

12. *Ne bis in idem* in an international and transnational criminal justice perspective – paving the way for an individual right?

Sabine Gless

1 INTRODUCTION

In national criminal justice systems, defence rights have been developed and consolidated over the centuries in order to balance the state's *ius puniendi* with the individual's interests that are adversely affected by criminal prosecution.¹ Fundamental rights and privileges represent a core understanding of fairness, which is necessary when a state brings an

¹ For information on the emergence of state jurisdiction, see Henry H. Brown, 'The History of the Criminal Law' (August 1908) 33 (CCCXLIX) *The Law Magazine and Review* 393; Daniel-Erasmus Khan, 'Territory and Boundaries' in Bardo Fassbender and Anne Peters (eds), *Oxford Handbook of the History of International Law* (Oxford University Press 2012) 233–5; Alejandro Chehtman, 'Jurisdiction' in Markus D. Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014) 404–5. For a short overview of the history of criminal law see, for example, Lukas Gschwend, in *Historisches Lexikon der Schweiz* (version from 26 November 2013) <<http://www.hls-dhs-dss.ch/textes/d/D9616.php>> accessed August 2015. For a comprehensive overview on the history of fair trial, see Patrick Robinson, 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY' (2009) 3 *Berkeley Journal of International Law* 1–3 <<http://bjil.typepad.com/publicist/2010/01/the-right-to-a-fair-trial-in-international-law-with-specific-reference-to-the-work-of-the-icty.html#end>> accessed August 2015.

individual to justice.² Among these principles is the right not to be tried twice for the same conduct – the so-called *ne bis in idem* principle.³

Over the last few decades, the general acceptance of basic guarantees within each national jurisdiction has also paved the way for recognition of such entitlements in the realm of international criminal law *stricto sensu* ('ICL', 'Völkerstrafrecht'), that is international core crimes.⁴ Such basic guarantees include, for example, the right to remain silent, the right to a lawyer and – in principle⁵ – the right not to be tried twice for the same conduct (*ne bis in idem*).⁶ The majority of the rights of defendants were first established on the national level, subsequently growing to reach the international level. Yet in situations where states join forces to fight certain crimes, for instance by way of treaty obligations of multilateral crime suppression conventions, creating a space for transnational criminal law (TCL),⁷ the principle of *ne bis in idem* lags

² On fairness in the European criminal procedural tradition, see Sarah Summers, *Fair Trials in the European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing 2007) passim.

³ It is, for example, provided for in Article 11 of the Swiss Code of Criminal Procedure <<https://www.admin.ch/opc/en/classified-compilation/20052319/index.html>> accessed 1 June 2017, in § 17 of the Austrian Code of Criminal Procedure <<http://www.wipo.int/edocs/lexdocs/laws/de/at/at099de.pdf>> accessed 1 June 2017, and in Article 6 of the French Code of Criminal Procedure <<http://www.wipo.int/wipolex/en/details.jsp?id=14295>> accessed 1 June 2017. For further examples see the Max Planck Information System for Comparative Criminal Law <infocrim.org> and search for 'ne bis in idem'. It is also provided for domestic legal systems in Article 4 of the 7th Protocol to the ECHR of 22 November 1984. The principle is undisputed. However, the normative content is at issue (see Wolfgang Schomburg, 'Ne bis in idem' in Gudrun Hochmayr (ed.), *Ne bis in idem' in Europa* (Nomos Verlag 2015) 10).

⁴ See on the basic guarantees in international criminal trials, Antonio Cassese and others (eds), *Cassese's International Criminal Law* (3rd edn Oxford University Press 2013) 347–62.

⁵ According to Article 20 of the Rome Statute, however, the *ne bis in idem* principle cannot be applied in cases of so-called sham proceedings or if a state shows unwillingness or incapability to prosecute a case properly (see Immi Talgren and Astrid Reisinger Coracini, 'Article 20 – *Ne bis in idem*' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn Nomos Verlag 2008) paras 44–6.

⁶ Generally on a defender-based approach, see Sabine Gless, 'Bird's-eye view and worm's-eye view: towards a defendant-based approach in transnational criminal law' (2015) *Transnational Legal Theory* 1.

⁷ Sabine Gless, 'Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle' (2013) 9(4) *Utrecht Law Review* 90.

behind.⁸ In general, at present, it is not acknowledged as an individual entitlement against double prosecution by different states.⁹ Despite the long tradition and pervasive rooting of *ne bis in idem* in national criminal justice systems,¹⁰ an offender can still be prosecuted for the same conduct by different states, even where such penal pursuits would be clearly barred within the same state, with few exceptions.¹¹ Overall, states have generally been reluctant to grant the right not to be tried twice, not only in situations where two states compete for the right to put a person on trial, but even in situations of *transnational* criminal prosecution, that is where states agree to fight certain cross-border crimes with joint force.¹² The reasons for a certain reluctance in cross-border cooperation probably are manifold. It might, for instance, be that an agreement to fight cross-border crimes with joint force is concluded, but the respective substantive criminal law provisions are not harmonised. National criminal policy, for instance with regard to drug use, can be highly divergent in different states.¹³

⁸ See Mehmet Güney, 'Preventing Double Jeopardy in National Courts after the International Tribunals Close' in Budislav Vukas and Trpimir M. Sobic (eds), *Liber Amicorum Bozidar Bakotic* (Martinus Nijhoff Publishers 2010) 5 with further references. On the traditional foundations of *ne bis in idem*, see also Juliette Lelieur, 'Transnationalising *Ne Bis In Idem*: How the Rule of *Ne Bis In Idem* Reveals the Principle of Personal Legal Certainty' (2013) 9(4) *Utrecht Law Review* 198, 199–202.

⁹ See Martin Böse, 'Einschränkungen des transnationalen *ne bis in idem* – notwendiges Korrektiv oder Anachronismus?' in Gudrun Hochmayr (ed.), '*Ne bis in idem*' in *Europa* (Nomos Verlag 2015) 171; Gerhard Kemp, 'The Application of the Principle *Ne Bis In Idem* in Respect of Judgements Rendered by International Criminal Courts' (2001) 1 *Journal of South African Law* 147, 149–50; Lelieur (n 8) 203–204.

¹⁰ See Ken Eckstein, 'Grund und Grenze transnationalen Schutzes vor mehrfacher Strafverfolgung in Europa' (2012) 124(2) *Zeitschrift für die gesamte Strafrechtswissenschaft* 490, 493 with further references; Güney (n 8) 5 with further references.

¹¹ For a prominent exception, see Article 54 Schengen Implementing Convention; further information ~~is provided~~, for example, Bernd Hecker, *Europäisches Strafrecht* (4th edn Schulthess 2012) 437–70; André Klip, *European criminal law* (Intersentia 2012) 251–62; Eleanor Sharpston and José Maria Fernández-Martín, 'Some Reflections on Schengen Free Movement Rights and the Principle of *Ne Bis In Idem*' in *Cambridge Yearbook of European Legal Studies*, Vol.10 (Cambridge University Press 2008) 413. See on the European model below Section 3.2.4.

¹² See Gless (n 6).

¹³ See on the perspective of the sovereignty of the states below Section 3.

Nevertheless, the reluctance of states to grant a transnational *ne bis in idem* comes as a surprise if one takes into account that the principle of *ne bis in idem* does not primarily serve efficiency of the states' *ius puniendi*, but it also secures a fundamental need of defendants: to obtain a final decision in criminal proceedings with regard to a specific accusation.¹⁴ Without *ne bis in idem*, the individual cannot attain legal certainty (*Rechtssicherheit*) even if state authorities have already tried that same person.¹⁵ The *ne bis in idem* principle provides protection in various ways; for instance, it safeguards the principle of guilt because it ensures that an offender can only be put on trial once (and not several times) for the wrong he or she allegedly committed.¹⁶ Excessive punishment (for example, being tried twice for one offence) contradicts the principle of proportionality, as it is understood in modern Western societies.¹⁷ Such thinking has paved the way for recognition of these entitlements in ICL *stricto sensu*, as it accrues, for example, from Article 55 Rome Statute.¹⁸

2 THE PROBLEM IN A NUTSHELL: LAW ENFORCEMENT INTERESTS OR INDIVIDUAL RIGHTS?

Fair trial principles have been established in international frameworks paralleling the principles governing criminal proceedings on the national level based on rather trivial reasoning: the individual facing prosecution needs certain rights taken into account when confronting state power, regardless of whether the *ius puniendi* is exercised inside a state or across state borders.¹⁹ Whereas this transfer of fair trial principles happened quite efficiently in ICL by the adoption of the Rome Statute²⁰ (albeit in the vertical and not yet in the horizontal context),²¹ it still faces

¹⁴ See Güney (n 8) 4 with further references.

¹⁵ See Eckstein (n 10) 497.

¹⁶ See Sabine Gless, *Internationales Strafrecht* (2nd edn Helbing Lichtenhahn 2015) para 1018.

¹⁷ See Eckstein (n 10) 497.

¹⁸ See Christopher K. Hall, 'Article 55 – Rights of persons during an investigation', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn Nomos Verlag 2008).

¹⁹ See Böse (n 9) 177, 183 and passim; Anne Peters, *Jenseits der Menschenrechte* (Tübingen 2014) 105–8.

²⁰ See <http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf> accessed ~~1 June 2017~~.

²¹ See below Section 3.1.

challenges in TCL,²² especially with regard to the risk of being tried twice for the same conduct: if a person allegedly committed a core crime that falls within the scope of the Rome Statute, that person – as a rule – must stand trial either before the International Criminal Court (ICC) or a national court.²³ If, however, someone engages in conduct that has effects in different states – like a transfer of money across borders that can be viewed as money laundering – chances are that the prosecution will be doubled with both states exercising their *ius puniendi*; even if both states are aware of this double prosecution. Therefore, for instance, an individual facing prosecution for a cross-border crime is more likely to face a greater number of different sentences than a person prosecuted for core international crimes.²⁴

At first blush, this situation appears to be a rather arbitrary approach to individual wrongdoing, at least if one is not satisfied by the somewhat technical explanation that – different from ICL – TCL frameworks normally lack a rule governing *ne bis in idem* in the first place. And a legitimate basis for a *ne bis in idem* principle in TCL can hardly be found in customary international law either, given that it requires a consistent cross-national legal practice (*usus*) based on the belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinio juris sive necessitatis*).²⁵ However, the *internal application* of *ne bis in idem* can be regarded as ‘a customary rule of international law grounded in an elementary principle of justice’²⁶ (albeit such application sometimes faces problems on the national level as well if, for instance, a particular conduct triggers *administrative* and *criminal* procedures at the same time).²⁷

²² Gless (n 6).

²³ See Article 55 Rome Statute; Hall (n 18). See John Vervaele, ‘The Transnational *Ne Bis In Idem* Principle in the EU: Mutual Recognition and Equivalent Protection of Human Rights’ (2005) 1(2) *Utrecht Law Review* 100. There are, however, problems regarding the right not to be tried twice in states with a federal structure where every federal state has its own substantive and procedural criminal law in addition to federal criminal law (see Andreas Eicker, *Transstaatliche Strafverfolgung* (Centaurus Verlag 2004) 137 with further references).

²⁴ See Cassese and others (n 4) 315.

²⁵ See Eicker (n 23) 234 with further references. See on different approaches in domestic criminal laws, Section 3.2.1.

²⁶ See Cassese and others (n 4) 315.

²⁷ If the administrative sanction is in fact a criminal sanction, *ne bis in idem* applies nonetheless (at least in Europe). The question though remains what amounts to a *criminal* sanction. See for example European Court of Human

In this paper, I will argue that the comparison between ICL and TCL presents a good case for why an individual should be granted the right not to be tried twice, regardless of whether he or she is tried in a purely national jurisdiction, by an international tribunal or by way of ‘transnational proceedings’.

The chapter follows a three-step argument: first, a comparison is drawn between (a) the position of a defendant who allegedly violated international human rights and humanitarian law by committing an international core crime and is put on trial before the ICC, and (b) the position of an individual who allegedly committed a transnational crime, but not an international core crime, for instance money laundering, and is tried in one of the states affected by the act. This will lead, as a second step, to two conflicting conclusions: on the one hand, the right not to be tried twice is in fact recognised worldwide for those offenders who stand trial for the most heinous crimes, such as genocide, if the ICC either convicts or acquits them (i.e. a vertically applicable right). By contrast, an individual who is prosecuted for having committed a less severe ‘transnational’ crime may be tried for the same conduct by several states, because a worldwide, horizontally applicable right not to be tried twice has not yet been established.²⁸ As a third step, it will be discussed whether these disparities in the position of defendants are in fact justified or whether a standardised approach based on general principles applicable in all criminal prosecution proceedings involving different jurisdictions should be established. The latter would include supplementing the vertical right with the horizontally applicable right not to be tried twice. The forerunners of such a model are Article 54 Convention Implementing the Schengen Agreement (CISA)²⁹ and Article 50 European Union (EU) Charter of Fundamental Rights.³⁰ However, one has to keep in mind that such sophisticated arrangements have been established in a specific institutional context of ‘like-minded’ states that, basically, aspire to constitute a closely knit economic and political union, as has

Rights (ECtHR), *Engel and Others v. the Netherlands*, 1976, Series A No. 22; EU Court of Justice (CJEU), 2013, Case C-617/10 *Åkerberg Fransson*.

²⁸ See Talgren and Coracini (n 5) paras 8 and 13.

²⁹ Published in EU Official Journal, OJ L 239, 22 September 2000, 19–62.

³⁰ EU OJ C 364 of 18 December 2000, 1. See Katalin Ligeti, ‘Rules on the Application of ne bis in idem in the EU: Is further legislative action required?’ [2009] *Eucrim* 37; Steve Peers, ‘Double Jeopardy and EU Law: Time for a Change?’ (2006) VIII(2/3) *European Journal of Law Reform* 199; Sharpston and Fernández-Martín (n 11) 413; Bas van Bockel, *The Ne Bis In Idem Principle in EU Law* (Wolters Kluwer 2010) passim; Vervaele (n 23).

been the case with the Schengen states, even if Schengen has always been open to certain non-EU Member States and has never included all EU Member States.³¹

3 DEFENDANTS' POSITION IN ICL *STRICTO SENSU* AND TCL – A COMPARATIVE PERSPECTIVE

3.1 *Ne Bis In Idem* in ICL *Stricto Sensu*

The controversial debate as to which jurisdiction has the final say over international core crimes runs like a thread through history. Various solutions have been presented, including those from the Nuremberg trials and the ad hoc tribunals for the former Yugoslavia and Rwanda. While these solutions are not the focus of this chapter, they have contributed to the development of the *ne bis in idem* principle regarding international core crimes.³² With regard to the ICC, the Rome Statute settles the debate as to which jurisdiction has the final say over international core crimes: it forms a relatively coherent body of law that includes general rules on how to handle situations of concurring jurisdictions (Articles 17 to 19) and furthermore establishes a *ne bis in idem* regime (Article 20).³³ More specifically, Article 20 Rome Statute prohibits the ICC from prosecuting a person twice for the same conduct and further provides that no person can be tried by another court for a crime for which that person has already been convicted or acquitted by the ICC itself. Nor may the ICC charge a person for conduct that:

has been tried by another court ... unless 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 recognised 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.

³¹ See Gless (n 16) paras 509–35.

³² See Article 10 of the ICTY Statute and Article 9 of the ICTR Statute. See Gless (n 16) para 1022. For further information, see Kemp (n 9) 150–2; Christoph Safferling, *Towards an International Criminal Procedure* (Oxford University Press 2001) 326–31.

³³ See Heinrich Grützner, Paul-Günter Pötz and Claus Kress, *Internationaler Rechtshilfeverkehr in Strafsachen* (C.F.Müller 2012) IVA 1, para 28.

Article 20 Rome Statute does not, however, explicitly address the right not to be tried twice in horizontal relations (domestic court of state A vs. domestic court of state B). Instead it only establishes – at present – a *ne bis in idem* in vertical relations (international court vs. domestic court).³⁴ This remains the case despite the fact that states share some willingness to recognise *ne bis in idem* beyond a purely domestic dimension.³⁵ It can furthermore be argued (or rather hoped) that this development is a step forward in the development of a truly transnational principle of *ne bis in idem* in cases of international core crimes.³⁶ Such a principle would enjoin any court (international or national) from retrying someone who has already been tried for the same conduct unless there was fraudulent *res judicata* (for example, by analogy to Article 20(3)(a) and (b) Rome Statute).³⁷

Beyond the details of the *ne bis in idem* regime in ICL, the important aspect in comparing the individual's position in ICL with his or her position in TCL is the fact that in ICL there is a provision protecting the individual from double jeopardy. Furthermore, there is a broad geographical scope of application of the *ne bis in idem* regime in ICL, since the application is not restricted to certain territories (such as Yugoslavia or Rwanda).³⁸ By contrast, in TCL, no similar far-reaching applicable provision exists in terms of the geographical dimension. An offender who has allegedly committed an international core crime is thus arguably better off as regards fair trial proceedings than an offender who 'merely' committed a transnational offence.

³⁴ See Eckstein (n 10) 494; Eicker (n 23) 231 with further references; Talgren and Coracini (n 5) paras 6–9; Safferling (n 32) 319 ff.

³⁵ See Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) 320; Eicker (n 23) 231; Talgren and Coracini (n 5) para 9.

³⁶ See Eva Scheschonka, *Der Grundsatz 'ne bis in idem' im Völkerstrafrecht unter besonderer Berücksichtigung der Kodifizierung durch das ICTY-Statut und das IStGH-Statut* (LIT Verlag 2005) 297–8. See also Cassese and others (n 4) 316; Güney (n 8) 7.

³⁷ See for examples of case law of the Inter-American Court of Human Rights on fraudulent *res judicata*, John Vervaele, 'Ne bis in idem: Towards a Transnational Constitutional Principle in the EU' (2013) 9(4) *Utrecht Law Review* 211, 214.

³⁸ See Article 12 Rome Statute; See Eicker (n 23) 233; Helmut Satzger, *International and European Criminal Law* (C.H. Beck 2012) 201–2; Gerhard Werle, *Principles of International Criminal Law* (2nd edn T.M.C. Asser Press 2009) para 234.

3.2 *Ne Bis In Idem* with Regard to TCL

There is no worldwide applicable right not to be tried twice by the courts of different states for a transnational crime. Thus, this section deals with the following questions: Do domestic laws provide for a transnational *ne bis in idem* principle? Do international treaties that enhance cross-border law enforcement to fight transnational crimes, such as piracy and money laundering, provide for a transnational *ne bis in idem*? Are there other international instruments that provide the individual with a *ne bis in idem* shield in the realm of TCL? Is there a European model of a transnational *ne bis in idem* that could be followed?

3.2.1 Approaches in domestic criminal law

If one defines TCL as criminal law established through treaty obligations in multilateral crime suppression conventions, covering ‘treaty crimes’ or ‘crimes of international concern’ but not international core crimes,³⁹ it is clear that TCL has an international layer. However, since there is no global regime designed to settle jurisdictional conflicts, and absent an international *ne bis in idem* regime applying not only within one state but also between states, national legislation remains of great importance for the affected individual.

States are reluctant to accept directions for penal law or even merely ‘share’ the *ius puniendi*. This is due to the Westphalian understanding of a state, according to which it is essential to hold the monopoly of force on one’s territory.⁴⁰ Therefore, many states traditionally only recognise a *ne bis in idem* principle within their own domestic legal order,⁴¹ unless they are bound to an international agreement that provides otherwise.⁴² Other states, adhering to a common law tradition such as Australia, Scotland and England and Wales, are reported to actually recognise a *res*

³⁹ See Neil Boister, ‘Transnational Criminal Law?’ (2003) 14(5) *European Journal of International Law* 953 <<http://ejil.oxfordjournals.org/content/14/5/953.short>> accessed August 2015.

⁴⁰ Khan (n 1) 233–5.

⁴¹ See Martin Böse, Frank Meyer and Anne Schneider (eds), *Conflicts of Jurisdiction in Criminal Matters in the European Union*, Vol. I: National Reports and Comparative Analysis (Nomos Verlag 2013) passim; Vervaele (n 23).

⁴² Vervaele (n 37) 212. See for the respective EU law: Martin Böse, Frank Meyer and Anne Schneider (eds), *Conflicts of Jurisdiction in Criminal Matters in the European Union*, Vol. II: Rights, Principles and Model Rules (Nomos Verlag 2014) passim.

judicata effect of foreign judgments in specific instances.⁴³ In the civil law family, only a handful of states – notably the Netherlands, Spain, France, Luxembourg, Belgium and Switzerland – appear to have a broader scheme for taking foreign judgments into account.⁴⁴ The Dutch Criminal Code, for example, contains a general *ne bis in idem* provision that is applicable to both domestic and foreign criminal judgments, irrespective of whether the offence was committed in the Netherlands or elsewhere.⁴⁵ Foreign criminal judgments also bar a trial in Belgium under certain circumstances. However, a trial in Belgium is only barred if the offence was committed outside the Belgian territory. Foreign convictions for offences committed in Belgium are – with exceptions for Schengen and EU states – not recognised.⁴⁶ In Switzerland, three principles (albeit subject to exceptions) govern situations where a foreign criminal judgment has already been issued: the principle of extinction (that is, prosecution in certain circumstances is barred), the principle of imputation (that is, sentences served abroad are taken into account) and the principle of enforcement (of a foreign sentence).⁴⁷ However, other states have not started down this road. German law, for instance, has no statute allowing for a transnational *ne bis in idem*; moreover, according to case law,⁴⁸ a foreign judgment does not trigger the relevant constitutional

⁴³ See Guy Cumes for Australia, Sarah Summers for Scotland and Susanne Forster for England and Wales on the Max Planck Information System for Comparative Criminal Law <infocrim.org>, II.B.1.e.

⁴⁴ See Eckstein (n 10) 493 in footnote 19 with further references.

⁴⁵ Vervaele (n 37) 212.

⁴⁶ Article 13 Voorafgaande titel van het Wetboek van Strafvordering, available online in Dutch at <http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1878041701&table_name=wet> and in French at <http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1878041701&table_name=loi> accessed August 2015. See Roland Michael Kniebühler, *Transnationales 'ne bis in idem'. Zum Verbot der Mehrfachverfolgung in horizontaler und vertikaler Dimension* (Duncker and Humblot 2005) 434.

⁴⁷ See Anna Petrig, 'The Expansion of Swiss Criminal Jurisdiction in Light of International Law' (2013) 9(4) *Utrecht Law Review* 34, 49–51; Anna Petrig and Nadine Zurkinden, *Swiss Criminal Law in a Nutshell* (Dicke Verlag 2015) 155–8.

⁴⁸ Decision of 4 December 2007 of the German Federal Constitutional Court (Beschluss des Bundesverfassungsgerichts vom 4 Dezember 2007, BVerfG, 2 BvR 38/06 (published online <https://www.bundesverfassungsgericht.de/entscheidungen/rk20071204_2bvr003806.html> accessed 4 June 2017)); Decision of 31 March 1987 of the German Federal Constitutional Court (Beschluss des Bundesverfassungsgerichts

guarantee of Article 103, paragraph 3:⁴⁹ ‘No person may be punished for the same conduct more than once under the general criminal laws.’ The argument is simple: *ne bis in idem* traditionally covers German law enforcement only and the law maker did not extend the guarantee to foreign judgments.⁵⁰ Legal scholars, however, have been challenging this stance since the 1990s,⁵¹ arguing that *ne bis in idem* must be extended by way of closer cooperation in cross-border prosecutions. The line of argumentation is that if states want to enjoy the fruits of cooperation in criminal justice then they must also share in the responsibilities, such as providing for a fair trial. But the German Federal Constitutional Court

vom 31 März 1987, 2 BvM 2/86 (published in Entscheidungen des Bundesverfassungsgerichts (BVerfGE) Volume 75, 1 or online: <<http://www.servat.unibe.ch/dfr/bv075001.html>> accessed 1 June 2017, 24 ff.).

⁴⁹ For further reflections on the idea of a transnational *ne bis in idem* from a German point of view, see Kniebühler (n 46) passim; Herbert Thomas, *Das Recht auf Einmaligkeit der Strafverfolgung* (Nomos Verlag 2002) passim; Britta Specht, *Die zwischenstaatliche Geltung des ne bis in idem* (Springer Verlag 1999) passim.

⁵⁰ Decision of 4 December 2007 of the German Federal Constitutional Court (n 48) paras 17 ff.

⁵¹ See Wolfgang Schomburg, ‘Anm. zu BGH 5 StR 596/96’ (1999) *Strafverteidiger* 246 and 249; and furthermore Rainer Endriss and Jörg Kinzig, ‘Eine Straftat – zwei Strafen: Nachdenken über ein erweitertes “ne bis in idem”’ (1997) *Strafverteidiger* 665–8; Michael Grotz, ‘Das Schengener Durchführungsübereinkommen und der Grundsatz ne bis in idem’ (1995) *Strafverteidiger Forum* 102–4; Heike Jung, ‘Zur “Internationalisierung” des Grundsatzes “ne bis in idem”’ in Peter A. Albrecht, Alexander P. Ehlers and others (eds), *Festschrift für Horst Schüler-Springorum zum 65. Geburtstag* (Heymann 1993) 493 ff.; Otto Lagodny, ‘Teileuropäisches “ne bis in idem” durch Art. 54 des Schengener Durchführungsübereinkommens (SDÜ)’ (1997) *Neue Zeitschrift für Strafrecht* 264–6; Markus Mayer, *Ne-bis-in-idem-Wirkung europäischer Strafentscheidungen* (Peter Lang 1992); Christiaan Frederik Rüter, ‘1990: Grenzenlos glücklich(er)?’ in Hans-Heinrich Jescheck and Theo Vogler (eds), *Festschrift für Herbert Tröndle zum 70. Geburtstag* (Walter De Gruyter 1989) 855 ff.; Wolfgang Schomburg, ‘Das Schengener Durchführungsübereinkommen’, *Juristische Blätter* (Walter De Gruyter 1997) 553; Christine van den Wyngaert and Guy Stessens, ‘The International *Non Bis In Idem* Principle: Resolving Some of the Unanswered Questions’ (1999) 48(4) *International and Comparative Law Quarterly* 779; Christine van den Wyngaert and Tom Ongena, ‘*Ne bis in idem* Principle, Including the Issue of Amnesty’ in Antonio Cassese, Paolo Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court*, Vol. I (Oxford University Press 2002).

(*Bundesverfassungsgericht*), for instance, rejected the idea of an ‘internationally divided criminal prosecution’ (*‘international arbeitsteilige Strafverfolgung’*),⁵² which brings with it the sharing of burdens.

Thus, as the laws in many states stand, a transnational *ne bis in idem* has not (yet) emerged as a general rule. The fact that a number of states seem to partially recognise *ne bis in idem* by way of imputation (that is taking into account a *served* prison term)⁵³ is of scant comfort. The shortcomings of the traditional approach in TCL become visible when looking at the harsh consequences for an individual charged with money laundering after having transferred assets between different states, which all initiate proceedings against him or her.

3.2.2 Approaches in TCL

Despite the reluctance to share penal power in TCL, states agree on certain rules and standards since they are a precondition to cooperation in fighting cross-border crimes. However, this legal framework usually focuses on law enforcement only, i.e. the definition of shared responsibilities with regard to fighting certain crimes. The standards adopted in TCL *do not* establish a framework for sharing the complete burden of criminal justice, which would include a shared responsibility to jointly guarantee certain basic rights of alleged criminals.⁵⁴ Rather, an individual who is prosecuted for a transnational crime, such as money laundering, faces the situation that several states may be eager to apply their own laws to the conduct in question. And as a result of different domestic criminal policies even if the individual is acquitted in one state, charges can be brought against him or her in another state. This might seem a valid approach from a sovereignty perspective that focuses on national strategies, but it appears unfair from the individual’s perspective and inadequate from a legal certainty point of view.

⁵² Wolfgang Schomburg, Otto Lagodny, Sabine Gless and Thomas Hackner, *Internationale Rechtshilfe in Strafsachen* (5th edn, C.H. Beck 2012) Einleitung nos. 112–54.

⁵³ For information on German law: Kniebühler (n 46) 433–4 and 356 with further references. For information on Swiss Law see Gless (n 16) para 146.

⁵⁴ See, for example, Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill/Martinus Nijhoff Publishers 2014) 225, arguing that the provisions of the law of the sea allowing for counter-piracy measures lack a human rights dimension and highlighting that the idea of limiting enforcement powers in light of individual rights only very recently found its way into treaties governing the fighting of crime at sea, notably in the 2005 SUA Protocol.

Overall, one must state that the reluctance of states to grant a transnational *ne bis in idem* while at the same time cooperating to criminalise and prosecute certain conduct has a long tradition in TCL – and, up to now, is one of its characteristics. This can also be seen in conventions on transnational crime; for instance, there is a long-standing agreement among states to fight piracy.⁵⁵ The international conventions focus on law enforcement in various respects, but only recently has a debate started on how to guarantee certain procedural rights and possibly compensate for procedural faults in another jurisdiction or to accept foreign states' judgments as a trigger for *ne bis in idem* and thus establish the right of a state to 'exhaust' the *ius puniendi* of others.

And, as previously mentioned, states have recently agreed to fight money laundering in a transnational manner, since the origin of particular assets is often concealed when moved across state borders.⁵⁶ Today, the rules applicable to tracing a 'dirty' money trail, as well as the rules governing whether certain conduct must be deemed money laundering, are the subjects of internationally set standards translated into national legislation.⁵⁷ For instance, international law adopted within the UN system obligates state parties to criminalise money laundering on the basis of, among other UN instruments, the so-called Palermo Convention.⁵⁸ In neither this nor other conventions, however, is special attention given to the safeguarding of individual rights at the international level, such as the right not to be tried twice for the same conduct. Thus – according to the money laundering conventions – the national law maker must translate the international standards into national criminal law, but need not give attention to the rights protecting individuals.

⁵⁵ See for instance Article 100 UNCLOS of 1982 and Article 14 Convention on the High Seas of 1958; these provisions are rooted in codification efforts and draft conventions, which date back to the beginning of the twentieth century; on the historic evolution of legal rules relating to piracy, see Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea* (Oxford University Press 2011) 37 ff.

⁵⁶ See, for different scenarios, Mark Pieth and Gemma Aiolfi, *A Comparative Guide to Anti-Money Laundering* (Edward Elgar 2004) passim.

⁵⁷ Mark Pieth, 'Vor Art. 305bis Siebzehnter Titel: Verbrechen und Vergehen gegen die Rechtspflege' in Marcel Alexander Niggli and Hans Wiprächtiger (eds), *Basler Kommentar Strafrecht II. Art. 111–392 StGB* (Helbing Lichtenhahn Verlag 2013) 2671, for Article 305, Nos 18–43.

⁵⁸ United Nations Convention against Transnational Organized Crime of 8 January 2001, A/RES/55/25, <https://www.unodc.org/pdf/crime/a_res_55/res_5525e.pdf> accessed August 2015.

3.2.3 International instruments protecting the individual

Conventions on transnational crime rarely establish individual procedural guarantees. The question thus arises: How does international law protect individuals tried for a cross-border crime – if at all? Does it, for instance, provide a general transnational *ne bis in idem* shield?

Appropriate bases for protection do exist. There is, for instance, Article 14(7) International Covenant on Civil and Political Rights,⁵⁹ which reads: ‘No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each state.’⁶⁰ It is, however, only applicable at an internal domestic level.⁶¹ Furthermore, there is Article 8(4) American Convention on Human Rights, which states: ‘An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.’ Yet it is not deemed to be an absolute human right. Thus, according to the German Federal Constitutional Court, none of the universal or regional human rights instruments by their wording extend the principle of *ne bis in idem* or the prohibition on double jeopardy to criminal proceedings in *another* state.⁶² This is in accordance with the case law of the UN Human Rights Committee and that of the Inter-American Court of Human Rights.⁶³ Apparently, also according to the case law of many states, foreign judgments cannot

⁵⁹ The text is available online: <http://www.ohchr.org/en/professional_interest/pages/ccpr.aspx> accessed August 2015.

⁶⁰ The Covenant has been ratified by 168 states with diverse legal systems, with, however, the validity of Article 14 (7) being conscribed with numerous reservations.

⁶¹ See *A. P. v. Italy*, Communication No. 204/1986, UN Doc. CCPR/C/OP/2 at 67 (1990), paragraph 7.3: ‘With regard to the admissibility of the communication under article 3 of the Optional Protocol, the Committee has examined the State party’s objection that the communication is incompatible with the provisions of the Covenant, since article 14, paragraph 7, of the Covenant, which the author invokes, does not guarantee non bis in idem with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State.’

⁶² Decision of 31 March 1987 of the German Federal Constitutional Court (Beschluss des Bundesverfassungsgerichts vom 31 März 1987, 2 BvM 2/86 (published in *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* Volume 75, 1 or online: <<http://www.servat.unibe.ch/dfr/bv075001.html>> accessed 27 June 2017).

⁶³ Vervaele (n 37) 214.

trigger *ne bis in idem*.⁶⁴ Due to such state-focused reasoning, the international instruments⁶⁵ cannot provide the individual with a *ne bis in idem* shield.

3.2.4 The European approach

Nonetheless, there is a development in Europe moving away from state-focused reasoning towards a transnationally applicable *ne bis in idem* principle.⁶⁶ The development started in the 1970s with conventions adopted within the framework of the Council of Europe: the European Convention on the International Validity of Criminal Judgments of 1970⁶⁷ and the European Convention on the Transfer of Proceedings in Criminal Matters of 1972,⁶⁸ which both have horizontal transnational application.⁶⁹ In terms of the number of ratifications, however, neither was a huge success.⁷⁰ The former has only been ratified by 22 states, including the Netherlands and Belgium; and while Germany signed but never ratified the Convention, Switzerland has not even signed it.⁷¹ The latter convention has been ratified by 25 states. Among them are the Netherlands, and Belgium signed but never ratified it, while Germany and Switzerland have not signed it.⁷²

The European Convention on Human Rights (ECHR) does not include a *ne bis in idem* provision. Such a provision was, however, established in Article 4 of the 7th Protocol to the ECHR of 22 November 1984.⁷³ The

⁶⁴ See for a comparison of the situation in 10 European states: Böse, Meyer and Schneider (n 41) *passim*.

⁶⁵ For more examples of international instruments, see Kniebühler (n 46) *passim*.

⁶⁶ See for instance Böse, Meyer and Schneider (n 42) 381 ff.; Gless (n 16) para 1021.

⁶⁷ CETS No. 070.

⁶⁸ CETS No. 073.

⁶⁹ Kniebühler (n 46) 346 and 348.

⁷⁰ Kniebühler (n 46) 357 and 435; Vervaele (n 37) 216.

⁷¹ See on the status of signatures and ratifications: <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=070&CM=8&DF=&CL=ENG>> accessed 1 June 2017.

⁷² See on the status of signatures and ratifications: <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=073&CM=1&DF=&CL=ENG>> accessed 1 June 2017.

⁷³ Vervaele (n 37) 213.

Protocol was ratified by 43 states, including Belgium and Switzerland.⁷⁴ Nevertheless, it has *no transnational application*.⁷⁵

The development continued within the Schengen area with the milestone Article 54 CISA.⁷⁶

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.

Article 55 CISA allows the contracting parties to make reservations. Thus, contracting parties can restrict the transnational *ne bis in idem* guarantee if an offence is committed on the territory of a state that wishes to prosecute it again,⁷⁷ if the acts of the already tried person constitute an offence against national security, or if the acts to which the foreign judgment relates were committed by officials of that contracting party in violation of the duties of their office. Nevertheless, Article 54 CISA is a far-reaching provision and the European Court of Justice (ECJ) made its extensive scope clear from the first decisions (*Gözütok* and *Brügge*)⁷⁸ and stated that the transnational *ne bis in idem* principle also applies to procedures barring further prosecution in which *no court* is involved.⁷⁹

⁷⁴ See on the status of signatures and ratifications: <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=117&CM=8&DF=31/07/2015&CL=ENG>> accessed 1 June 2017.

⁷⁵ See Eckstein (n 10) 493 with further references; Vervaele (n 37) 227.

⁷⁶ See (n 29); for further information; Klip (n 11) 251–62; Satzger (n 38) § 8 para 66; Gless (n 16) paras 537 ff. and 1021; Scheschonka (n 36) 86–9.

⁷⁷ See Cassese and others (n 4) 316; Lelieur (n 8).

⁷⁸ Case C-187/01 *Hüseyin Gözütok* and Case C-385/01 *Klaus Brügge*, [2003] ECR I-5689.

⁷⁹ See on the discussion whether Article 54 applies even if the completion of procedures in another state have only limited legal force: Bernd Hecker, ‘Schliesst Article 54 SDÜ die Strafverfolgung in einem anderen Vertragsstaat aus, wenn die Verfahrenserledigung im Aburteilungsstaat nur eine beschränkte materielle Rechtskraft entfaltet?’ in Katrin Gierhake, Jan Bockemühl and others (eds), *Festschrift für Bernd von Heintschel-Heinegg zum 70. Geburtstag* (C.H. Beck 2015) 175–88. Further cases on Article 54 CISA are Case C-469/03 *Miraglia*, [2005] ECR I-2009; Case C-150/05 *Jean Leon Van Straaten*, [2006] ECR I-9327; Case C-436/04 *Leopold Henri Van Esbroeck*, [2006] ECR I-02333; Case C-467/04 *Giuseppe Francesco Gasparini et al.*, [2006], I-9199; Case C-288/05 *Jürgen Kretzinger*, [2007] I-6441; Case C-491/07 *Vladimir Turanský*,

In fact, Article 54 CISA was the most comprehensive provision regarding a transnational *ne bis in idem* principle in Europe⁸⁰ until the Treaty of Lisbon entered into force in December 2009, and as a consequence, Article 50 EU Charter, which also contains a transnational *ne bis in idem* guarantee,⁸¹ became legally binding.⁸² Since then, it is disputed whether Article 54 CISA or Article 50 EU Charter has primacy in transnational cases.⁸³ This is of relevance since Article 50 EU Charter does not provide for restrictions and thus is an even more far-reaching transnational *ne bis in idem* provision.⁸⁴ It 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.’ Although the EU provision lacks specific details on how to administer this discontinuation of criminal proceedings (for example, with regard to taking foreign sentences into account or handling absconding prisoners),⁸⁵ these EU provisions

[2008] ECR I-11039; Case C-297/07 *Klaus Bourquain*, [2008] ECR I-9425; Case C-261/09 *Gaetano Mantello*, [2010], I-11477.

⁸⁰ See Eicker (n 23) 287.

⁸¹ See Explanation on Article 50 in the Explanations relating to the Charter of Fundamental Rights of the European Union, OJ C 303/17, 14 December 2007, 31: ‘In accordance with Article 50, the “non bis in idem” rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States.’

⁸² See Eckstein (n 10) 495. See for more details on Article 50 EU Charter, Christoph Burchard and Dominik Brodowski, ‘Art. 50 Charta der Grundrechte der Europäischen Union und das “europäische ne bis in idem” nach dem Vertrag von Lissabon’ (2010) *Strafverteidiger Forum* 179 ff.; Frank Zimmermann, ‘Strafgewaltkonflikte in der Europäischen Union’ (Nomos Verlag 2014) 223–5.

⁸³ See Eckstein (n 10) 509–25 with further references. In May 2014 the European Court of Justice found that the Schengen rule, restricting the application of the *ne bis in idem* principle to cases in which the penalty has been enforced (or is actually in the process of being enforced) is not contrary to the Charter of Fundamental Rights: Case C-129/14 *Zoran Spasic* [2014].

⁸⁴ See for more details of Article 50 EU Charter, John Vervaele, ‘The Application of the EU Charter of Fundamental Rights (CFR) and Its *Ne Bis In Idem* Principle in the Member States of the EU’ (2013) 6(1) *Review of European Administrative Law* 113.

⁸⁵ For more information on the current discussion see Michele Simonato, ‘*Ne Bis In Idem* in the EU: Two Important Questions for the CJEU (Opinion of the AG in C-486/14 *Kussowski*)’ (*European Law Blog*, 12 January 2016) <<http://europeanlawblog.eu/?p=3071>> accessed 4 June 2017.

could serve as a blue print for a vision of transnationally applicable *ne bis in idem*.⁸⁶

3.2.5 Resume

Even though in European TCL a transnational *ne bis in idem* guarantee is provided, the national stance persists, and the hard law provisions only provide a solution for the European realm. Beyond Europe, we lack a solution for the problems created by adopting crime suppression conventions without a human rights dimension. Today, TCL essentially caters to law enforcement needs and rarely takes the position of the individual into account. The hypothesis of this chapter, however, is that if states establish cooperation and use their *ius puniendi* side-by-side, they must also take individual rights into account, and, for instance, provide an interface translating the *ne bis in idem* principle into TCL.

This demand seems obvious enough, yet the following question nevertheless arises: What is the explanation for the differing position of defendants? That is, the position that varies depending on whether they are tried for having committed an international core crime or whether they have allegedly committed a (merely unacceptable) ‘regular’ convention crime.

3.3 Explanation for the Different Positions on *Ne Bis In Idem* in ICL and TCL

Generally, the reluctance to recognising foreign judgments may have several reasons flowing from the traditional understanding of the sovereignty of states⁸⁷ and a lack of trust in the administration of justice by other states.⁸⁸ Due to the sovereignty of states, no state is obliged to accept any law other than its own unless a duty to accept other laws is established by an international obligation (such as an international treaty

⁸⁶ For a study on the *ne bis in idem* principle in the EU see, for example, Van Bockel (n 30) passim; Marco Mansdörfer, *Das Prinzip des ne bis in idem im europäischen Strafrecht* (Duncker and Humblot 2004) passim. An effort to prevent conflicts of exercise of jurisdiction in criminal proceedings was also made by the Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L 328, 15 December 2009, 42–7.

⁸⁷ See Gless (n 16) para 1019; Scheschonka (n 36) 297.

⁸⁸ See Cassese and others (n 4) 316 citing IYIL (1988–92), at 196–7.

or customary international law).⁸⁹ Thus, every state has its own criminal law based on its own criminal policy – and criminal policy can be highly divergent (particularly in the areas of drugs, assisted suicide and abortion).⁹⁰ A transnationally applicable *ne bis in idem* would infringe state sovereignty in that the state that tries a person first prevents all other states from doing so, and therefore another state can no longer apply its own criminal law (resulting from its criminal policy).⁹¹ Also states claim to be ‘entitled to prosecute and punish crimes committed on their territory, because such crimes have troubled the social order and infringed values upheld in the local community’.⁹²

Such concerns could, however, be countered with the possibility to restrict the *ne bis in idem*. Such restrictions could be due to a fraudulent *res judicata*⁹³ as is done in ICL in Article 20(3)(a) and (b) Rome Statute. Restrictions could also be foreseen due to infringement of the *ordre public* of a state, when – based on the public policy doctrine – a body of principles that underpin the operation of a certain legal system shall be protected with a refusal of cooperation (this is the rationale, for instance, behind the Swiss principle of extinction);⁹⁴ or in cases where an offence is committed on the territory of a state (a possibility that already exists for EU Member States according to Article 55 CISA).

But then why is it that in ICL a customary rule of worldwide applicability of the right not to be tried twice is arguably evolving,⁹⁵ while in the realm of TCL defendants’ rights have been neglected up until recently?

Several causes may come into play. They root in the specific and unique histories of ICL and TCL, and they are perpetuated by the structural differences between these two areas of criminal law. Both the

⁸⁹ On the relationship between ICL and state sovereignty, see Robert Cryer, ‘International Criminal Law vs State Sovereignty: Another Round?’ (2005) 16(5) *European Journal of International Law* 979.

⁹⁰ See Eckstein (n 10) 491–2 with an example of a case in which a person was sentenced to 20 days in prison in the Netherlands and later Germany sentenced him to 10 years in prison for the same drug offence.

⁹¹ See Eckstein (n 10) 496 and 499–500.

⁹² See Cassese and others (n 4) 316.

⁹³ See Kniebühler (n 46) 369; Vervaele (n 37) 214.

⁹⁴ See Petrig (n 47) 50: ‘prosecution in Switzerland remains possible despite a foreign acquittal or an enforced, waived or prescribed sentence if the foreign proceeding contradicted the Swiss *ordre public*, i.e. if it violated fundamental principles of the Swiss Federal Constitution or the European Convention on Human Rights.’

⁹⁵ See above C.I.

historical and the structural differences have their effect on the (non) establishment of *ne bis in idem*.

3.3.1 History

The establishment of the ICC and the phrasing and adoption of the Rome Statute mark a certain point in history when states took a deliberate decision to fight impunity together with unified force. At the same time, the respective states were committed to a procedure in accordance with the rule of law and the right to a fair trial. When establishing the joint penal power, this standard shaped several provisions of the Rome Statute, among them Article 20.⁹⁶

By contrast, TCL has evolved over time due to various occurrences of glaring cross-border misconduct, such as trafficking in human beings, trafficking in certain goods and money laundering. When drafting conventions, states naturally had the fight against certain types of misconduct in mind. However, the right to criminalise and to adjudicate remains with the state,⁹⁷ and this is consequently also true for the details of criminal prosecution.

Therefore, while ICL has become a body of law, the emergence of which is jointly supported by the international community, TCL remains a patchwork of various subjects taken up by conventions and necessitating implementation at the national level. While ICL slowly emerges as being ‘made of one piece’, the picture of TCL is markedly different – it appears to be more or less an accidental assemblage of different conventions, a piecemeal collection of various subjects and laws reflecting the respective zeitgeist, rather than a coherent global policy.

3.3.2 Nature and structure

The differing position of defendants in ICL and TCL, originating in history, is perpetuated by the varying nature and structure of ICL, on the one hand, and TCL on the other.

As mentioned, ICL is a body of law, the emergence of which was supported by the international community. By establishing the ICC, the Rome Statute created an independent international organisation for the

⁹⁶ For a brief overview of the historical background and objectives of the ICC, see Hans-Peter Kaul, ‘International Criminal Court (ICC)’ in Max-Planck Encyclopedia of Public International Law, paras 1–7, <www.mpepil.com> accessed August 2015.

⁹⁷ Neil Boister, ‘Further Reflections on the Concept of Transnational Criminal Law’ (2015) *Transnational Legal Theory* 1, 5.

prosecution and trial of perpetrators of international crimes.⁹⁸ This development is fostered by the interfaces connecting ICL and national law, such as Article 17 Rome Statute, which expresses the prospect of ICC jurisdiction if a state ‘is unwilling or unable genuinely to carry out the investigation or prosecution’, as well as the *ne bis in idem* provision of Article 20(3) Rome Statute, which prohibits prosecuting a person for allegedly committing an international core crime twice for the same facts.

By contrast, there is no transnational criminal court. Thus, TCL leaves the task of prosecuting and punishing alleged offenders to national prosecutors and courts.⁹⁹ Furthermore, TCL remains a patchwork of various subjects and laws. Beyond a – relatively loose – convention frame, it is based on the *ius puniendi* of each state. And the states’ penal power developed independently – or rather in border demarcation of each territory – with the establishment of the Westphalian model state.

Again, the German Constitutional Court has no problem accepting *ne bis in idem* triggered by the ICC in ICL, since the national law maker has already agreed to it. But it will not accept the same effect with respect to judgments issued by third states.¹⁰⁰ The reasons for the dissimilar approaches probably are manifold. One reason may be a consensus among states as to what qualifies as an international crime (based on the Rome Statute), while opinions on TCL still differ. States may not wish to share jurisdiction – or even in a sense outsource it – in respect to what is seen as domestic crimes. Partly this is because they do not entirely agree on its content, and thus are reluctant to accept the *res judicata* of a foreign judgment; partly this is because at times they lack trust in the administration of justice by other states, and with it the fear that a sham trial in one state would bar (the genuine and fair) prosecution of the same conduct by another state.¹⁰¹

3.3.3 Rationale/effect of establishing *ne bis in idem*

Does the history and structure of TCL therefore actually suggest that it needs an approach different from that of ICL? Must the approach be more tailored to the peculiarities of TCL because, at its heart, it spells out as national law? Despite the fact that suppression convention crimes are

⁹⁸ See Kaul (n 96).

⁹⁹ This situation was the same in international criminal law before international criminal courts were first set up. See Cassese and others (n 4) 5.

¹⁰⁰ Decision of 4 December 2007 of the German Federal Constitutional Court (n 48) paras 30 ff.

¹⁰¹ Decision of 4 December 2007 of the German Federal Constitutional Court (n 48) para 31.

of international concern,¹⁰² they are not – as in ICL – international core crimes to be fought by the joint force of the international community.

And this might prove a crucial difference since the motivation behind the *ne bis in idem* principle is twofold: on the one hand, an individual shall be protected from being dragged into court for the same conduct several times due to legal certainty (*Rechtssicherheit*);¹⁰³ on the other hand, a state wants to avoid diverging judgments, since it would weaken the authority of its courts (*res judicata*).¹⁰⁴

In my view, it is *res judicata* that makes a genuine difference in the comparison of the situations of ICL and TCL: the international community cannot tolerate diverging decisions with regard to an international core crime because it would weaken the standing of the ICC if national courts were to contradict a finding that genocide had taken place. But in cases of TCL, states may tolerate diverging judgments in foreign states because no transnational criminal court exists and, as discussed, TCL actually spells out as national law and as an expression of domestic concerns such as drugs and money laundering.¹⁰⁵ However, such an assessment does not take into account the position of the individual being tried because states are reluctant to accept directions for penal law, unless there is close cooperation or a strong emphasis on individual rights – both of which are evolving more and more in the EU framework.

4 CONCLUSION

In TCL, for far too long, little attention has been given to the theoretical underpinnings that can provide for an adequate and appropriate legal position of the individual facing prosecution. It is rather recently that an increasing number of scholars and courts have started to pay attention *not* merely to what TCL *is* (or may be), but what it *does*, especially with regard to the individual affected by it.¹⁰⁶ If we are striving to cultivate a

¹⁰² Even if they follow a concept of reciprocal protection of parallel state interests, rather than the protection of fundamental values of the international community (see Claus Kress, ‘International Criminal Law’, *Max-Planck Encyclopedia of Public International Law* para 8 <www.mpepil.com> accessed August 2015.

¹⁰³ See Eckstein (n 10) 491.

¹⁰⁴ See Lelieur (n 8) 200.

¹⁰⁵ Boister (n 97) 13.

¹⁰⁶ ECtHR of 27 October 2011 – 25303/08, *Stojkovic vs. France*, §§ 38 ff.; German Bundesgerichtshof Decision of 21 November 2012 – 1 StR 310/12, Nos 23 and 25; Kate Parlett, *The Individual in the International Legal System*

coherent body of TCL, we must abandon the classic state-oriented, international public law, ‘suppression convention’ determined approach and turn to one governed to a greater extent by consideration for the individual affected,¹⁰⁷ identify the general principles that protect persons prosecuted across borders, and recognise individual rights.¹⁰⁸

The fact that the international community included fundamental rights when it adopted rules on criminal procedure for the prosecution of international core crimes – arguably the worst of all crimes – in a global context sends a message: the individual shall not lose all safeguards when states join forces to prosecute certain crimes while also wishing to exercise independent prosecution power. Such an approach of ‘having one’s cake and eating it too’¹⁰⁹ with regard to penal power goes against our second nature as lawyers seeking a coherent body of law. Over the last decade, we have seen a strong movement for a standardised approach to fair trial principles that limit the *ius puniendi*, regardless of whether an individual is tried by an international court, in a purely national context or in transnational proceedings.

(Cambridge University Press 2011) 365; Schomburg, Lagodny, Gless and Hacker (n 52) Einleitung nos. 112 ff; see furthermore ECtHR of 7 July 1989 – 14038/88, *Soering v. The United Kingdom*, § 113; Albin Eser, Otto Lagodny and Christopher L. Blakesley (eds), *The Individual as Subject of International Cooperation in Criminal Matters* (Nomos Verlagsgesellschaft, Band 27, 2002) passim.

¹⁰⁷ See, for classic textbooks on transnational or international criminal law, Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press 2012) passim; Christine Van den Wyngaert, *International Criminal Law* (2nd rev. edn Kluwer Law International 2000) passim.

¹⁰⁸ See (2013) 9(4) *Utrecht Law Review*.

¹⁰⁹ See, for a prominent example, the discussion about law enforcement on the Internet: Teresa Scassa and Robert J. Currie, ‘New First Principles? Assessing the Internet’s Challenges to Jurisdiction’ (2011) 42(4) *Georgetown Journal of International Law* 1017.