

**XVIITH INTERNATIONAL CONGRESS OF PENAL LAW
(Beijing, 12 - 19 September 2004)²¹**

Topics:

1. Criminal Responsibility of Minors in National and International Legal Order.
2. Corruption and Related Offences in International Business Relations.
3. The Application of Principles of Criminal Procedure in Disciplinary Proceedings.
4. Concurrent National and International Criminal Jurisdiction and the Principle 'Ne bis in idem'.

**Section I. Criminal Responsibility of Minors in National and International
Legal Order**

*The participants to the XVIIth International Congress of Penal Law, held in Beijing from 12 to
19 September 2004,*

Considering that minors require special protection by society, and in particular by the legislature, as well as the social and judicial system,

Considering that youth necessitates a special adaptation of legal rules,

Considering that the protection of young persons, their harmonious development and socialization should be of particular importance, while at the same time ensuring the protection of society and taking account of the interest of victims of offences,

Considering that society's intervention with regard to minors must always keep account of the predominance of their interests,

Considering that the state of adolescence can be prolonged into young adulthood (25 years) and that, as a consequence, legislation needs to be adapted for young adults in a similar manner as it is done for minors,

Conscious of the diverse national situations as well as the cultural, social and economic differences that exist in the various countries,

Recalling the international standards and norms, as expressed in the Beijing Rules on the Administration of Juvenile Justice adopted by the United Nations in 1985,

Have adopted the following recommendations:

²¹ RIDP, vol. 75 3-4, 2004, pp. 761-783 (French); p. 785-806 (English); pp. 807-829 (Spanish).

I. Justification of the Principle of Criminal Liability and the Different Categories of Age

1. Minors are subjects of law with their own special characteristics. Because of these specificities, the legislative system should view the criminal liability of minors as a separate issue within the framework of the elements of crime.
2. The age for criminal majority should be set at 18 years. The legislation should determine from what age a special penal system could be applied. This minimum age should not be lower than 14 years at the time of the commission of the offence.
3. Minor offenders should be subjected predominantly to educational measures or other alternative sanctions that focus on the rehabilitation of the individual or, if the circumstances so require, exceptionally to penal measures in the traditional sense of the term.
4. Below the age of 14 years, only educational measures may be applied.
5. The administration of educational measures or alternative sanctions that focus on rehabilitation may be extended, at the demand of the concerned individual, to the age of 25.
6. Concerning crimes committed by persons over 18 years of age, the applicability of the special provisions for minors may be extended up to the age of 25.

II. Judicial Establishment of Criminal Liability of Minors

7. The criminal liability of minors and the consequences that result from such a liability must be decided by a specialized judicial authority that has a separate jurisdiction to that of adults. This special qualification of the organs concerned should include all other participants of the process. It would be desirable to extend the competence of this jurisdiction to all issues concerning minors.
8. The decision of this jurisdiction should be enlightened by preliminary multidisciplinary investigations open to questioning by the parties.
9. Special attention should be given to safeguarding the interests of victims and to treating them with humanity.

III. Sanctions and Other Applicable Measures

10. The death penalty, which in itself poses a serious problem with regard to human rights, shall never be imposed on an offender who was a minor at the time of the crime.
11. Life imprisonment in any form, corporal punishments, and torture or other inhuman or degrading treatment shall be prohibited. The maximum term of imprisonment should not exceed 15 years.
12. Pre-trial detention should only be applied in exceptional cases. The decision concerning such a detention must be made by a judicial body, founded on a reason provided by law, and

preceded by a hearing. Pre-trial detention should, as far as possible, be accompanied by educational support. It should, as far as possible, not be imposed on a person under 16 years of age.

13. Imprisonment must remain an exceptional sanction that may be pronounced only for serious offences and applied only to minors whose personality has been evaluated carefully. The pronouncing, and duration, of imprisonment must be strictly limited. Any imprisonment of minors should be enforced in a place different from that of adults. Every time it is possible, alternative measures to imprisonment, and to formal trial, must be applied. Although the primary concern has to be the re-integration of the offender, preference should be given to measures of mediation that take best account of the interests of the victims.

14. The application of educational and protective measures must be subject to the same requirements and guarantees as those foreseen for the punishment of minors. Any such measure is limited by the principle of proportionality.

15. In all cases, the maximum limits of proportionality should be observed.

IV. International Aspects

16. Legislative systems, courts, prosecutors, and all other institutions dealing with minors should act in accordance with international instruments on the rights of the child. It is particularly important to ensure that domestic legislation, as well as judicial and administrative decisions, are in conformity with the treaties and conventions ratified by the State and in accordance with relevant international standards and norms.

17. The application of instruments on international cooperation in criminal matters must have special regard for the predominant interests of the child. The cooperation must never create a situation that is worse than the one to which the child would be exposed in the child's country of origin. Special emphasis has to be given to the right to consular protection and to refugee protection, respectively.

The respect of the right to a family life should be expressly stipulated, especially in extradition instruments. The alien child must have at least the same rights as those granted to children with citizenship.

Section II. Corruption and Related Offences in International Business Relations

The participants to the XVIIth International Congress of Penal Law, held in Beijing from 12 to 19 September 2004, have adopted the following recommendations:

I. The Relevance of Corruption and Related Offences

The abuse of authority in exchange of an advantage (corruption), as well as related offences, causes severe harm. Corruption and related offences lead to substantial economic damage, impair the integrity and efficient functioning of public administration, frustrate the trust of the public in organs of the State, undermine the rule of law and democracy, distort fair economic competition, and impede economic development. Corruption and related offences can be means used by organized criminal groups to influence and penetrate political, administrative, and economic structures. Corruption and related offences are especially dangerous when carried out systematically or transnationally. It is therefore necessary to combat corruption and related offences by effective measures, both nationally and transnationally. The *United Nations Convention against Corruption* provides a universal framework for this purpose.

II. The Necessity for a Multilateral Approach

1. Prevention and control of corruption and related offences require a multitude of measures. In the first place, effective measures for the prevention of these offences are mandated. In addition, effective criminal laws against corruption and related offences are necessary to demonstrate their reprehensible nature and to deter potential offenders.

2. Combating corruption and related offences is difficult because such offences are often committed in secret, with no individual victim to complain. Moreover, corruption and related offences often transcend national borders. The successful fight against these offences therefore requires joint efforts by the international community, in particular:

- effective measures for the prevention of corruption and related offences;
- national criminal laws against these offences in accordance with international standards;
- effective investigation, prosecution, and adjudication, while safeguarding the human rights of suspects and witnesses;
- effective sanctions against persons convicted of corruption and related offences;
- effective international cooperation in criminal matters.

III. Measures for the Prevention of Corruption and Related Offences

1. Effective measures for the prevention of corruption and related offences are of crucial importance.
2. A culture of good governance, transparency, legality, integrity and honesty, as well as public support, is indispensable to the prevention and control of corruption and related offences. Therefore, States are encouraged to initiate public awareness campaigns and to implement educational programs.
3. Ensuring good governance in the public sector is a prerequisite for prevention and control of corruption and related offences. The following measures may be useful for that purpose:
 - careful selection of staff with competence and integrity for public service;
 - adequate remuneration of public officials;
 - codes of conduct for public officials, including rules concerning conflicts of interest and incompatibilities;
 - involvement of more than one public official in the process of making critical decisions;
 - strict internal and external controls, including random audits;
 - corruption hotlines, with due regard to safeguarding the rights of persons who may be falsely accused;
 - specialized “corruption ombudsmen” and/or anti-corruption commissions with guaranteed independence;
 - development of lists of “warning signals” of corruption.
4. The highest possible degree of transparency and accountability to the public sector should be maintained to promote integrity and to fight corruption and related offences. The media and NGOs play an important role in ensuring transparency. States should ensure a public right of access to information. Disclosure of assets of certain public officials and their families should be considered.
5. The introduction of anti-corruption measures and compliance programs by private companies should be encouraged.
6. There should exist an appropriate legal framework for accounting and auditing standards, including effective penalties for grave violations.
7. National tax law should deny tax deductibility of bribes.

IV. Criminal Laws Against Corruption and Related Offences

1. Corruption and Bribery of Public Officials

1.1 Provisions concerning corruption and bribery of public officials should pertain to persons acting on behalf of the State or the public administration at any level of hierarchy and in any legislative, executive, administrative, or judicial function, including employees of national and local governments, members of national and local legislative bodies, judges, prosecutors, and employees of government controlled entities and corporations.

1.2 Corruption should be defined as demanding, agreeing to accept, or accepting, by any public official, at any time, an undue advantage, regardless of its nature, for himself/herself or another person or institution in connection with the actual or potential performance or non-performance of the public official's functions. Corruption should not require performance or even the intent of performing the act or omission for which the advantage is intended.

1.3 The following should be treated as aggravating circumstances:

- a) The fact that the public official demanded, agreed to accept, or accepted an advantage in connection with a violation of his or her official duties.
- b) The fact that the bribery was committed in connection with organized crime.

1.4 The fact that the public official has, before performing the act or the omission, withdrawn from the agreement and restituted any undue advantage received should be considered as a mitigating circumstance.

1.5 Bribery should be defined as promising, offering or giving, by any person, at any time, an undue advantage, regardless of its nature, to any public official or, upon his/her request, to another person, or institution in connection with the actual or potential performance or non-performance of the public official's functions. The aggravating and mitigating circumstances mentioned in 1.3 and 1.4 should be applied *mutatis mutandis*. The fact that the offender had a right to the public official's performance or non-performance of the act in question should also be treated as a mitigating circumstance.

2. Corruption and Bribery in the Private Sector

2.1 Corruption and bribery of executives and agents of enterprises violate fair competition and may also be harmful to the enterprise whose executive or agent is bribed.

2.2 Corruption in the private sector should be defined as demanding, agreeing to accept, or accepting, by an executive or an agent of an enterprise, at any time, an undue advantage, regardless of its nature, in exchange for an improper act or omission relating to the affairs of the principal.

2.3 Bribery in the private sector should be defined as offering, promising or giving, by any person, at any time, an undue advantage, regardless of its nature, to an executive or agent of any enterprise in exchange for an improper act or omission relating to the affairs of the principal.

3. Trading in Influence

3.1 The law may define trading in influence as a criminal offence. Trading in influence is committed by any person who, asserting that he or she is able to exert influence on a public official, demands, agrees to accept, or accepts an undue advantage, regardless of its nature, for himself/herself or another person or institution in exchange for the promise or exercise of improper influence on any public official.

3.2 States may also make punishable the acts of offering or giving an undue advantage to a person trading in influence.

4. Sanctions

4.1 Penalties for corruption, bribery, and related offences should be appropriate sanctions proportionate to the seriousness and the dangerousness of the offence.

4.2 Removal from public office should be a possible consequence of corruption. For perpetrators of bribery, exclusion from public sector contracts may constitute an additional sanction.

4.3 Bribes should be subject to confiscation. Offenders may also be deprived of privileges and proceeds derived from the offence. When confiscation is imposed, third parties' interests should be taken into account.

4.4 When the offence has been committed on behalf of a legal person, sanctions against the legal person should be available only if the offence has been committed in the interest or to the advantage of the legal person, and the offence was due to a lack of control of the legal person.

4.5 Effective disciplinary measures could complement criminal sanctions.

5. Related Offences

5.1 Corruption and bribery are often connected with the commission of other offences such as fraud, embezzlement, breach of trust, extortion, agreements to unfairly restrict or influence competition, or the disclosure of legally protected secrets. The law should provide for adequate sanctioning of offences in this regard.

5.2 Money laundering laws providing for criminal penalties for the laundering of the proceeds of corruption should be enacted and effectively enforced.

6. International Aspects

6.1 National criminal law should include bribery of public officials of foreign States and officials of public international organizations (foreign public officials). States should consider criminalizing corruption of officials of international organizations to which they belong.

6.2 States should establish jurisdiction over bribery of foreign public officials where the offence or any element thereof is committed in their territory. If a State does not extradite its nationals, it should establish jurisdiction over bribery of foreign public officials committed by its nationals.

6.3 International organizations should support efforts by States to investigate and prosecute corruption committed by their officials, in particular, by waiving immunity.

6.4 National criminal law may be extended to bribery in the private sector committed abroad by a national of the State.

V. Investigation, Prosecution, and Adjudication

1. Investigation, prosecution, and adjudication of corruption and related offences should be free from improper political, economic, or other influences.

2. The law should provide sanctions for public officials who intentionally violate an obligation to report corruption cases to the appropriate authorities. Reporting requirements may be extended to private persons.

3. States should provide all necessary resources for effective investigation, prosecution, and adjudication of corruption and related offences.

4. The law should provide for appropriate methods for the investigation of corruption offences. These methods may, in serious cases, include undercover investigations and interception of communications.

5. States should consider affording incentives for persons to cooperate in the investigation or prosecution of corruption and related offences. For persons suspected of crime, incentives may include exemption from or mitigation of punishment.

6. States should protect witnesses in corruption cases. Persons who report acts of corruption should be protected from undue negative consequences.

7. Bank secrecy should not impede investigative or provisional measures ordered by a competent authority with regard to corruption and related offences in the context of a domestic investigation or in response to a proper request for international legal assistance.

8. The secrecy of tax files may be lifted for the investigation of serious corruption.

9. Statutes of limitations should allow for an adequate period of time for investigation, prosecution, and adjudication.

10. Immunities, where applicable, should not bar prosecution after expiration of an offender's term of office.

11. In the investigation, prosecution, and adjudication of corruption and related offences, proper safeguards, including judicial control, should be provided for the protection of human rights, especially the right of privacy, as well as the right to a fair trial and the right of defense.

12. States should consider establishing and maintaining specialized units for the investigation and prosecution of corruption and related offences. Staff of such units, as well as the judiciary, should receive adequate resources and training.

VI. International Cooperation

1. In order to avoid safe havens for corruption offenders, States should provide effective international cooperation for the investigation, prosecution, and adjudication of corruption and related offences in accordance with their laws and international treaties. National laws on criminal procedure should, to the extent feasible and necessary, be harmonized for that purpose.

2. States should introduce mechanisms for returning assets derived from corruption in accordance with Chapter V of the *United Nations Convention against Corruption*.

3. The *United Nations Convention against Corruption*, as well as other international conventions, are valuable tools for promoting and coordinating international cooperation in combating corruption and related offences. Such conventions should include mechanisms for monitoring their implementation. States are encouraged to ratify and implement them.

4. Research and the international exchange of information on combating corruption and related offences should be promoted.

Section III. The Application of Principles of Criminal Procedure in Disciplinary Proceedings

The participants to the XVIIth International Congress of Penal Law, held from 12-19 September 2004, in Beijing, China,

Mindful of the resolution on principles of criminal procedure adopted by the XVth International Congress of Penal Law, held in 1994 in Rio de Janeiro, Brazil, as well as of the resolution on administrative penal law adopted by the XIVth International Congress of Penal Law, held in 1989 in Vienna, Austria,

Considering that it is important to apply basic principles of criminal procedure in disciplinary proceedings, at least where these relate to facts that may incur other than minor disciplinary sanctions,

Considering that the application of principles of criminal procedure to disciplinary proceedings cannot neglect the general principles of substantive nature, in particular the principle of legality of incriminations and of sanctions,

Considering that, in the majority of the countries, disciplinary law is used to impose sanctions in a growing range of settings, including in the military, in the police, in the public administration, in penitentiary or educational settings, and in liberal professions, sometimes even covering the relationship between the state authority and the public at large,

*Considering that, although criminal law and disciplinary law both belong to the field of punitive justice, differences between the two proceedings can be justified, *inter alia*, by the specific nature of the offence or by purposes of simplification,*

Have adopted the following recommendations:

1. Disciplinary sanctions must be sufficiently clear and foreseeable. Sanctions and essential procedural rules must be provided for by law.
2. Sanctions for disciplinary infractions should be reasonable and proportional to the gravity of the infraction and to the personal circumstances of the person having committed the infraction. In particular, disciplinary proceedings may not be used as criminal justice 'in disguise.'
3. An impartial decision must be assured to the defendant on the grounds of precise guarantees, which are provided for by law. A separation between prosecuting and investigating powers, on the one hand, and judging and punishing powers, on the other hand, is advisable.
4. If sanctions are not imposed by an authority that is different from the one holding the prosecuting or investigation powers or that is not independent from the organization whose discipline has been breached, the defendant must be granted the right to appeal to an

independent and impartial tribunal, which must have the power to suspend execution of the sanction upon request of the defendant.

5. During disciplinary proceedings, even considering the need for simplification to which such proceedings must be inspired, the defendant must enjoy the essential rights of a fair and speedy trial, including: the presumption of innocence and the related principle *in dubio pro reo*; the respect of the rights of the defense, including the rights of the defendant to keep silent, not to cooperate in any way in establishing his own responsibility, and to examine or to have examined the witnesses against him and to obtain witnesses in his behalf under the same conditions as the witnesses against him; and the exposition of the grounds of the decision.

6. The access to documents and data of the public administration or of another organization sharing the disciplinary power, being relevant for the discovery of the truth, must be guaranteed to the defense, if no fundamental public reasons exclude it. In any case, no sanction is possible on the basis of evidence that is kept secret from the defense.

7. Throughout disciplinary proceedings, the defendant must have the right to effective assistance by an independent lawyer chosen personally or, alternatively, to choose to be assisted by another person having a good knowledge of the organization holding the disciplinary power. Where the interests of justice require it, the defendant must be entitled to free assistance by an independent lawyer by official appointment, when he has no economical means to remunerate him personally.

8. As a principle, hearings in disciplinary proceedings should be public, with the exception of proceedings concerning minor sanctions and of those situations in which there is a need to protect morality or minors, the private lives of the parties, or, in a democratic society, where there are reasons based on national security. The defendant shall have the right to request non-public hearings, unless this is strongly contrary to public interest.

9. When criminal guilt can be added to disciplinary guilt, and the disciplinary sanction adds to the criminal sanction, the defendant in the criminal proceedings cannot undergo a duplication of sanctions, unless justified by the difference of the interests protected by the disciplinary and the criminal sanctions. In the latter case, in principle no sanctions of the same type should be imposed.

10. Disciplinary authorities should not be allowed to have recourse to investigative measures having an intrusive or coercive character or a potential impact on a person's privacy that are not allowed for in criminal investigations. In any event, information or evidence obtained using torture is not admissible as a basis for disciplinary sanctions, nor may information or evidence obtained during disciplinary proceedings by recourse to investigative measures having an intrusive or coercive character or a potential impact on a person's privacy that are not allowed for in criminal investigations be used in criminal proceedings.

Section IV. Concurrent National and International Criminal Jurisdiction and the Principle ‘Ne bis in idem’

The participants of Section IV of the XVIIth International Congress of the International Association of Penal Law, held in Beijing, China (12-19 September 2004),

Recognizing that the prohibition of double jeopardy, as expressed in the principle of “*ne bis in idem*,” is a demand of justice, legal certainty, proportionality, as well as of the authority of court decisions,

Recalling the resolution of Section IV B.4, adopted by the XVIth International Congress of Penal Law (1999), according to which *ne bis in idem* as a human right shall be “also applicable on the international or transnational level,”

Keeping in mind that the application of *ne bis in idem* shall not impede legitimate interests of the victim,

Recalling that the *ne bis in idem* principle appears at the domestic level as an exigency of individual justice and a citizen’s guarantee forbidding all multiple prosecutions and sanctions of an individual on substantially the same factual basis,

Mindful that in an era of globalization, due to increasing cross-border crime and extension of extraterritorial jurisdiction, concomitant or subsequent prosecutions by different national jurisdictions occur more frequently,

Considering that the establishment of International *ad hoc* Criminal Tribunals and recently of the permanent International Criminal Court entails new sources of double jeopardy problems in vertical concurrence between national and international jurisdictions, as well as by horizontal concurrence between different international jurisdictions,

Have adopted the following resolutions:

I. General Principles - Requirements at the domestic level

1. Transnational *ne bis in idem* presupposes internal prohibition of double prosecution. To achieve transnational recognition of *ne bis in idem*, it is necessary to safeguard this human right already within the national-internal legal order by clear provisions.

2. At any rate, double prosecutions and sanctions of a criminal nature have to be avoided.

Taking into account that criminal sanctions may not be the only means of sanctioning violations of the law, it should be considered that non-criminal prosecutions and decisions with an equivalent punitive effect likewise bar a new prosecution.

3. The “*idem*,” in terms of the object of the concurrent proceedings, should be identified with regard to substantially the same facts, provided that the first court or authority had the legal competence to examine and decide on all penal aspects of them.

4. The “*bis*,” in terms of double jeopardy to be prevented, shall not refer to only a new sanction; it should already bar a new prosecution.

5. As a general rule, any final judgment delivered by a criminal court convicting or acquitting the defendant or definitely terminating proceedings with respect to substantially the same facts shall bar a new prosecution .

5.1. Taking into account differences in national legislations, a definitive termination of prosecution may also be found in an out-of-court settlement or any other administrative, prosecutorial, or judicial decision that would permit a continuation, deferral, or reopening of the case under exceptional conditions only.

5.2. As not definitely decided upon and, thus, not barring a continuation of the proceeding are to be regarded cases in which ordinary remedies (such as complaints or appeals), both in favor of or against a defendant, are available, particularly taking into account the fact that a jurisdiction may not consider a case as *res judicata* prior to the exhaustion of ordinary remedies.

5.3. After the aforementioned stage, the reopening of a matter that has to be regarded as *res judicata* and, thus, an exception to *ne bis in idem*, may be allowed only on extraordinary grounds and clearly regulated by law. Such a reopening can, in particular, be justified in favor of the defendant and/or in the overwhelming interest of justice.

6. The demands of *ne bis in idem* are best served by the principle of recognition according to which the prohibition and inadmissibility of subsequent prosecutions and convictions should be the principal aim and consequence at the domestic level.

7. As long and to the extent that this status of recognition is not reached, States should take other appropriate measures to prevent double prosecutions and double sanctions.

8. A new proceeding, where exceptionally admitted, should, according to the principle of accounting or deduction, take into consideration a former sanction or should at least grant adequate mitigation.

II. Horizontal transnational “ne bis in idem”

1. Increasingly, concurrence of national criminal jurisdictions

- creates a risk of multiple prosecutions on the same factual basis,
- can be detrimental to the human rights of the individual concerned,
- might result in the non-identification of transnational crimes in their entirety,

- may have a negative impact on legitimate interests and the sovereignty of the states involved.

1.1. It is therefore necessary to develop preventive mechanisms in order to avoid problems emanating from concurrent national jurisdictions. Insofar as this is not possible, problems arising from conflicting jurisdictions should be settled by applying and developing international legal provisions on cooperation in criminal matters, with the final aim of establishing an international instrument on concurrent jurisdiction.

1.2. In this context, recognition of the principle of *ne bis in idem* in various international instruments, such as the International Covenant on Civil and Political Rights and various instruments of human rights and international humanitarian law, deserves appreciation, as well as the Resolution of Section IV B.4, adopted by the XVIth International Congress of Penal Law (1999), according to which *ne bis in idem* as a human right shall be “also applicable on the international or transnational level.”

1.3. Noting the number of conventions, which include *ne bis in idem* clauses, that are not yet signed, ratified, or acceded to by all States, all countries in the position to do so are encouraged to sign, ratify, or accede to them and/or to revise their policy by adopting the principle in their national legislation to attain an as-complete-as-possible common standard in the application of this principle. In this regard, it would be desirable that States limit or withdraw their reservations made under these conventions.

1.4. With respect to these efforts, however, an international *ne bis in idem* regulation should go further and, at least in regional areas determined by the same political-social structure and legal culture, and to the greatest extent possible, strive for mutual recognition of penal judgments and decisions and ensure a uniform application of transnational *ne bis in idem*.

2. Although the requirements for transnational *ne bis in idem* are basically the same as on the national-internal level (as described *supra* I.), certain peculiarities must be observed.

2.1. The *idem*, in terms of the “same act” the proceedings at issue are the object of, should, in principle, be identified according to the facts established in the preceding process and, in particular, by the indictment and/or the final decision as governed by the applied law. This factual approach provides a more objective and clearer criterion than that of juridical equivalence, which is very much affected by the differences between the respective national penal provisions and the rules on concurrence of offences.

2.2. If substantially the same facts constitute additional serious offences according to the second law applicable pursuant to Section I.3, which offences are not punishable and, thus, have not been dealt with in the first proceeding, a new proceeding may be admissible only if, according to the principle of deduction, the first sentence, in so far as fully or partly enforced, is accounted for.

3. With regard to the character of the concurrent proceedings and sanction systems, national differences should not allow a new proceeding *per se* but only on a strict territorial basis or if the first proceeding does not cover legitimate security interests of the other State or where the act was committed by a civil servant of that State in breach of his or her official duties.

4. Whether the same case was finally terminated should, in principle, be determined in the light of the first decision.

5. If the person concerned has been convicted in the first jurisdiction and the enforcement of the sanction is a condition for applying *ne bis in idem*, enforcement of the previous sentence should not be required if it can be recognized and enforced in the second state, as well as if the convicted person cannot be held responsible for the non-enforcement of the first sanction.

6. For avoiding concomitant or subsequent concurrent national proceedings, as well as for preventing “forum shopping” by the prosecuting authorities or the defense, both domestic measures and international agreements on certain priorities should be provided for.

6.1. Whenever there are relevant indications of a former or concomitant foreign proceeding on the same act, an *ex officio* examination should be performed and mutual information should be disclosed.

6.2. If an investigation is about to begin or has already begun in another foreign jurisdiction, preference should be given to the jurisdiction that will better serve the purposes of the proper administration of justice in terms of fair and efficient proceedings. In finding a solution, the following criteria should be taken into account:

- (a) the territory where the offence was committed;
- (b) the State of which the perpetrator is a national or resident;
- (c) the State of origin of the victim;
- (d) the State in which the perpetrator was apprehended;
- (e) the State where (incriminating as well as exculpatory) evidence, including witnesses, is most readily available.

Before the forum is finally chosen, the defendant should also enjoy the right to be heard on that choice.

6.3. If a conflict of jurisdictions cannot be resolved, in particular due to the fact that the case has already reached an advanced stage rendering the transfer of proceedings difficult, a former foreign sentence should, at least, be accounted for according to the principle of deduction.

7. To avoid abuses, *ne bis in idem* shall not apply if the first proceeding was conducted for the purpose of shielding the person concerned from criminal responsibility or was not conducted independently, impartially, and fairly in accordance with the norms of due process recognized

by internationally accepted legal standards, or was conducted in a manner which, under the circumstances, was inconsistent with an intent to bring the person concerned to justice.

In this respect, access to an international or supranational impartial authority should always be available.

8. *Ne bis in idem* should also be recognized as a human right in the field of international cooperation in criminal matters.

9. International agreements should also address problems of *ne bis in idem* with regard to the prosecution of legal entities and its compatibility with a parallel prosecution of individuals for substantially the same facts. International agreements should also address the indirect or secondary effects of foreign judgments.

III. Vertical national-supranational concurrence

1. The question of the applicability of *ne bis in idem* in the vertical international concurrence, *i.e.*, between national and international courts, to some extent needs specific regulation.

2. No person shall be tried before a national court for acts constituting serious violations of international law under the statute of an international court for which he or she has already been tried by an international court.

2.1 Due to the specialized jurisdiction of the international courts, “downwards” an *idem* has to be determined primarily on the basis of substantially the same facts, thus barring domestic prosecution if the conduct of the accused qualifies both as an ordinary crime and, according to the judgment, as a serious violation of international humanitarian law or international human rights law for which the defendant has already been convicted or, due solely to reasons other than the lack of jurisdiction of the international court, acquitted.

2.2 Sentences already imposed have to be taken into account.

3. “Upwards,” the application of *ne bis in idem* should be guided by the principle that the special character of serious violations of international humanitarian law should receive full consideration and should not be disregarded as a result of domestic proceedings in which this character is not duly recognized.

4. Domestic jurisdictions should identify possible *ne bis in idem* conflicts in the vertical international concurrence and regulate them following the principles approved by this Resolution.

IV. Horizontal inter(supra)national concurrence

1. Horizontal concurrence regulations between international jurisdictions should also follow the general rules, as set forth in Section II.

2. Procedures should be established, in particular, with the aim of guaranteeing the prosecution by the jurisdiction that will better assure the proper administration of justice in terms of fair and efficient proceedings.