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Ne Bis in Idem as a Right in the Transnational Context. Uncovering Legal Reasons for its Recognition

Sofia Milone*

ABSTRACT: This article deals with the protection of the right to *ne bis in idem* in the transnational context and tries to identify and resolve the inconsistencies of the current judicial approach. After defining *ne bis in idem* and its protective rationale towards the individual, it underlines the lack of recognition that characterizes this right when the same fact is tried under different jurisdictions. In such cases the disregard for the *ne bis in idem* is justified by the myth of absolute separateness of criminal law systems and by the strong link between state sovereignty and the exercise of the *ius puniendi*. Although national courts seem to accept the status quo, there seem to be compelling legal reasons for changing it, under both human rights and criminal law. In order to understand them, courts need to adopt a new perspective when dealing with cases of transnational multiple prosecutions: instead of looking at the issue from a systemic perspective, under which criminal jurisdictions appear isolated and self-referential, courts should focus on the fact concurrently regulated by multiple jurisdictions.

KEY WORDS: "Transnational" ne bis in idem; inter-legal perspective, focus on the fact, interpretation of human rights, substantive justification for criminal jurisdiction.

1. Introduction

In this paper I reflect on the protection of the right to *ne bis in idem* in the transnational context.

Although the principle that a person should not be prosecuted more than once for the same conduct is widely shared and is regarded as a fundamental right of the individual within each legal system, states are reluctant to recognise the right to *ne bis in idem* when the individual has been finally judged in another state (I call it 'transnational ne bis in idem'). This is because in such cases the protection of the right to *ne bis in idem* interferes with the application of national criminal law and affects national sovereignty as regards one of its most sensitive areas.

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The relevance of the issue is not merely hypothetical: the existence of competing jurisdictions may derive both from the exercise of extraterritorial jurisdiction and, especially as regards cross-borders crimes, from the broadening of territorial jurisdiction following the principle of ubiquity. According to this principle a state can exercise jurisdiction over a crime provided that at least one of its constitutive elements, the criminal acts (subjective territoriality) or its effects (objective territoriality), take place within its own territory.[1] Furthermore, face to the lack of exclusivity of the *ius puniendi* of the states, concurring proceedings may occur also when administrative bodies are entitled to impose punitive sanctions.

From the point of view of the individual it seems hardly understandable why, when the fact is under the jurisdiction of a state only, he enjoys a fundamental right not to be prosecuted twice for that fact; while, when different states have jurisdiction on the same fact, should they all exercise it, no room for the recognition of the *ne bis in idem* is left.

Although courts do not challenge this asymmetry, it seems unacceptable. My claim is that bringing a second prosecution on the same fact consists in a purely 'formal' exercise of criminal jurisdiction that does not encompass the protection of human rights nor the respect of principles of criminal law.

2. The Principle of *Ne Bis in Idem*: Sources and Content

The principle of *ne bis in idem*, generally named double jeopardy in common law systems,[2] prevents the state from prosecuting or punishing twice a person for the same fact. The main sources of this right are both national provisions – constitutional or statutory –[3] and supranational provisions of human rights conventions. Article 4 Protocol n. 7 of the European Convention of Human Rights (ECHR) strongly affirms *ne bis in idem* as an individual guarantee that cannot be derogated from; article 50 of the Charter of Fundamental Rights of the European Union (CFREU) acknowledges the *ne bis in idem* as a fundamental right of the individual that can be limited only under the conditions established by article 52 of the Charter: according to the principle of proportionality, limitations must be 'necessary and genuinely meet objectives

[1] C. Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008), at 75-84.
[2] M.L. Friedland, *Double Jeopardy*, (Oxford: Oxford University Press, 1969), at 3-17.
[3] In Italy, article 649 of the Code of Criminal Procedure; in France, article 6 of the Code of Criminal Procedure; in Germany, article 103(3) of the Basic Law; in the USA, the 5th Amendment of the Constitution.

of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

Beyond Europe's borders, Article 14 § 7 of the International Covenant on Civil and Political Rights (ICCPR) recognizes the right to *ne bis in idem* among the guarantees of the right to fair trial.

Thanks to judicial dialogue between the domestic and European courts, these sources tend to be interpreted in accordance with each other. The constitutive elements of the right, resulting by the interpretation provided by national judges, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) can be described as such: as for the '*bis*', the existence of a final decision, that acquired the force of *res iudicata* according to the law as no further ordinary remedies are available or the time-limit has expired. As for the '*idem*', the coincidence of the object and of the subject of the new prosecution with those of the previous final decision: the new trial must concern the same individual and the same facts.

It has been debated whether to adopt a legal or factual approach to the definition of the '*idem*' in both the national and the European context. According to the factual approach, the '*idem*' can be described in purely factual terms as the same historical event; the legal approach, instead, requires not only the identity of the facts, but also of the legal qualification. At the moment, both the CJEU and the ECtHR have upheld a factual notion in order to provide the individual with wider protection.[4] Although the ECtHR has tried to clarify what should be intended as 'same fact' – 'a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space' – still some uncertainties remain. Indeed, it seems hard to identify the *natural boundaries* of criminal deeds.[5] On the other hand, the selection of the factual circumstances that define the '*idem*' is inevitably influenced by the *a priori* understanding of the relevant facts according to criminal law.

Furthermore, both prosecutions must be considered criminal in substance, irrespective of the formal domestic justification, according to the renowned criteria established by the

[4] ECtHR (GC), *Zolotukhin v. Russia*, 2009, no. 14939/03, judgment of 10 February 2009; CJEU (GC), *Mantello*, C-261/09, judgment of 16 November 2010, §§ 39-40; CJEU (GC), *Menci*, C-524/15, judgment of 20 March 2018, §§ 34-37.

[5] C. F. Stuckenberg, 'Double Jeopardy and Ne bis in Idem in Common Law and Civil Law Jurisdictions', in D.K. Brown, J. Iontcheva Turner and B. Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford: Oxford University Press, 2019), 458-475, at 468.

ECtHR in the *Engel* decision.[6] In this leading case, the Court gave an autonomous definition of criminal charge, with respect to the definition given by state parties, for the purpose of the application of the conventional rights. Such an autonomous definition is based on the criteria of the connection with a criminal proceeding; the function of the measure; its severity. This approach has been followed even with regard to the scope of application of the right to *ne bis in idem*[7] and has been upheld by the CJEU.[8]

For a long time *ne bis in idem* has been conceived as a principle protecting the *res iudicata* and providing rationality to the exercise of jurisdiction. The recent debate, instead, has focused on the need for protecting the individual against the abusive power of the institutional authority.[9]

The conflicting interest in discovering the substantial truth trough criminal proceeding is generally taken into account by admitting the re-opening of the case in exceptional circumstances; for example, when the first proceeding is found to have been blatantly unlawful or when relevant new evidence is discovered.[10]

A. Ne Bis in Idem as a Right of the Individual

In both the national and the European debate, *ne bis in idem* is recognised as a right of the individual against the punitive power. The general justification of such a right is that the *ius puniendi* would be abusive if it could be exercised repeatedly for the same fact in order to convict the defendant: under the sword of Damocles represented by a new possible judgment, irrespective of the content of the final decision, the enjoyment of fundamental rights by the individual would be jeopardized. Using the words of Justice Black in *Green v. United States*: 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense

[6] ECtHR, *Engel and others v. The Netherlands*, nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, judgment of 8 June 1976.
[7] ECtHR (GC), *A and B v. Norway*, nos. 24130/11 and 29758/11, judgment of 15 November 2016.
[8] CJEU (GC), *Åkerberg Fransson*, C-617/10, judgment of 26 February 2013.
[9] Friedland, *supra* note 2, *passim*. N. Galantini, 'Il divieto del doppio processo come diritto della persona', 7 *Rivista italiana di diritto e procedura penale* (1981), 97-121. More recently, Stuckenberg, *supra* note 5, at 460.
[10] Article 4 Prot. 7 ECHR, § 2, allows the reopening of the case 'if there is evidence of new or newly discovered facts, or if it there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case'.

and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' [11]

Different accounts of the *ne bis in idem* as a right of the individual have been proposed: the right to a fair trial, to legal certainty, not to be subjected to inhuman or degrading treatments. Although their justification may appear self-evident, it seems useful to provide a deeper insight into them in order to ascertain whether their validity is somehow affected by the national/foreign character of the previous final decision or is system-independent.[12]

Let's consider the right to fair trial. States cannot make multiple attempts in order to find the individual guilty as this would result in an unjustified vexation or oppression and could be a hypothesis of abuse of process[13] that justifies the decision of the court of staying the criminal proceeding. This seems true even in cases of *lis pendens*:[14] the individual would be prevented from organizing his defence in an effective way; he would have to repeatedly suffer limitations on his personal freedom due to procedural activities (e.g. collection of evidence).

Let's think of legal certainty. This is not only an objective value for the system, but also a subjective right of the individual: '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.'[15] Namely, they would live in the uncertainty of being found guilty even after an acquittal for the same fact.

Let's examine, finally, the protection from inhuman and degrading treatment. Indeed, the situation of uncertainty and anxiety arising from the possibility of being found guilty, even after a final acquittal, as well as from the distress of multiple proceedings, can be considered an inhuman and degrading treatment. Furthermore, if the trial itself constitutes punishment for the individual,[16] as it imposes limitations on his freedoms, irrespective of the content of the final decision, a new trial for the same fact has to be regarded as undue punishment.

[11] *Green v. United States*, 355 U. S. 184 (1957).
[12] C. Van den Wyngaert and G. Stessens, 'The international non bis in idem principle: resolving some of the unanswered questions', 48 *International and Comparative Law Quarterly* (1999) 779-804, at 781-783.
[13] On this concept, A. L-T Choo, *Abuse of process and judicial stays of criminal proceedings* (2nd edn., Oxford: Oxford University Press, 2008), at 6.
[14] On the expansion also to international *lis pendens*, L. Luparia, *La litispendenza internazionale: tra ne bis in idem europeo e processo penale italiano* (Milano: Giuffrè, 2012), mainly at 38-49.
[15] J. Lelieur, 'Transnationalising Ne Bis in Idem: How the Rule of Ne is Idem Reveals the Principle of Personal Legal Certainty', 9 *Utrecht Law Review* (2013) 198-210, at 210.
[16] F. Carnelutti, 'Pena e processo', 7 *Rivista di diritto processuale*, 1952, at 166-167.

All these arguments seem valid irrespective of the fact that multiple prosecutions occur at the national or transnational level and show the human right nature of *ne bis in idem*.

B. Procedural and Substantial Ne Bis in Idem: a Distinction to be Drawn.

Although this is not always adequately stressed, the right not to be prosecuted twice significantly differs from the right of the individual to receive proportionate punishment for his deeds.

A proportionate sanction can be granted even in case of multiple prosecutions if the final decision takes into account the sanction inflicted by the previous one. In this hypothesis the individual would not be protected from the distress of being twice under trial for the same fact, but only from disproportionate punishment.

That's why the two sides of the principle – procedural (exhaustion-of-procedure principle or *Erledigungsprinzip*) and substantial (accounting principle or *Anrechnungprinzip*) – should be kept distinct.

The latest trend of the CJEU towards reducing the scope of the *ne bis in idem* to its substantial side seems then to be criticized. Especially when examining the conformity with article 50 CFREU of the concurrence of criminal and administrative proceedings, the Court seems to be satisfied with the proportionality of the entirety of the inflicted sanctions.[17] On the contrary, the ECtHR still requires also the material and temporal coordination between the proceedings.[18]

3. *Bis in Idem* in the Transnational Context. A Gap in the Protection of the Individual

Ne bis in idem is recognised as a fundamental right only as long as the individual is prosecuted within the same state:[19] when the right to *ne bis in idem* is invoked after a previous foreign final decision, unless there are specific agreements between the involved states, it is doomed to be ignored.

[17] CJEU (GC), *Menci*, *supra* note 4, §56.
[18] ECtHR, *Nodet v. France*, no. 47342/14, judgment of 6 June 2019, §§ 41-42.
[19] J.L. De la Cuesta, 'Concurrent national and international criminal jurisdiction and the principle «*ne bis in idem*». General Report', 73 *Revue internationale de droit pénal* (2002) 707-736.

This is true at least of the 'horizontal' *ne bis in idem*, that refers to the decisions of two national courts. As for the 'vertical' *ne bis in idem*, that pertains to the decisions of national and supranational courts, it must be reminded that article 20 of the International Criminal Court (ICC) Statute prohibits the *bis in idem* when the ICC and state courts are concerned, as a consequence of the principle of complementarity between the ICC and national jurisdictions.[20] By virtue of this principle, whose meaning can be derived by article 17 ICC Statute on the issues of admissibility, the Court cannot intervene in a case where the state has already acted or is acting, unless the state is unwilling or unable to genuinely investigate or prosecute. Furthermore, the need for a 'vertical' *ne bis in idem* can be better understood in light of the universal recognition of the values violated by *crimina iuris gentium* falling within the jurisdiction of the ICC, that may often bring about issues of concurring jurisdictions.

With regard to the exercise of jurisdiction by national courts, according to the main interpretations, the scope of the right to *ne bis in idem* enshrined in human rights conventions such as the ECHR and the ICCPR, is limited to the jurisdiction of the same state.[21] This outcome has been reaffirmed in a recent case by the ECtHR,[22], relying on the text of article 4 protocol 7 additional to the Convention that refers to the 'jurisdiction of the same State', as well as on its explanatory report. It could be argued that the protection from *bis in idem* should be anyway grounded in article 6 ECHR on the right to fair trial, but this has been excluded by the decisions of the European Commission of Human Rights.[23] And after article 4 protocol 7 has been expressly added, it seems even harder to be claimed.

On the other hand, a consensus on the existence of a norm of international customary law that recognizes the right to *ne bis in idem* when jurisdictions of different states concur has not been reached yet.[24]

A broader recognition seems to concern the 'deduction of sentence' principle. This principle requires the second prosecuting state to take into account the penalty that has been

[20] K. Ambos, *Treatise on International Criminal Law*, Vol. 3 (Oxford: Oxford University Press, 2016) at 393-407; D. Bernard, '*Ne bis in idem* – Protector of Defendants' Rights or Jurisdictional Pointsman?', 9 *Journal of International Criminal Justice* (2011) 863-880, mainly at 874.
[21] As for article 4 prot. 7 ECHR, *Gestra v. Italy*, Eur. Comm. HR, no. 21072/92, decision of 16 January 1995. As for article 14 § 7 ICCPR Human Rights Committee, *AP v. Italy*, Communication, 2 November 1987, UN Doc. CCPR/C/31/D/204/1986, § 7.3.
[22] ECtHR, *Krombach v. France*, no. 67521/14, judgment of 30 March 2018, §§ 34 et seq.
[23] *X v. Germany*, no. 6846/81, decision of 6 July 1976; *X v. Netherlands*, no. 9433/81, decision of 11 December 1981.
[24] Ambos, *supra* note 20, at 399-401.

already imposed and enforced by the first prosecuting state for the same fact.[25] As its purpose is to avoid disproportionate punishment, it is evident that this principle only concerns the substantial side of the *ne bis in idem*.

Furthermore, some conventions acknowledge the transnational relevance of the *ne bis in idem* within the Council of Europe.[26] But, in these cases, it operates as a principle affecting judicial cooperation among the requested state and the requesting state, more than as a right of the individual against the prosecuting state.

It is true that article 50 CFREU recognises the right even in its transnational dimension,[27] but only provided that the individual 'has already been finally acquitted or convicted within the Union'.

Thus, when two different states have jurisdiction on the same fact, a secondary prosecution of the perpetrator is allowed even if there has been a previous final judgment; at least as long as states are not members of the EU, and there is no bilateral agreement between them that regulates the conflict of jurisdiction or recognizes the application of the principle. Article 68 of the Dutch Criminal Code, that offers protection from *ne bis in idem* even when the final judgment has been rendered by a foreign court, is then an exception. [28]

This asymmetry between the protection of the *ne bis in idem* within the same jurisdiction or across different jurisdictions is critical, as it conflicts with its human right nature.

The reluctance to recognize the right to *ne bis in idem* in the transnational dimension has been already criticized: on the one hand, it has been underlined that the rationale of the principle of *ne bis in idem* does not justify a different protection depending on whether multiple prosecutions have occurred within the same state or in different states.[29] On the other, it has been argued that a minimum common core of the safeguard of *ne bis in idem*, as the fruit of the

[25] Van den Wynagaert and Ongena, *supra* note 12, at 717.
[26] See article 9 European Convention on Extradition (1957); article 53 European Convention on the International Validity of Criminal Judgments (1970); article 35 European Convention on the Transfer of Proceedings in Criminal Matters (1972).
[27] See B. Van Bockel, *The ne bis in idem principle in EU law* (Alphen aan de Rijn: Kluwer Law International 2010); A. Weyembergh and I. Armada, 'The principle of ne bis in idem in Europe's Area of Freedom, Security and Justice', in V. Mitsilegas, M. Bergström and T. Konstadinides (eds), *Research Handbook on EU Criminal Law* (Cheltenham: Edward Elgar, 2016) at 189.
[28] A. Klip and H.G. van der Wilt , 'Netherlands' report for the International Association of Penal Law on *Ne bis in idem*', 73 *Revue Internationale de Droit Pénal* (2002) 1091-1137.
[29]Lelieur, *supra* note 15, at 203 et seq.

balancing of the right of the individual with the principle of state sovereignty, can be found in the practice and provides the basis for a general international rule.[30]

Despite such criticism, changes have not occurred yet. As I show in the next paragraph, until courts address this issue *exclusively* under the systemic relations between international and national law, they cannot make steps towards the recognition of the transnational *ne bis in idem*.[31]

4. *Ne Bis in Idem* in Courts. The Case of Italy: a Fundamental Right Disappearing in-between Legal Orders.

The decisions of the Italian Supreme Court (*Corte di Cassazione*) are particularly telling of the aprioristic refusal by national judges to recognize the right to *ne bis in idem* in the transnational context and show the limits of a systemic approach to the issue of fundamental rights protection. I decided to analyse them not only for reasons of *vicinitas* to this legal order, but also because the Italian legal order is representative of other European legal systems that recognize the right to *ne bis in idem* in the national and European dimension according to domestic, ECHR and EU provisions and, at the same time, consider such provisions irrelevant in the transnational dimension.

In the absence of a hierarchically superior norm of international law, out of the scope of the CFREU and of the ECHR, courts agree that transnational *ne bis in idem* is not protected by the Italian legal system. Article 11 of the Italian criminal code, that allows a new judgment even after a foreign final decision on the same fact, is a clear expression of the political choice of denying to foreign decisions a preclusive effect on the exercise of national criminal jurisdiction.

Let's consider first a recent case of the Italian Supreme Court[32] that has recognized the *ne bis in idem* within the EU. Turkey was demanding Italy the extradition for drug offences of an individual who had been already tried in Germany for the same fact. The Court of appeal

[30] G. Conway, '*Ne bis in idem* in international law', 3 *International Criminal Law Review* (2003) 217-244, at 238-244.
[31] Recently, U.S. Supreme Court, *Gamble v. United States*, judgment of 17 June 2019, 587 U.S. (2019); Italian *Corte di Cassazione*, VI, 12 September 2018, n. 48086, available at http://www.italgiure.giustizia.it/sncass/, and French *Cour de Cassation, Ch. Crim.*, no. 16-82.117, 14 March 2018, *Bulletin des arrêts de la Chambre Criminelle Mars 2018*.
[32] *Corte di Cassazione*, VI, 15 November 2016 no. 54467, available at http://www.italgiure.giustizia.it/sncass/.

had refused the recognition of the *ne bis in idem* within the proceeding of extradition because, according to article 9 of the European convention on extradition, *ne bis in idem* can be invoked in order to avoid cooperation only if the requested state has already tried the individual; not if a third-party did it. The Supreme Court: a) considers the principle of *ne bis in idem* a general principle in the Italian legal order, that is based not only on statutory provisions (article 649 code of criminal procedure), but also on the Constitution (articles 24 and 111 on, respectively, the right to defence and the right to fair trial); b) acknowledges that there is a norm of statutory law requiring the state to put the individual on trial although he has already been tried by another state having jurisdiction on the same fact (article 11 criminal code); c) affirms that transnational *ne bis in idem* is not a general principle of international law, so it cannot be automatically recognized through article 10 of the Italian Constitution; d) underlines that *ne bis in idem* is a general principle of EU law and a fundamental right under the CFREU.

As a result, the court is bound to refuse extradition in order to comply with EU law: the Italian judges are required to take into account the German final decision, as barring further prosecutions under article 50 of the CFREU, even for the purpose of denying extradition to a non-EU country. Needless to say, the conclusion would have been different if the request of extradition had been made by Germany and the individual had been previously tried in Turkey for the same fact. In that case, the Italian court would have not recognized a preclusive effect to the decision, as the latter would have been issued in a non-EU member state.

While the outcome of the decision of the court can be praised for the purpose of European integration, the systemic distinction drawn among the national, European and international protection of the right to *ne bis in idem* is not convincing.

A paradigmatic case of denial of the transnational *ne bis in idem* has concerned the crime of drug trafficking between Albany and Italy.[33] The *Corte di Cassazione* rejected the application of the *ne bis in idem* preclusion in favour of an Albanian citizen who had already been judged in his home country for the offence of drug trafficking from Albany to Italy. The decision is particularly relevant for the analysis because it shows that courts, although aware of the existence of a gap of protection in the transnational context, consider the situation justified and impossible to be challenged in light of positive law.

[33] *Corte di Cassazione* IV, 6 December 2016, no. 3315, available at http://www.italgiure.giustizia.it/sncass/.

On the one hand, the court, recalling the arguments made by the Italian Constitutional Court decades before,[34] considers that the differences among legal systems of criminal law and criminal procedure provide sufficient justification for denying the recognition of such a right. On the other, it does not find any norms recognizing *ne bis in idem* in the transnational context. The judges set aside the application of article 4 prot. 7 ECHR as its scope is limited to national legal orders; as well as of article 50 CFREU, because it is relevant only for the application of EU law. They also exclude the existence of a norm of customary international law or of general principles of international law that would be automatically applicable by means of article 10 of the Constitution. And, as for the relationship between Italy and Albany, they deny the existence of ad hoc conventions on the application of the *ne bis in idem* that can derogate from article 11 criminal code. Specific hypothesis provided by international agreements concerning judicial cooperation, such as the Convention on the transfer of proceedings[35] cannot give evidence of the existence of a general principle of *ne bis in idem*.

Finally, another case that is worth mentioning concerns a Republic of Montenegro national murdering a compatriot in Italy.[36] This decision too justifies the refusal of the right to transnational *ne bis in idem* in light of the marked differences in the evaluation of criminal conducts from state to state. It is evident that such an argument cannot be persuasive with regard to the prosecution of a violent crime against the individual such as murder. It confirms that courts deny protection to transnational *ne bis in idem* not as a consequence of the scrutiny of the fact under trial, but as a result of an abstract and aprioristic perspective based on the traditional idea of separateness of criminal law systems.

5. Unveiling the Reasons behind the Non-recognition of the Transnational *Ne Bis in Idem*. Separateness of Legalities in Criminal Law.

I now examine the normative reasons behind the disregard for the right to *ne bis in idem* in the transnational dimension and assess whether they provide sufficient justification for limiting – better, substantially denying – the right.

[34] *Corte Costituzionale* 12 April 1967, no. 48 and *Id*. 25 March 1976, no. 69, available at www.cortecostituzionale.it

[35] Italy has not ratified the Convention of Strasbourg of 1972 on the transfer of proceedings, that recognizes the *ne bis in idem* at article 35, but the international agreement between Albany and Italy on judicial assistance, ratified by the Italian law no. 97 of the 2011, at article 19 refers to this source for the regulation of the transfer of proceedings.

[36] *Corte di Cassazione*, I, 12 June 2014, no. 29664, available at http://www.italgiure.giustizia.it/sncass/.

Among the reasons that are traditionally given for justification, the need for defending the sovereignty of the states and the existence of significant differences among legal systems are generally put at the forefront.[37]

Both of them oppose to the preclusive effect of foreign decisions with regard to the exercise of national jurisdiction and reflect the traditional ideas of the exclusiveness of the punitive power of the states and of the separateness of national criminal laws.

Although the same fact is under the jurisdiction of different states, it is considered separately by each of them for the purpose of their respective *ius puniendi*. No matter that the case is regulated by foreign law too; once the conditions for enforcing national law are met – e.g. the perpetrator is in the territory of the state –, at least when the 'strongest' criteria for anchoring jurisdiction are satisfied, such as the territorial one, the national judge has to celebrate the trial according to national criminal law. The latter normally differs from that of the other states as it expresses and protects the fundamental values of each polity. *Bis in idem* seems then the normal outcome of the self-standing nature of legalities in criminal law and of the non-interference among them.

This explains the prevalent current attitude towards *ne bis in idem* in the transnational context: it is primarily conceived as a limitation to judicial cooperation (e.g. to extradition, recognition of foreign criminal decisions, transfer of criminal proceedings) – that becomes relevant in order to deny the recognition of foreign decisions or requests – instead of a limitation to domestic jurisdiction based on the negative effect of the recognition of foreign decisions. On the contrary, in the EU, the recognition of *ne bis in idem* has followed the affirmation of the principle of mutual recognition of criminal decisions and constitutes a negative effect of this principle.[38]

Face to recent changes that put into question the self-referential nature of national criminal law, it could be asked whether this utter indifference to foreign criminal judgments can still be accepted and might justify the disregard for the transnational *ne bis in idem*.

Indeed, the idea of exclusiveness of state's regulation in criminal law has been called into question by both the widening of territorial limits of the concept of crimes and the loosening

[37] Ambos, *supra* note 20, at 400; Van den Wyngaert and Stessens, *supra* note 12, 781-782. Conway, *supra* note 30, 218.
[38] A. Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in Criminal Law: from a Presumption to (Room for) Rebuttal', 20 *German Law Journal* (2019) 468-495, at 471-473.

of the link between the political authority of the state and criminalization.[39] Transnational crimes have been breeding ground for harmonization and cooperation in criminal law once states understood the necessity of a common legal frame in order to fight them.[40] In the EU, in line with article 82 TFUE, the concept of trust arising from integration proved essential for the mutual recognition of judicial decisions, that is the cornerstone of judicial cooperation. Beyond EU borders too, international agreements are in place providing a general framework for cooperation or instruments of cooperation and judicial assistance, at least for specific crimes.[41]

Furthermore, the argument based on the differences among legal orders and lack of trust in the criminal justice systems of other countries proves weak if one considers that national criminal law sometimes attributes positive effects to foreign decisions; generally when they are functional to the collective interest in recognizing the criminal records of the person or to the interests of the victim. [42] Such an asymmetry between the negative and the positive effects of recognition seems contradictory.

Of course, harmonization of criminal provisions and mutual recognition can make the protection of the *ne bis in idem* more effective in practice. It is no coincidence that transnational *ne bis is in idem* has been recognised as a fundamental right only in the European context, in close connection with the evolution of the concept of mutual trust among the criminal law systems of the EU member states.[43] Even before article 50 CFREU, *ne bis in idem* was affirmed by the Convention of Brussels of 1987,[44] then by Article 54 of the Convention for the Implementation of the Schengen Agreement in relation to free movement of people (CISA). [45]

However, both harmonization and mutual recognition are not in principle essential to the recognition of the *ne bis in idem*. The case of the EU is telling.

[39] R. Cotterell, 'The Concept of Crime and Transnational Networks of Community', in V. Mitsilegas, P. Allridge and L. Cheliotis (eds), *Globalisation, Criminal Law and Criminal Justice* (Oxford: Hart Publishing, 2015) at 7-23; A. di Martino, *Inter-Legality and Criminal Law*, in J. Klabbers, G. Palombella (eds), *The Challenge of Inter-Legality* (Cambridge: Cambridge University Press, 2019), 250-268.
[40] M. Fichera, 'Criminal Law beyond the State: the European model', 19 *European Law Journal* (2013) 174-200.
[41] Among the most relevant, the UN Convention against transnational organized crime, open to signature in Palermo, in December 2000 and the UN Convention against corruption, open to signature in Merida, in December 2003.
[42] In Italy, for example, according to Article 12 criminal code and articles 730 and 732 code of criminal procedure recognition may concern the status of recidivism, or other personal status relevant for the application of security measures, and civil damages.
[43] Willems, *supra* note 38, at 471-473.
[44] Convention between the Member States of the European Communities on Double Jeopardy, Brussels, 25 May 1987.
[45] Convention for the Implementation of the Schengen Agreement, Schengen,19 June 1990.

On the one hand, in the EU *ne bis in idem* has been recognized in spite of the lack of a fully-fledged harmonization of criminal provisions. The CJEU itself has stressed that the application of *ne bis in idem* is not conditional upon the harmonisation of criminal laws.[46]

On the other, it is true that *ne bis in idem* has been broadly applied because of the presumption of mutual trust among EU member states; but this does not imply that, in the absence of such a presumption, *ne bis in idem* should be *a priori* excluded. In such a case it may happen that the *ne bis in idem* effect is de facto denied when the foreign decision does not satisfy the relevant conditions for its recognition according to a concrete assessment.

Even in the EU, as a consequence of the exceptional possibility of rebutting the presumption of mutual trust,[47] it might happen that a member state, under the interpretation given by the CJEU in a preliminary ruling, refuses to recognize the *ne bis in idem* effect of a decision taken in another member state because it does not comply with the respect of fundamental rights. Furthermore, mutual trust does not mean blind enforcement of the *ne bis in idem* effect of any final decision taken in a member state. Namely, issues may arise as to the requirement of the 'finality' of the decision, and, especially, as to the condition, specified by the CJEU case-law, that the decision should address the merits of the case.[48] Take a recent case, where the CJEU denied that the decision could be regarded as 'final', for the purpose of article 54 of the CISA, because it was not the outcome of a complete and detailed investigation as neither the victim nor the witness had been heard.[49]

As for the transnational, non-EU, context, in the absence of a principle of mutual recognition of judicial decisions grounded in a presumption of mutual trust, national courts might attribute the *ne bis in idem* effect to a foreign decision only after a proceeding for its recognition or, at least, if they ascertain that, on the one hand, the decision has been respectful of the rights of the individual because the proceeding has been compliant to fair trial; on the other, it has not followed a 'sham' proceeding aimed at providing the individual with impunity. Similar conditions are imposed by article 20(3) ICC Statute in order to make vertical *ne bis in idem* applicable.

[46] CJEU, *Gözütog and Brügge*, C-187/01 and C-385/01, judgment of 11 February 2003, §§32-33.
[47] See for example CJEU, *Aranyosi and Caldararu*, C-404/15 et C-659/15 PPU, judgment of 5 April 2016 and Id. *L.M.*, C-216/18 PPU, judgment of 25 July 2018, concerning the European Arrest Warrant.
[48] In particular, CJEU, *Miraglia*, C-469/03, judgment of 10 March 2005.
[49] See CJEU, *Kossowski*, C-484/14, judgment of 29 June 2016, §§50-53.

Perhaps, it is preferable to require foreign decisions to comply with minimal conditions. A balance between the protection of the individual and the need to avoid impunity is necessary; but making the right of the individual conditional upon the logic of the recognition of the decision – thus dependent on an *exequatur* – would mean to make the individual bear the risk of shortcomings of the judicial system of the state.

5.1. The Defence of Sovereignty. Ne Bis in Idem Hindering the Exercise of National Criminal Jurisdiction.

The main obstacle to the recognition of the transnational *ne bis in idem* seems the strong link between the exercise of the *ius puniendi* and states' sovereignty. Criminal punishment, the use of coercive power over individuals in order to defend the existence itself of the society and its founding values, is strictly linked to national sovereignty. Since the Hobbesian justification of state's monopoly on the use of force, state has been entitled to a proper right to punish in the interest of the society.

Ne bis in idem endangers sovereignty as it paralyses state's criminal jurisdiction and, consequently, it prevents states from protecting their fundamental values within their territory through the exercise of criminal jurisdiction.

The fact that *ne bis in idem* is not recognized in the United States when federal jurisdiction concurs with the jurisdiction of the states, according to the dual sovereignty doctrine, is quite telling. This doctrine, elaborated by the US Supreme Court, imposes a limitation on the protection from the double jeopardy, enshrined in the 5th Amendment of the US Constitution, when entities draw their power to punish from a different 'ultimate source': as separate sovereigns, they can exercise their *ius puniendi* on the same acts without violating the double jeopardy; those acts breaking the laws of two sovereigns constitute different offences.[50]

The issue of sovereignty seems particularly clear in light of the dual relevance of the transnational *ne bis is in idem*: on the one hand, it protects the individual against multiple prosecutions for the same fact; on the other, it de facto works as a means of coordination of states' jurisdictions.[51]

[50] Recently restated by *Gamble v. United States*, *supra* note 31.
[51] T. Bravo, '*Ne bis in idem* as a defence right and procedural safeguard in the EU', 2 *New Journal of European Criminal Law* (2011) 393-401, at 394-395.

Following the *Lotus* case, it is generally affirmed that states are free to expand their criminal jurisdiction selecting the relevant links between national jurisdiction and the criminal acts.[52] The principle of territoriality is regarded as preeminent: as it embodies the strongest expression of state's sovereignty, its justification is self-evident. But states may also establish their criminal jurisdiction extraterritorially according to different criteria, such as the principle of universality, for the most serious crimes; the principle of protection of the national interests, that allows the exercise of jurisdiction on crimes that violate the interests of the state; the principles of active and passive personality, that extend jurisdiction, respectively, to crimes committed by nationals and to crimes perpetrated against nationals.

In the absence of a unanimous hierarchy of these criteria and of general mechanisms of resolution of conflicts of jurisdiction, should the transnational *ne bis in idem* be recognised, jurisdiction would be de facto regulated by the criterion of priority, following a 'first come, first served' principle. The first prosecution would bar the prosecution by another state, irrespective of which state is better placed to conduct the criminal prosecution or is more affected by the criminal conduct.

Reluctance to recognize *ne bis in idem* could be justified especially when state's criminal intervention is based on certain criteria of jurisdiction that enjoy a stronger moral justification if compared with the others. For example, criminal prosecution based on the principles of territoriality and of the protection of national interests can be considered essential to contribute to keeping state's criminal law system in force for the sake of the security and dignity of the individuals.[53]

But in such cases too – and even imagining that a consensus on a hierarchy of criteria for exercising jurisdiction is reached – it seems hard to accept that the interest in the exercise of the best-founded criminal jurisdiction unconditionally prevails on a fundamental right of the individual. Of course, such an interest justifies the adoption of mechanisms of regulation of jurisdiction in order to give prevalence to the state whose power to punish is based on the prevailing moral justification or can be exercised more effectively. But the fact that such mechanisms of regulation do not exist or, although existing, are not implemented, cannot

[52]P.C.I.J., *SS Lotus, France v. Turkey*, Series A, no. 10, judgment of 7 September 1927. This decision marked the distinction between 'jurisdiction to prescribe', that can be exercised extraterritorially, and 'jurisdiction to enforce', that is strictly territorial. On the principles governing criminal jurisdiction, C. Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008) *passim*.

[53] A. Chehtman, 'The extraterritorial scope of the right to punish', 29 *Law and Philosophy* (2010) 127-157, at 132-135.

interfere with the recognition of such an individual right. As the rationale of the preclusive effect of the *ne bis in idem* is different from that underlying the regulation of the exercise of criminal jurisdiction, the former should be recognized irrespective of the correctness of the latter.

Furthermore, it is interesting to notice that a new prosecution for the same fact could be envisaged not only with regards to those offences that have been perpetrated within the territory of the state or against its specific interests, but even when national jurisdiction is based on 'weaker' criteria.[54] This is the case of Italy. In order to allow the *bis in idem* with respect to crimes that have not been committed within the territory of the state, Article 11 of the Italian criminal code only requires a further requisite with respect to territorial crimes: the political evaluation by the Minister of Justice. This seems to confirm that the reasons behind the non-recognition of the transnational *ne bis in idem* are the fruit of the political will of the state, more than of compelling legal reasons.

6. Overcoming the Asymmetry. On the Relevance of the Inter-legal Perspective.

The non-recognition of the transnational *ne bis in idem* still leaves many doubts.

I try to show that the outcome of the analysed judicial decisions would be different if they took the perspective of inter-legality. Such a perspective would require the judge to reconstruct the law regulating the case of transnational multiple prosecutions focusing on the concrete situation, instead of concentrating on the formal relations among the different criminal jurisdictions.

As for the concept of inter-legality, I refer to the recent doctrinal framework used to describe a typical situation of the current legal era: the coexistence and interweaving of multiple legal norms, originated in different legal systems, on the same fact.[55] The notion also has a normative meaning as it requires the public authority – for the purposes of this analysis, the judge – to identify and take all these norms into account for the solution of the case: when hierarchy and mechanisms of coordination among sources are absent or cannot work properly,

[54] States may adopt different solutions. In France, according to articles 113-9 *Code pénal* and 692 *Code de procédure pénale*, the secondary prosecution is allowed only for crimes committed within national territory.
[55] Palombella and Klabbers (eds), *supra* note 39, and namely G. Palombella, 'Theories, Realities, and Promises of Inter-legality. A Manifesto', *ibidem*, at 363-390.

the decision must be built on the assessment of all the norms that are relevant to the concrete case, irrespective of the systemic relations among the different legal orders where they have been created. The systemic approach seems ill-equipped to face cases in-between multiple legalities' settings.[56]

The concurrence of multiple laws and regulations on the same factual situation is not unknown to criminal law. This seems true when the criminal conduct has a transnational relevance – e.g. for the objective nature of the conduct, when it crosses territorial borders, or for the relevance of the interests that have been violated or for the nationality of the author or of the victim – and entails the concurrence of different jurisdictions, as this occurrence challenges the exclusiveness and self-referential perspective of states' regulation. Furthermore, it is due to international treaties and human rights conventions that impose legal obligations on the state and then require national authorities to balance the need for security with the need for effective protection of human rights by interpreting national law in compliance with such obligations.

The adoption of the inter-legal perspective in criminal law requires the interpreter to take into account the peculiar nature of this branch of law that concerns the relation between the coercive power and the individual committing harmful conduct. This means that, when facing multiple legalities concurring or competing with regard to the same concrete case, the interpreter should always respect the protective function of criminal law; that is placing constraints on the institutional coercive power.[57]

6.1. Taking the Perspective of the Fact.

In light of this premise, as for the specific issue of *ne bis in idem*, the resort to the inter-legal approach suggests to look at the situation of overlapping jurisdictions on the same fact from the perspective of the individual and of the criminal conduct that concretely falls under different regulations. This turn helps revealing the compelling legal reasons, under both human rights and criminal law, in support of the recognition of the transnational *ne bis in idem*.

Taking the perspective of inter-legality means for the judge, on the one hand, to carefully consider whether the substantive elements of the human right not to be prosecuted twice are integrated in the concrete case, even though situated in the transnational context. The

[56] Palombella, *supra* note 55, at 379.
[57] di Martino, *supra* note 39, at 266-267.

task of the judge is not only, or not much, to ascertain in what legal system a norm recognizing the right to *ne bis in idem* in the transnational context can be ultimately found. It is firstly to consider the need for protection emerging in the concrete case and examine whether it reflects the essential content of the right to *ne bis in idem* as it is legally recognized.

On the other hand, the inter-legal perspective requires the judge not to be indifferent to the exercise of foreign criminal jurisdiction on the same fact. Criminal law resulting from the foreign *res iudicata*, although considered irrelevant from the point of view of the legal order, proves relevant from the perspective of the individual as it has concretely produced limiting effects on his liberties as a response to his harmful conduct.

Ne bis in idem seems, then, the 'natural' response to the cases of inter-legality that arise from the concurrence of criminal jurisdictions.

7. Revealing the Reasons for the Recognition of *Ne Bis in Idem*. Protection of Human Rights.

The perspective of inter-legality opens a window in the current formal perspective of courts and brings to the fore substantial reasons for the recognition of the right to *ne bis in idem*. They are expression of both human rights and criminal law.

I argue that *ne bis in idem*, as a right of the individual, keeps its own protective rationale unchanged even in the transnational context as it protects the individual against degrading treatments, unfair proceeding, endless subjection to the prosecuting authorities. As long as *ne bis in idem* is conceived as a human right that, together with other substantial and procedural rights – such as the right to personal criminal liability, fair trial – limits and shapes the exercise of the *ius puniendi*, an *a priori* reject in the name of state's sovereignty cannot be accepted. If courts realize that the underlying factual situation creates the same need for the protection of the individual in both the transnational and the national context, they should wonder whether this asymmetry is justified and, if the answer is not, they should overcome it.

Of course, affirming the fundamental nature of the right to *ne bis in idem* does not mean its unconditional recognition face to conflicting interests. Human rights too must confront with other rights – for example, in the case at stake, those belonging to the victim of the crime – as well as with the public interest: in order to be recognised as fundamental, rights must be

assigned a value consistent with the legal system[58] and, as a result of the balancing, their protection can be limited. Nonetheless, reconsidering the constitutive elements of the right as a result of the balancing does not mean to deny that *the individual has a right.*

It is important to underline that this line of reasoning does not imply a disregard for positive law; it only enhances the interpretive possibilities of human rights norms and, in general, of principles. The protection of *ne bis in idem* within the same jurisdiction is already provided by norms of positive national, European and international law. Rejecting their application on the grounds of concurring jurisdictions, then, could be considered unreasonable. Furthermore, other norms indirectly supporting the protection of the individual from multiple prosecutions seem relevant and can contribute to shape the law of the case. Think of those norms on the right to fair trial (for example, article 6 ECHR) or on the protection from inhuman and degrading treatment (article 3 ECHR).

7.1. The Need for a Substantive Justification of Criminal Jurisdiction.

Criminal law reasons in favour of the recognition of the transnational *ne bis in idem* are related to the need for substantive justification for the exercise of criminal jurisdiction.

The second prosecuting authority that does not take into account the fact that the same acts have been finally regulated by another legal system seems to uphold a merely formal concept of criminal jurisdiction – the enforcement of the criminal provisions of the system – while overlooking its substantive meaning of institutional response, through the use of the legitimate coercive power, to a criminal conduct.

I argue that, from a theoretical point of view, the transnational *ne bis in idem* should not be dealt with as an issue related to the justification of the allocation of criminal jurisdiction among states. First and foremost, *ne bis in idem* should be addressed as an issue directly related to the justification of criminal intervention. In other words, I maintain that transnational multiple prosecutions could be accepted only if they prove compatible with the *substance* of criminal jurisdiction; that is the justification of the institutional response (as for the moments of both prosecution and punishment) to the harmful human conduct (the fact).

[58] G. Palombella, 'From Human Rights to Fundamental Rights. Consequences of a conceptual distinction', *EUI LAW*, 2006/34, available at http://hdl.handle.net/1814/6400.

7.2. On the Justification of Multiple Criminal Interventions.

Let's consider carefully whether multiple criminal interventions might be justified in light of the principles governing criminal intervention.

The debate on the justification for criminal intervention is ever-lasting. The Kantian and Benthamian positions still are the starting point of the current approaches on the moral and the instrumental reasons for punishment.[59] I share the idea that punishment is justified as long as it acts both as moral censure for the harmful conduct of the individual and as a means of preventing further violations of the legally protected interests.

From the perspective of each national legal order, the exercise of criminal jurisdiction on a fact is justified provided that it performs the functions of criminal intervention, even though they have been already fulfilled by a previous foreign criminal prosecution on the same fact. From the perspective of the human conduct, the picture seems completely different: when the first prosecution has already served the purposes of criminal law towards the individual, the secondary intervention is deprived of its justification.

This seems evident with regard to censure and specific deterrence towards the individual. Some doubts might arise with respect to the function of general deterrence, that serves state's interest in the abidance of its laws by the society as a whole. However, such a partial justification of the secondary prosecution would not be sufficient in order to prosecute and punish the individual.

7.3. Multiple Protected Legal Interests as Possible Justifications for Multiple Criminal Interventions.

One might criticize this approach to the extent that it overlooks the relevance of the notion of crime, as harm to a protected legal interest, for the justification of criminal intervention. The concept of legal interest, the asset protected by criminal law, has been elaborated especially under the theorisation of the principle of harm.[60] According to this

[59] Among the many, A. Ashworth and A. von Hirsch, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005).

[60] A. Eser, 'The Principle of "Harm" in the Concept of Crime', 5 *Duquesne University Law Review* (1966), at 345-417.

principle, criminal intervention is justified against harmful conducts, that are actually harm-causing or creating a direct risk of harm to a protected legal interest.

It might be wondered about this issue: are multiple criminal interventions justified when they are directed against a conduct that violates different legal interests?

It could be argued that a fact violating different legal interests cannot be considered 'the same' under the definition of '*idem*', but would result in multiple criminal acts. This means of course to reject a naturalistic concept of '*idem*', based on the sheer fact, and to adopt a legal concept, based on the fact relevant for criminal law: the harmful conduct offending a specific protected legal interest.

Similar arguments have been effectively put forward in the debate on the interpretation of the constitutive elements of the transnational *ne bis in idem* within the EU.[61] Regarding transnational and continuing crimes[62] such as drug trafficking or smuggling, it has been stressed that the conduct of importing and exporting illegal goods from one country to another, although it could be considered the same under the factual qualification, integrates different crimes because it causes harm against the legal interests of each of the concerned states. As a result, it could be affirmed that each of the multiple prosecutions is justified as long as it answers the need for protection of a distinct legal interest. For example, in the case of transnational smuggling, each of the concerned states is entitled to prosecute the fact because is the carrier of a proper legal interest, impinged by the movement of goods across its borders.

It is necessary to underline that this approach differs from that in favour of a legal notion of '*idem*' based on the sameness of the legal provision. The latter would effectively result in the total denial of the *ne bis in idem*, and it would not satisfy the need for substantive justification for the secondary intervention. Indeed, 'a strict *idem crimen* approach that equates "same offense" with "same provision of the criminal law" or "same statute" would allow parallel or subsequent prosecutions for each nominally distinct offense.' [63] The approach under scrutiny is likewise at odds with the idea that, when the same fact violates the law of two different states, each of them is always entitled to prosecute it, even when a final decision has been issued by the authorities of the other state: it is not the mere violation of a national legal

[61] M. Nemedy, *Ne bis in idem*: a separation of acts in transnational cases?, 7 *Perspectives on Federalism* (2015), 85-115, at 98-103; Stessens and Van de Wyngaert, *supra* note 12, at 790-795.
[62] For continuing crimes, I intend those crimes committed over a period of time, either because their harm expands throughout time (like kidnapping), or because, in practice – as it is often the case of drug trafficking and smuggling – they occur as a pattern made-up of individual facts.
[63] Stuckenberg, *supra* note 5, at 467-468.

provision that justifies the secondary intervention, but the violation of a specific legal interest of the state.

Finally, it is worth noticing that, should a legal notion of *idem*, based on the protected legal interest, be upheld, instead of a factual one, the outcome would not be the automatic denial of the transnational *ne bis in idem*. On the contrary, the judge should evaluate whether the criminal acts violated the legal interests of different states and, as a consequence, integrated multiple legal facts.

8. A Possible Scenario for the Right to Transnational *Ne Bis in Idem*.

The analysis has shown that the recognition of the transnational *ne bis in idem* is normatively necessary. I now consider its concrete impact on the legal reasoning of the courts. Again, I consider the Italian legal system as a case study.

Italian courts should firstly wonder whether it is possible to give an interpretation of article 11 of the criminal code consistent with constitutional norms or those human rights norms with which the legal order has to comply with under the international obligation posed by article 117 of the Constitution. Article 11 is clear about admitting double prosecution; as a result, an interpretation of this provision consistent with the constitutional norms protecting the right to *ne bis in idem* does not seem to fall within the possibilities of the common judge.

The common judge could ask the Constitutional Court to declare article 11 unconstitutional. In addressing the Court, he could invoke those national, European and international norms recognizing *ne bis in idem*, although within the same criminal jurisdiction, together with article 3 of the Constitution on the principle of reasonableness. As I have already underlined, the asymmetry concerning the protection of the individual, depending on the national, European, transnational context, does not seem justified. Furthermore, the judge could refer to other norms recognizing rights that share a common rationale with the *ne bis in idem*, such as those on fair trial and the right to defence (articles 24 and 111 of the Constitution and article 6 ECHR), or on the protection against inhuman and degrading treatment (article 27 of the Constitution, article 3 ECHR).

Of course, should article 11 be declared unconstitutional, the right to *ne bis in idem* would not be automatically recognized in every situation. Courts should verify *in concreto* whether the elements of the right are satisfied despite the peculiarities of the transnational

context. For example, as for the concept of '*bis*', it would be necessary to ascertain, even in the absence of a special procedure for the recognition of the foreign decision, through a consultation with foreign authorities, whether the decision has followed a true investigation; has been taken after a fair trial; can be considered as 'final'. As for the concept of '*idem*', if a purely factual notion is dismissed, it should be excluded that the alleged conduct has offended distinct legal interests of the states and, as a result, it has integrated different facts relevant for criminal law.

These issues still affect the debate on the width of the transnational *ne bis in idem* within the EU. Of course, *in civitate maxima*, the lack of integration makes the solution to these questions more complex and time-consuming; but these seem practical obstacles that cannot justify by themselves the denial of human rights.