



The Sovereign Ceiling: The Limits of *Ne Bis In Idem* as a General Principle of International Law

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Abstract

This paper examines the status of ne bis in idem as a general principle of international law under Art. 38(1)(c) of the Statute of the International Court of Justice. Despite universal domestic recognition, the principle fails to crystallise transnationally as it lacks ‘transposability’ because it cannot overcome inherent sovereign distrust. Furthermore, its application within the EU and the ICC represents treaty-based exceptions not customary norms. This paper argues that while an absolute principle remains untransposable, an emerging conditional version might eventually pave the way for future transposition.

Keywords: *Ne bis in Idem*, General principles of international law, Transposition, Transnational Criminal Law, *Jus Puniendi*, Sovereignty, Dual Sovereignty.

Introduction

Consider the case of a warlord who orchestrates a campaign of genocide spanning the porous border of two sovereign nations. Apprehended and prosecuted to the fullest extent of the law in State A, the individual serves their sentence and considers their debt to society paid. However, upon their release, State B seeks to prosecute the same person for the same conduct, asserting its own sovereignty and claiming that its own peace and national security were independently violated. Domestically, prosecuting and punishing a person twice for the same set of facts or actions is almost universally condemned. However, from the perspective of international law, State

B is entirely within its rights to prosecute. But then, who holds the ultimate right to punish and at what point does the individual’s right to finality crystallise?

This hypothetical exposes a glaring but persistent tension in transnational criminal law namely, the disparate application of the principle of *ne bis in idem* in transnational law. Broadly, the right not to be tried or punished twice for the same offence, the principle of *ne bis in idem*, is heralded as a cornerstone of criminal justice. While the principle acts as an impenetrable shield within the domestic borders of nations, it almost entirely disappears when application has to be across the borders of those same nations. This paper is situated

precisely at the crossroad of individual human rights of the accused and the sovereign's jurisdictional prerogatives. It analyses the status of *ne bis in idem* not merely as a treaty obligation but potentially as a gap filling norm or a general principle of international law under Article 38(1)(c) of the Statute of the International Court of Justice (ICJ).¹ This structural paradox prompts the central research question of this paper: *Why does a principle that is almost 'universal' domestically and in human rights treaties, fail to become a binding principle in transnational law and does this failure disqualify it from being a true general principle of international law?*

The Methodological Framework: Article 38(1)(c) and the 'Transposability' Test

In order to evaluate whether *ne bis in idem* forms a binding transnational norm, one must dismantle the methodological framework of the source from which it supposedly emanates, namely, Article 38(1)(c) of the Statute of the ICJ.² When the Advisory Committee of Jurists drafted the predecessor to this provision for the Permanent Court of International Justice in 1920, they were acutely concerned with the spectre of *non liquet* or a situation where a tribunal would be forced to decline judgement due to an absence of applicable treaty or customary law. In order to prevent such jurisprudential paralysis, the drafters included the 'general principles of law recognised by civilised nations,'³ as a primary, though functionally supplementary, source of international law. They are designed to fill normative vacuums. However, the exact legal mechanics of how a principle is elevated from a domestic legal tradition to an international legal principle remained shrouded in doctrinal ambiguity for decades, often leading to questions regarding judicial subjectivism.⁴ Further, the

term 'civilised' nations restricted the scope of sources of these principles until it was ultimately omitted in 1971.⁵ It is within this historical context of gap filing that the claim of *ne bis in idem* must be situated. Through developments, we now understand that the question is not merely whether the principle exists in *foro domestico*, but whether the specific 'gap' it seeks to fill in international law can be bridged without collapsing the foundational pillars of the international system?

The International Law Commission's Draft Conclusions

The modern framework for identifying general principles has been articulated by the International Law Commission (ILC) in its 2023 Draft Conclusions on General Principles of Law.⁶ The ILC sought to clarify the scope of general principles of international law under Article 38(1)(c),⁷ which it did by establishing an objective two-part test. Draft Conclusion 4 posits a two-step test⁸ that serves as the methodological backbone of identifying a general principle of international law derived from national legal systems. *Firstly*, there has to be a determination that the principle is common to various legal systems of the world,⁹ which is done through a comparative analysis of national legal systems.¹⁰ This requires surveying legal systems such as the common law, civil law and other jurisprudence to ensure the principle is not merely a regional phenomenon but a true general principle promoting justice and other ideals of the international community at large.

However, the ILC, analysing past jurisprudence, has also noted that ubiquitous domestic presence is not sufficient to elevate a tradition to a general principle.¹¹ Draft Conclusion 6 mandates that for a domestic principle to be elevated to an international

norm, it must be capable of being transposed to the international legal system without contravening the systemic structure of international law.¹² The requirement of transposability of the principle is the unique pivot that the ILC's report takes. This two-part test demands a functional translation, acknowledging that rules designed for the internal governance of a state may be structurally incompatible with the external relations between equal sovereign states.

It is in this two part-test in which we examine *ne bis in idem* as a possible general principle, but also the very test where the aspirations for making it a general principle ultimately fracture. The international legal system is characterised by its decentralised, horizontal nature. It is marked by the sovereign equality of states, the absence of a supreme global legislature and the lack of a centralised enforcement mechanism.¹³ Conversely, domestic legal systems are inherently hierarchical and thus, vertical in the enforcement of rules. Within a state, the sovereign holds the monopoly over the legitimate use of force.¹⁴ A principle like *ne bis in idem* is perfectly suited to this vertical environment because it protects the subordinate individual from the overwhelming power of the state apparatus.

In the international sphere, however, applying a strict rule of *ne bis in idem* would dictate a judicial determination by one sovereign state would completely extinguish the jurisdictional rights of another equally sovereign state. Principles may be transposed in part, if only a part of it is compatible with the international legal system.¹⁵ However, the core essence of *ne bis in idem*, finality in judgement, resists such modification. If we were to transpose the principle successfully, it would require sovereign states to universally recognise and defer to foreign judicial proceedings, surrendering their sovereign right to *jus*

puniendi and subsequent jurisdiction. Thus, transposability test filters out domestic rules with vertical application that are incompatible with the horizontal nature of international law and relations. The rationale that underlies this compatibility test is that the international legal system and national legal systems have distinct structures and characteristics that should not be overlooked.¹⁶

Gap Filling versus Sovereignty Displacement

A crucial part of transposition is drawing the distinction between legitimate 'gap-filing' and the illegitimate displacement of established domestic sovereign rights. It is understood that general principles under Article 38(1) (c) are intended to operate where the law is silent, not to overwrite the foundational doctrines of sovereignty. The ICJ has been hesitant in imposing domestic principles as general traditions such as in the *North Sea Continental Shelf* cases,¹⁷ where it was hesitant to impose a 'principle of equity' regarding maritime delimitation that would retroactively burden states or override their inherent sovereign rights without their explicit consent or widespread customary practice.¹⁸ The Court thus drew a firm line between using principles to interpret existing obligations and using them to create entirely new, sovereignty entrenching mandates. Applying the same logic to transnational criminal law, it becomes evident why *ne bis in idem* struggles to pass the transposability test.

In the landmark *S.S. Lotus* case, a principle was propounded, popularly known as the *Lotus* principle or the *Lotus* presumption. It states that a sovereign states possess an inherent and presumptive right to exercise criminal jurisdiction over matters that affect their peace, security and citizens, unless specifically constrained by a prohibitive rule

of international law.¹⁹ There is an undeniable ‘gap’ in international law regarding the coordination of concurrent jurisdictional claims. However, filling this gap by transposing *ne bis in idem* as a mandatory general principle would actively displace the *Lotus* principle. It would elevate the individual’s right to finality above the state’s inherent *jus puniendi* (the right to punish). Since the international legal system is structurally fundamentally anchored in state sovereignty and the preservation of jurisdictional autonomy, a domestic principle that effectively disarms a state of its jurisdiction without its treaty-based consent is structurally not transposable. The methodology of Article 38(1)(c), therefore, is not a gateway for the principle, but the very mechanism that reveals its international limitations.

Recognition in *Foro Domestico*

The Threshold of Universal Recognition

Having established the methodological rigour demanded by Article 38(1)(c) of the Statute of the ICJ, we must now turn to the substantive application of the ILC’s first definitional limb. Draft Conclusion 4 requires that a norm be universally recognised by the ‘community of nations’ across a representative spectrum of legal systems or families.²⁰ In this regard, *ne bis in idem* does not merely satisfy the threshold; it meets it overwhelmingly. The prohibition against double jeopardy is not merely a procedural technicality but a foundational principle of justice, deeply entrenched in the constitutional and statutory frameworks of virtually every modern legal system. The practice of subjecting an individual to the ‘jeopardy’ of repeated criminal prosecutions for the same conduct for a conviction by the state with all its resources and power, is universally condemned as a tyrannical exercise of sovereign authority.²¹ As we will note below, its omnipresence across the common

law, civil law and other legal traditions serves as a testament to a shared human intuition regarding the fundamental limits of state power.

The Common Law System: Jeopardy and Prosecutorial Restraint

In the common law system, the *ne bis in idem* principle is historically founded on the concept of ‘jeopardy’ and the prevention of prosecutorial harassment.²² The Fifth Amendment to the United States Constitution famously declares that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.”²³ American courts have interpreted this clause not merely as a procedural rule, but as a substantive guarantee of finality of judgement designed to protect the individual from the financial, emotional and psychological strain of iterative litigation.²⁴ The underlying rationale is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual, thereby enhancing the possibility of even though innocent they might be found guilty.²⁵ The Indian legal framework, while sharing this common law heritage, adopts a slightly narrower approach. Article 20(2) of the Constitution of India mandates that “no person shall be prosecuted and punished for the same offence more than once.”²⁶ The Supreme Court of India has strictly interpreted the *conjunctive* ‘and’ in the text.²⁷ As a result, in order to invoke double jeopardy protection in India, one is required to show (i) a prior prosecution, (ii) a prior punishment and the ruling has to be delivered by a court of competent jurisdiction.²⁸

Due to the requirement of prior ‘punishment,’ an acquittal does not invoke the constitutional guarantee under Article 20(2), though statutory protections under the erstwhile Code of Criminal Procedure, 1973²⁹ (now

Bharatiya Nagarik Suraksha Sanhita, 2023)³⁰ serve to fill that procedural gap by preventing trial of persons already acquitted or convicted by a competent court for the same offence or material conduct. Despite these variations, the overarching philosophical commitment remains identical across the common law systems: a definitive end to the state's prosecutorial endeavour is a fundamental human right.

The Civil Law Tradition: Res Judicata and Absolute Finality

The civil law tradition offers a more robust articulation of the principle, basing it on the doctrine of *res judicata* and *nemo debet bis vexari pro una et eadem causa* meaning no one ought to be vexed twice for the same cause.³¹ Unlike the common law focus on 'jeopardy' of the process, civil law jurisdictions prioritise the sanctity of the judgement itself.³² Article 103(3) of the German Basic Law (*Grundgesetz*) explicitly states that no person may be punished for the same act more than once under general criminal laws.³³ This constitutional guarantee is echoed robustly throughout Europe, finding clear statutory expression in Article 68 of the Dutch Criminal Code³⁴ and Article 692 of the French Code of Criminal Procedure.³⁵

In these civil law frameworks, the protection is generally conceived as *non bis in idem*, emphasising that the prohibition applies equally to previous acquittals and previous convictions. The primary legal interest is the preservation of legal certainty, sanctity of judgement of the court and the prevention of contradictory judicial outcomes.³⁶ Once a competent tribunal of the state has conclusively decided on a matter, to the highest extent of appeal allowable, the state's *jus puniendi* (right to punish) regarding that material conduct is exhausted. This absolute bar operates as an objective limitation on the state's penal

jurisdiction, further entrenching the principle as a necessary element of the rule of law and justice domestically within the community of nations.

Regional Jurisprudence and the Breadth of the Global South

In order to fulfil the ILC's tests, a general principle cannot merely be a Western legal construct, it must resonate across diverse cultural and religious legal traditions. The inclusion of *ne bis in idem* within Islamic jurisprudence establishes its global reach. In Sharia law, the principle of *hukm al-qadi* (the finality of the judge's verdict) operates as a mechanism for dispute resolution and social peace and harmony.³⁷ Once a recognised *qadi* has issued a final judgement on a matter based on the presented evidence, that decision is considered binding.³⁸ Repeated litigation over the same dispute is looked down upon by the community as against communal harmony and an affront to religious authority.

This deep-seated commitment to legal finality has seamlessly transitioned into modern human rights instruments emerging from the Global South and the Arab world as well. The Arab Charter on Human Rights explicitly codifies the protection in Article 16, which states that no one shall be tried twice for the same offense.³⁹ Beyond the Arab human rights frameworks, the Latin American legal tradition provides a robust articulation of the principle in Article 8(4) of the American Convention on Human Rights (the Pact of San Jose) which declares that 'an accused person acquitted by a non appealable judgement shall not be subjected to a new trial for the same cause.'⁴⁰ The Inter-American Court of Human Rights (IACtHR) in *Loayza-Tamayo v. Peru*, has interpreted this provision as an essential component of due process, strictly prohibiting the state from utilising different judicial

avenues, first military court and then civilian court, to try the same material conduct.⁴¹ Similarly, the African Charter on Human and People's Rights as interpreted by the regional human rights' adjudicatory bodies like the African Court on Human and People's Rights, recognises the fundamental right to a fair trial as encompassing the guarantee against double jeopardy.⁴²

This sweeping geographical and cultural consensus conclusively establishes that the first limb of Article 38(1)(c) is thoroughly satisfied and the global domestic existence of the norm is beyond dispute.

The Definitional Evolution: From Idem Crimen to Idem Factum

While the existence of the principle is universally recognised, its normative content, specifically, the definition of the word *idem* (the same) suffers from severe fragmentation. For decades, states routinely circumvented the protection of *ne bis in idem*, by employing the doctrine of *idem crimen* (the same crime).⁴³ Under this restrictive approach, the 'sameness' of an offence was determined by its legal classification rather than the underlying physical conduct. Consequently, a state could prosecute an individual for 'assault' and upon an acquittal, prosecute them again for 'attempted murder' or 'disturbing the public order,' relying entirely on the exact same set of physical facts. This sleight of hand became the State's major tactic to utilise its larger pool of resources and power and almost guaranteed convictions of those tried again.

However, modern developments in international human rights law has seen a harmonisation of this loophole, shifting toward an *idem factum* (the same facts) standard. The catalyst for the maturation of the principle was the landmark decision of the European Court

of Human Rights (ECtHR) Grand Chamber in *Zolotukhin v. Russia* (2009).⁴⁴ The Court recognised that allowing the application of the principle to hinge on the arbitrary legal characterisations of domestic authorities rendered the protection illusory.

The Zolotukhin Standard and International Harmonisation

In *Zolotukhin*, the ECtHR definitively abandoned the *idem crimen* test. The Grand Chamber held that the protection under Article 4 of Protocol No. 7 to the European Convention on Human Rights must be understood to prohibit the prosecution or trial of a second offence in so far as it arises from 'identical facts or facts which are substantially the same.'⁴⁵ This conduct-based approach demands that tribunals look past the statutory labels and examine the historical reality of the accused's actions. If the material conduct, inextricably linked together in time and space, are the same, the constitutional or human rights bar is triggered, regardless of how cleverly the prosecutor attempts to recategorise the violation.

This progressive harmonisation is not confined to the European landscape and has been embraced by the broader international human rights jurisprudence. The UN Human Rights Committee, in its authoritative General Comment No. 32 on Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR), mirrored the *Zolotukhin* logic. The Committee clarified that the word 'offence' in the context of *ne bis in idem* prohibition refers to the actual conduct, the material actions of the accused, and not merely to their legal characterisation under domestic penal codes.⁴⁶ This alignment between the ECtHR and the UN Human Rights Committee confirms that the substantive content of *ne bis in idem* has achieved a

remarkable degree of clarity and consensus.

Thus, the right of the accused to definitive finality is acknowledged by the community of nations as an indispensable shield against the coercive power of the sovereign state. However, this internal entrenchment only heightens the stark paradox at the heart of transnational criminal law. While states universally agree that they cannot subject their citizens to endless prosecutions within their own borders, they fiercely resist the application of the same principle when a foreign border is crossed. The unified shield of finality fragments the moment it encounters the horizontal reality of international relations. The next section will demonstrate how this entrenched domestic principle collided with the insurmountable barrier of 'dual sovereignty' doctrine, causing it to fail the ILC's ultimate test of transposability.

Failure of Transposability

Transnational Paradigm and the Limits of Finality

Let us return to the hypothetical scenario of the transnational criminal, but this time grounding it within a jurisdictional reality. Consider the case of an insurgent leader who orchestrates a series of coordinated attacks on villages on both sides of an international border, impacting both State X and its neighbouring sovereign state, India. Upon being apprehended first by the authorities of State X, the insurgent is subjected to a full criminal trial, convicted of terrorism-related offences, and serves a full sentence. Upon their eventual release, the individual is apprehended by the Indian law enforcement. The Indian state immediately initiates prosecutorial proceedings for the exact same material conduct, the cross-border attacks that resulted in the loss of Indian lives and breach of Indian peace and security. The accused invokes the fundamental right against

double jeopardy under Article 20(2) of the Constitution, arguing that they have already been 'prosecuted and punished' for these exact material facts. To the lay observer, and indeed under the *idem factum* standard of international human rights law, this appears to be a textbook violation of *ne bis in idem*. Yet, in the realm of transnational criminal law, the accused's constitutional right crumbles. The Indian state is not legally barred from prosecuting the insurgent and would proceed with prosecuting the individual 'again.' This hypothetical vividly illustrates the insurmountable friction at the heart of Article 38(1)(c), a principle that is absolute within the vertical relationship between a state and its subjects, becomes paralysed when applied horizontally across sovereign jurisdictions of State X and India.

The Dual Sovereignty Doctrine Impasse

This paralysis is not an accidental loophole, rather it is a structural feature of the international legal order, predominantly enforced through the 'dual sovereignty' doctrine. As noted earlier, the ILC's Draft Conclusion 6 mandates that for a domestic principle to be recognised as a general principle of international law, it must be capable of transposition or simply be compatible with the overarching architecture of international law and relations.⁴⁷ The international system is intrinsically horizontal, predicated upon the Westphalian concept of sovereign equality and the decentralised distribution of *jus puniendi* or the right to punish. When a singular criminal act violates the laws, peace and dignity of two distinct sovereign entities, the dual sovereignty doctrine dictates that the act constitutes two entirely separate offences.⁴⁸ Thus, a trial by State X merely vindicates the legal order of State X, it has no effect in extinguishing or satisfying the independent

jurisdictional claims of India. If we transpose *ne bis in idem* as a mandatory transnational gap-filler it would be the equivalent of forcefully requiring India to recognise the judicial finality of State X's courts as equivalent to its own. In a global landscape characterised by 'sovereign distrust' rather than mutual recognition and by compelling a state to abdicate its inherent right to prosecute crimes committed against its own interests simply because another state has already done so is a legal impossibility. The dual sovereignty doctrine thus stands as a seemingly impenetrable barrier, definitively blocking the transposition of the principle.

A crime in international law cannot be reduced to merely its physical, material elements or essentially pulling the trigger, rather, a crime is conceptually defined as the transgression of a specific sovereign's law. The offence is intrinsically linked to the authority that criminalised the conduct. Consequently, if a financial swindler operates a syndicate that defrauds people in both the United Arab Emirates and India, the physical act of fraud but the legal offences are plural. The swindler has committed an offence against the sovereign legal order of the UAE and a distinct, separate offence against the sovereign legal order of India. Because the international legal system operates under the Lotus presumption, where states can exercise jurisdiction unless explicitly prohibited by a rule of international law, and no state is obligated to view its own unique penal laws to have been satisfied by a foreign tribunal. This jurisdictional theory exposes a fatal flaw in the transposability for the principle; the domestic rationale for *ne bis in idem* presumes a singular justice that is being dispensed with, but the international reality is a mosaic of competing, equally valid 'justices.'

The resilience of the dual sovereignty doctrine was defended in the landmark case of *Gamble v United States*, where the Supreme Court

refused to overturn the dual sovereignty exception to the Fifth Amendment.⁴⁹ The petitioner, Terance Gamble, was prosecuted sequentially by the State of Alabama and the federal government for the exact same instance of illegal firearm possession. Gamble sought dismissal of the subsequent proceeding on the ground of double jeopardy.⁵⁰ However, the Supreme Court affirmed the doctrine, anchoring its reasoning on the conceptual definition of an 'offence' as a transgression of a specific sovereign's law.⁵¹ The Court reasoned that because the federal government and the individual states within the United States constitute 'separate sovereigns,' they possess distinct penal codes, and thus, a single physical act inevitably constitutes two distinct offences.⁵² The implications of this case for international law are staggering. If the Apex Court of one of the most integral federal systems refuses to waive the dual sovereignty doctrine between its own constituent political units, the proposition that the broader radically decentralised international community of more or less 193 disparate nations has tacitly agreed to waive it via a 'general principle of law' is untenable. The decision in *Gamble* underscores that the right to define and punish an offence is an indivisible attribute of sovereignty, one that cannot be quietly subsumed by the transposition of a domestic norm.

Section 188 CrPC and the Extraterritorial 'Kanoon ka Haath' of the Indian State

The Indian legal framework mirrors this stringent commitment to sovereign jurisdictional autonomy, although it has its own unique constitutional and statutory mechanisms. Article 20(2) provides the fundamental right against double jeopardy stating that 'no person shall be prosecuted and punished for the same offence more than once.'⁵³ However, the Supreme Court of India

has consistently utilised the lack of clarity regarding the conjunctive ‘and’ to circumvent this right. In foundational cases such as *Maqbool Hussain v State of Bombay*, the Court defined the requisites to trigger Art 20(2) to be that the proceedings must have taken place before a ‘court of competent jurisdiction’ or a judicial body operating under the authority of the Indian state.⁵⁴ The Indian constitutional jurisprudence assumes a unified, domestic prosecutorial apparatus. It does not contemplate nor does it extend the constitutional protection to prosecutions initiated by foreign sovereigns. When an individual faces the jeopardy of the Indian judicial system, the courts examine whether the Indian state has previously exhausted its right to prosecute. The judicial determinations of foreign nations, operating under different penal systems, including different penal philosophies, evidentiary standards and even political imperatives, are not recognised as binding constraints on India’s constitutional right to uphold its own domestic rule of law. This domestic insularity is explicitly operationalised in India’s criminal procedural law, specifically section 188 of the Code of Criminal Procedure, 1973 (and its contemporary equivalent, section 208 of the Bharatiya Nagarik Suraksha Sanhita, 2023). Section 188 (or 208) empowers the Indian state to prosecute offences committed outside its territorial borders by Indian citizens or by individuals on ships or aircrafts registered in India.⁵⁵ The jurisprudence surrounding Section 188 indicate that the Indian state holds the authority to prosecute with government sanction and that foreign trials, by themselves, do not generate a transnational *ne bis in idem* effect.

Transposition Failure: Sovereign Distrust v Human Rights

Essentially, the transposability barrier that blocks *ne bis in idem* is not a mere technicality,

rather, it is a profound philosophical contest between the rights of the individual and the fundamental architecture of the international system. The human right to finality demands a global perspective, one with the individual at its centre, who is entitled to protection from iterative harassment regardless of which sovereign is wielding the gavel. In contrast, the structural reality of international law sees the sovereign state as the primary unit, possessing an unyielding right to maintain the peace and security of its citizens. The International Law Commission’s second limb, or the test of transposability demands compatibility with this structural reality, but because the international system is characterised by profound sovereign distrust, where states do not universally view each other’s judicial systems as equal, fair or capable of adequately exonerating shared interests, *ne bis in idem* cannot survive the journey across borders. The dual sovereignty doctrine, deeply entrenched in the jurisprudence of the United States and tacitly in India as well, proves that the state’s *jus puniendi* will always eclipse the individual’s right to transnational finality unless expressly surrendered by treaty. Therefore, *ne bis in idem* fundamentally fails the ILC’s methodological test, confirming that while it is a crucial principle within domestic borders, it remains a structurally disabled, non-binding norm in the horizontal relations between independent states.

The Lex Specialis Illusion

Exceptions that prove the rule: Vertical and Regional Regimes

A possible counter-narrative would be the undeniable, codified success of the principle within specific international regimes. Most prominently, the inclusion of the principle in the Rome Statute of the International Criminal Court and also its robust success in

the European Union's Schengen Area. The question then arises, if sovereign states can successfully implement a transnational bar against double jeopardy in these areas, is the ILC's transposability a real barrier to a seemingly customary norm? The application of *ne bis in idem* within the ICC and the EU does not signify the dawn of a new general principle, rather these instances are specialised, treaty-based exceptions. They are isolated legal ecosystems, one 'vertical' and the other 'supranational.' They exist precisely because the participating states have consented to waive specific aspects of their sovereignty. Far from disproving the thesis of this paper, these exceptions actually definitively prove the general rule that without explicit, treaty-bound recognition, the principle cannot survive the friction of customary transnational relations.

The Supranational Exception: The Schengen Area and Article 54 CISA

Altering our running hypothetical, consider our transnational insurgent but situate their actions squarely within continental Europe. Imagine this individual orchestrates a cross-border crime network committing and supporting violent activities, including crimes against humanity within France and Germany. Upon being, apprehended by the French authorities, the individual is subjected to a comprehensive criminal trial in Paris, ultimately serving a sentence for their conduct. Upon their release, the individual is apprehended by the German authorities, who attempt to initiate a second prosecution for the exact same material conduct recognising that the individual's actions compromised German national security and peace. The dual sovereignty doctrine would permit this second trial without any hiccups. However, within the European Union, the German prosecution is immediately halted. The

insurgent successfully invokes Article 54 of the Convention implementing the Schengen Agreement (CISA), which mandates that a person whose trial has been 'finally disposed of' in one Member State may not be prosecuted in another Member State for the same acts.⁵⁶ In this specific geographical and legal context, the transnational application of *ne bis in idem* is a reality.

Principle of Mutual Trust v Sovereign Distrust

The question then arises, why does Article 54 of the CISA succeed when the general international law fails? The answer lies in a foundational principle upon which the European Union's Area of Freedom, Security and Justice is based, namely, the 'Principle of Mutual Trust.' The Court of Justice of the European Union (CJEU) gave this principle an expansive interpretation in the joined cases of *Gozutok and Brugge* (2003), where it determined that even out of court settlements reached with the public prosecutor without the direct involvement of a judge, constitute a 'final disposal' that triggers the transnational bar of double jeopardy across the Schengen Area.⁵⁷ The CJEU's reasoning pivoted on the legal fiction that Member States must have absolute, reciprocal confidence in each other's criminal justice systems. France and Germany have agreed, via treaty instruments, to legally presume that their respective penal codes and judicial processes are fundamentally equivalent in upholding human rights and delivering justice.

This mutual distrust is the remedy to the sovereign distrust that characterises general international relations among the international community. The EU model is a supranational anomaly where states have effectively collated their sovereignty, surrendering the unilateral *jus puniendi* to facilitate free movement of citizens without

the fear of iterative prosecutions. The general international community of more than 193 states with their own unique legal, political and cultural regimes, possesses no equivalent to the Principle of Mutual Trust. India does not legally presume that the criminal justice system of a neighbouring adversarial state operates with the same rigor or motivations as its own nor does the United States hold such presumptions even domestically between its different states and federal government, let alone its geopolitical rivals. The structural prerequisites for the EU's success, namely mutual trust and surrendered sovereignty, are wholly absent in the broader community of nations. Thus, the Schengen model proves that *ne bis in idem* is not transposable without a special treaty framework.

The Vertical Exception: The Rome Statute and Complementarity

The second major counterargument relies on the 'vertical' success of the principle within international criminal law, specifically Article 20 of the Rome Statute.⁵⁸ For one final time, let us adapt our running hypothetical: the transnational warlord, responsible for crimes against humanity across multiple countries, is apprehended by State X, a country whose government is secretly sympathetic to the warlord's objectives. In order to protect the warlord, State X orchestrates a highly publicised but compromised domestic trial, resulting in a swift acquittal or shockingly lenient sentence. When the Prosecutor of the ICC subsequently attempts to indict the warlord in The Hague for the same material conduct, the warlord invoked Article 20 of the Rome Statute, which explicitly contains a *ne bis in idem* provision stating that no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by another court. With just an

understanding of Article 20, it would appear that the ICC is bound to the finality of the domestic decision.

However, the ICC does not operate on a horizontal plane with the sovereign states. It operates vertically, governed by the principle of complementarity. Further, the *ne bis in idem* protection in the Rome Statute is conditional and is structurally subordinate to the international community's imperative to end impunity for the most heinous crimes, such as crimes against humanity. The conditional nature of the vertical protection is codified in Article 20(3) of the Rome Statute, which contains a 'shielding' exception. The ICC's bar against *ne bis in idem* becomes inapplicable if the previous domestic prosecution were 'for the purpose of shielding the person concerned from criminal liability' or were not conducted 'independently or impartially in accordance with the norms of due process recognised by international law.'⁵⁹

If we return to our hypothetical, the ICC Prosecutor would invoke this very exception, arguing that State X's trial was a sham designed to shield the warlord. The ICC Pre-Trial Chamber would then sit in judgement of the sovereign judicial processes of State X. A similar case on admissibility was litigated in *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, where the ICC had to determine whether concurrent domestic proceedings in Libya triggered the complementarity bar.⁶⁰ The existence of such a 'check' over domestic judgements proves that the Rome Statute does not embody an unqualified general principle of *ne bis in idem*. If the principle were a structurally embedded norm of international law under Article 38(1)(c), the mere fact of a finalised domestic judgement would definitively end the question, just as it does within the internal borders of a state. Instead, the principle in international criminal law as

it appears in the ICC regime is characterised by a fundamental lack of absolute deference to domestic finality. The vertical application of the principle is therefore not a recognition of a customary right, but a special conditional mechanism to balance competing interests of a centralised international tribunal against the jurisdictional prerogatives of domestic states. Such a condition or ‘check’ is also only possible in case of a vertical application as horizontally, no equal sovereign can sit in judgement over the quality of domestic judgements of a coequal sovereign.

These specific treaty regimes, from the Rome Statute to the CISA, operate under the doctrine in *lex specialis*, creating specific rules that derogate from the general law to suit the specific, consented needs of a particular part of the community of nations.

The Anglo-Australian shift and the Domestic Convergence with the international reality

This conceptual friction between absolute finality and the *jus puniendi* prerogatives is not exclusively an international occurrence. It is increasingly being reflected in the evolution of domestic common law, hinting at a potential future of transposition. The historical roots of the common law protection trace back directly to English jurisprudence, specifically enshrined in the pleas of bar of *autrefois acquit* and *autrefois convict*.⁶¹ In the United Kingdom, the Criminal Justice Act, 2003, catalysed by the *Stephen Lawrence* case, controversially abrogated the absolute rule against double jeopardy for specific serious offences, permitting a retrial if ‘new and compelling evidence’ emerged.⁶² This statutory evolution is closely mirrored in Australian jurisprudence where: while the High Court vehemently defended the traditional, absolute bar under common law, in the landmark case of *R v Carroll* (2002), by quashing a perjury conviction as

impermissible collateral attack on a prior murder acquittal, they had to eventually yield to the democratic, legislative reform. Various Australian states have amended their penal codes to allow retrials in cases of ‘tainted acquittals’ such as jury tampering or where fresh and compelling evidence is found.⁶³ This domestic shift away from an absolute principle towards a more conditional, qualified rule mirrors the international need for flexibility, such as the ICC’s Art 20(3) exception. The Anglo-Australian reforms demonstrate that perhaps *ne bis in idem* is started undergoing change as an absolute principle is becoming unpalatable *in foro domestico*, when it frustrates the discovery of truth or delivery of justice.

The conditional iteration of the principle is fascinating because, potentially, it might not pose a threat to sovereign’s jurisdictional autonomy and may not fail the test of transposability. If this version gains sufficient customary traction across the community of nations, it could eventually offer a viable framework for transnational application of the principle, qualified with exceptions for fraudulent trials, tainted acquittals or flawed investigations, et. al. A qualified principle would be more transposable as it balances the individual’s right to finality with the sovereign’s jurisdictional and *jus puniendi* imperatives. But for now, the principle remains untransposable due to its inherent conflict with the sovereign’s rights.

Conclusion

This paper commenced with the hypothetical of a transnational insurgent, an individual caught within the overlapping jurisdictional crossroads of two distinct sovereigns. Through the methodological lens of Article 38(1)(c) of the Statute of ICJ and the ILC’s definitive framework, the fate of this hypothetical accused has been demystified. The central research question asked why a principle almost

universally heralded as a fundamental human right fails to crystallise as a binding transnational norm. The answer was based not in domestic recognition, but a failure of the principle to transpose internationally. The sovereign ceiling is an impenetrable jurisdictional barrier constructed from the bedrock principles of Westphalian statehood, sovereign equality and the decentralised distribution of *jus puniendi*. As long as the international architecture remains

predicated upon the absolute independence of the sovereign state and not mutual trust or recognition, the ceiling holding back *ne bis in idem* will remain unbroken, leaving the individual exposed to the pluralistic realities of a divided, distrustful world.

Endnotes

- 1 Statute of the International Court of Justice art 38(1)(c).
- 2 *ibid.*
- 3 Permanent Court of International Justice, Statute of the Permanent Court of International Justice (1920) art 38. Permanent Court of International Justice: Advisory Committee of Jurists Procès-verbaux of the Proceedings of the Committee. Although the wording ‘civilised’ was criticised, most prominently in Judge Ammoun’s separate opinion in the *North Sea Continental Shelf Cases* [Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands] 132–33.
- 4 PCIJ Advisory Committee (n 3), 308, 346. Giorgio Gaja, ‘General Principles of Law’ Max Planck Encyclopedia of International Law (2020).
- 5 United Nations General Assembly, ‘Review of the Role of the International Court of Justice: Report of the Secretary-General’ (15 September 1971).
- 6 International Law Commission, ‘General Principles of Law’ in *Report of the International Law Commission: Seventy-fourth session* (2023) UN Doc A/78/10 (2023) ch IV.
- 7 *ibid.*, Draft Conclusion 1.
- 8 *ibid.*, Draft Conclusion 4. Conclusion 4 Identification of general principles of law derived from national legal systems To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain: (a) the existence of a principle common to the various legal systems of the world; and (b) its transposition to the international legal system.
- 9 *ibid.*, Draft Conclusion 4 (a).
- 10 *ibid.*, Draft Conclusion 5 (1). Conclusion 5 Determination of the existence of a principle common to the various legal systems of the world 1. To determine the existence of a principle common to the various legal systems of the world, a comparative analysis of national legal systems is required. 2. The comparative analysis must be wide and representative, including the different regions of the world. 3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials.
- 11 *ibid.*, Draft Conclusion 5, commentary (7).
- 12 *ibid.*, Draft Conclusion 6. Conclusion 6 Determination of transposition to the international legal system A principle common to the various legal systems of the world may be transposed to the international legal system insofar as it is compatible with that system.
- 13 Malcolm N Shaw, *International Law* (9th edn, Cambridge University Press 2021) 5–12. Andre Klip and Steven Freeland, ‘International Criminal Justice and the Enforcement Deficit: In Search of Sui

- Generis Theories and Procedures' (2019) 19 *International Criminal Law Review* 191.
- 14 Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth and Claus Wittich eds, University of California Press 1978).
 - 15 ILC Report (n 6), Draft Conclusion 6, Draft Conclusion 4.
 - 16 ILC Report (n 6), Draft Conclusion 6.
 - 17 *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] ICJ Rep 3.
 - 18 *ibid.*
 - 19 *SS Lotus* (France v Turkey) PCIJ Rep Series A No 10 (1927).
 - 20 ILC Report (n 6), Draft Conclusion 4.
 - 21 *Green v United States* 355 US 184, 187-88 (1957).
 - 22 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1769) vol 4, 196. *Green v United States* 355 US 184 (1957). *Connelly v Director of Public Prosecutions* [1964] AC 1254 (HL)
 - 23 United States Constitution, Fifth Amendment.
 - 24 Veronica Mina, 'Gamble v. United States: The Dual Sovereignty Doctrine' (2019) 35(1) *Maryland Journal of International Law* 225. *United States v DiFrancesco* 449 US 117, 128 (1980). *Benton v Maryland* 395 US 784, 795-96 (1969).
 - 25 *Green v United States* 335 US 184 (1957).
 - 26 Constitution of India (1950), art 20(2).
 - 27 *Maqbool Hussain v State of Bombay* [1953] SCR 730.
 - 28 *S.A. Venkataraman v Union of India* [1954] SCR 1150.
 - 29 Code of Criminal Procedure 1973, s 300.
 - 30 *Bharatiya Nagarik Suraksha Sanhita* 2023, s 337.
 - 31 Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996).
 - 32 Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, OUP 1998) 296. Justinian, *The Institutes of Justinian* (JW Cairns and P du Plessis trs, Edinburgh University Press 2016).
 - 33 German Basic Law (*Grundgesetz*) 1949, art 103(3).
 - 34 Dutch Criminal Code, art 68.
 - 35 French Code of Criminal Procedure, art 692.
 - 36 Zweigert & Kötz (n 32).
 - 37 Wael B Hallaq, *Shari'a: Theory, Practice, Transformations* (CUP 2009).
 - 38 Rudolph Peters, *Crime and Punishment in Islamic Law* (CUP 2005).
 - 39 Arab Charter on Human Rights (2004), art 16.
 - 40 American Convention on Human Rights, art 8(4).
 - 41 *Loayza-Tamayo v. Peru* IACHR Series C No 33 (1997).
 - 42 African Charter on Human and Peoples' Rights, art 7(1). *Alex Thomas v United Republic of Tanzania* (App No 005/2013) African Court on Human and Peoples' Rights (2015).
 - 43 *State of Bombay v SL Apte* [1961] 3 SCR 107.
 - 44 *Zolotukhin v. Russia* (2009) 49 EHRR 8.
 - 45 *ibid.*

- 46 Human Rights Committee, General Comment No. 32 to Article 14 of the International Covenant on Civil and Political Rights (ICCPR): Right to Equality Before Courts and Tribunals and to a Fair Trial, UN Doc CCPR/GC/32 (2007).
- 47 ILC Report (n 6), Draft Conclusion 6.
- 48 *Gamble v United States* 587 US 678 (2019). *Heath v Alabama* 474 US 82 (1985).
- 49 *ibid.*
- 50 *ibid.*
- 51 *ibid.* *Heath v Alabama* 474 U.S. 82, 92 (1985).
- 52 *ibid.*
- 53 Constitution of India (1950), art 20(2).
- 54 *Maqbool Hussain v State of Bombay* [1953] SCR 730.
- 55 Code of Criminal Procedure 1973, s 188. *Bharatiya Nagarik Suraksha Sanhita* 2023, s 208.
- 56 Convention Implementing the Schengen Agreement (CISA), art 54.
- 57 *Gozutok and Brugge* (Joined Cases C-187/01 and C-385/01) [2003] ECR I-1345.
- 58 Rome Statute of the International Criminal Court, art 20.
- 59 Rome Statute of the International Criminal Court, art 20.
- 60 *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11).
- 61 Blackstone (n 22).
- 62 Criminal Justice Act 2003 (UK), ss 78-79.
- 63 Western Australia Criminal Appeals Amendment Act 2022, s 35D. Queensland Criminal Code Amendment (Double Jeopardy) Amendment Bill 2007, s 678H-678I. New South Wales Crimes (Appeal and Review) Act 2001, s 100.

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