

Section 4: *Ne Bis in Idem*

Article 8: *Ne Bis in Idem* (Double Jeopardy)

A person may not be tried for a criminal offense for which he or she has previously been finally convicted or acquitted, unless the proceedings:

- (a) were for the purpose of shielding the person concerned from criminal responsibility; or
- (b) were not conducted independently and impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that, under the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Commentary

The principle of *ne bis in idem*, also known as double jeopardy, is deemed a constitutional right and a procedural right in the constitutions or the domestic legislation of many states. It is also an internationally protected human right under the International Covenant on Civil and Political Rights, Article 14(7); the American Convention on Human Rights, Article 8(4); and Protocol 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 4(1). The purpose of a provision on *ne bis in idem* is to protect the individual against the arbitrary power of a state and to prevent a state from prosecuting someone for the same offense twice. In addition to being held as a constitutional right and a human right, *ne bis in idem* is sometimes viewed as a procedural defense to a criminal charge (as opposed to the substantive defenses contained in Section 9 of the General Part of the MCC) that bars its prosecution. In other jurisdictions, it is seen as a substantive defense to a criminal charge.

Four issues will be discussed before turning to a discussion of how the *ne bis in idem* principle operates internally (i.e., in a domestic context) versus how it operates

externally (i.e., in an international context). They are: (1) What does *ne bis in idem* apply to? (2) To whom does it apply? (3) When does *ne bis in idem* begin to apply? (4) What is the scope of the exceptions to the *ne bis in idem* principle?

As regards question 1, there are variations in state practice. In some states, *ne bis in idem* applies to the historical facts, or a particular set of events. Once a person has been prosecuted for a criminal offense arising from a set of historical facts, he or she cannot be further prosecuted for other criminal offenses arising from the same set of historical facts. This practice accords with the literal meaning of *ne bis in idem*, where *idem* means “circumstances.” Of course, a person may be prosecuted for a number of offenses arising from the same historical facts, but this must all be done together and at the same trial and under the same indictment. In systems that look to the historical facts as the determinant of the *ne bis in idem* principle, a distinction is often made between internal and external operation of *ne bis in idem*. While historical facts may govern the application of this principle with regard to domestic trials, externally the criminal offenses are looked at. In this case, when a person has been prosecuted for a particular criminal offense in another state, the first state can prosecute him or her again for a different criminal offense that occurred as part of the same historical episode and still not violate the external *ne bis in idem* principle. In a domestic context, the state could prosecute the person for the criminal offenses only where they were part of a different historical episode.

In other legal systems, and under the MCC, double jeopardy applies, both externally and internally, to a particular criminal offense, not to a historical episode. In this way, if a person is convicted or acquitted of the offense of assault causing serious harm, he or she cannot subsequently be tried for the same offense, whether the first prosecution took place in the state or outside the state, but could be prosecuted for another offense that took place as part of the historical episode at which the offense of assault causing serious harm was allegedly committed. In another example, where a person robs a shop and in doing so shoots the owner, it would not be a breach of Article 8 if he or she were convicted or acquitted of robbery and then later tried for unlawful killing. One issue of note relates to “lesser included offenses,” meaning an offense that can give rise to a number of offenses, one of them being the “less serious” of the two. In relation to the “assault causing serious harm” example mentioned above, the person cannot subsequently be tried for the lesser criminal offense of assault as this is the lesser included offense of assault causing serious harm. By the same token, if a person is convicted or acquitted of assault, he or she cannot subsequently be tried for the more serious offense of assault causing serious harm. The legislation in states that apply the *ne bis in idem* principle to criminal offenses, as opposed to a historical set of facts, often contains provisions that limit a prosecutor from instigating separate prosecutions or indictments against the same person for criminal offenses arising from the same historical set of facts when the prosecutor knew of the offenses at the trial of the first offense. A post-conflict state introducing a provision on *ne bis in idem* may choose to include a similar provision in domestic criminal legislation.

Where a person is accused of two criminal offenses arising from the same criminal episode, there is still the possibility of the court ordering that the offenses be tried separately. This order has no effect on the application of *ne bis in idem*. Reference should be made to Chapter 10, Part 1, of the MCCP and its accompanying commentary.

Question 2 relates to whom the *ne bis in idem* applies—namely, does it apply to a legal person where a natural person has already been convicted or acquitted of the same criminal offense, and vice versa? The answer is “no.” Under the generally accepted interpretation of the *ne bis in idem* principle, the trial of a natural person for a particular criminal offense does not apply to the subsequent trial of a legal person for the same offense. Equally, the trial of a legal person for a particular criminal offense does not apply to the subsequent trial of a natural person for the same offense. Reference should be made to Article 19(3), which sets out this principle.

The third question of when *ne bis in idem* begins to apply is an important one. The answer depends very much on the criminal procedure law in place in the state, particularly whether the law provides for prosecutorial appeals of final judgments or whether it allows retrials. Reference should be made to the general commentary to Chapter 12 of the MCCP, which discusses different approaches to appeals in different legal systems. The third question relates to the term *finally convicted or acquitted*, a term that has been widely interpreted to mean that all modes of review and appeal have been exhausted and all waiting limits have expired. Appeals, either by the convicted person or by a prosecutor, are not considered a breach of *ne bis in idem*, as they are merely a continuation of the same case. It is the use of the term *finally* that is determinative to when double jeopardy applies. The relevant question is: When are the proceedings considered final and complete? In some jurisdictions, where the prosecutor has no right to appeal after the accused is acquitted or convicted (and he or she has exhausted his or her appeal options), *ne bis in idem* starts to apply. In other jurisdictions, where the prosecution may appeal an acquittal on an error of law or fact and where a retrial can be ordered, just like in the system developed under the MCCP, *ne bis in idem* will apply either when all appeals have been exhausted or when the time limit for appeals has expired. Reference should be made to Chapter 12, Part 1, of the MCCP, which set out the procedures and time limits for filing appeals, and their accompanying commentaries.

Finally, question 4, and the scope of exceptions to *ne bis in idem*, should be considered. In some states, in relation to internal *ne bis in idem*, there is a blanket prohibition on the trial of a person once he or she has been finally convicted or acquitted. This prohibition often leads to discontent among the population, as, for example, when it is clear that the proceedings were not carried out fairly or when they were seen as a sham designed to exonerate a person who clearly committed an offense. Some states allow exceptions to the principle of *ne bis in idem* when the proceedings were a fraud or a sham, such as when the accused bribed the judge. This exception allows the court to look into the substance of the previous case to determine whether another trial for the same criminal offense can go ahead. The MCC allows for an exception to the principle of *ne bis in idem* to preempt a situation involving the unfair application of the principle. The wording of Article 8 is taken from Articles 20(3)(a) and 20(3)(b) of the Statute of the International Criminal Court.

The provisions of Articles 20(3)(a) and 20(3)(b) of the Statute of the International Criminal Court allow the International Criminal Court to exercise jurisdiction where a person has been previously tried, if the trial was conducted to shield a person from prosecution or was not conducted in an “independent and impartial manner” and was “inconsistent with an intent to bring the person concerned to justice.” If a state is party to the statute, this provision will form part of the International Criminal Court’s

determination of whether to exercise jurisdiction with respect to the criminal offenses within its jurisdiction (genocide, crimes against humanity, and war crimes). In the context of the MCC, this provision governs a domestic court's determination of whether it can legally retry a person for the same criminal offense, notwithstanding the fact that he or she has been "finally acquitted or convicted" of the offense. The notion of shielding contained in Article 8(a) seems to suggest an element of bad faith on the part of the prosecuting state or court (e.g., a state wants to appear to other states to be holding a person accountable for the commission of serious criminal offenses, but in reality the state shields the person by conducting a sham trial designed to exonerate the person). In assessing whether the proceedings were for the purpose of shielding the person concerned from criminal responsibility, the court must look at the totality of the proceedings. When looking at the second qualification to the *ne bis in idem* principle under Article 8(b), the court will have to look to relevant international standards on the independence and impartiality of criminal proceedings contained in conventional law and in nonbinding norms of international law. Reference should be made to Chapter 2, Part 4, of the MCCP, which discuss these norms in greater detail. In addition to finding a lack of independence and impartiality, the court must also find that the proceedings were "inconsistent with an intent to bring the person concerned to justice." As with Article 8(b), the court will be looking for an element of bad faith on the part of the court. It should also assess the totality of the proceedings to make its determination.

Article 8 may not only apply a qualified *ne bis in idem* principle internally but may also apply it externally, meaning in instances in which a person has been finally convicted or acquitted by a court in another state. Many states do not apply the principle of *ne bis in idem* to proceedings conducted outside of their jurisdictions. Additionally, some federal states do not apply this principle to states within the federation. This means that the state, or a state within a federation, will not see the trial of a person for a particular criminal offense in another state as a bar on it prosecuting the person for the same offense. The practice of not applying the principle of *ne bis in idem* is sometimes justified on the basis of "dual sovereignty." In federal states that do not recognize the external application of the *ne bis in idem* principle, a person can be tried at the state level for a criminal offense and also at the federal level. In the context of an issue arising between two states, it would mean that a person could be tried for a criminal offense irrespective of any foreign trial. The lack of total unanimity as to the application of external *ne bis in idem* is evidenced in the Schengen Agreement, which operates between European states. Article 54 recognizes that external *ne bis in idem* applies between states. However, Article 55 allows states to opt out of it. In the realm of international human rights law, under which *ne bis in idem* is protected (as discussed above), the Human Rights Committee (the United Nations body established under Article 28 of the International Covenant on Civil and Political Rights to interpret states parties' adherence to the covenant) has stated that the prohibition of double jeopardy does not apply externally (see *A. P. v. Italy*, case no. 204/1986 of the United Nations Human Rights Committee). In contrast, external *ne bis in idem* is recognized without qualification in the Charter of Fundamental Rights of the European Union (Article 50). Some states have included this unqualified approach in domestic legislation or it has been approved of by their constitutional courts.

The drafters of the MCC are of the view that external *ne bis in idem* should be recognized. Three determinative factors persuaded the drafters to include the external *ne bis in idem* rule in the MCC. First, under the MCC, there are wide grounds for the assertion of territorial, extraterritorial, and universal jurisdiction. Where there is a jurisdictional overlap, it would cause undue hardship to an accused person if the principle of *ne bis in idem* were not recognized as an externally applicable principle. This response to jurisdictional overlap is recognized and supported in the *Princeton Principles on Universal Jurisdiction*, Principle 9, as is the need to qualify this principle. Second, given the breadth of jurisdiction under the MCC, and the inevitable potential for conflicts of jurisdiction, the recognition of *ne bis in idem* at an international level is an important mechanism to control conflicts of jurisdiction. Third, in the context of a post-conflict criminal justice system, which is likely to have severely limited capacity and resources, it would generally be inadvisable to focus those scarce resources on the retrial of a case that had already been credibly prosecuted elsewhere. However as mentioned above, the MCC does not contain a blanket prohibition on the retrial of a person for the same criminal offense where a person has been tried abroad for it but instead qualifies this prohibition on the basis of Paragraphs (a) and (b). Thus the domestic court can look into the substance of the proceedings conducted in the other state to determine whether they fall within the exceptions to *ne bis in idem*. This process is consistent with the provisions of the Statute of the International Criminal Court. It also accords with the position adopted by the United Nations International Law Commission. The International Law Commission has stated that “international law [does] not make it an obligation for States to recognize a criminal judgment handed down in a foreign State” where the proceedings were not conducted impartially, independently, or in a manner designed to shield the accused from international criminal responsibility (UN document A/51/10 1996).