.3. Applicability to administrative penal prosecutions

It has become very common in Europe for sanctions to be pronounced by administrators rather than judges. The procedure according to which they are pronounced does not lead to a judgment but simply to a decision. By nature, they do not belong to criminal law but to quasi-criminal administrative law. That said, it often happens that the same conduct qualifies as both a criminal and an administrative offence (for example, as criminal fraud and an administrative tax fraud). May a person who has been sanctioned by an administrative authority be prosecuted again on the same facts under the criminal law? If the rule

38 CISA Art. 54 requires that the 'trial' of the person be 'finally disposed of'.

39 Roxin & Schünemann, *supra* note 22, § 52, p. 441.

40 German Code of Criminal Procedure Section 373a.

41 French Code of Criminal Procedure Art. 495-11(2).

42 Cases C-187/01 and C-385/01, *Gözütok and Brügge*, 11 February 2003.

of *ne bis in idem* applies independently of the principle of *res judicata pro veritate habetur*, it does not matter that an administrator is not in a position to render a judgment that has *res judicata* effect. Thus, there is no difficulty in recognising that a person who has been punished pursuant to administrative law should be protected against a second prosecution on the same facts under the criminal law.

However, administrations take many decisions that have nothing to do with sanctioning a person for criminally wrongful behaviour. They pronounce orders to regulate conduct in one way or another, as well as injunctions to comply with rules it has authored. They also set out disciplinary rules for civil servants. Although these measures must not be confused with criminal offences, in practice it is not always easy to draw a clear line between the two sorts of decisions. This has led the European Court of Human Rights to develop an elaborated case law concerning the precise meaning of the term ‘criminal charge’ in Article 6 of the Convention.<sup>43</sup>

In order to distinguish administrative decisions that bar further prosecutions on the same facts from those decisions that do not, one must simply refer to this case law. The European Court of Human Rights did so in *Zolotukhin v Russia* and found that the administrative nature of a procedure directed against a person is not automatically an obstacle to the applicability of the rule of *ne bis in idem*.<sup>44</sup> The European Court of Justice proceeded in the same way in its recent case law. It found that administrative sanctions such as exclusion from receiving aid and a reduction in the aid, provided for by the European Union in order to punish fraud against its financial interests, do not constitute criminal penalties.<sup>45</sup> It also interpreted Article 50 of the Charter of Fundamental Rights to mean that Member States may punish acts of noncompliance with declaration obligations in the field of value added tax by a tax penalty as well as by a criminal penalty, ‘in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine’.<sup>46</sup>

Going through the various requirements of the rule of *ne bis in idem* and excluding all influence of the principle of *res judicata pro veritate habitur* gives the rule a new dimension, which benefits not only the transnational application of the rule, but also its national application: its liberation from the principle of *res judicata pro veritate habitur* enables it to better protect individuals against multiple prosecutions for the same conduct. The decision in *Zolotukhin v Russia*,<sup>47</sup> in which the European Court of Human Rights applied the national rule of *ne bis in idem*, is the perfect illustration of this.

The liberation of the rule of *ne bis in idem* from the principle of *res judicata*... raises new questions, however. With the principle of *res judicata* as the underlying principle, the rule of *ne bis in idem* was clearly rooted in national law. But since the European Union is declared by its constitutive Treaties to be an area of freedom, security and justice, one must rethink the scope of application of the rule of *ne bis in idem*. Moreover, considering that rules of law rarely stand on their own, which general principle shall be the basis for the rule of *ne bis in idem*? There is an obvious need to place the rule of *ne bis in idem* on a new foundation.

## 5. The proper scope of application of the rule of *ne bis in idem*

The legal discussion about ‘transnationalising’ the rule of *ne bis in idem* is based on an old, traditional way of thinking about international and transnational criminal law: as criminals are able to cross national borders, criminal law should also be able to go over these borders. The words ‘trans-national criminal law’ very clearly express this idea.

But what about removing the borders instead of crossing them? Criminals cannot do this, but the Member States of the European Union have already made significant steps in that direction by creating

43 *Engel et al. v The Netherlands*, 8 June 1976, appl. no. 5100/71; *Öztürk v Germany*, 21 February 1984, appl. no. 8544/79; *Lutz v Germany*, 25 August 1987, appl. no. 9912/82; *Bendenoun v France*, 24 February 1994, appl. no. 12547/86.

44 *Zolotukhin v Russia*, Grand Chamber, 10 February 2009, appl. no. 14939/03.

45 Case C-489/10, *Bonda*, 5 June 2012.

46 Case C-617/10, *Åklagaren*, 26 February 2013, commented by C. Copain, ‘Le principe ne bis in idem: entre hamornisation et dissonance européennes’, 2013 *Actualité Juridique Pénale*, pp. 270-272.

47 *Ibid.*

the European area of freedom, security and justice (AFSJ).<sup>48</sup> Established by the Treaty of Amsterdam<sup>49</sup> in 1997, today the AFSJ gives its name to the heading of Title V of the Treaty on the Functioning of the European Union, which includes all the provisions concerning cooperation in criminal matters. As Michiel Luchtman rightly puts it, 'the creation of the (...) AFSJ leads one to suspect that the European Union is striving for something more than just streamlining inter-state criminal cooperation. In the AFSJ, room has also been explicitly created for EU citizens, constitutional guarantees and fundamental rights'.<sup>50</sup> A little further on, the author explains that:

'The perception of the AFSJ as a single area, where law enforcement is the responsibility of national authorities which, in principle, are bound by the territory of their state, has already affected the interpretation of the *ne bis in idem* principle. This principle now encompasses the entire European territory and is therefore viewed differently than in federal states, such as the United States, where the state and federal jurisdictions are considered as legal systems which are distinct from each other (dual sovereignty doctrine). Compared to traditional international criminal law, this has significantly increased the role of *ne bis in idem* in an interstate context, and rightly so.'<sup>51</sup>

The existence of the AFSJ clearly suggests that the geographical scope of application of *ne bis in idem* has changed. The rule has been detached from its traditional, national roots and grafted onto a new, not only transnational but primarily European foundation. Therefore, instead of speaking of a transnationalised *ne bis in idem*, would it not be more correct to say that the rule of *ne bis in idem* is being Europeanised? The wording of Article 50 of the European Union's Charter of Fundamental Rights<sup>52</sup> and the case law of the European Court of Justice, according to which in the context of fraud against the financial interests of the European Union, national and supranational prosecution of the same person for the same facts is only possible if the European sanctions are not criminal in nature,<sup>53</sup> gives credence to this approach: in the vertical as well as in the horizontal dimension, the rule of *ne bis in idem* is now European in scope.

Given this new scope, it is easier to understand the exceptions that should be made when the rule's application is sought in the international or transnational context.

A first kind of exception expresses the concern that the first proceedings did not provide the person with a fair trial. For instance, Article 20(3) of the Rome Statute of the International Criminal Court provides that a person who has already been tried by a national court may be prosecuted again and tried by the International Court for the same conduct if:

'the proceedings in the other court a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.'

In the European Union, the political statement on the existence of mutual trust between the Member States explains why such a reservation to the transnational rule of *ne bis in idem* has not been adopted. Thus, as a matter of policy, the question whether the first proceeding led to a fair trial does not arise.

Two other main exceptions concerning the transnational application of the rule are enshrined in the CISA. However, the entry into force of Article 50 of the European Union's Charter of Fundamental Rights raises the question whether they are still valid.

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48 Treaty establishing the European Union Art. 2.

49 The Amsterdam Treaty was signed on 2 October 1997 and entered into force on 1 May 1999.

50 M. Luchtman, 'Choice of forum in an area of freedom, security and justice', 2011 *Utrecht Law Review* 7, no. 1, pp. 74-101, especially p. 75.

51 *Ibid.*, p. 76.

52 Art. 50 reads: '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.'

53 Case C-489/10, *Bonda*, 5 June 2012.

Firstly, is the lack of enforcement of the penalty imposed as a result of the first decision an obstacle to the application of the rule? Article 54 of the CISA does indeed include a condition of applicability that ‘if a penalty has been imposed, it [must have] been enforced, [be] actually in the process of being enforced or [it must be] no longer [enforceable] under the laws of the sentencing Contracting Party’. By contrast, Article 50 of the Charter prohibits the multiple prosecution of a person for the same conduct without referring to the non-enforcement of the penalty as an exception. There are currently animated discussions, especially in German legal academic circles, as to whether, as a matter of international treaty interpretation, this exception may be considered to exist, to only partially exist, or have been totally eliminated.<sup>54</sup> This contribution will neither repeat nor expand on that discussion. It will simply observe that the facilities that exist today to execute a penalty in an EU country other than the one in which it was pronounced<sup>55</sup> or to surrender a person from one EU country to another under an European arrest warrant for the purpose of execution of a penalty, clearly lend strength to the disappearance of the exception. On that point, the expansion of the principle of mutual recognition to decisions in criminal matters *should* lead to a more comprehensive application of the rule of *ne bis in idem*.

Secondly, it is doubtful whether the exception of territoriality, which Article 55(1)(a) of the CISA allows Contracting Parties to make use of through a declaration, is still compatible with the AFSJ. According to Article 55(1), a state in the territory in which an offence has completely taken place may refuse to apply the rule of *ne bis in idem* after a first judgment has been rendered abroad on the basis of a principle of jurisdiction other than territoriality. Were the place of commission of the offence the most important criterion for the determination of the competent authority at the European level, one could accept the existence of this exception. But, as the choice of forum is still not regulated in the AFSJ<sup>56</sup> and in practice, the criterion of a determination of the competent authority is ‘first come, first served’, so there is no reason why a person who has been tried in his/her home state should be exposed to another prosecution in the country of the commission of the offence, for example. If the offence took place on the territory of several countries, according to Article 55(1)(a) of the CISA, those countries are already prohibited from making use of the territoriality exception in cases that have already been dealt with in another country on the basis of territoriality.

## 6. A new foundation for the rule of *ne bis in idem*

It is not an abstract and theoretical idea to give the rule of *ne bis in idem* a new foundation. Without saying so explicitly, the ECJ has done just that. As early as 2003, in the case of *Gözütok and Brügge*, the Court referred to the free movement of persons in the European Union: ‘Article 54 of the CISA, the objective of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, (...)’.<sup>57</sup> According to this reasoning, if European citizens are threatened with a new prosecution on the same facts just because their offence is transnational, their right to freely move in the European Union is not being honoured. Thus, for the ECJ, the ‘Europeanised’ rule of *ne bis in idem* is based on the free movement of persons. This interesting point does not provide a new universal basis for the rule. What if the rule is invoked in a strictly national context or an international context that extends beyond the borders of the European Union?

In the case law of the European Court of Human Rights, the radical change happened in 2009 in *Zolotukhin v Russia*. In the opinion of this author, in that very judgment the Court freed the national rule

54 The latest publication dealing with this issue is Eckstein, *supra* note 10. The other publications are quoted in this article.

55 See Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions; Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

56 Luchtman, *supra* note 50.

57 Cases C-187/01 and C-385/01, *Gözütok and Brügge*, 11 February 2003.

of *ne bis in idem* from the principle of *res judicata pro veritate habetur*.<sup>58</sup> How did the ECtHR justify its new approach? By very discreetly noting that its former approach was 'too restrictive on the rights of the individual'.<sup>59</sup> The Court gave no other explanation.

Which 'right(s) of the individual' could possibly be at issue? At least from a theoretical point of view, there are several possible answers. Certainly the right to a fair trial would be an option. The right to due process of law may well be another. But the right that is this author's focus has to do with the idea of personal legal certainty. Individuals who undergo several prosecutions for the same facts are indeed put in a situation of unforeseeability because, even after they have been tried in one country, their legal situation may be modified in another. Were the rule of *ne bis in idem* not applicable, if the courts of three countries have jurisdiction, a person might be prosecuted three times. If the courts of twenty-eight countries have jurisdiction, he or she might be prosecuted twenty-eight times! It is quite obvious that the rule of *ne bis in idem* is very closely linked to the idea of ensuring personal legal certainty.

Actually, personal legal certainty was already being discussed in the 18<sup>th</sup> century in the context of the assertion of the 'right to be secure'. It is important to recall the way the 'right to be secure' was understood at the end of the 18th century when the French Declaration of the Rights of Man and the Citizen was adopted. Like the Constitution of the United States (1787), Article 2 of the Declaration of 1789 refers, amongst other rights, to the right to liberty and the right to be secure (*le droit à la sûreté*). In the 18th century, security was considered to be protection against the infringement all kinds of freedoms and rights. It was defined as the protection guaranteed by society to each of its members for the defence of his/her person, rights, and property and this broad concept of security is reflected in the protection of the liberty and security of the person offered by the Universal Declaration on Human Rights, the European Convention on Human Rights, and the International Covenant on Civil and Political Rights. Today, however, the 'right to be secure' and 'security of the person' are frequently condensed to the shorter term 'personal security', which is closely linked to the right to physical liberty, that is, to the right of free movement. In addition, the right to personal security is often reduced to the right to be free from arbitrary arrest and/or detention. For example, Article 5 of the European Convention on Human Rights prohibits arbitrary arrest and detention under the title 'right to liberty and security'. In its original meaning, however, the right to security, or to be secure, included legal certainty, that is, it protected individuals from arbitrary treatment by the justice system.

Montesquieu drew attention to the 'dangers of justice itself' and said that safety 'is nowhere threatened more than in public and private accusations'.<sup>60</sup> The Declaration of 1789 therefore extended the principle of legality not only to crimes and punishments but also to accusations. Article 7 of the Declaration reads: 'No man may be *accused*, arrested or detained except in the cases determined by the Law and following the procedure that it has prescribed' (emphasis added). Of course, no law provides that a person who has violated the provisions of various legal systems with only one type of criminal conduct may be accused as many times as there are legal systems. Consequently, multiple prosecutions for the same conduct covered by different laws could be considered a breach of the 'principle of the legality of accusations'.

Coming back to the present, neither the 'right to security' nor the 'principle of the legality of accusations' is concretely referred to in the European case law. If one accepts, however, that at least the idea of security shall not be reduced to physical security only but shall include legal certainty, personal legal certainty is probably the most appropriate basis for the rule of *ne bis in idem*. It is therefore worth asking whether a (new) 'principle of personal legal certainty' would not be the appropriate, aspirational general principle that will help build a 'law to handle individual interests in transnational criminal law'.<sup>61</sup> ¶

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58 Therefore, the Court's mention of '*res judicata*' is rather a paradox in that case (see above, Section 2. The foundations of *ne bis in idem*, in fine).

59 Para. 81 of the Judgment.

60 Montesquieu, 'De l'esprit des lois', in *Œuvres complètes, tome II*, text presented and annotated by R. Caillois, Gallimard, Bibliothèque de la Pléiade, 1951, Book XII, Chapter II, p. 431.

61 Gless & Vervaele, supra note 7.