THE *NE BIS IN IDEM* RULE AND THE RIGHT NOT TO BE TRIED TWICE FOR THE SAME ACT IN INTERNATIONAL AND EUROPEAN UNION LAW[*]

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SUMMARY: 1.- Introduction; 2.- The conceptual understanding of *ne bis in idem;* 3.- The rationale of the *ne bis in idem* rule and its status in International Law; 4.- *Ne bis in idem* in International Law; 4.1.- International Convenant on Civil and Political Rights; 4.2.- Interpretation of *ne bis in idem* by the European Court of Human Rights within the framework of the European Convention on Human Rights; 4.2.1. - Article 4 of the Additional Protocol No. 7 to the European Convention on Human Rights; 4.2.2. - The rule of *ne bis in idem* within the framework of case-law of the European Court of Human Rights; 4.3.- International Criminal Tribunals and International Criminal Court; 4.3.1.- The development of *ne bis in idem* within *ad hoc* tribunals; 5.- *Ne bis in idem* under European Union Law; 4.3.2.- *Ne bis in idem* in the context of the International Criminal Court; 5.1.-Article 54 of the Convention implementing the Schengen Agreement; 5.2.- Article 50 of the Charter of Fundamental Rights of the European Union; 5.3.- *Gözütok* and *Brügge* judgements of the Court of Justice of the European Union; 6.- Conclusions

1.- Introduction.

Ne bis in idem prohibits any person from being prosecuted and punished more than once for an act that he or she commited. It has two elements at its core. It is possible to express these elements as the same person and the same act. The same person element refers to the fact that in the second trial, the perpetrator of the act and the prosecution authority conducting the trial at the same time do not change. On the other hand, what should be understood by the same act is the acts arising from the exact same facts or the essence of the same facts. As a matter of fact, the European Court of Human Rights (ECtHR), in its *Zolotukhin v. Russia* judgment[1], in which it set significant criteria regarding the *ne bis in idem* rule and adopted a new approach based on its previous judgments, stated that *82. (…) Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same*[2] and clarified what should be understood by the same act.

This rule recognized in many national legal systems and is even constitutionally guaranteed in some of them. However, the applicability of it in the International Law is quite difficult due to reasons such as the understanding of sovereignty of states and different definitions of crime at the national level. Although certain legal bases have been provided for this rule in the European Union member states and the rule has been accepted as a general principle which is applicable between the member states, it is not possible to say that such a legal basis has been established for ne bis in idem in the international context. Moreover, there is no customary application of it.

This difference between national legal systems, European Union Law as a supranational organization and International Law raises questions about the applicability of *ne bis in idem.*

This study is essentially focused on answering these questions and finding an answer to legal

[*] The paper develp the speech presented at the Jean Monnet Module EU-GLOBACT Conference on "Judicial and Police Cooperation Across Borders for the Common Security, Rule of Law and Human Rights", held at the University of Salerno on May 5, 2025.

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[1] ECtHR, Zolotukhin v. Russia, Application No. 14939/03, Grand Chamber, Judgment (February 10, 2009).

[2] *Id.*, para. 82.

character of *ne bis in idem* and the international applicability of it. For this purpose, firstly, the conceptual definition will be provided and then the rationale of the it will be explained by taking into account the views in the doctrine. In the following sections of the study, the key sources of the rule in International Law and European Union Law will be examined.

2.- The conceptual understanding of *ne bis in idem*.

Ne bis in idem means that an individual can not be investigated and prosecuted more than once for the same act and can not be punished more than once[3]. The *ne bis in idem* rule essentially consists of two main elements. We can classify these elements as the same person and same act. The same person element means that the accused and the prosecution, who constitute the parties, do not change. In other words, in national law systems the same person element refers to the person named in indictment and the judgment, whereas in International Law it should be understood that the person is the same person and state bringing the case is the same state[4]. Moreover, according to Ozen's opinion, the same act should be understood as the act concretized in the indictment[5]. Torun also agrees that the notion of same act should be understood as acts arising from identical facts or facts that are essentially the same[6]. On the other hand, there is a different situation in the same act element owing to the issues that may arise from the definitional differences in national legal systems. These definitional discrepancies are related to the fact that offences with the same name may cover different acts in different national regulations[7].

Another issue that needs to be considered in the conceptual analysis of *ne bis in idem* is its legal character. Is *ne bis in idem* a rule of law or a general principle of law? In this respect, it is first necessary to analyze the differences between legal rules and legal principles. Legal principles, in addition to constituting the starting point of other basic rules, express the entirety of justice-based behaviors and basic rules for humanity as a society or a set of societies within the framework of fundamental rights[8].

Dworkin's distinction between rules and principles is important. The author emphasized that rules can be applied in an 'all or nothing' manner, which is directly related to the principle of legal certainty. However, he stated that principles have an intellectual meaning rather than legal certainty during implementation and therefore, unlike rules, they can not exist in an 'all or nothing' manner. In addition, in case of a conflict between legal rules, it is possible to resolve this conflict by resorting to various hierarchy methods, whereas in case of a conflict between principles, there is no conflict to be resolved and it is possible to use the principles that continue to exist in the legal world as a solution method in different disputes. While explaining the difference between rules and principles, the author points out that rules are established by the legislative body, whereas principles emerge as a result of social development; they are embodied through doctrinal debates and judicial decisions and gain applicability[9].

Lelieur, on the other hand, based on Dworkin's theory of legal rules and legal principles, argued that

[3] M. Wasmeier, *The Principle of* Ne Bis In Idem, in *Revue Internationale De Droit Penal* 77.1 (2006) 121; S. Cebeci, *The Principle of* Ne Bis In Idem *in the Context of Turkish Criminal Law,* Istanbul 2018.

[4] Cebeci**,** *The Principle* cit.

[5] M. Ozen, Non Bis In Idem *(There Shall Be No Double Jeopardy For The Same Act) Principle*, in *Ankara Hacı Bayram Veli Unıversity Faculty Of Law Journal* 14.1 (2010) 393.

[6] F. Torun, *Compatibility Of "The Principle of* Ne Bıs In Idem*" With The Sanction System Specified by Tax Procedure Law No. 213,* in *Constitutional Jurisdiction* 40.1 (2023) 176.

[7] Cebeci**,** *The Principle* cit.

[8] J. Daci, *Legal Principles, Legal Values and Legal Norms: Are They the Same or Different?*, in *Academicus International Scientific Journal* 1.02 (2010) 110.

[9] On the difference between rules and principles, see; H. T. Goksu, *Basic Concepts In Ronald Dworkin's Theory of Justice: Rights, Principles and Ideal Judge Hercules,* in *Journal Of The Court Of Dispute* 4 (2014) 121; J. Braithwaite, *Rules and Principles: A Theory of Legal Certainty, Australasian,* in *Journal Of Legal Philosophy* 27.2002 (2002) 50-52.

there should be a principle of legal certainty to protect individuals from being investigated more than once. At this point, the author recognizes that *ne bis in idem* is a rule of procedure that exists in the legal world on the basis of the principle of *res judicata*[10]. It should be also noted that legal certainty also requires respect for the principle of *res judicata*, which in Latin means 'that which has been decided' and includes final judgement[11].

In the meantime, Carpi, by referring to the decisions of the Court of Justice of the European Union (CJEU) dated September 14, 2023 and numbered C-27/22 and dated April 3, 2019 and numbered C-617/17[12], stated that *ne bis in idem* finds it's application depending on *res judicata*; in other words *res judicata* is a precondition for the application of *ne bis in idem*[13].

The main views in the doctrine, and in particular the perspective of the Court of Justice of the European Union, provide a strong basis for the view that *ne bis in idem* is the practical manifestation of the principle of *res judicata*. The principle of *res judicata*, which is of crucial importance in terms of ensuring legal certainty and maintaining consistency in the legal system, is based on the idea that a dispute on which a final judgment has been rendered should not be subjected to retrial. At this point, it is possible to say that the *ne bis in idem* rule is a procedural rule put forward to ensure the applicability of the principle of *res judicata*. The extent to which the *ne bis in idem* rule is included in the existing legal order and how reliable the applicability of the rule is gives an idea about the functionality of the legal order in question. This is because ensuring the finality of judgments is indispensable for democratic states governed by the rule of law.

Ne bis in idem, which we have examined notionally and qualitatively until this section of the study, appears in different areas. First of all, the rule precludes a person from being subjected to the same criminal proceedings more than once in domestic legal systems. Apart from this, *ne bis in* idem can be found in international and transnational law through treaties in which states mutually restrict their national jurisdictional rights, albeit not by custom. In the following part of the study, the rationale of *ne bis in idem* and its place in International Law and European Union Law will be analyzed in order to provide a general understanding of the sources of the rule. In this context, the applicability of the rule, which has not yet been widely accepted in International Law, will be discussed.

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[10] J. Lelieur, *Transnationalising'* Ne Bis In Idem*: How the Rule of* Ne Bis In Idem *Reveals the Principle of Personal Legal Certainty*, in *Utrecht Law Review* 9.4 (2013) 203.

[11] For a better understanding of the relationship between legal certainty and the principle of *res judicata*, see: ECtHR, Vardanyan and Nanushyan v. Armenia, Application no. 8001/07, First Section, Judgment (October 27, 2016), para. 64: *Legal certainty presupposes respect for the principle of res judicata (see Brumărescu, cited above, § 62), that is the principle of the finality of judgments. This principle requires that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' powers of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (see Ryabykh v. Russia, no. 52854/99, § 52, ECHR 2003 IX; Roşca v. Moldova, no. 6267/02, § 25, 22 March 2005)*. Morover, this decision, taking into account the negative consequences of unconditional adherence to the principle of *res judicata*, states that an exception to the principle may be granted in the presence of important and compelling circumstances. The decision is also important in this respect.

[12] CJEU, 17 Powszechny Zakład Ubezpieczeń na Życie S.A. w Warszawie, Case C-617/17, Forth Chamber, Judgment (April 2, 2020), para. 18: *The principle of ne bis in idem undoubtedly constitutes one of the cornerstones of any legal system based on the rule of law. (5) Broadly speaking, as a close corollary to the principle of res judicata, its rationale lies in ensuring legal certainty and equality; in ensuring that once the person concerned has been prosecuted and, as the case may be, punished, that person has the certainty that he will not be prosecuted again for the same infraction. Conversely, if he is acquitted, the principle ensures that he has the certainty of not being prosecuted again in further proceedings for the same offence*.

[13] A. Carpi, Ne Bis In Idem *in Light of the* Res Judicata *Principle: Procedural Guarantee or First Come First Served Rule?*, in *Review of European Litigation* 1 (2024) 158.

3.- The rationale of the *ne bis in idem* rule and its status in International Law.

The rule of *ne bis in idem* is vital in defining the limits of the state's power to punish (*ius puniendi*) and therefore serves a guarantee for the protection of individuals fundamental rights and freedoms[14]. It should be emphasized here that *ne bis in idem* not only limits the state's power to punish but also protects the authority of the state and the consistency of its legal procedures[15]. Therefore, it is possible to reconcile the existence of *ne bis in idem* in International Law with justice, proportionality, protection of the individual vis-a-vis the state and other fundamental rights and freedoms, in particular the right to a fair trial.

Another rationale for this rule is to protect the finality of judgments and thus prevent violations of the principles of legal certainty and legal security; thereby strengthening the doctrine of *res judicata*[16]. However, it should be noted at this point that strict adherence to *ne bis in idem* may harm the functioning of justice in cases where the final decisions rendered in criminal cases include legal mistakes and do not reflect the truth[17]. Therefore, as stated by Bernardini, it is necessary to ensure the compatibility of the rule and the criminal law system, and the solution to this necessity seems to be possible with legal regulations in accordance with the rule[18].

Similarly, Lelieur states that the *ne bis in idem* rule mainly protects the principle of legal certainty and is also used as a tool to strengthen public confidence in the judicial system[19]. In addition to its impact on the principle of legal certainty and reliability of the judicial system, the author states that the rule aims to reduce the adverse effects of flawed criminal proceedings on individuals. This is because the rule of *ne bis in idem* prevents individuals from being subjected to indefinite criminal investigations and examinations and thus restricting their freedoms[20].

To sum up, *ne bis in idem* not only protects the authority of the state and the individual, who is in a weak position vis-a-vis this authority, but also provides protection to society in many aspects. This is because the constant harassment of members of society by subjecting them to multiple trials for the same act will undermine the legitimacy of the state and lead to processes contrary to procedural economy. It is quite clear that this situation will affect the society[21].

But are these rationales sufficent for *ne bis in idem* to be transferred from national legal systems to International Law as a general rule? What are the general doctrinal views on the legal nature of *ne bis in idem* in International Law?

Whether the rule of *ne bis in idem* can be accepted as a generally applicable rule in International Law has always been a matter of debate due to the strong connection of criminal law with the sovereignty of states. These discussions arise from differences in the application of the *ne bis in idem* rule at the national level. The fact that criminal law is one of the most powerful weapons in the hands of a state in terms of demonstrating its sovereignty brings with it many hesitations about the application of a rule such as *ne bis in idem*, which differs in national context[22].

Therefore, despite all these rationales, *ne bis in idem* is not recognized as a general rule of

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[14] J.A.E. Vervaele, *The Transnational* Ne Bis In Idem *Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights*, in Utrecht Law Review 1.2 (2005) 100; S. Mirandola, G. Lasagni, *The European* ne bis in idem *at the Crossroads of Administrative and Criminal Law*, in *Eucrim* 2019.2 (2019) 126.

[15] W. B. V. Bockel, *The* Ne Bis In Idem *Principle in Eu Law: A Conceptual And Jurisprudential Analysis*, 2009.

[16] G. Conway, Ne Bis In Idem *in International Law*, in *International Criminal Law Review* 3 (2003) 217.

[17] L. Bernardini, *Reopening Criminal Proceedings and* Ne Bis in Idem*: Towards a Weaker* Res Iudicata *in Europe?*, in *European Papers-a Journal on Law and Integration* 1 (2024) 312.

[18] *Id.*, 320.

[19] Lelieur**,** *Transnationalising'* cit.

[20] *Id.*, 201.

[21] For explanations that the rule of *ne bis in idem* also provides protection to the whole of society, see; C. V. D. Wyngaert, G. Stessens, *The International* Non Bis In Idem *Principle: Resolving Some of the Unanswered Questions*, in *International & Comparative Law Quarterly* 48.4 (1999) 780; Bockel, *The Ne Bis In Idem* cit.; Daniels, *Non Bis In Idem* cit.

[22] Conway, Ne Bis In Idem *in International Law* cit.

International Law nor established as a rule of customary law. Moreover there is no international legislation to recognize it as such[23]. Although *ne bis in idem* is included in international legal instruments such as Protocol No. 7 to the European Convention on Human Rights and Article 14(7) of the International Covenant on Civil and Political Rights, the protection provided by these articles is quite limited, as will be explained in more detail under the next heading[24]. Nevertheless, although the rule is not generally binding in International Law, it has recently become an important opinion that the rule should be recognized as a right with supranational validity due to its significance in terms of human rights.

Although Vervaele states that *ne bis in idem* has been accepted as a general rule in many national legal systems and that in some countries even constitutionally guaranteed, he acknowledges that the rule has historically existed only at the national level[25]. Similarly, as Daniels, one of the scholars in the field, points out, despite its acceptance in national legal systems, the application of the rule between different states and international courts is less established or developed[26].

Although it is widely accepted that *ne bis in idem* is not a general rule of International Law and can only find application in national legal systems, Conway defends that *ne bis in idem* could gain general acceptance in International Law. Contrary to the view that the differences in national legal systems prevents *ne bis in idem* from being accepted as a rule of International Law, Conway considers that it should also be considered whether ne bis in idem can be accepted as a general rule of International Law based on its frequent occurrence in national systems[27]. Nevertheless, the author acknowledges that ne bis in idem is not recognized as a general rule of International Law and that there is no consensus in the doctrine in this respect[28]. Similarly, Gless states that although *ne bis in idem* has a long history in national criminal law systems, it is not recognized as an individual right. However, given the purposes served by the rule (the fundamental rights and freedoms of the accused, the *ius puniendi* of state, etc…), the author finds the reluctance of states to ensure uniformity in its transnational application puzzling[29]. Likewise, Nerep accepts the prevailing view that *ne bis in idem* has no validity in International Law[30].

As can be seen from these explanations, although the *ne bis in idem* rule, which is based on the principle of *res judicata*, is widely accepted in national legal systems, it cannot be said to have been internationalized. Indeed, as the study continues, the essential sources of the rule will be examined. This will reveal that the application of the rule in International Law is quite rare and that there is no regulation in place to allow it to be recognized a general rule. However, compared to this situation in International Law, the state of affairs in European Union Law appears more promising. Indeed, the rule has become a general rule with applicability among Member States.

[23] M. R. Erdem, D. Tezcan, *et al*., *Uluslararası Ceza Hukuku*, Ankara 2023; J. I. E. Veas, *Are Multiple Sanctioning Systems Contrary to the* Ne Bis In Idem, 2021; Vervaele, *The Transnational* cit.

[24] Wasmeier, *The Principle* cit. Cebeci, *The Principle* cit.

[25] Vervaele, *The Transnational* cit.

[26] Daniels, *Non Bis In Idem* cit.

[27] Although the author does not elaborate on this view it is possible to infer this from the explanations he made in parentheses while explaining another view in the doctrine: *Morosin, for example, reflecting the main thrust of opinion, suggests that despite being frequently found in national laws (which suggests the rule may be a general principle of International Law), the disparities of approach to ne bis in idem present a serious obstacle to its formulation in International Law; however a contrary view is also arguable.* G. Conway, Ne Bis In Idem *and the International Criminal Tribunals*, in *Criminal Law Forum* 14.4 (2003) 356.

[28] *Id.*, 355.

[29] S. Gless, Ne Bis In Idem *in an International and Transnational Criminal Justice Perspective–Paving The Way For An Individual Right?*, in *Legal Responses to Transnational and International Crimes* (Ed.Wilt, Harmen, Paulussen, Christophe) 2017.

[30] E. Nerep, *Extraterritorial Control of Compétition Under International Law*, 1983.

4.- *Ne bis in idem* in International Law.

The rule of *ne bis in idem*, which is widely accepted in national legal systems and even included in the constitutions of many states is, as previously mentioned, not a general rule of International Law. However, it is present in International Law and fundamental human rights instruments. Under this heading, Article 14(7) of the International Covenant on Civil and Political Rights, Article 4 of Protocol No. 7 to the European Convention on Human Rights and the main case-law of the European Court of Human Rights regarding the rule of *ne bis in idem* will be examined. Additionally, the position of the rule in the Statutes of International (*ad hoc* and permanent) Criminal Courts will be discussed and the core differences between these legal frameworks will be determined.

4.1.- International Convenant on Civil and Political Rights.

Article 14(7) of the International Covenant on Civil and Political Rights stipulates: *No one shall be retried or punished for an offense of which he has been finally convicted or acquitted in accordance with the laws and criminal procedure of each country*.
As can be seen from the Article, it is unclear whether the *ne bis in idem* rule only provides a guarantee for the jurisdiction of the State or whether this provision has a meaning in International Law[31]. However, the decision of the Human Rights Committee in 1986 is important regarding this uncertainty. In this decision, the Committee interpreted the *ne bis in idem* rule in the International Convenant on Civil and Political Rights (ICCPR) as prohibiting double jeopardy only in relation to a crime committed in a particular state. This interpretation by the Human Rights Committee (HRC) therefore eliminates the ambiguity created by the wording of the article and clearly emphasizes that the Covenant provides protection for the *ne bis in idem* rule solely at the national level[32].
Another point to be considered regarding the article of the International Convenant on Civil and Political Rights on the rule of *ne bis in idem* is that the article is applicable where there is a prior final conviction or acquittal in accordance with the law and criminal procedure of a country. As a matter of fact, the phrase '*an offense for which he has been finally convicted or acquitted in accordance with the law and criminal procedure of each country*' in the Article reveals this situation. Therefore, unless there is a final judgment as a result of the ongoing trial in any country, the provision on the rule of *ne bis in idem* in Article 14, paragraph 7 of the Convenant on Civil and Political Rights would be meaningless[33].

4.2. - The interpretation of *ne bis in idem* by the European Court of Human Rights within the framework of the European Convention on Human Rights.

4.2.1. - Article 4 of the Additional Protocol No. 7 to the European Convention on Human Rights.

Article 4 of the Additional Protocol No. 7 to the European Convention on Human Rights includes the principle of *ne bis in idem* under the heading 'right not to be tried or punished twice. The article reads as follows:

> *1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or*

[31] Bockel, *The Ne Bis In Idem* cit.
[32] HCR, A.P. v. Italy, Comm. No. 204/1986, Decision (July 16, 1986): *(…) since article 14, paragraph 7, of the Covenant, which the author invokes, does not guarantee non his in idem with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State (…)*.
[33] Daniels, *Non Bis In Idem* cit.

convicted in accordance with the law and penal procedure of that State.
2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3) No derogation from this article shall be made under Article 15 of the Convention.

As can be understood from the wording of the Article, the rule of *ne bis in idem* is framed to include both the prohibition of retrial and the prohibition of re-sentencing. This is because a person can not be retried or punished in the presence of a final judgment, whether it is a judgment of acquittal or conviction. Furthermore, the Article states that scope of application of *ne bis in idem* is limited to the 'same State', in other words, the national legal system. Therefore, it is not possible to say that *ne bis in idem* has been given an international character based on this provision. This is because the provision only prevents the retrial or punishment of a person who has been definitively acquitted or convicted under the law and rules of criminal procedure in a particular national legal system[34]. Hence, the provision has no validity under International Law in terms of *ne bis in idem*.

4.2.2. - The rule of *ne bis in idem* within the framework of case-law of the European Court of Human Rights.

The European Court of Human Rights has several case-law on the rule of *ne bis in idem* under Article 4 of Protocol No. 7 to the Convention. Under this heading, the Court's decisions on the important elements of *ne bis in idem* will be examined.

Criminal nature of the trial.
In the preamble to Article 4 of Protocol No. 7 to the European Convention on Human Rights, it is indicated that the right protected by this Article is only applicable in criminal proceedings[35]. Therefore, the European Court of Human Rights pays attention to the criminal nature of both proceedings in the disputes before it and considers this to be a condition for the applicability of the rule.
However, what the European Court of Human Rights considers to be a 'crime' and what should be understood by criminal proceedings is another issue that needs to be tackled. The Court has established a set of criteria for determining the existence of a criminal charge. According to these criteria, in explaining the concept of a crime, the Court looks at the classification of the offence in national law, the nature of the offence and the severity of the punishment to which the person concerned is at risk of being subjected[36]. These criteria are known as Engel criteria and are also applied by the Court of Justice of the European Union. They are known as the Engel criteria because they were developed in Engel and Others v. the Netherlands.
The case of *Kurdov and Ivanov v. Bulgaria* is one of the existing case-law of the European Court of

[34] Bockel, *The Ne Bis In Idem* cit.
[35] See Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 32*: Article 4, since it only applies to trial and conviction of a person in criminal proceedings, does not prevent him from being made subject, for the same act, to action of a different character (for example, disciplinary action in the case of an official) as well as to criminal proceedings*.
[36] G. Schiavo, *The Principle of* Ne Bis In Idem *and the Application of Criminal Sanctions: of Scope and Restrictions: ECJ 20 March 2018, Case C-524/15, Luca Menci ECJ 20 March 2018, Case C-537/16, Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa (Consob) ECJ 20 March 2018, Joined Cases C-596/16 and C-597/16, Enzo Di Puma v Consob and Consob v Antonio Zecca,* in *European Constitutional Law Review* 14.3 (2018) 651-652; C. Yavuz, *The Principle of Legality of Crimes and Penalties under the European Convention on Human Rights,* in *Union of Turkish Bar Associations Review* 145 (2019) 21; E. O. Tekin, *The Principle of* 'Ne Bis In Idem*' in International Criminal Law and European Union Law,* 2024.

Human Rights concerning the requirement that 'both proceedings must be criminal in nature' for the *ne bis in idem* rule to apply. In that case, the applicants, who were employed by Bulgaria's national railway company, were required to weld a wagon as part of their duties. However, while they were welding a fire broke out in the carriage. Thereafter, administrative proceedings were initiated against one of the applicants (to Mr. Kurdov) for failing to take the necessary safety precautions and an administrative fine was imposed. In addition both applicants were criminally prosecuted for allegedly intentionally setting fire to valuables. At this point the applicant, who had been subjected to both administrative and criminal proceedings, claimed that the administrative action in question, although qualified as an administrative action under domestic law, constituted a criminal offence for the purposes of the Convention and therefore violated Article 4 of Protocol No. 7 to the European Convention on Human Rights. In its examination of the administrative act, the Court held that the administrative act in question did not meet the Engel criteria and could not be characterized as a criminal offence; therefore, there was no violation of the *ne bis in idem* principle on the grounds that there were no two criminal investigations into the same offence[37].
Likewise, the Court's judgment in *Palmen v. Sweden*[38] is significant in case-law on the Court's requirement that 'both proceedings must be criminal in nature'. In that case, the applicant had assaulted his partner and was convicted for that act. Some time later, the applicant's permit to carry a firearm was revoked by the Police Department on the grounds that he was unfit to carry a firearm. The applicant thereupon exhausted domestic remedies and claimed that he had been subjected to criminal proceedings more than once for the same act and that his right under Article 4 of Protocol No. 7 to the Convention had been violated. The Court found that this measure, characterized as an administrative procedure under domestic law, was not the result of criminal proceedings and was preventive rather than punitive. In this context, it concluded that the measure was not of a criminal nature and seriousness, given that the applicant did not use weapons professionally. The judgment therefore states that there has been no violation of Article 4 of Protocol No. 7 to the Convention.

Same offence condition in trials (*idem*).
According to the case-law of the European Court of Human Rights, another condition for the application of Article 4 of Protocol No. 7 to the Convention is the 'same offence', in other words '*idem*' condition. As we explained above, the rule of *ne bis in idem* prohibits the same person from being tried and convicted more than once for the same offence. But what exactly does the notion of the same offence mean? In *Zolotukhin v. Russia*[39], the European Court of Human Rights adopted a factual approach to the concept of the same offence and stated that *ne bis in idem* would apply if the second offence arose from the same incident or element underlying the first offence[40]. With this decision, the Court has established a consistent position regarding the 'same offence' element of *ne bis in idem*.
One of the judgments in which the Court adopted the approach of *Zolotukhin v. Russia* with regard

[37] Tekin, *The Principle* cit. ECtHR, Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights Right not to be tried or punished twice, updated on 31 August 2022, 8.
[38] See: ECtHR, Palmen v. Sweden, Application No. 38292/15, Third Section, Decision (December 1, 2017): *27. As regards the degree and severity of the revocation, the Court notes that the applicant is not dependent on using a weapon for professional purposes. Moreover, it observes that he may apply for a new weapons licence at any time and that, if he is deemed suitable, he may be granted a licence again. Consequently, although the revocation was regarded by the applicant as a severe measure, it cannot be characterised as a penal sanction; even if it was linked to his behaviour, what was decisive was his suitability to hold a firearm (see, mutatis mutandis, Tre Traktörer AB v. Sweden, 7 July 1989, § 46, Series A no. 159).*
28. Having regard to all of the above, the Court finds that the revocation of the applicant's weapons licence is not to be considered, either in nature or severity, a criminal sanction for the purpose of Article 4 of Protocol No. 7 to the Convention.
[39] See (where the Court introduced a new approach to the concept of the same offence) ECtHR, *Zolotukhin v. Russia* cit.
[40] ECtHR, *Guide on Article 4 of Protocol No*. 7 cit. Tekin**,** *The Principle* cit. Escobar Veas, *Are Multiple* cit.

to the same offence element is *Ramda v. France*[41]. In that case, the applicant, an Algerian national, was tried twice on the grounds that he may have been the perpetrator of terrorist attacks in France in 1995. The first of these proceedings was based on the allegation that he had joined a group with the aim of committing terrorist acts and the applicant was convicted. Subsequently, a separate trial was held before the Assize Court and the applicant was convicted of participation in a number of offences, including murder and attempted murder. At this point the applicant appealed to the court, arguing that the facts leading to his conviction were the same in both proceedings and that this was contrary to *ne bis in idem*. However, the Court held that the two proceedings against the applicant were based on substantially different facts and therefore there had been no violation of Protocol No. 7 to the Convention.

Another recent decision of the Court concerning the same offence requirement is *Stăvilă v. Romania*[42]. In that case, the applicant was driving without a driver's license. During routine police controls, the applicant admitted that he did not have a driving license when asked for his documents. Thereupon, a criminal investigation was initiated against the applicant, but only an administrative fine was imposed on the grounds that the incident subject to the investigation did not constitute a criminal offence. This decision became final. However, despite this finalized decision, a new investigation was initiated and a lawsuit was filed on the grounds that the events in question constituted a crime and endangered traffic safety. The applicant claimed that he was tried more than once for the same offence and claimed that the rule of *ne bis in idem* had been violated. The Court, on the other hand, noted that the first trial had been final and the second investigation had been initiated without the presentation of new evidence, and emphasized that even if it was assumed that the first decision was incorrect, such mistakes by the States authorities should be interpreted in the applicant's favor. Accordingly the Court found a violation of Article 4 of Protocol No. 7 to the Convention.

The requirement of duplicate in procedures (*bis*).

The *ne bis in idem* rule in Article 4 of Protocol No. 7 to the Convention includes the right not to be punished twice for the same offence, as well as the right not to be prosecuted or tried. Therefore, it is possible for a person to be subject to two different ongoing proceedings if the proceedings are sufficiently connected in substance and time. However, if one of these proceedings continues while the other is concluded, the right protected by the Article will be violated[43].

In this respect, the *Goulandris and Vardinogianni v. Greece*[44] judgment is precedent-setting. In that case, the applicants, who were husband and wife and lived in London, purchased a plot of land in Greece in 2003. The applicants built a wall around the plot of land they had bought and when this unauthorized wall was detected by the Town Planning Department, they were imposed an administrative fine. Despite the fact that the applicants paid the administrative fine, an indictment was brought against them in 2005 and the applicants were sentenced to imprisonment as a consequence of the prosecution phase. However considering the seriousness of the offence and the applicants criminal records, the prison sentence was commuted to a judicial fine. Thereupon the applicants claimed that the finalized administrative fine was of a criminal nature and that they had paid the administrative fine; therefore, the fine imposed as a result of the second prosecution violated Article 4 of Protocol No. 7 to the Convention. The Court examined separately whether the administrative fines were of a criminal nature, whether they constituted final convictions, whether the offences were of the same nature (*idem*) and, finally, whether the proceedings were duplicative (*bis*). At this point the Court's assessment regarding the repetition of the proceedings is important.

[41] See the decision: ECtHR, Ramda v. France, Application No. 78477/11, Fifth Section, Judgment (December 19, 2017).
[42] See the decision: ECtHR, Stăvilă v. Romania, Application No. 23126/16, Fourth Section, Judgment (June 01, 2022).
[43] ECtHR, *Zolotukhin v. Russia* cit.
[44] ECtHR, Goulandris and Vardinogianni v. Greece, Application No.1735/13, First Section, Judgment (September 16, 2022).

Indeed, as a result of its assessments, the Court held that the criminal proceedings did not continue in parallel with the administrative proceedings and that there was not a sufficient connection between these two proceedings in terms of time and essence. According to the Court, the first applicant, who was punished for the same act for the second time, suffered a disproportionate damage due to this duplication.
Another element required by Article 4 of Protocol No. 7 to the Convention is the existence of a final judgment. However, according to the wording of the Article and the Explanatory Report[45], a final judgment is not enough, the person must also have been finally acquitted or convicted. In order to understand the Court's assessment of the final judgment element, the *Sundqvist v. Finland*[46] judgment should be taken into account. In that case, the decision not to prosecute the applicant was not recognized as a final judgment in domestic law and the applicant was prosecuted. As a result of this prosecution, the applicant was convicted. In the applicant's application alleging a violation of his right under Article 4 of Protocol No. 7 to the Convention in connection with this situation, the Court was unable to find any violation of that Article. This was because the prosecutor's previous decision was neither an acquittal nor a conviction[47]. Therefore, the rule of *ne bis in idem* protected by the Additional Protocol to the Convention was not applicable here.

4.3.- International Criminal Tribunals and International Criminal Court.

International Criminal Tribunals play a crucial role in establishing a shared system of criminal justice at the international level and in fostering the development of international criminal law as an evolving field capable of ensuring deterrence[48]. Despite this crucial role, the history of modern efforts to establish international criminal justice is relatively recent. Following the need that arose after World War II, *ad hoc* tribunals were established in Nuremberg and Tokyo. However after these tribunals completed their mandates, no significant steps were taken for a long time to enable independent and impartial trials beyond national borders. The establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) a year later marked important milestones in this historical process[49].
Despite the leading role of *ad hoc* tribunals and their key contribution to the pursuit of international justice, the violent conflicts and grave violations of fundamental human rights in the late 20th century underscored the need for an independent and permanent court[50]. In this context, the Rome Conference held in 1998, which synthesizing International Law and Criminal Law to establish a mechanism for ensuring global justice, ultimately resulted in the establishment of the International Criminal Court (ICC) in 2002. The International Criminal Court marks a turning point in the efforts to establish a common area of justice. Indeed, the willingness of states to relinquish part of their sovereignty and

[45] See Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 26: *This article embodies the principle that a person may not be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted (*non bis in idem*)*.
[46] ECtHR, Ulf Sundqvist v. Finland, Application No. 75602/01, Fourth Section, Judgment (June 27, 2000).
[47] *Id.* the Court justifies it decision as follows: *The Court notes that the domestic law allowed the Prosecutor General to review a decision by a subordinate prosecutor. Thus, the domestic legal system does not regard decisions not to prosecute as 'final'. Accordingly, the Prosecutor General's decision to prosecute the applicant and the following conviction did not amount to new proceedings falling under the sphere of Article 4 of Protocol No. 7. Consequently, this provision has no application in the present case.*
[48] G-J A. Knoops, *An Introduction to the Law of International Criminal Tribunals - A Comperative Study Second Revised Edition*, 2014.
[49] *Id.*, 1. W. A. Schabas, *International Criminal Tribunals: A Review of 2007*, in *Northwestern Journal of International Human Rights* 6.3 (2008) 382-383.
[50] As a matter of fact, the preamble of the Rome Statute clarifies the reasons why states have gathered around this statute. It can also be reviewed: R. Wedgwood, *The International Criminal Court: An American View,* in *European Journal of International Law* 10.1 (1999) 93.

subject their nationals to the jurisdiction of an international system, outside their own criminal jurisdiction is revolutionary[51].
The *ne bis in idem* rule, which is the focus of our study, is enshrined in the Statutes of both *ad hoc* tribunals and the International Criminal Court. Under this section, the general provisions regarding *ne bis in idem* will be examined and similarities-differences in its application will be identified.

4.3.1.- The development of *ne bis in idem* within *ad hoc* tribunals.

Ad hoc tribunals refer to international judicial bodies established temporarily to prosecute perpetrators of specific incidents or series of incidents. These tribunals derive their primary characteristics from being extraordinary courts authorized solely to try certain types of crimes[52]. Due to their establishment for specific incidents and the regulation of crimes related to those incidents, these tribunals have often faced criticism for posing significant threats to fundamental rights and freedoms, such as the principle of natural judge, the principle of legality of crimes and punishments and the right to a fair trial[53].
Although these criticisms hold some validity, it is evident that *ad hoc* tribunals have served as a guiding force in the establishment of a common international justice system. Notably, these tribunals have also contributed to the recognition of the importance of *ne bis in idem* in International Law, as their Statutes included this rule and their decisions have occasionally referred to it.
The Nuremberg Military Tribunal Statute is the first *ad hoc* tribunal statute to include the rule of *ne bis in idem*[54]. Article 11 of the Statute[55] states that a person convicted by the Nuremberg Tribunal may be retried before national, military or occupation courts mentioned in Article 10 of the same Statute, except for the crime of membership in a criminal group or organization. Thus, this Article allows national courts to impose an independent sentence or an additional sentence apart from the sentence imposed by the Nuremberg Military Tribunal in cases, where they prove the guilt of the accused other than the crime of membership in a criminal group or organization. Therefore this Article guarantees that national courts may not retry the accused in cases of membership of a group or organization that has been declared guilty by the Nuremberg Military Tribunal. Despite the fact that ne bis in idem rule is not explicitly stated in this Article and a narrow field of application is left, it is possible to say that this regulation is important in terms of ne bis in idem's development in International Law.
As a matter of fact, the inclusion of this rule in the Statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda by expanding its scope is an indication of this. The rule is included in Article 10 of the International Criminal Tribunal for the former YugosStatute[56] and Article 9 of the Yugoslavia and the International Criminal Tribunal for

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[51] A. Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections,* in *European Journal of Internatıonal Law 10*.1 (1999) 145.
[52] H. Sarıgüzel, *The International Criminal Court,* in *Journal of the Court of Jurisdictional Disputes* 3 (2013) 234.
[53] *Id.,* 234. U. Bozkurt, *Criticisms on Ad Hoc International Criminal Tribunals within the Context of International Criminal Law and the International Criminal Court,* in *Journal of Security Strategies* 6.11 (2010) 81.
[54] M. Zamani, M. Seyedhatami *et. al., Admissibility of Cases and the Prohibition of Double Jeopardy in the Statute and Jurisprudence of the International Criminal Court*, in *Interdisciplinary Studies in Society,* in *Law and Politics* 3.4 (2024) 146.
[55] See Nuremberg Military Tribunal Statute, Article 11 (Aug. 8, 1945): *Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization*.
[56] Article 10 of ICTY Statute with the heading *Non Bis In Idem*: *1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal. 2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a)*

Rwanda Statute[57], and these two provisions, regulated in different Statutes, are quite similar in content. These two provisions, which have the same content, prevent a national court from retrying acts that consitute serious violations of international humanitarian law in cases where the International Tribunal has tried acts that constitute serious violations of international humanitarian law. However, it should be noted that both provisions contain two exceptions to this rule.

The first of these exceptions is where the act for which the perpetrator is being tried is characterized as an ordinary, in other words a common crime by the national court. To illustrate with an example, let us assume that the perpetrator's actions were intended to destroy an ethnic group. However, if the national court characterizes the crime as intentional killing and prosecutes the perpetrator, the International Tribunal, in accordance with its mandate, has the right to characterize and prosecute this crime, which affects the entire international community, as the crime of genocide. In this case, the *ne bis in idem* rule would not constitute an obstacle for the International Tribunal to prosecute the same act. However it should be noted that if the national court has correctly defined the crime and if we continue to illustrate the above example, it is clear that *ne bis in idem* rule will be applied if it has defined the crime as the crime of genocide. This is because states are the fundamental components of International Law, and a trial conducted with the correct definition of the act will have consequences in the context of International Law[58].

Another exception is if the proceedings conducted by the national court are not conducted in an impartial and independent manner, if the proceedings are conducted for the purpose of relieving the perpetrator from international criminal responsibility or if the due diligence is not shown in the proceedings.

At this point, the ICTY's Tadic judgment[59] should be mentioned. Serbian paramilitary leader Duško Tadić was held responsible for his acts in violation of international humanitarian law during the Bosnian War. However, Tadic claimed the International Tribunal lacked jurisdiction, claiming that an indictment had already been issued in Germany for the same acts. The International Tribunals, based on the wording of Article 10 of the Statute, examined whether there had been any previous proceedings. As a result of this examination, the International Tribunal found that only the indictment had been issued in the proceedings in Germany and that no trial had commenced. The Tribunal taking this into account, rejected the defendant's defense based on the *ne bis in idem* rule and ruled that the rule does not limit the jurisdiction of the Tribunal's in this specific case[60].

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the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted. 3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

[57] Article 9 of ICTR Statute with the heading of *Non Bis In Idem*: *1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda. 2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if: (a) The act for which he or she was tried was characterised as an ordinary crime; or (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted. 3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served*.

[58] A. J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, in *Washington University Law Review* 86.4 (2009) 822.

[59] ICTY, The Prosecutor v. Duško Tadić, IT-94-1, Appeals Chamber, Judgment (July 15, 1999).

[60] *Id.*, 146. See the declaration of Judge Nieto-Navia: *2. It is notable that the International Tribunal's own Statute recognises the maxim of non bis in idem. Article 10 protects a person tried by the Tribunal from subsequent prosecution by a national court. The corollary is also true: a person tried by a national court may not be tried subsequently by the International Tribunal unless the original charge was classified as a common crime, or the national court proceedings did not conform to the fundamental principles of criminal law (that is, the court proceedings were not independent and impartial, or were conducted to shield the accused from international criminal responsibility, or the charge was not*

The ICTR's Bagosora[61] decision, like the Tadic decision, is a very important decision in the interpretation of *ne bis in idem* from the International Law perspective. The trial took place in relation to the acts of Théoneste Bagosora, who had military powers during the Rwanda Genocide, in violation of humanitarian law. One of the issues discussed in the trial is whether the Prosecutor has the authority to issue a new indictment against Bagosora, given that he had already been tried by the Belgian courts. In its assessments to resolve this issue, the Court also considered the concept of ordinary crimes and made evaluations within the framework of this concept. As a result of these assessments, it was once again emphasized that the International Tribunals may retry the crimes in question if the national courts define the crimes in question as ordinary crimes and conduct proceedings within this framework, in accordance with Article 9, Paragraph 2 of the Statute of the Court. In other words, in order for the jurisdiction of the International Tribunal to arise, the crime must be defined in the national court proceedings in accordance with the principles of international humanitarian law and of course the proceedings must have been conducted in an independent and impartial manner, without seeking to protect the accused. However, the Tribunal found that there was no provision in Belgian law on genocide or crimes against humanity and therefore the acts of the accused were ordinary crimes in nature[62]. In this regard, the ICTR determined that it had jurisdiction to prosecute Bagosora and requested the Belgian government to transfer the proceeding to the Tribunal in order to prosecute him for genocide and crimes against humanity.
Therefore when this decision is taken into consideration, the concept of ordinary crime should be understood as a type of crime in which the punisment cannot balance the gravity of the crime and thus the outcome of the punishment does not coincide with the objectives of International Law.[63]

4.3.2.- *Ne bis in idem* in the context of the International Criminal Court.

As we have already explained, the signing of the Rome Statute by 120 States in 1998 and the subsequent establishment of the International Criminal Court as a permanent court in 2002 marked a turning point in international criminal law[64]. The Rome Statute, which is the founding document of the Court, contains provisions on the *ne bis in idem* rule that are similar to those in the statutes of International Tribunals[65].
However, despite the similarity, it is evident that the ICC adopts a less interventionist attitude, compared to the ICTY and ICTR and is a complementary measure for national courts. In other words, the ICC recognizes states as primarily responsible for the prosecution of perpetrators in cases of violations of international humanitarian law and exercises its jurisdiction as a complementary measure in cases where states fail to fulfill their responsibilities properly[66]. The fact that the ICC has a less interventionist attitude compared to other International Tribunals and that states accept the jurisdiction of the International Tribunals with the force of the Security Council, while the Rome

prosecuted diligently).
[61] ICTR, The Prosecutor v. Theoneste Bagosora, ICTR-96-7-D, Decision, Judgment (May 17, 1996).
[62] *Id.*, para. 13: *Moreover, the Prosecutor rightly observes that Article 9.2 of the Tribunal's Statute, concerning the principle of non bis in idem, sets limits to the subsequent prosecution by the Tribunal of persons who have been tried by a national court for acts constituting serious violations of international humanitarian law. And. in the case of Theoneste Bagosora, as belgian law does not contain any provision concerning genocide or crimes against humanity, it was only for murder and serious violations of the Geneva Conventions of 12 August 1949 and Additional Protocols I and II of 8 June 1977 that the belgian authorities were able to prosecute him, given the facts that he is charged with. Therefore, should the Prosecutor subsequently wish to prosecute Theoneste Bagosora for the same facts, characterising them as genocide and crimes against humanity, he would not be able to do so, if Theoneste Bagosora had already been tried by belgian jurisdictions*.
[63] Zamani, Seyedhatami *Admissibility* cit.
[64] Daniels, *Non Bis In Idem* cit.
[65] Conway, *Ne Bis In Idem* cit.
[66] Colangelo, *Double Jeopardy* cit.

Statute was created by their common will, makes states more willing to waive their jurisdiction[67].
Following these explanations, it is necessary to address the question of which provisions of the Rome Statute allows the ICC to exercise complementary jurisdiction and how. Article 20 of the Rome Statute is entitled *ne bis in idem*:

> *1. Except as provided in this Statute, 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 the Court.*
> *2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.*
> *3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:*
>
> > *(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or*
> > *(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by International Law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice*.

As can be seen, Article 20(1) of the Rome Statute states that no person who has been convicted or acquitted by the Court shall be tried again for the same conduct, except in the specific circumstances provided for in the Statute. The conditions under which a person may be retried for the same act are explained in Article 84 of the Statute[68]. According to this Article the final judgment may be reviewed for rectification where there is new evidence relevant to the proceedings, where the evidence taken into account during the proceedings is false, forged or subsequently altered and this is subsequently realized and where one or more of the judges involved in the rendering of the judgment has committed a serious error or negligence warranting dismissal. In order to initiate this process, the convicted person, or if the convicted person is deceased their spouse, children, parents or any person alive at the time of the convicted person's death who has received explicit written instructions from the convicted person to act on their behalf, or the Prosecutor on behalf of such a person must apply to the Appeals Chamber. It is therefore clear that these situations constitute exceptions and do not constitute a breach of the *ne bis in idem* rule[69]. Because the rule is not absolute, as the wording of Article 20 suggests but the cases listed in Article 84 under the heading of *Review of the Judgment* are given as exceptions to the rule[70].
On the other hand the second paragraph of Article 20 provides that a person convicted or acquitted of crimes within the jurisdiction of the Court, as set out in Article 5 of the Rome Statute (genocide, crimes against humanity, war crimes, the crime of aggression) cannot be tried before any other court.

[67] *Id.*, 823.
[68] Zamani, Seyedhatami *Admissibility* cit.
[69] See Article 84(1) of the Rome Statute regarding the matters explained: *The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that: (a) New evidence has been discovered that: (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict; (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46*.
[70] *Id.*,148.

In the next paragraph, the possibility that the accused may have been tried before the ICC exercises its jurisdiction is addressed. According to this provision, it is accepted that a person who has been tried in another court for acts prohibited under Articles 6,7, and 8 of the Rome Statute (genocide, crimes against humanity and war crimes respectively) cannot be tried by the ICC for the same act. However two exceptions to this paragraph have been identified. These exceptions, set out in subparagraphs *(a)* and *(b)* of the paragraph, include the cases where the previous trial by another court in matters falling within the jurisdiction of the ICC was conducted in a manner that did not meet international procedural norms, was not conducted in an independent and impartial manner, and was conducted in a manner inconsistent with an intent to bring the person concerned to justice. Although it is possible to say that these exceptions are in line with the situations in the ICTY and ICTR Statutes, it is clear that there are fundamental differences in the implementation of the *ne bis in idem* rule between the *ad hoc* tribunals and the ICC.

The root of these differences lies in the fact that the ICTY and ICTR exercised their jurisdiction over matters within their competence in a manner that superseded national courts, whereas the ICC prioritizes national courts in the prosecution of crimes within its jurisdiction.[71] This is because in the regulations on the *ne bis in idem* rule in the Statutes of ICTY and ICTR, which have nearly identical content, only the Tribunals are authorized to try acts constituting violations of humanitarian law and it is stated that these acts cannot be tried in national courts. However contrary to these provisions of the ICTY and ICTR Statutes, the Rome Statute states that a person convicted or found not guilty by the Court cannot be retried by another court. At the same time a person who has been tried for genocide, crimes against humanity and war crimes in accordance with International Law norms cannot be retried by the Court. In this way, the regulation gives priority to other mechanisms, which it characterizes as another court, and does not intervene unless the above mentioned subparagraphs *(a)* and *(b)* of paragraph 3 of Article 20 are in question. In these cases, the Court acts within the framework of the principle of complementarity and can try the accused.

Despite these differences between the Rome Statute and the statutes of *ad hoc* tribunals (especially ICTY and ICTR), all these regulations have a common point. Although the analyzed regulations strengthen the place of *ne bis in idem* rule in International Law, they do not make it a general rule. This is because the regulations are aimed at ensuring the resolution of disputes in vertical relations rather than ensuring the validity of the rule in horizontal relations. Vertical relations refer to the relationship between the ICC, as a supranational mechanism and national courts. The provisions in question establish the *ne bis in idem* rule as a fundamental rule for resolving conflicts that may arise between the ICC and national courts. However these provisions do not address how to proceed in cases of double jeopardy between the courts of two different states, that is in interstate relations.[72] Therefore, in its current form, it is not entirely accurate to claim that *ne bis in idem* has become a general rule of International Law.

5.- *Ne bis in idem* under European Union Law.

5.1.- Article 54 of the Convention implementing the Schengen Agreement.

The Convention implementing the Schengen Agreement aims at the legal elimination of border controls to ensure the free movement of people.[73] However, as a result of the changes made for this purpose, it is possible that population mobility in the Schengen area may result in the same people being tried and punished for the same act over and over again[74]. This is where Article 54 of the

[71] Colangelo, *Double Jeopardy* cit.
[72] Gless, *Ne Bis In Idem* cit.
[73] Bockel, *The Ne Bis In Idem* cit. Moreover, as the author refers to, Article 2(1) of the Convention sets out the aim of the convention.
[74] *Id.*, 22.

Convention Implementing the Schengen Agreement emerges to solve this problem. Article 54 continues under the heading Application of *Ne Bis In Idem*:

> *A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party*.

As can be seen, the Convention aims to prevent a person who is subject of a final judgment in one Member State from being retried in another Member State. In this way, the Convention will serve the purpose of free movement of nationals of the Member States without hesitaiton[75]. Article 55 lists the circumstances in which signatory States may declare themselves not bound by Article 54. These circumstances are that the act which is the subject of the foreign judgment took place entirely within the territory of the signatory State, that it constitutes a threat to its national security, or that it was committed by State officials in dereliction of their duties. Article 56 and 57 contain other relevant provisions on the application of the rule, while Article 58 makes it clear that the Convention's provisions on *ne bis in idem* do not preclude the application of broader national provisions.
Although there are exceptions to the application of the *ne bis in idem* rule, these exceptions, or the lack of a separate provision beyond these exceptions, do not eliminate the uncertainty as to how the principle will be applied in national legal systems. Indeed, Article 54 of the Convention requires the existence of a final judgment in the Contracting State, in which case the rule of *ne bis in idem* applies. *Bernardini* does not find this surprising and regards the decision to re-examine a criminal case in national legal systems as a vertical application of *ne bis in idem*, i.e. the application of the domestic legal order[76]. The fact that the state which rendered the decision considers it necessary to re-examine its decisions is related to its sovereignty and jurisdiction. It is therefore, not suprising that Article 54 of the Convention Implementing the Schengen Agreement, as the author states, constitutes an exception to the application of the *ne bis in idem* rule in domestic legal systems, although there is no provision for this in the Convention.

5.2.- Article 50 of the Charter of Fundamental Rights of the European Union.

The Charter of Fundamental Rights of the European Union protects fundamental rights and freedoms by ensuring the rule of law and sets out the values that constitute the foundation of a democratic society. *Ne bis in idem*, the right to not to be tried or punished twice in criminal proceedings for the same offence, is also enshrined in Article 50 of the Charter. Article 50 of the Charter reads as follows:

> *No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law*.

First of all, it should be noted that the Article covers final judgments rendered in any of the Member States of the Union. This is important because, although the drafting of Article 50 of the Charter was based on Article 4 of Protocol No. 7 to the European Convention on Human Rights, the scope of this article has been extended and the application of the principle has been generalized to the Member States of the Union and not only to one State[77]. However, the fact that the wording of the Article limits this definitive provision to cases of 'acquittal' or 'conviction' has narrowed the scope of

[75] Bernardini, *Reopening* cit.
[76] *Id.*, 322.
[77] Tekin, *The Principle* cit.

application of the rule[78].
As regards the application of Article 50 of the Charter, it should be stated that the rule is not an absolute right and may be restricted in accordance with the conditions laid down in Article 52(1) of the Charter. The fundamental rights and freedoms set out in the Charter may be restricted only by law, preserving their essence and subject to the principle of proportionality for public interest purposes acceptable to the Union or without prejudice to other rights and freedoms, the conditions set out in Article 52(1)[79]. At the same time, paragraph 3 of Article 52 provides that where the fundamental rights contained in the European Convention on Human Rights and the rights contained in the Charter overlap, the meaning and scope of the rights contained in the Charter shall be the same as the meaning and scope of the rights contained in the European Convention on Human Rights. However the last sentence of the paragraph makes it clear that a more comprehensive protection of fundamental rights and freedoms by the Charter is possible. In line with these provisions, as stated in the preamble to Article 50 of the Charter, the same applies to the rule of *ne bis in idem*[80]. In other words, the provision of Article 50 of the Charter on the rule of *ne bis in idem* has the same meaning and scope as the provisions of Article 4 of Protocol No. 7 to the European Convention on Human Rights on the application of the rule. However, even though we say that they have the same meaning and scope, as we have explained above, it should be kept in mind that the protection afforded by Article 4 of Protocol No. 7 to the European Convention on Human Rights to the rule of *ne bis in idem* refers to the law of the same State, whereas the protection afforded by Article 50 of the Charter refers to Member States.

5.3.- *Gözütok* and *Brügge* judgements of the Court of Justice of the European Union.

The incorporation of *ne bis in idem* in the European Union acquis necessitates its application beyond national borders among the Union's member states. However, the scope of the existing regulations and other ambiguities related to these regulations need to be clarified[81]. At this point, the judgment of the Court of Justice of the European Union in the *Gözütok and Brügge* case, delivered on February 11, 2003, under case numbers C-187/01 and C-385/01 holds significant importance[82]. The judgment holds particular significance as it marks the first time the European Court of Justice (ECJ) has assessed a preliminary reference concerning third-pillar rights[83]. Moreover, the judgment is noteworthy because it represents the Court's first interpretation of the provisions of the Convention

[78] Moses Besong, *Exploring the* Ne Bis In Idem *Principle: Material Scope and Application in EU Law*, in *World Journal of Advanced Research and Reviews* 22.2 (2024) 1129; Bockel, *The Ne Bis In Idem* cit.
[79] Tekin, *The Principle* cit.
[80] See the preamble of the provision of Article 50: *In accordance with Article 50, the 'non bis in idem' rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the acquis in Union law; see Articles 54 to 58 of the Schengen Convention and the judgment of the Court of Justice of 11 February 2003, C-187/01 Gözütok [2003] ECR I-1345, Article 7 of the Convention on the Protection of the European Communities' Financial Interests and Article 10 of the Convention on the fight against corruption. The very limited exceptions in those Conventions permitting the Member States to derogate from the 'non bis in idem' rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations. As regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR*.
[81] H. Tasdemir, A. P. Girgin, *The First Preliminary Ruling on the Third Pillar – A Review: Gözütok and Brügge Case,* in *Journal of Doğuş University* 9.1 (2008) 81.
[82] To review the judgement in more detail, see: Court of Justice of the European Union, Gözütok v. Public Prosecutor's Office and Case C-385/01, Brügge v. Belgian Public Prosecutor's Office, Grand Chamber, Judgement (November 11, 2003).
[83] M. Fletcher, *Some Developments to the Ne Bis In Idem Principle in the European Union: Criminal Proceedings Against Huseyin Gozutok and Klaus Brugge,* in *the Modern Law Review* 66.5 (2003) 769. N. Thwaites, *Mutual Trust in Criminal Matters: The European Court of Justice Gives a First Interpretation of a Provision of the Convention Implementing the Schengen Agreement*, in *European & International Law* 4.3 (2003) 259.

Implementing the Schengen Agreement[84].
There are two separate consolidated cases subject to the decision. In the *Gözütok* case, drugs above the legal limit were found in the bar run by Gözütok, a Turkish citizen residing in the Netherlands. Since the offence in question does not entail a prison sentence of more than six years, the Prosecutor's Office is authorized by the Dutch Criminal Code to stipulate various conditions for the accused and to discontinue the prosecution if these conditions are fulfilled by the accused. Indeed, the Prosecutor's Office's proposals in line with this provision were accepted by Gözütok and the criminal proceedings against him were suspended.
At the same time, however, suspicious activity in Gözütok's bank account in Germany prompted the German authorities to take action. Gözütok was arrested in Germany as a result of an arrest warrant issued against him and sentenced to one year and five months imprisonment for drug trafficking, which was suspended on probation.
Gözütok and the Dutch Prosecutor's Office appealed to the Cologne High Court. The Court adjourned the case on the grounds that the interpretation of Article 54 of Convention Implementing the Schengen Agreement was important in the evaluation of the appeal. Having adjourned the, the Court referred the file to the Supreme Court for a preliminary ruling by asking the question:

> *Is there a bar to prosecution in the Federal Republic of Germany under Article 54 of the CISA if, under Netherlands law, a prosecution on the same facts is barred in the Netherlands? In particular, is there a bar to prosecution where a decision by the Public Prosecutor's Office to discontinue proceedings after the fulfilment of the conditions imposed (transactie under Netherlands law), which under the law of other Contracting States requires judicial approval, bars prosecution before a Netherlands court?*.

The other consolidated case concerned the assault and wounding of Ms Leliaert by a German national, Mr Brügge, in the Belgian town of Oostdinkerke. As a result of these acts of Mr. Brügge, two separate investigations were conducted in Belgium and Germany. However, the Prosecutor's Office in Bonn (Germany) offered an out-of-court settlement on the basis of Article 153a and Article 153(1) of the German Code of Criminal Procedure and Mr. Brügge accepted the offer and paid the sum offered, and the Prosecutor's Office dropped the investigation. However, the Court of First Instance of Vernue (Belgium) felt the need to invoke the interpretation of the Convention implementing the Schengen Agreement and referred to the Supreme Court for a preliminary ruling:

> *Under Article 54 of the [CISA] is the Belgian Public Prosecutor's Office permitted to require a German national to appear before a Belgian criminal court and be convicted on the same facts as those in respect of which the German Public Prosecutor's Office has made him an offer, by way of a settlement, to discontinue the case after payment of a certain sum, which was paid by the accused?*.

As can be seen, the questions posed for the preliminary ruling essentially seek an answer as to whether the *ne bis in idem* set out in CISA 54 also applies in the presence of a decision not to proceed with the prosecution if the defendant fulfills the conditions laid down by the Prosecution.
In response to this question, the Court of Justice of the European Union has held that *ne bis in idem* enshrined Article 54 of the Convention on the Application of the Schengen Agreement applies where the defendant accepts the conditions offered to him/her during a particular investigation and, in particular where he/she pays a sum set by the prosecutor's office, as was the case in the facts of this application.
The *Gözütok* and *Brügge* judgments clarified the application of *ne bis in idem* in Article 54 of the

[84] *Id.*, 254.

Convention on the Application of the Schengen Agreement within the Union. It is clear from the judgment that member states have an obligation to recognize decisions that terminate criminal proceedings. The interpretation of such a limitation on the exclusive power of States to punish is a strong step in terms of applicability of the rule. With the existence of this limitation, it is possible to say that it contributes to a harmonized criminal law system that will create a common application area for the member states, although the decision does not emphasize suc an aim. Furthermore, this step has served the purpose of free movement of persons without the danger of being tried again for the same offence, as the Convention on the Application of the Schengen Agreement seeks to achieve.

6.- Conclusions.

This study conducts a conceptual analysis of the rule named *ne bis in idem*, which prohibits an individual from being tried or punished twice for the same act. It explores whether this rule is essentially a procedural norm or a principle and examines fundamental sources related to *ne bis in idem*, questioning its applicability at both national and international levels.

As a result of the examination, we conclude that *ne bis in idem* is rule stemming from the principle of *res judicata*, which ensures the finality of judgments. The fact that *ne bis in idem* is regulated in various national and international documents as a rule that will serve the principle of *res judicata*, strengthen this principle and ensure the protection of legal certainty and stability in legal systems is an evidence of this. This is because the intellectual accumulation and theoretival discussions behind the principle of *res judicata* appear in legal practice as the *ne bis in idem* rule on how to prevent the same person from being tried and punished more than once for the same act.

Obviously, the sole purpose of the *ne bis in idem* rule is not only to strenghten the doctrine of *res judicata*. This rule also serves the idea of protecting the individual who is in a vulnerable position against the state. In this respect, *ne bis in idem* also provides a guarantee of the right to a fair trial and it is possible to say that it is an individual right.

However, despite all this importance, the application of the *ne bis in idem* rule in International Law is quite weak. Although this rule is frequently encountered in national legal systems, this does not constitute a justification for its general acceptance in International Law. Morover, in our opinion, considering the differences in domestic legal systems, it is not possible for these regulations to automatically transform the *ne bis in idem* rule, which constitutes a whole, into an International Law rule. Furthermore, since the conversion of *ne bis in idem* into an internationally recognized rule, especially in the case of transnational crimes, requires a certain restriction of the punishment powers of states, states are more cautious and reluctant in this regard.

As a matter of fact, both the international instruments and the European Union acquis regarding the rule we discuss in this study reveals this situation. The Convenant on Civil and Political Rights and Article 4 of Protocol no. 7 to the European Convention on Human Rights are far from providing an international characterization to the *ne bis in idem*. Although the Rome Statute, which is also the founding document of the International Criminal Court, reinforces the validity of the rule in International Law, it is clear that Article 20 of the Statute, which contains the rule, exists only in vertical relations (like as International Criminal Court and national courts). Therefore it would be a step away from reality to adopt the idea that this provision, which does not cover horizontal relations (the legal system of State A and the legal system of State B), makes the rule an international rule of law.

A general review of the European Union acquis shows that the rule is regulated in a more applicable manner for the member states of the Union. Article 54 of the Convention on the Application of the Schengen Agreement and Article 50 of the Charter of Fundamental Rights of the European Union are meaningful for the member states of the Union. These regulations, which have a transnational character, have been developed to create a common area of justice, freedom and security. The Court of Justice of the European Union has played an important role in the interpretation of the relevant

provisions and in the elimination of ambiguities identified by Member States and consequently in the better understanding of the rule. As is evident from the judgments analyzed during the study, not only the Court of Justice of the European Union but also the European Court of Human Rights has addressed the elements of the rule in a way to eliminate the existing uncertainties and has given the rule a wide scope of application.

In this way although the elements of the *ne bis in idem* rule and the situations in which the rule can be applied have been clarified to a great extent, it is important to shape it in a way that can be accepted in International Law. In this context, it is important that the principled and consistent judgments of the European Court of Human Rights and the regulations in other international instruments on the *ne bis in idem* rule are not only applicable to a single state, but also that they are reconsidered in a more inclusive manner. This requires serious cooperation between States. States should make it a matter of foreign policy to strike a proportionate balance between their power to punish and the fundamental rights and freedoms of individuals and should be willing to make reciprocal sacrifices in this regard. Likewise, the International Criminal Court should produce more jurisprudence to develop this rule, which it has included in the Rome Statute, and develop the theoretical infrastructure to provide a wider application area fort he rule with these jruisprudence. At the same time, it should be noted that the regulation of the rule in the Statute does not provide a strong protection in terms of human rights. This is because the regulation contains some ambiguities. One of these ambiguities is the exceptions to the provision in the third paragraph of the Article where the perpetrator has already been tried by another court. Although it is stated that the jurisdiction of the ICC will arise in the presence of these exceptions, it is left unclear how to determine these exceptions and what the concrete criteria will be. In order to obtain more precise results in such cases, the establishment of a commission and the supervision of national legal systems by this commission affiliated to the ICC should be open to consideration as a more essential soultion proposal. Morover, the commission's effort to align the principles adopted in national legal systems with international legal norms in trials may also contribute to strengthening the position of the *ne bis in idem* rule in internatonal law.

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The paper expands and updates the research activities carried out in the framework of the EU-GLOBACT Jean Monnet Module - Project funded by European Commission Erasmus+ Programme – Jean Monnet Action Project number 101126599. Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the European Education and Culture Executive Agency (EACEA). Neither the European Union nor EACEA can be held responsible for them -.

Co-funded by the European Union