Volume 10 Issue 2 Articles & Essays

University of Bologna Law Review

https://doi.org/10.60923/issn.2531-6133/20646

Received: 08 Nov. 2024 | Reviewed: 08 Dec. 2025 | Accepted: 13 Jan. 2026 | Published: 27 May 2026

The “Ne Bis in Idem” Principle in Serbian Criminal Law: Application, Challenges, and Supranational Influences

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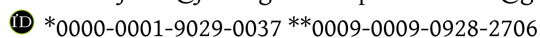
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ABSTRACT

This article investigates the application of the *ne bis in idem* principle in Serbian criminal law, with particular focus on its doctrinal interpretation and procedural challenges. While the principle has been widely discussed in international literature, limited attention has been given to its practical implementation across multiple legal proceedings—criminal, misdemeanor, economic, and disciplinary—in the Serbian legal system. This study analyzes how the principle is shaped by both international instruments and domestic constitutional and statutory frameworks. It adopts a doctrinal and case law–based methodology, focusing on the jurisprudence of the European Court of Human Rights (E.Ct.H.R.) and its influence on Serbian judicial reasoning. The findings highlight interpretative inconsistencies in Serbian courts' application of the Engel criteria, the scope of criminal matters, the idem element, and the prohibition of duplication of proceedings. Special attention is paid to challenges arising from institutional fragmentation and overlapping jurisdictions. Ultimately, the article contributes to the ongoing scholarly discussion by identifying normative and practical gaps and proposing alignment with supranational standards. The results offer insights into Serbia's capacity to uphold fundamental rights under the ECHR framework, with broader implications for comparative criminal procedure and European human rights law.

KEYWORDS

Ne Bis in Idem; Serbian Criminal Law; Engel Criteria; European Court of Human Rights; Dual Proceedings

TABLE OF CONTENTS

Introduction 88
1. Legal Regulation of *Ne Bis in Idem* in International Law 90
1.1. The principle of *Ne Bis in Idem* in international legal regulations 90
1.2. European Convention on Human Rights (E.C.H.R.) and Protocol No. 7 94
1.2.1. Determining the Criminal Nature of Proceedings: The Engel Criteria 95
1.2.2. Identity of the Act *(Idem)* 103
1.2.3. Duplication of Proceedings and Penalties of Criminal Nature *(bis)* 104
1.2.4. Existence of Final Decision 106
1.3. E.U. Charter of Fundamental Rights (C.F.R.) 109
1.4. Schengen Area and Article 54 of the C.I.S.A. 115
1.5. Relationship Between Article 50 C.F.R. and Article 54 C.I.S.A. 116
1.6. The *Ne Bis in Idem* Principle in International Criminal Law: I.C.C. and Ad hoc Tribunals 119
2. *Ne Bis in Idem* Principle in Serbian Legal System - Legal Framework and its Effects 120
2.1. Constitutional Framework of the *Ne Bis in Idem* Principle in Serbia 120
2.2. Criminal Procedure Code and the Structure of Punitive Proceedings 122
2.2.1. Misdemeanors and Economic Offenses: Statutory Application of the *Ne Bis in Idem* Principle 123
2.2.2. Normative Tensions and Institutional Fragmentation: Challenges to the Coherent Application of *Ne Bis in Idem* 126
2.3. The Effects of the *Ne Bis in Idem* Principle 128
2.3.1. Scope and Structure of the Prohibition 128
2.3.2. Finality and the Range of Protected Decisions 131
2.4. Conditional Deferral of Prosecution and the Role of Prosecutorial Discretion . . 133
2.5. Supranational and International Dimensions of the *Ne Bis in Idem* Principle . . . 134
3. The Application of the Principle of *Ne Bis in Idem* and Problems in Serbia 136
3.1. Methodological Framework for Analyzing the *Ne Bis in Idem* Principle 136
3.2. The Criminal Nature Requirement - Relationship Between Crimes, Misdemeanors, and Other Administrative Offenses 138
3.2.1. The Constitutional Dimension of *Ne Bis in Idem* in Serbia: Doctrinal Evolution and Jurisprudential Consolidation 138
3.2.2. Ordinary Courts and the Application of *Ne Bis in Idem* to Misdemeanor and Criminal Matters 141
3.3. The Relationship Between Disciplinary and Criminal Proceedings 147
3.4. Res Judicata in Dismissals Based on the Principle of Opportunity 149
3.5. The Relationship Between Criminal and Civil Proceedings 153
4. Principle of *Ne Bis in Idem* During the Pandemic Caused by the Covid-19 Virus 155
Conclusion 159
Contributorship Statement 162
Funding Details 162
Disclosure Statement 162
Data Availability Statement 162

INTRODUCTION

The principle of *ne bis in idem* (not twice about the same thing)—or double jeopardy in common law systems—prohibits an individual from being prosecuted or punished more than once for the same criminal offense.[1] It operates both as a safeguard against retrial following a final judgment and as a procedural barrier against concurrent legal actions involving the same person and the same factual circumstances. Although long regarded as a universal principle of criminal justice,[2] its contours have evolved in response to shifting legal interpretations within national and supranational frameworks. As will be shown in the following sections, this evolution has led to fragmentation among supranational standards, complicating the consistent application of the principle.

In the Republic of Serbia, the principle of *ne bis in idem* holds constitutional and procedural significance. Article 34 of the Constitution[3] guarantees the right to legal certainty in criminal law, expressly incorporating the prohibition of double jeopardy.[4] Similarly, Article 4 of the Criminal Procedure Code codifies the principle,[5] establishing its role as a foundational guarantee in the domestic criminal justice system. However, its

[1] *See* Valsamis Mitsilegas & Fabio Giuffrida, *Ne Bis in Idem and Conflicts of Jurisdiction, in* EU Criminal Law 148 (Valsamis Mitsilegas ed., 2022); *see also* Valsamis Mitsilegas & Fabio Giuffrida, *Ne Bis in Idem*, *in* General Principles for a Common Criminal Law Framework in the EU 209 (Rosaria Sicurella et al eds., 2017); Carl-Friedrich Stuckenberg, *Double Jeopardy and Ne Bis in Idem in Common Law and Civil Law Jurisdictions*, *in* The Oxford Handbook of Criminal Process 457 (Darryl K. Brown et al eds., 2019).

[2] Sir William Blackstone made an unforgettable contribution to the development of the double jeopardy concept. *See* George C. Thomas III, Double Jeopardy: The History, the Law (1998). Also, double jeopardy has its place in American law and is prescribed by the fifth amendment of the Constitution. The principle of ne bis in idem means that a final judgment in criminal proceedings against an individual is treated as exactly that - final. *See* Robin Lööf, Defending Liberty and Structural Integrity: A Social Contractual Analysis of Criminal Justice in the EU 163 (2008). *See* José Luis de la Cuesta, *Concurrent National and International Criminal Jurisdiction and the Principle 'Ne Bis in Idem'*, 73 Revue internationale de droit pénal 707, 709 (2002); *supra note* 1.3; Sven Frisch, *Ne Bis in Idem Under an Optimal Antitrust Enforcement Framework*, 24 ERA F. 183 (2023); Stanko Bejatović, Krivično procesno pravo [Criminal Procedural Law] 132 (2019); Milan Škulić, Krivično procesno pravo [Criminal Procedural Law] 104 (2015); Vojislav Đurđić, Osnovni principi jugoslovenskog krivičnog postupka i zaštita ljudskih prava i sloboda [Main *Principles of Yugoslav Criminal Procedure and Protection of Human Freedoms and Liberties]*, 39 revija za kriminologiju i krivično pravo [yugoslavian J. Criminology & Crim. L.], May-Dec. 2001, at 75, 84.

[3] Ustav Republike Srbije [Constitution of the Republic of Serbia] (Official Gazette of the Republic of Serbia, Nos. 98/2006 & 115/2021).

[4] *See* Saša Knežević, Krivično procesno pravo: opšti deo [Criminal Procedural Law: General Part] 89–100 (2019); *see also* Stanko Bejatović, *supra* note 2, at 124–127; Dragoljub V. Dimitrijević, Đorđe Lazin & Milica Stefanović-Zlatić, Krivično procesno pravo [Criminal Procedural Law] 79–81 (1987); Vojislav Đurđić, Krivično procesno pravo: opšti deo [Criminal Procedural Law: General Part] 97–105 (2014); Momčilo Grubač, Krivično procesno pravo: uvod i opšti deo [Criminal Procedural Law: Introduction and General Part] 144–48 (2004); Milan Škulić, *supra* note 2, at 53, 62–65.

[5] Zakonik o krivičnom postupku [Criminal Procedure Code] *(CPC)* (Official Gazette of the Republic of Serbia, Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019 & 27/2021) (CC decision), 62/2021 (CC decision).

application is not limited to criminal proceedings.[6] Misdemeanor procedures and cases involving economic offenses may also invoke *ne bis in idem*, while the legal status of disciplinary proceedings remains contested in Serbian doctrine and case law.[7] This doctrinal ambiguity raises pressing questions about the breadth of procedural safeguards available under Serbian law.

The present legal framework further complicates the practical implementation of the principle. Tensions persist between the constitutional commitment to legal certainty and the realities of procedural fragmentation across criminal, misdemeanor, and administrative domains.[8] In many instances, Serbian law does not clearly delineate punishable acts across these categories, allowing for overlapping proceedings and inconsistent jurisprudence. Moreover, the potential for concurrent or sequential prosecutions—particularly through the strategic use of misdemeanor procedures—poses serious risks to the integrity of *ne bis in idem* as a safeguard of due process.[9]

This paper explores whether Serbian law and practice adequately reflect the obligations stemming from international human rights instruments, with particular

[6] In Serbian legal scholarship, a criminal proceeding is often defined as one whose outcome is of a penal nature, i.e. a procedure in which the state's right to punish (*ius puniendi*) is exercised (*see* Milica Pavlović Turkalj, *Pojmovno određenje kaznenog postupka prema Evropskoj konvenciji za zaštitu ljudskih prava i osnovnih sloboda [Conceptual Definition of Criminal Procedure According to the European Convention for the Protection of Human Rights and Fundamental Freedoms]*, Glasnik prava, 2022, at 73, 76). By contrast, in E.Ct.H.R. jurisprudence, the concept of "criminal" has an autonomous meaning, developed most prominently in the *Engel* judgment (*Engel and Others v. The Netherlands*, App. Nos. 5100/71, 5101/71, 5102/71, 5354/72 & 5370/72 (June 8, 1976), https://hudoc.echr.coe.int/eng?i=001-57479; *Vegotex International S.A. v. Belgium*, App. No. 49812/09 (Nov. 3, 2022), https://hudoc.echr.coe.int/eng?i=001-220415), which looks beyond domestic classifications to the nature of the offense and sanction. Serbian constitutional jurisprudence has gradually incorporated this broader understanding, although the doctrinal definition rooted in *ius puniendi* remains influential.

[7] It has been shown that, in the normative element, the differences between misdemeanors and criminal offences arising from their legal definitions and theoretical considerations, such as different levels of social danger, abstract–concrete endangerment of the protected interest, severity of the threatened sanction, guilt (intention–negligence), etc., lose importance for distinguishing between criminal offences and misdemeanors *in abstracto*, and only loose instructions remain for the legislator whether to prescribe an unwanted behavior as a misdemeanor or as a criminal offense or not to sanction it at all. *See* Ivo Josipović & Karmen Novak Hrgović, *The Principle of Ne Bis In Idem in the Context of Misdemeanor, Criminal and Administrative Law*, 23 Croatian Y.B. for Crim. Scis. Prac. 483 (2016); *see also* Maria Fletcher, *The Problem of Multiple Criminal Prosecutions: Building an Effective EU Response*, 26 Y.B. Eur. L. 33 (2007); Drago Radulović, *Načelo ne bis in idem i kazneno zakonodavstvo Crne Gore* [*The Principle of Ne Bis In Idem and the Penal Legislation of Montenegro*], *in* Načelo ne bis in idem i pravna sigurnost građana [The Principle of Ne Bis in Idem and Legal Security of Citizens] 229 (Stanko Bejatović & Nataša Novaković eds., 2022).

[8] *See* Emir Ćorović, Osnove prekršajnog prava Crne Gore [The basics of Montenegrin Misdemeanor Law] 22-3 (2021).

[9] *See* Stanko Bejatović, *Načelo ne bis in idem i pravna sigurnost građana (međunarodni pravni standardi, regionalna zakonodavstva i iskustva u primeni)* [*The principle of ne bis in idem and legal security of citizens (international legal standards, regional legislation and experiences in application)*], *in* Načelo ne bis in idem i pravna sigurnost građana (međunarodni pravni standardi, regionalna zakonodavstva i iskustva u primeni) [The principle of Ne Bis in Idem and legal security of citizens (international legal standards, regional legislation and experiences in application)] 7, 8 (Stanko Bejatović & Nataša Novaković eds., 2022).

emphasis on the jurisprudence of the European Court of Human Rights [hereinafter E.Ct.H.R.]. The analysis considers both the normative framework and the judicial interpretation of the *ne bis in idem* principle, focusing on four foundational elements elaborated in leading E.Ct.H.R. judgments: the criminal nature of the matter, duplicity of proceedings, factual identity, and the finality of decisions. At the same time, attention is also given to the interaction between E.Ct.H.R. and the Court of Justice of the European Union [hereinafter C.J.E.U.] case law, given their significant overlap and growing influence on Serbian law. Special attention is devoted to the misuse of misdemeanor proceedings, the fragmented treatment of economic offenses, and the uncertain status of disciplinary measures in relation to criminal liability.

Ultimately, this paper argues that although Serbian law formally recognizes the *ne bis in idem principle*, significant discrepancies remain in its practical application. These inconsistencies risk undermining legal certainty, due process, and Serbia's alignment with European legal standards. The paper concludes by proposing reforms to strengthen the coherence and credibility of the principle within the national legal system, particularly in light of lessons learned during periods of legal stress, such as the COVID-19 pandemic.

The following chapter examines the principle of *ne bis in idem* within international legal regulations, beginning with its recognition in universal and regional human rights instruments and proceeding to its elaboration in the jurisprudence of the E.Ct.H.R. and, where relevant, the C.J.E.U..

1. LEGAL REGULATION OF *NE BIS IN IDEM* IN INTERNATIONAL LAW

1.1. THE PRINCIPLE OF *NE BIS IN IDEM* IN INTERNATIONAL LEGAL REGULATIONS

Traditionally confined to national criminal justice systems,[10] the scope of *ne bis in idem* has expanded significantly through the jurisprudence of international and regional bodies, particularly within the European Union legal order. This principle ensures that an individual who has been finally convicted or acquitted of a criminal offense cannot be prosecuted again for the same offense in another proceeding within the European Union [hereinafter E.U.] legal order.[11] In this context, *ne bis in idem* represents a restrictive application of mutual recognition, functioning to prevent further prosecution rather

[10] *See* John A. Colman Grant, *The "Lanza" Rule of Successive Prosecutions*, 32 Colum. L. Rev. 1309, 1317 (1932).

[11] *See, e.g.*, Anne Weyembergh & Inés Armada, *The Principle of Ne Bis In Idem in Europe's Area of Freedom, Security and Justice*, *in* Research Handbook on EU Criminal Law 189 (Valsamis Mitsilegas et al eds., 2016).

than to facilitate it.[12] However, the *ne bis in idem* principle does not prevent the European Union from imposing sanctions on an individual for the same conduct that has already been prosecuted or punished outside the E.U., unless an international agreement expressly prohibits such action.[13] The *Menci* case[14] clarified the boundaries of this principle in situations involving dual administrative and criminal proceedings,[15] reinforcing the requirement for proportionality and complementarity in sanctioning systems. This evolution underscores the complexity of balancing individual rights with public interests in effective law enforcement across borders.[16]

Historically, the *ne bis in idem* principle was first recognized within national criminal justice systems as a safeguard against repeated prosecutions for the same offense. Over time, the principle was elevated to the international plane,[17] finding expression in instruments such as Article 14(7) of the International Covenant on Civil and Political Rights [hereinafter I.C.C.P.R.] and Article 4 of Protocol No. 7 to the European Convention on Human Rights [hereinafter E.C.H.R.], as well as in the practice of international criminal tribunals and the International Criminal Court. With the development of the E.U. legal order,[18] the principle acquired a further supranational dimension, enabling its application across the borders of individual Member States. It was limited to criminal justice. The application of administrative sanctions was prevented,[19] but the *Menci* case[20] clarified the criteria for when both administrative and

[12] *See* AUKE WILLEMS, THE PRINCIPLE OF MUTUAL TRUST IN EU CRIMINAL LAW 80 (2021); *accord* SAMULI MIETTINEN, CRIMINAL LAW AND POLICY IN THE EUROPEAN UNION 181 (2012).

[13] *See* KOEN LENAERTS & PIET VAN NUFFEL, EU CONSTITUTIONAL LAW 693 (2022).

[14] Case C-524/15, Criminal proceedings against Luca Menci, ECLI:EU:C:2018:197 (Mar. 20, 2018).

[15] *See* Giulia Lasagni & Sofia Mirandola, *The European Ne Bis In Idem at the Crossroads of Administrative and Criminal Law*, 2019 EUCRIM 126.

[16] *See* Constanţa Mătuşescu, *The Scope of Application of Fundamental Rights Guaranteed by European Union Law on Member States' Action: Some Jurisprudential Landmarks*, L. REV., 2017, at 22, 38; BOŽIDAR BANOVIĆ, STANKO BEJATOVIĆ & VELJKO TURANJANIN, Ме ународно кривично право [INTERNATIONAL CRIMINAL LAW] 458 (2020).

[17] *See* KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW - VOLUME 1: FOUNDATIONS AND GENERAL PART 396–406 (2013); *see also* de la Cuesta, *supra* note 2.3, at 708.

[18] *See, e.g.*, Charlotte Genschel, Lara Schalk-Unger & Nikolina Kulundzˇija, *The European Investigation Order – National Report Austria*, *in* THE EUROPEAN INVESTIGATION ORDER: LEGAL ANALYSIS AND PRACTICAL DILEMMAS OF INTERNATIONAL COOPERATION 19 (Kai Ambos et al eds., 2023); Mário Simões Barata, Ana Paula Guimarães & Daniela Serra Castilhos, *The European Investigation Order in Portugal – Legal Analysis and Practical Dilemmas*, *in* THE EUROPEAN INVESTIGATION ORDER: LEGAL ANALYSIS AND PRACTICAL DILEMMAS OF INTERNATIONAL COOPERATION 87 (Kai Ambos et al eds., 2023); Miha Šepec, Tamara Dugar & Jan Stajnko, *European Investigation Order – A Comparative Analysis of Practical and Legal Dilemmas*, *in* THE EUROPEAN INVESTIGATION ORDER: LEGAL ANALYSIS AND PRACTICAL DILEMMAS OF INTERNATIONAL COOPERATION 123 (Kai Ambos et al eds., 2023); Martin Böse, *The Transnational Dimension of the Ne Bis In Idem Principle and the Notion of Res Judicata in the EU*, *in* JUSTICE WITHOUT BORDERS: ESSAYS IN HONOUR OF WOLFGANG SCHOMBURG 49 (Martin Böse et al. eds., 2018).

[19] *See* John A.E. Vervaele, *Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*, UTRECHT L. REV., Sept. 2013, at. 211, 212.

[20] *See* Case C-524/15, Criminal proceedings against Luca Menci, ECLI:EU:C:2018:197 (Mar. 20, 2018).

criminal penalties might apply and helped define the limits of the *ne bis in idem* principle in relation to dual proceedings.

The relationship between administrative and criminal sanctions had already been addressed in the case law of the E.Ct.H.R., most notably in *A and B v. Norway* (2016),[21] where the E.Ct.H.R. accepted that dual proceedings may be compatible with Article 4 of Protocol No. 7 [hereinafter A4P7] if they are sufficiently connected in substance and time. Building on this reasoning, the C.J.E.U. in *Menci* (2018)[22] followed the jurisprudence of the E.Ct.H.R., as reflected in the Opinion of the Advocate General and subsequently in the judgment itself, while further clarifying the criteria for when both administrative and criminal penalties may apply. This line of reasoning has since been refined through later judgments of both the E.Ct.H.R. and the C.J.E.U., such as *Garlsson Real Estate SA and Others v. Italy* (2018)[23] and *Österlund v. Finland* (2019),[24] which further elaborated on the relationship between administrative and criminal proceedings in the application of the *ne bis in idem* principle. Multiple international legal instruments affirm the *ne bis in idem* principle. At the universal level, it is recognized in Article 14(7) of the I.C.C.P.R.,[25]

[21] A and B v. Norway, App. Nos. 24130/11 & 29758/11, (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972.

[22] Case C-524/15, Criminal proceedings against Luca Menci, ECLI:EU:C:2018:197 (Mar. 20, 2018).

[23] Case C-537/16, Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e la Borsa (Consob), ECLI:EU:C:2018:193 (Mar. 20, 2018).

[24] Österlund v. Finland, App. No. 53197/13 (Sept. 10, 2015), https://hudoc.echr.coe.int/fre?i=001-150997.

[25] *International Covenant on Civil and Political Rights*, United Nations General Assembly, 2200A, Dec. 16, 1966. Since their adoption in 1966, the International Covenant on Civil and Political Rights (I.C.C.P.R.) and its counterpart, the International Covenant on Economic, Social and Cultural Rights (ICESCR), have formed the normative pillars of the post-war international human rights architecture. Originally negotiated in the ideological climate of the Cold War, these instruments were separated along the East–West divide into distinct categories of rights, each governed by its own legal framework. On historical development, *see* Jamil Ddamulira Mujuzi, *The Right Against Double Jeopardy (Non Bis in Idem) and the Drafting History of Article 14(7) of the International Covenant on Civil and Political Rights, 1966,* FUNDAMINA, 2023, at. 1. However, as Schrijver notes, the last few decades have witnessed a growing movement toward integrating these two dimensions of human rights into a more cohesive and universal system of protection. *See* Nico Schrijver, *Fifty Years International Human Rights Covenants: Improving the Global Protection of Human Rights by Bridging the Gap Between the Two Covenants,* 41 NTM 457 (2016). This development evolved from the limitations of the UN Charter, which—despite its rhetorical commitment to human rights—contained mostly promotional and vague provisions. Scholars such as Alston and Forsythe have argued that this lack of specificity spurred the immediate drafting of a more detailed and justiciable human rights framework, first realized in the 1948 Universal Declaration of Human Rights, and later codified in the two Covenants opened for signature in 1966. *See* Philip Alston, *Critical Appraisal of the UN Human Rights Regime*, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 1 (Philip Alston ed., 1995); HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, AND MORALS (1996); DAVID P. FORSYTHE, THE INTERNATIONALIZATION OF HUMAN RIGHTS (1991).

although this paper does not examine the case-law of the Human Rights Committee.[26] Within the Council of Europe framework, the principle is guaranteed in A4P7 of the E.C.H.R.,[27] which serves as the central reference point for the present analysis. In the European Union legal order, it appears in Article 50 of the Charter of Fundamental Rights of the European Union [hereinafter C.F.R.][28] and Article 54 of the Convention Implementing the Schengen Agreement [hereinafter C.I.S.A.].[29] The principle is also embedded in the statutes of international criminal tribunals and courts, including Article 20 of the Rome Statute of the International Criminal Court [hereinafter I.C.C.],[30] Article 10 of the Statute of the International Criminal Tribunal for the former Yugoslavia [hereinafter I.C.T.Y.],[31] and Article 9 of the Statute of the International Criminal Tribunal for Rwanda.[32] Similar provisions are found in Article 9 of the Statute of the Special Court for Sierra Leone[33] and Article 7 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia,[34] although these instruments are of more limited relevance for the Serbian legal context. While acknowledging this broader international framework, the paper devotes particular attention to the E.C.H.R. and, to a complementary extent, the C.F.R and C.I.S.A., given their direct relevance to Serbian law and practice.

[26] Among the rights guaranteed by the I.C.C.P.R., Article 14(7) enshrines the *ne bis in idem* principle, prohibiting the prosecution or punishment of an individual for a criminal offense for which they have already been finally acquitted or convicted. This provision affirms the finality of adjudication as a key component of legal certainty and the right to a fair trial, reinforcing the broader goals of justice and individual liberty in criminal proceedings. However, scholarly analyses have raised questions regarding the practical enforcement of such guarantees. For example, Linda Camp Keith, drawing on empirical research across ratifying states, argues that mere ratification of the I.C.C.P.R. does not necessarily lead to improved human rights practices unless supported by domestic political will and institutional capacity. *See* Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. Peace Rsch. 95 (1999). Article 14(7) of the International Covenant on Civil and Political Rights (I.C.C.P.R.) states that "[n]o one may be prosecuted or punished for a criminal offense in connection with which he has already been acquitted or convicted by a final judgment according to law and the criminal procedure of each country." This provision enshrines *ne bis in idem* as a fundamental procedural safeguard, ensuring individuals are not subjected to repeated prosecution or punishment for the same offense once a final decision has been rendered. *See also* Paul M. Taylor, A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of I.C.C.P.R. Rights 424-28 (2020); Sarah Joseph & Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary 518 (2013); *supra* note 26.2, at 369.

[27] Convention for the Protection of Human Rights and Fundamental Freedoms, (Nov. 4, 1950), E.T.S. No. 5, 213 U.N.T.S. 221.

[28] Charter of Fundamental Rights of the European Union, (Dec. 18, 2000), 2000 O.J. (C 364) 1.

[29] Convention Implementing the Schengen Agreement art. 54, (June 14, 1985), art. 54, 2000 O.J. (L 239) 19.

[30] Rome Statute of the International Criminal Court art. 20, (July 17, 1998), 2187 U.N.T.S. 3.

[31] Statute of the International Criminal Tribunal for the Former Yugoslavia art. 10, S.C. Res. 827 (May 25, 1993).

[32] Statute of the International Criminal Tribunal for Rwanda art. 9, S.C. Res. 955 (Nov. 8, 1994).

[33] Statute of the Special Court for Sierra Leone art. 9, (Jan. 16, 2002), 2178 U.N.T.S. 137.

[34] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 7, NS/RKM/1004/006 (Oct. 27, 2004).

1.2. EUROPEAN CONVENTION ON HUMAN RIGHTS (E.C.H.R.) AND PROTOCOL NO. 7

A4P7 provides that "[n]o 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 convicted." This provision codifies the *ne bis in idem* principle as a component of the right to a fair trial, prohibiting the re-prosecution or double punishment of an individual for the same criminal offense. Crucially, the second paragraph of the article introduces a limited exception, permitting the reopening of proceedings "in accordance with the law and criminal 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." This exception underscores the E.C.H.R.'s emphasis on both finality and fairness, allowing for correction in the event of miscarriages of justice while maintaining safeguards against abusive retrials. Before the adoption of Protocol VII, the E.C.H.R. did not foresee the principle of *ne bis in idem* as part of Article 6.[35] A4P7 introduces a stronger regional formulation of *ne bis in idem*, with important caveats allowing for the reopening of proceedings under specific conditions. Before the adoption of Protocol No. 7, this principle was not expressly included in Article 6 E.C.H.R., though scholarly commentary and E.Ct.H.R. jurisprudence have since explored its implicit presence through interpretations of "criminal charge" and "punishment" under Articles 6 and 7.[36][37] As Allegrezza (2012) and Vervaele (2005) argue, this formulation balances the finality of judgments with the necessity to correct miscarriages of justice, reflecting the E.Ct.H.R.'s nuanced view of procedural fairness.[38] The E.Ct.H.R. has clarified the scope of this provision in key judgments, such as *Zolotukhin v. Russia*,[39] interpreting the phrase "same offence" in a factual, not legal, sense (*idem factum* rather than *idem crimen*). This standard has broadened protection against double jeopardy,

[35] *Accord* Xavier Groussot & Angelica Ericsson, *Ne Bis In Idem in the EU and ECHR Legal Orders: A Matter of Uniform Interpretation?*, *in* Ne Bis In Idem in EU Law 56 (Willem Bastiaan van Bockel ed., 2016);John A.E. Vervaele, *The Transnational Ne Bis in Idem Principle in the EU: Mutual Recognition and Equivalent Protection of Human Rights*, 1 Utrecht L. Rev. 100, 102 (2005); Commentario Breve alla Convenzione Europea Dei Diritti Dell'Uomo e Delle Libertà Fondamentali 894 (Sergio Bartole et al. eds., 2012).

[36] Groussot et al., *supra* note 35.

[37] Ruotsalainen v. Finland, App. No. 13079/03, § 41 (June 16, 2009), https://hudoc.echr.coe.int/eng?i=001-92961; Nikitin v. Russia, App. No. 50178/99, § 35 (July 7, 2004), https://hudoc.echr.coe.int/eng?i=001-61928; Gradinger v. Austria, App. No. 15963/90, § 53 (Oct. 23, 1995), https://hudoc.echr.coe.int/tur?i=001-57958; Peter Whelan, The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges 160 (2014); Cristoffer Wong, *Criminal Sanctions and Administrative Penalties: The Quid of the Ne Bis In Idem Principle and Some Original Sins*, *in* Do Labels Still Matter? Blurring Boundaries Between Administrative and Criminal Law: The Influence of the EU 219, 225 (Francesca Galli & Anne Weyembergh eds., Université de Bruxelles 2014).

[38] Vervaele, *supra* note 35; Allegrezza, *supra* note 36.

[39] Sergey Zolotukhin v. Russia [GC], App. No. 14939/03 (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

especially in cases where the same conduct might fall under multiple legal classifications.

For Serbia, as a signatory to the E.C.H.R. and Protocol No. 7, these standards carry binding force. Domestic law must not only formally incorporate *ne bis in idem*, but must do so in a manner consistent with the E.Ct.H.R.'s evolving jurisprudence. As will be discussed in subsequent sections, tensions remain between Serbian procedural law and the E.C.H.R. framework, particularly regarding the use of misdemeanour proceedings and inconsistencies in defining the "same offence." The challenge of harmonization lies in ensuring that exceptions to the rule—such as retrials based on newly discovered evidence—are applied narrowly and transparently. Any broader interpretation risks undermining legal certainty and eroding the principle's core protective function. Strengthening compliance with A4P7 is therefore essential to safeguarding individual rights and promoting the rule of law within Serbia's judicial system.

1.2.1. DETERMINING THE CRIMINAL NATURE OF PROCEEDINGS: THE ENGEL CRITERIA

The first condition for the application of the *ne bis in idem* principle is that the matter in question must be "criminal" in nature.[40] While domestic legal systems provide their own formal classifications of offenses, the E.Ct.H.R. has developed an autonomous concept of a "criminal matter" under Article 6 E.C.H.R. In its landmark judgment *Engel and Others v. Netherlands*,[41] the E.Ct.H.R. formulated a tripartite test—known as the *Engel criteria*—to determine whether proceedings should be considered criminal for Convention purposes,

[40] Seražin v. Croatia, App. No. 19120/15, 63 (Oct. 9, 2018), https://hudoc.echr.coe.int/fre?i=001-187707; Ghoumid and Others v. France, App. No. 52273/16 and 4 others, 68 (June 25, 2020), https://hudoc.echr.coe.int/eng?i=001-20353; Velkov v. Bulgaria, App. No. 34503/10, 45 (July 21, 2020), https://hudoc.echr.coe.int/eng?i=001-203844.

[41] Engel and Others v. The Netherlands, App. Nos. 5100/71, 5101/71, 5102/71, 5354/72 & 5370/72, (June 8, 1976), https://hudoc.echr.coe.int/eng?i=001-57479.

even if they are formally classified as disciplinary or administrative under national law.[42] The three criteria are: (1) the legal classification of the offense in domestic law, which, although relevant, is not decisive; (2) the intrinsic nature of the offense, examining whether the conduct involves elements typically associated with criminal liability, such as moral blameworthiness or social harm; and (3) the type and severity of the penalty, with sanctions such as imprisonment or substantial fines generally qualifying as criminal.[43] Taken together, these criteria ensure that the scope of Article 6—and by extension A4P7—is not limited by national labels but instead reflects the substantive reality of punitive proceedings.

Although these criteria were developed in the context of Article 6 (fair trial rights), the E.Ct.H.R. has subsequently confirmed their applicability to A4P7. The reason is that both provisions rely on the same autonomous concept of a "criminal charge" (*accusation en matière pénale*) under the E.C.H.R. system.[44] The concept of a "charge," as clarified in the E.Ct.H.R.'s *Deweer v. Belgium* judgement,[45] is understood for Article 6(1) E.C.H.R. as the formal notification issued by a competent authority informing an individual of the allegation that he or she has committed a criminal offense. Since the scope of A4P7 hinges on whether earlier or subsequent proceedings are criminal in nature, the *Engel criteria* provide the analytical framework for determining when the

[42] *Id.* In the judgment *Engel and Others v. Netherlands*, members of the armed forces filed a petition concerning proceedings conducted against them before a military court in relation to offenses such as refusal to obey, which Dutch law qualifies as disciplinary offenses. The applicants were members of the military with various ranks in the Dutch army. According to the decisions of their superiors, they were given different punishments in separate and non-simultaneous proceedings for violating military discipline. These punishments included sentences to several days of "light," "heavy," or "strict" detention. The applicants appealed to the E.Ct.H.R. (after exhausting all legal remedies available in their country), claiming that the disciplinary proceedings had a criminal character. They argued that the proceedings conducted by the military authorities and the Supreme Military Court did not meet the criteria of Article 6 of the ECHR regarding criminal charges. In assessing the criminal nature of the proceedings, the Court established three criteria to determine whether a procedure can be considered criminal: (1) the legal qualification of the act under national law, (2) the legal nature of the act, and (3) the degree of severity of the punishment to which the individual is exposed. Based on these criteria, the Court found that the proceedings in this case did not constitute criminal charges.

[43] *See also* Cavca v. The Republic of Moldova, App. No. 21766/22, 31 (Apr. 4, 2025), https://hudoc.echr.coe.int/eng?i=001-238660; Gestur Jónsson & Ragnar Halldór Hall v. Iceland, App. Nos. 68273/14 & 68271/14, ¶ 75 (Dec. 22, 2020), https://hudoc.echr.coe.int/eng?i=001-207115.

[44] Maugeri, *supra* note 40, at 6.

[45] Deweer v. Belgium, App. No. 6903/75, 46 (Feb. 27, 1980), https://hudoc.echr.coe.int/eng?i=001-57469.

guarantee against double jeopardy applies.[46] This ensures consistency across the E.Ct.H.R.'s case law and prevents states from circumventing the prohibition by reclassifying punitive proceedings under domestic law.

The first criterion concerns the legal classification of the offence under national law. It is of relative weight and serves only as a starting point for the E.Ct.H.R.'s analysis.[47] If domestic law explicitly classifies the offence as criminal, this determination is decisive for the application of Article 6 and, by extension, A4P7.[48] However, this criterion, though important, is not necessarily decisive[49] in determining whether a procedure falls under Article 6 of the E.C.H.R. if national law categorizes the act as a criminal offense. This classification is conclusive for the E.Ct.H.R.. No further criteria are needed for consideration. However, if the national legal order designates the offence as administrative, disciplinary, or otherwise non-criminal, the E.Ct.H.R. will not treat this as conclusive.[50] Instead, it will look beyond the domestic label and examine the substantive reality of the procedure in question, applying the second and third *Engel* criteria. In this way, the E.Ct.H.R. prevents states from circumventing Convention guarantees simply by reclassifying punitive measures under national law.

[46] Although the Engel criteria remain the cornerstone of the E.Ct.H.R.'s jurisprudence for determining the "criminal nature" of proceedings, they continue to be the subject of scholarly and judicial debate. Critics argue that the criteria, while flexible, may lead to legal uncertainty and an over-extension of the criminal sphere, demonstrating that their scope and application remain contested even today. *See* Thomas H. Bickel, Engel Was Grievously Wrong and Should Be Overruled, HARV. J.L. & PUB. POL'Y PER CURIAM (Mar. 2, 2023), https://journals.law.harvard.edu/jlpp/engel-was-grievously-wrong-and-should-be-overruled-thomas-h-bickel/?utm_source=chatgpt.com; Matteo Mastracci, *Judiciary Saga in Poland: An Affair Torn Between European Standards and E.Ct.H.R. Criteria*, POLISH REV. INT'L & EUR. L., Nov. 2020, at 39 (Pol.).

[47] *See* Gestur Jónsson & Ragnar Halldór Hall v. Iceland [GC], App. Nos. 68273/14 & 68271/14, 85 (Dec. 22, 2020), https://hudoc.echr.coe.int/eng?i=001-207115; Žugić v. Croatia, App. No. 3699/08, ¶ 65 (May 31, 2011), https://hudoc.echr.coe.int/eng?i=001-104933.

[48] *See* Păcurar v. Romania, App. No. 17985/18, 124 (June 24, 2025), https://hudoc.echr.coe.int/eng?i=001-243776.

[49] *See* Mihalache v. Romania, App. No. 54012/10, 53 (July 8, 2019), https://hudoc.echr.coe.int/fre?i=001-194523; Serazin v. Croatia, App. No. 19120/15, 64 (Oct. 9, 2018), https://hudoc.echr.coe.int/fre?i=001-187707; Sergey Zolotukhin v. Russia [GC], App. No. 14939/03, ¶ 52 (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222. This approach was illustrated in *Păcurar v. Romania*, where the confiscation of unexplained assets was formally designated as an administrative sanction under Romanian law and adjudicated before administrative courts applying civil procedure. The E.Ct.H.R. nonetheless reiterated that such domestic classification is not determinative, since the first criterion carries only relative weight and must be assessed in light of the second and third criteria. In this way, the E.Ct.H.R. prevents states from circumventing ECHR guarantees by formally reclassifying punitive measures, ensuring that the substantive reality of the proceedings remains decisive.

[50] Gestur Jónsson and Ragnar Halldór Hall v. Iceland, App. Nos. 68273/14 & 68271/14, 77-78, 85 (Jan. 22, 2020), https://hudoc.echr.coe.int/eng?i=001-207115; *See* Andreas Th. Muller & Theresa M. Weiskopf, *Leading Cases in the European Court of Human Rights' Jurisprudence 2020*, 76 ZöR - ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 1371 (2021) (Austria).

A pertinent example of this approach is *Ravnsborg v. Sweden*,[51] which concerned the internal qualification of a fine imposed for inappropriate statements made during civil proceedings. Although Swedish national law did not classify the act as a criminal offense, the E.Ct.H.R. found that the severity of the penalty (a fine) could be considered akin to a criminal sanction. Thus, the E.Ct.H.R. concluded that the proceedings fell under Article 6, despite the offense not being classified as criminal within Sweden's legal framework.[52] This case illustrates the E.Ct.H.R.'s flexible approach to defining "criminal" matters under the Convention. Additionally, it is important to note that the Engel criteria are not always straightforward, and the E.Ct.H.R. may take a contextual approach. This is especially true when national law categorizes the offense differently, as the E.Ct.H.R. weighs the overall impact of the proceedings, including the severity of sanctions and whether they resemble criminal penalties in their purpose and consequences.

A key development in recent years has been the evolution of the E.Ct.H.R.'s approach towards fines and sanctions, particularly in administrative offenses that are not traditionally criminal. The E.Ct.H.R. has expanded its understanding of what constitutes a "criminal charge" in light of evolving national laws and the increasing use of administrative sanctions for offenses that would have previously been treated as criminal acts.[53] This includes the growing use of financial penalties or administrative sanctions in cases involving public officials or business activities, which may now trigger

[51] Ravnsborg v. Sweden, App. No. 14220/88, (Mar. 23, 1994), https://hudoc.echr.coe.int/eng?i=001-57871; *see* Achilles C. Emilianides, *Contempt in the Face of the Court and the Right to a Fair Trial: The Implications of Kyprianou v. Cyprus*, 13 Eur. J. Crime, Crim. L. & Crim. Just. 401 (2005) (Neth.); David Pannick, *Commercial Judicial Review and the Human Rights Act 1998*, 4 Jud. Rev. 177 (1999) (U.K.).

[52] Ravnsborg v. Sweden, App. No. 14220/88, 33 (Mar. 23, 1994), https://hudoc.echr.coe.int/eng?i=001-57871 (assessing no violation of Article 6 of the ECHR, examined under *Engel* criteria).

[53] *See* Katja Šugman Stubbs, *An Increasingly Blurred Division Between Criminal and Administrative Law*, *in* Visions of Justice: Liber Amicorum Mirjan Damaška 351 (Bruce Ackerman et al eds., 2016) (Ger.); Nadine Zurkinden, *Swiss Peculiarities of the Enforcement Mechanisms in Core, Secondary and Administrative Criminal Law*, *in* Criminal and Quasi-Criminal Enforcement Mechanisms in Europe: Origins, Concepts, Future 38 (Vanessa Franssen & Christopher Harding eds., 2022) (U.K.); Sarah Wilson & Gary Wilson, *The Interplay between Criminal and Quasi-Criminal Enforcement Mechanisms in the UK Context Explored through the Prism of 'Market Abuse': Current Approaches and Historical Perspectives*, *in* Criminal and Quasi-Criminal Enforcement Mechanisms in Europe: Origins, Concepts, Future 84 (Vanessa Franssen & Christopher Harding eds., 2022) (U.K.). In Spanish law, the principle of double jeopardy not only bars multiple criminal punishments for the same offense but also precludes the concurrent imposition of both criminal and administrative sanctions arising from the same conduct. *See* Carlos Gómez-Jara Díez & Luis E. Chiesa, *Spain*, *in* The Handbook of Comparative Criminal Law 488, 492 (Kevin Jon Heller & Markus D. Dubber eds., 2010).

Article 6 protections if the penalty is severe enough.[54] Furthermore, recent case law has addressed with detention and custodial sentences that may initially be classified as non-criminal under national law but are found to trigger the E.C.H.R.'s criminal procedural safeguards because of their consequences for personal liberty.

The second *Engel* criterion is the legal nature of the disputed act. With this criterion, the E.Ct.H.R. takes into account the position of the act within the national legal framework, considering the reasons why the act is prescribed as prohibited and punishable. This involves examining the values and protected interests that the legislator intended to safeguard. The E.Ct.H.R. has consistently held that criminal or penal acts include behaviors that may not be explicitly classified as criminal in national legislation but are still subject to sanctions due to their harmful nature.[55] The E.Ct.H.R. will treat an act as criminal if it determines that the protected values fall within the criminal sphere. The E.Ct.H.R. has emphasized that any procedure governed by criminal procedural safeguards may fall within the ambit of criminal law.[56] This principle extends to acts that fall under what is referred to in Serbia as secondary criminal legislation.[57] Such acts, even if not traditionally considered criminal offenses, should be interpreted within the framework of criminal law, especially when criminal procedural norms apply.

When assessing whether the legal nature of the act is criminal, the following details must also be taken into account: whether the legal rule applies to a specific group

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[54] The E.Ct.H.R. has developed a nuanced approach toward the classification of sanctions and fines, particularly in the context of administrative offenses that are not traditionally viewed as criminal. The Court has primarily used the Engel criteria—comprising the legal classification of the act under national law, the nature of the offense, and the severity of the penalty—to determine whether a particular case falls within the "criminal charge" category under Article 6 of the European Convention on Human Rights. For example, in the *Jussila v. Finland* case (2006), for instance, the Court highlighted the importance of assessing both the nature of the sanction and its seriousness. Administrative fines with a deterrent effect, even if not classified as criminal by national law, might still invoke the protections under Article 6 if they are deemed to have a criminal character due to their punitive or deterrent effects. *See* Jussila v. Finland [GC], App. No. 73053/01, (Nov. 23, 2006), https://hudoc.echr.coe.int/eng?i=001-78135. In *Oleksandr Volkov v. Ukraine* (2013), the Court held that even severe disciplinary actions such as the dismissal of a judge could be classified outside the "criminal" domain, depending on how the state structured the disciplinary system, despite the significant impact of such decisions.

[55] *See* Campbell and Fell v. United Kingdom, App. Nos. 7819/77 & 7878/77, 71 (June 28, 1984), https://hudoc.echr.coe.int/eng?i=001-57456; Jussila v. Finland, App. No. 73053/01, 38 (Nov. 23, 2006), https://hudoc.echr.coe.int/eng?i=001-78135; Ziliberberg v. Moldova, App. No. 61821/00, 30 (Feb. 1, 2005), https://hudoc.echr.coe.int/eng?i=001-68119; Kyprianou v. Cyprus, App. No. 73797/01, 31 (Jan. 27, 2004), https://hudoc.echr.coe.int/eng?i=001-71671; Zaicevs v. Latvia, App. No. 65022/01, (July 31, 2007), https://hudoc.echr.coe.int/fre?i=001-82001.

[56] Öztürk v. Germany, App. No. 8544/79, 51 (Feb. 21, 1984), https://hudoc.echr.coe.int/eng?i=001-57553.

[57] Veljko Turanjanin, *KRIVIČNI ZAKONIK I KRIVIČNA DELA SPOREDNOG KRIVIČNOG ZAKONODAVSTVA* [The Criminal Code and Criminal Offenses of Secondary Criminal Legislation] (2022) (Serb.).

of people[58] (e.g. doctors, fans) or applies to all citizens,[59] whether the legal rule has a deterrent effect or punitive purpose,[60] whether sentencing depends on guilt, as well as whether the legal rule protects the interests of society that are otherwise protected by criminal law.[61] Thus, a broad range of punishable behaviors—although not formally criminal—may be considered as falling within the scope of criminal law.

The E.Ct.H.R.'s approach to the *Engel* criteria and the legal nature of the act has evolved in recent case law. Particularly in cases concerning administrative offenses or regulatory violations, the E.Ct.H.R. has increasingly focused on the punitive and deterrent effects of sanctions, even when they are not formally classified as criminal under national law. In *Ravnsborg v. Sweden*,[62] for example, the E.Ct.H.R. scrutinized whether a fine imposed for inappropriate statements made during a civil proceeding could be considered a criminal sanction. This case underscored the E.Ct.H.R.'s growing tendency to classify penalties as "criminal" when they are sufficiently severe or have a punitive or deterrent effect. The E.Ct.H.R. emphasized that the key question is whether the sanction serves the same purpose as a criminal penalty, even if the act is not classified as criminal under national law. Therefore, in cases where national legislation imposes penalties that serve to deter or punish certain behaviors, the E.Ct.H.R. is more likely to treat the procedure as criminal, even if the offense does not fall within the

[58] Ramos Nunes de Carvalho e Sá v. Portugal [GC], App. Nos. 55391/13, 57728/13 & 74041/13, 125 (Nov. 6, 2018), https://hudoc.echr.coe.int/eng?i=001-187507. *See* Mathieu Leloup, *The Concept of Structural Human Rights in the European Convention on Human Rights*, 20 Hum. Rts. L. Rev. 480 (2020) (U.K.).

[59] *Id.* § 53; Vegotex Int'l S.A. v. Belgium [GC], App. No. 49812/09, 69 (Nov. 3, 2022), https://hudoc.echr.coe.int/eng?i=001-220415; Bendenoun v. France, App. No. 12547/86, ¶47 (Feb. 24, 1994), https://hudoc.echr.coe.int/tur?i=001-57863; Milenković v. Serbia, App. No. 50124/13, ¶ 35 (Nov. 26, 2013), https://hudoc.echr.coe.int/eng?i=001-161001; Mihalache v. Romania, App. No. 54012/10, ¶ 59 (July 8, 2019), https://hudoc.echr.coe.int/eng?i=001-194523; Šimkus v. Lithuania, App. No. 41788/11, ¶ 43 (June 13, 2017), https://hudoc.echr.coe.int/eng?i=001-174398; Žaja v. Croatia, App. No. 37462/09, 88 (Oct. 4, 2016), https://hudoc.echr.coe.int/eng?i=001-166925; Muslija v. Bosnia and Herzegovina, App. No. 32042/11, ¶ 28 (Jan. 14, 2014), https://hudoc.echr.coe.int/fre?i=001-139988.

[60] *E.g.*, Benham v. United Kingdom, App. No. 19380/92, 56 (June 10, 1996), http://hudoc.echr.coe.int/eng?i=001-57990; Welch v. United Kingdom, App. No. 17440/90, 26 (Feb. 9, 1995), http://hudoc.echr.coe.int/eng?i=001-57927; Öztürk v. Germany, App. No. 8544/79, 53 (Feb. 21, 1984), http://hudoc.echr.coe.int/eng?i=001-57553. Here we will emphasize that both criminal and administrative/administrative procedures can have both a punitive and deterrent purpose, while the boundary line between them lies in the instruments and consequences of public repressive action, which are more difficult in criminal proceedings, taking into account that greater values and interests in question. *See also* Antonio Tarallo, *About Disorder in the "Cuisine Interne" of Mihalache Grand Chamber Judgment: Some Reasons for a Radical Change of Approach in Ne Bis In Idem Issues*, 32 Crim. L.F. 317, 325 (2021) (Neth.).

[61] *E.g.*, *A. Menarini Diagnostics S.R.L. v. Italy*, App. No. 43509/08, 40 (Sept. 27, 2011), https://hudoc.echr.coe.int/eng?i=001-106438; Mihalache v. Romania, App. No. 54012/10, 59 (July 8, 2019), https://hudoc.echr.coe.int/eng?i=001-194523; Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, App. No. 47072/15, 42 (Jan. 23, 2019), https://hudoc.echr.coe.int/eng?i=001-187199; Milenković v. Serbia, App. No. 50124/13, 35 (Mar. 1, 2016), https://hudoc.echr.coe.int/eng?i=001-161001; Sergey Zolotukhin v. Russia, App. No. 14939/03, 55 (Mar. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

[62] Ravnsborg v. Sweden, App. No. 14220/88 (Mar. 23, 1994), http://hudoc.echr.coe.int/eng?i=001-57871.

traditional scope of criminal law. This approach reflects the E.Ct.H.R.'s broader interpretation of what constitutes a "criminal charge", ensuring that individuals are afforded the protections guaranteed by Article 6 of the E.C.H.R.

The third *Engel* criterion—the type and severity of the sanction—is pivotal in determining whether a matter qualifies as criminal under Article 6 of the E.C.H.R. This criterion often becomes decisive when the first two (the legal classification of the offence and the nature of the act) do not yield a clear answer. In its case law, the E.Ct.H.R. has emphasized that the assessment must focus not only on the formal designation of the sanction but also on its potential impact on the individual. In *Păcurar v. Romania*,[63] the E.Ct.H.R. observed that the sanctions the applicant risked under the asset-verification framework were disciplinary in nature and did not involve imprisonment, distinguishing the case from *Anghel v. Romania*[64] and *Bendenoun v. France*,[65] where sanctions included fines or tax surcharges with the possibility of imprisonment in default. The E.Ct.H.R. has further clarified, in line with its reasoning under Article 7 E.C.H.R., that the severity of a sanction alone is not determinative of its criminal nature, since many non-penal measures may nevertheless impose a substantial burden on the person concerned.[66] In this respect, it has been accepted that even significant financial penalties may remain outside the "criminal" sphere if their primary purpose is regulatory or disciplinary rather than punitive. Thus, in *Müller-Hartburg v. Austria,*[67] a potential fine of €36,000 was held insufficient to render the matter criminal. In contrast, in *Ramos Nunes de Carvalho e Sá v. Portugal*[68] a maximum penalty of €43,750 did not alter the essentially disciplinary character of the proceedings. Similarly, in *Grosam v. Czech Republic,*[69] the E.Ct.H.R. concluded that disciplinary proceedings against bailiffs, which entailed removal from office and a fine of nearly €31,000, did not involve the determination of a criminal charge. Taken together, this jurisprudence demonstrates that the third Engel criterion is applied with caution: although the severity of the

[63] Păcurar v. Romania, App. No. 17985/18, ¶125–30 (June 24, 2025), https://hudoc.echr.coe.int/eng?i=001-243776.
[64] Anghel v. Romania, App. No. 28183/03, 52 (Oct. 4, 2007), https://hudoc.echr.coe.int/eng?i=001-108558.
[65] Bendenoun v. France, App. No. 12547/86, 47 (Feb. 24, 1994), https://hudoc.echr.coe.int/eng?i=001-57863.
[66] *E.g.*, Welch v. United Kingdom, App. No. 17440/90, 32 (Feb. 9, 1995), https://hudoc.echr.coe.int/eng?i=001-57927; Del Rio Prada v. Spain [GC], App. No. 42750/09, ¶ 82 (Oct. 21, 2013), https://hudoc.echr.coe.int/eng?i=001-127697; *Longo v. Italy*, App. No. 35780/18, 67 (Aug. 27, 2024), https://hudoc.echr.coe.int/fre?i=001-235959.
[67] Müller-Hartburg v. Austria, App. No. 47195/06, 47 (Feb. 19, 2013), https://hudoc.echr.coe.int/eng?i=001-116734.
[68] Ramos Nunes de Carvalho e Sá v. Portugal [GC], App. Nos. 55391/13, 57728/13 & 74041/13, 25, 71 & 126, 217 (Nov. 6, 2018), https://hudoc.echr.coe.int/eng?i=001-187507.
[69] Grosam v. Czech Republic [GC], App. No. 19750/13, 120–21 (June 1, 2023), https://hudoc.echr.coe.int/eng?i=001-225231.

sanction is an important factor, it is not sufficient by itself to bring a matter into the criminal sphere unless combined with punitive purpose or general applicability.[70]

The importance of this criterion is highlighted in the *Milenković v. Serbia* judgment,[71] which emphasized that the severity of the measure imposed is primarily determined by the maximum potential sentence set out in the relevant domestic law. While the actual sentence imposed is also relevant, it cannot diminish the primary focus, which is the maximum penalty prescribed by law.[72] This underscores that the potential for severe sanctions is key in determining whether a legal matter falls within the criminal domain.[73] Therefore, the purpose of prescribing and imposing criminal sanctions is predominantly repressive, and also serves a preventive goal.

As established by the E.Ct.H.R., the second and third criteria are considered alternative rather than cumulative.[74] This means that it is sufficient for either the nature of the act or the severity of the sanction to suggest a criminal charge under Article 6.[75] However, when neither of these two elements provides a clear answer, the criteria may be applied cumulatively to ensure a more comprehensive determination.[76] The alternative application is particularly useful when dealing with cases where the legal qualification of the act is not clear-cut. As such, in some instances, the E.Ct.H.R. may choose to analyze both the nature of the act and the severity of the sanction in combination. This approach ensures that even when one of the elements fails to establish a criminal charge, the other can provide the necessary context to uphold the principles of fairness and justice under Article 6 of the E.C.H.R.

[70] *See* Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey, App. No. 48657/06, 22–26 (Nov. 28, 2017), https://hudoc.echr.coe.int/eng?i=001-178942; *see also* Sancaklı v. Turkey, App. No. 1385/07, 28–31, (May 15, 2018), https://hudoc.echr.coe.int/eng?i=001-182847; *see also* Dilek Genç v. Türkiye, App. Nos. 74601/14 & 78295/14, (Jan. 21, 2025), https://hudoc.echr.coe.int/?i=001-240182.

[71] Milenković v. Serbia, App. No. 50124/13, 36 (Nov. 26, 2013), https://hudoc.echr.coe.int/eng?i=001-161001.

[72] *See* Emir Ćorović, *Načelo ne bis in idem i Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda i praksa Evropskog suda za ljudska prava* [*The Principle of Ne Bis in Idem and the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Practice of the European Court of Human Rights*], *in* NAČELO NE BIS IN IDEM I PRAVNA SIGURNOST GRAĐANA [THE PRINCIPLE OF NE BIS IN IDEM AND LEGAL SECURITY OF CITIZENS] 131, 137 (Stanko Bejatović & Nataša Novaković eds., 2022) (Pol.).

[73] A. and B. v. Norway, App. Nos. 24130/11 & 29758/11, 136-154 (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972.

[74] Ezeh and Connors v. United Kingdom, App. Nos. 39665/98 & 40086/98 (Oct. 9, 2003), https://hudoc.echr.coe.int/eng?i=001-61333; *see also* Mirko Bonačić & Marko Rašo, *Characteristics of Misdemeanor Law and Trial: Current Issues and Priorities*, 2012 CROATIAN ANN. CRIM. L. & PRAC. 443 (2012) (Croat.).

[75] Lutz v. Germany, App. No. 9912/88, 23, 55 (Aug. 25, 1987), https://hudoc.echr.coe.int/eng?i=001-57531.

[76] *E.g.*, Janosevic v. Sweden, App. No. 34619/97, 67 (Jan. 26, 2000), https://hudoc.echr.coe.int/eng?i=001-60628; Sergey Zolotukhin v. Russia, App. No. 14939/03, 53 (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

1.2.2. IDENTITY OF THE ACT *(IDEM)*

The second element of the *ne bis in idem* principle —*idem*— addresses the identity of the act and has proven to be the most contentious in both legal doctrine and jurisprudence. Before the *Zolotukhin v. Russia* judgment in 2009, the E.Ct.H.R. applied divergent approaches to interpreting what constitutes the "same offense," resulting in significant inconsistency. In cases such as *Gradinger v. Austria,*[77] *Oliveira v. Switzerland,*[78] and *Franz Fischer v. Austria,*[79] the E.Ct.H.R. alternatively focused on the legal qualification, factual background, and protected legal interests, leading to legal uncertainty regarding the scope of the principle. *Gradinger v. Austria*[80] focused on the legal classification and aimed to assess whether the criminal elements of the two proceedings were the same. *Oliveira v. Switzerland*[81] introduced a broader approach, emphasizing the factual circumstances rather than legal definitions. In *Franz Fischer v. Austria*,[82] the Court evaluated both the facts and the protected legal interest. These divergent rulings led to uncertainty, as they suggested different ways of interpreting whether offenses in separate proceedings were indeed the same.

The *Zolotukhin*[83] judgment marked a pivotal shift, establishing that the key criterion for determining the identity of the offense is factual sameness. The E.Ct.H.R. clarified that *ne bis in idem* is engaged when both proceedings concern "identical facts or facts which are substantially the same." This entails that if the factual allegations underpinning one proceeding reappear—wholly or substantially—in a subsequent indictment, the two are deemed materially identical. This decision brought greater predictability and alignment in E.Ct.H.R. case law by focusing on factual identity rather than the formal legal categorization of offenses.

The *idem* element is perhaps the most controversial aspect of the *ne bis in idem* principle[84] and has both subjective and objective aspects. Subjective identity (*eadem persona*) exists when the same individual (*eadem persona*) who was prosecuted or tried in one case faces prosecution in another proceeding. The person's identity remains the same even if, for instance, the form of intent or culpability shifts between proceedings.

[77] Gradinger v. Austria, App. No. 15963/90, (Oct. 23, 1995), https://hudoc.echr.coe.int/eng?i=001-57958.
[78] Oliveira v. Switzerland, App. No. 25711/94, (July 30, 1998), https://hudoc.echr.coe.int/eng?i=001-58210.
[79] Franz Fischer v. Austria, App. No. 37950/97, (May 29, 2001), https://hudoc.echr.coe.int/eng?i=001-59475.
[80] Gradinger v. Austria, App. No. 15963/90, (Oct. 23, 1995), https://hudoc.echr.coe.int/eng?i=001-57958.
[81] Oliveira v. Switzerland, App. No. 25711/94, (July 30, 1998), https://hudoc.echr.coe.int/eng?i=001-58210.
[82] Franz Fischer v. Austria, App. No. 37950/97, (May 29, 2001), https://hudoc.echr.coe.int/eng?i=001-59475.
[83] Sergey Zolotukhin v. Russia, App. No. 14939/03, (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.
[84] *See* Bas van Bockel, *The 'European' Ne Bis in Idem Principle: Substance, Sources, and Scope, in* NE BIS IN IDEM IN EU LAW 47 (Willem Bastiaan van Bockel ed., 2016) (U.K.).

Objective identity (*eadem res*) refers to the sameness of the act itself. Following *Zolotukhin,*[85] the E.Ct.H.R. emphasized that the most essential aspect is the material identity of the facts. It is also necessary to show a temporal and spatial connection between those facts, indicating that both cases are grounded in the same core incident or series of actions.

1.2.3. DUPLICATION OF PROCEEDINGS AND PENALTIES OF CRIMINAL NATURE *(BIS)*

The third core element of the *ne bis in idem* principle concerns the prohibition of duplicate proceedings (*bis*). While multiple proceedings may arise from the same factual circumstances, they do not automatically breach A4P7. Since *Zolotukhin v. Russia,*[86] the E.Ct.H.R. has clarified that the decisive question is whether the proceedings are "sufficiently close in substance and in time".[87] Where this condition is met, the proceedings may be considered an integrated response to a single offense rather than an impermissible duplication. This standard was built on earlier case-law, including *Nykänen v. Finland*[88] and *Rinas v. Finland,*[89] where the E.Ct.H.R. emphasized that parallel tax surcharge and criminal proceedings lacking a sufficiently close connection amounted to a violation, and was later reaffirmed in *Johannesson and Others v. Iceland,*[90] which further clarified the proportionality and foreseeability requirements.

In *A and B v. Norway*, the E.Ct.H.R. articulated four key factors for determining whether two proceedings form such an integrated whole: a) each procedure pursues a distinct yet complementary objective, addressing different aspects of the same socially harmful behavior; b) *bis* is a foreseeable consequence *idem*: conducting two different proceedings (*bis*) is, based on law and practice, a foreseeable consequence of the same illegal behavior (*idem*); c) duplication of evidentiary proceedings was avoided: the procedures were carried out in such a way as to avoid duplication of presentation and assessment of evidence to the greatest extent possible; d) the totality of the sanctions is proportional to the committed act: the sanction from the procedure that was first

[85] Sergey Zolotukhin v. Russia, App. No. 14939/03, (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.
[86] *Id.*
[87] A. and B. v. Norway, App. Nos. 24130/11 & 29758/11, 13 (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972; *see also* Jesus Pinhal v. Portugal, App. Nos. 48047/15 & 2276/20, (Oct. 8, 2024), https://hudoc.echr.coe.int/eng?i=001-237560; (Eur.) 2024; *See also* Case C-27/22, Volkswagen Group Italia S.p.A. v. Autorità Garante della Concorrenza e del Mercato (AGCM), ECLI:EU:C:2023:663, 94 (Sep. 14, 2023).
[88] Nykänen v. Finland, App. No. 11828/11, (July 20, 2014), https://hudoc.echr.coe.int/eng?i=001-144112.
[89] Rinas v. Finland, App. No. 17039/13, (Jan. 27, 2015), https://hudoc.echr.coe.int/eng?i=001-150668.
[90] Jóhannesson & Others v. Iceland, App. No. 22007/11, (May 18, 2017), https://hudoc.echr.coe.int/eng?i=001-173498.

concluded with a legally binding decision must be taken into account in the second procedure because this prevents the imposition of an excessive burden on an individual.[91]

This approach ensures that dual administrative and criminal responses may coexist only if they collectively form a coherent, proportionate, and foreseeable framework. Where these conditions are absent, successive or parallel proceedings constitute an impermissible duplication contrary to the *ne bis in idem* principle.

When dealing with administrative or misdemeanor proceedings, the E.Ct.H.R. suggests considering two additional factors to determine whether the combination of procedures imposes an undue burden: a) whether the procedure in which the sanction was imposed is "criminal" in the sense of the ECHR (criminal nature of the procedure) - if it is not, it is less likely that the principle of *ne bis in idem* will be violated and b) the degree of stigmatization that the administrative/misdemeanor procedure has on the perpetrator - if the degree of stigmatization is not significant, it is more likely that the combination of procedures did not impose an excessive burden on the applicant.[92] The connection between two procedures must also be temporal. This does not imply that proceedings must run in perfect parallel; however, authorities should conduct them efficiently to avoid prolonged uncertainty for the individual about potential additional proceedings. The E.Ct.H.R.'s reasoning in *A and B v. Norway*[93] thus consolidated and refined principles first signaled in *Nykänen*[94] and *Rinas*[95], and later confirmed in *Johannesson and Others,*[96] thereby establishing a coherent framework for assessing the compatibility of dual proceedings with A4P7.

Recent E.Ct.H.R. rulings continue to refine these principles, emphasizing proportionality and the nature of connections between proceedings. In *Marguš v. Croatia* [GC],[97] the E.Ct.H.R. clarified two important dimensions of A4P7. First, it confirmed that the discontinuance of criminal proceedings by a public prosecutor does not amount to a 'final acquittal or conviction,' and therefore falls outside the protective scope of *ne bis in idem*. Second, it held that amnesty decisions relating to grave breaches of fundamental rights—such as war crimes—cannot be regarded as final judgments within the

[91] *Id.* at 132.
[92] *Id.* at 133.
[93] A. and B. v. Norway, App. Nos. 24130/11 & 29758/11, (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972.
[94] Nykänen v. Finland, App. No. 11828/11, (July 20, 2014), https://hudoc.echr.coe.int/eng?i=001-144112.
[95] Rinas v. Finland, App. no. 17039/13, (Jan. 27, 2015), https://hudoc.echr.coe.int/eng?i=001-150668.
[96] Jóhannesson & Others v. Iceland, App. no. 22007/11, (May 18, 2017), https://hudoc.echr.coe.int/eng?i=001-173498.
[97] Marguš v. Croatia [GC], App. No. 4455 /10, 116–118 &126–139 (May 27, 2014), https://hudoc.echr.coe.int/fre?i=001-144276.

autonomous E.C.H.R. meaning of Article 4.[98] The E.Ct.H.R. emphasized the growing tendency in international law to consider amnesties for serious violations of human rights as impermissible, stressing that Articles 2 and 3 E.C.H.R. impose positive obligations on states to investigate and prosecute such crimes. Consequently, Croatia's decision to re-indict and convict the applicant for war crimes was found consistent with the E.C.H.R. framework.[99] Additionally, *Lupeni Greek Catholic Parish v. Romania*[100] reiterated the importance of procedural safeguards and consistent application of A4P7.

1.2.4. EXISTENCE OF FINAL DECISION

The drafting history of Protocol No. 7 provides important context for interpreting Article 4. According to the Explanatory Report to Protocol No. 7,[101] the protection against double jeopardy applies only once a person has been "finally acquitted or convicted" in accordance with the domestic law and criminal procedure of the State concerned. This confirms that the principle is not engaged by every final decision in a

[98] *See* Elizabeth S. Bates, *Introductory Note to Margus v. Croatia (Eur. Ct. H.R.)*, 53 INT'L LEGAL MATERIALS 751 (2014); Svetlana Nenadic, *Ne Bis in Idem Principle in European Convention on Human Rights and Implementation of the Principle in Jurisprudence of European Court of Human Rights*, 52 J. CRIMIN. & CRIM. L. 141 (May-August 2014); *supra* note 60 (Neth.); Michail Vagias, *Rethinking Amnesties and the Function of the Domestic Judge*, 9 CONST. REV. 142 (2023) (Indon.); Tarhan Yusif ogli Shukurov, *Application of ECHR Case-Law by International Regional Courts of Human Rights*, 2021 UKR. J. INT'L L. 155 (Ukr.); Veljko Turanjanin & Jelena Stanisavljević, *Human Trafficking and Forced Prostitution Under Article 4 of the European Convention on Human Rights*, 25 GERMAN L.J. 262 (2024) (Germ.); McKenzie Gallagher, *Amnesty Laws in Modern Peace Agreements: An Analysis of the Northern Ireland Legacy Act under International Law,* 39 AM. U. INT'L L. REV. 327 (2024) (2024); Michael Hamilton & Antoine Buyse, *Human Rights Courts as Norm-Brokers*, 18 HUM. RTS. L. REV. 205 (2018) (U.K.); Miles Jackson, *Amnesties in Strasbourg*, 38 OXFORD J. LEGAL STUD. 451 (2018) (U.K.); Teodor-Viorel Gheorghe, *Particular Cases of Application of the Ne Bis In Idem Principle*, THE ANNALS OF "DUNAREA DE JOS" UNIVERSITY OF GALATI, June 2023, at 87 (Rom.); Goran Ilic, *Ne Bis in Idem Principle in Practice of the European Court of Human Rights*, 61 STRANI PRAVNI ZIVOT 21 (2017) (Serb.); Paolo Caroli, *Behind the Rhetoric: The Implications of Prohibiting Amnesties*, 13 J. COMP. L. 95 (2018).

[99] A central question in the E.Ct.H.R.'s jurisprudence concerns what qualifies as a "final" decision triggering the protection of *ne bis in idem*. In *Gözütok and Brügge*, Joined Cases C-187/01 and C-385/01, ECLI:EU:C:2003:87, the Court held that decisions of public prosecutors to discontinue proceedings following the fulfilment of conditions imposed on the accused must be treated as final for the purposes of Article 4 of Protocol No. 7, even though they were not issued by a court. In contrast, the Grand Chamber in *Marguš v. Croatia* emphasized that not every procedural termination falls within the protective scope of the provision. In that case, domestic proceedings had been discontinued on the basis of a general amnesty law covering acts committed during the war. The E.Ct.H.R. concluded that amnesty decisions relating to grave breaches of fundamental rights, such as war crimes, could not be regarded as "final acquittals or convictions" within the autonomous meaning of the Convention. The Court underscored that Article 4 of Protocol No. 7 must be interpreted consistently with Articles 2 and 3 of the ECHR, which impose positive obligations on states to investigate and prosecute serious human rights violations. As such, Croatia's decision to re-indict and convict the applicant was found compatible with the Convention framework.

[100] Lupeni Greek Catholic Parish v. Romania [GC], App. No. 76943/11, 84 (Nov. 29, 2016), https://hudoc.echr.coe.int/eng?i=001-169054.

[101] Council of Europe, Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 117 (Nov. 22, 1984).

broad sense, but only by those that carry the effect of res judicata, whether by acquittal or conviction. The Report thus establishes a narrow gateway to the protection of Article 4, limiting its scope to decisions that conclusively terminate criminal liability.

The protection afforded by A4P7 applies only where there has been a "final acquittal or conviction." As clarified in the *Explanatory Report to Protocol No. 7*,[102] this provision does not extend to every form of final decision, but only to those that determine criminal responsibility on the merits of the case. The E.Ct.H.R. in *Mihalache v. Romania [GC]*[103] emphasized that the decisive factor is not the formal classification of the decision, but its substantive content and legal effects. Crucially, judicial intervention is not required for a decision to qualify as an "acquittal" or "conviction": decisions of non-judicial authorities may fall within the scope of Article 4 if they involve an evaluation of the evidence and a determination of responsibility. In *Felix Guțu v. Moldova,*[104] the E.Ct.H.R. confirmed that even prosecutorial decisions may trigger ne bis in idem protection, provided that they include an assessment of the merits and produce binding legal effects.

Even in the absence of judicial involvement, a prosecutorial decision may qualify as a "conviction" if it entails an assessment of the evidence, a determination of responsibility, and the imposition of a sanction with punitive or deterrent purposes. In *Mihalache*, the prosecutor's discontinuance of proceedings, combined with the imposition of a penalty, was found to constitute a "conviction" within the meaning of Article 4 of Protocol No. 7.[105]

Conversely, decisions that merely terminate proceedings without an evaluation of the accused's guilt or innocence fall outside the scope of the provision. In *Smoković v. Croatia (dec.),*[106] the E.Ct.H.R. held that a ruling terminating criminal proceedings on grounds of statutory limitation could not amount to either a conviction or an acquittal, as

[102] *Id.*

[103] Mihalache v. Romania, App. No. 54012/10, 88-101 (July 8, 2019), https://hudoc.echr.coe.int/eng?i=001-194523; *See* Maria Beatrice Berna, *Hotărârea Curții Europene a Drepturilor Omului în cauza Mihalache împotriva României* [*Decision of the European Court of Human Rights in the Case Mihalache v. Romania*], DREPTURILE OMULUI, 2019, at 91 (Rom.); Cedric Serneels, *'Unionisation' of the European Court of Human Rights' Ne Bis in Idem Jurisprudence: The Case of Mihalache v Romania*, 11 NEW J. EUR. CRIM. L. 227 (2020) (U.K.); Matei Bratu & Mihaela Mazilu-Babel, *The Grand Chamber, ECHR. Mihalache v. Romania (Conviction): Ne Bis in Idem and the Final Decision of the Public Prosecutor. Implications in the Romanian Criminal Proceedings and on European Union Law*, 2019 PANDECTELE ROMANE 147 (Rom.); *supra* note 60. (Neth.).

[104] Felix Guțu v. Moldova, App. No. 13112/07, 47–54 (Mar. 24, 2020), https://hudoc.echr.coe.int/eng?i=001-205641; Anamaria Groza, *Res Judicata and the Principle of Effectiveness of European Law: A (Sometimes) Difficult Encounter?*, 13 PERSP. L. & PUB. ADMIN. 654 (2024) (Rom.).

[105] Mihalache v. Romania [GC], App. No. 54012/10, 99-101 (July 8, 2019), https://hudoc.echr.coe.int/fre?i=001-194523.

[106] Smoković v. Croatia (dec.), App. No. 57849/12, 43-45 (Nov. 21, 2019), https://hudoc.echr.coe.int/eng?i=001-199300.

no assessment of the facts or of the applicant's responsibility had taken place.[107] Thus, for the *ne bis in idem* protection to apply, the decision in question must reflect a substantive adjudication of the alleged conduct, not merely a procedural impediment to prosecution.

The *ne bis in idem* guarantee under A4P7 applies only once there is a "final" decision in the sense of res judicata. According to the Explanatory Report to Protocol No. 7, a decision is deemed final when it has become irrevocable—either because no further ordinary remedies are available, or because the parties have exhausted such remedies or allowed the time-limit to expire without pursuing them. The E.Ct.H.R. confirmed this in *Zolotukhin v. Russia [GC],*[108] holding that decisions subject to ordinary appeal fall outside the scope of the guarantee until the appeal period expires.[109] By contrast, extraordinary remedies, such as reopening proceedings or extending expired deadlines, are not taken into account when determining finality, as they are considered a continuation of the first proceedings rather than a bar to their finality.

In *Mihalache v. Romania [GC]*, the E.Ct.H.R. elaborated a structured methodology for assessing finality. It stressed that domestic law—both substantive and procedural—must satisfy the principle of legal certainty, which requires a clear and foreseeable time-limit for ordinary remedies.[110] A remedy that grants unlimited discretion to reopen proceedings or is otherwise imbalanced in its accessibility to the parties cannot be considered "ordinary" for Article 4. Applying this logic, the E.Ct.H.R. held that a higher-ranking prosecutor's unlimited power to re-examine a lower prosecutor's decision did not qualify as an ordinary remedy, and thus did not prevent the earlier decision from acquiring finality.[111]

The E.Ct.H.R. has consistently excluded certain procedural outcomes from the definition of a "final acquittal or conviction." For example, in *Sundqvist v. Finland*,[112] a decision by a prosecutor not to prosecute under domestic law did not qualify as final, thereby allowing subsequent proceedings. Likewise, in *Smirnova and Smirnova v. Russia (dec.)*[113] and *Harutyunyan v. Armenia (dec.),*[114] the E.Ct.H.R. reiterated that prosecutorial discontinuance does not amount to acquittal or conviction. Moreover, in *Marguš v.*

[107] *Id.*

[108] Sergey Zolotukhin v. Russia [GC], App. No. 14939/03 (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

[109] *Id.*

[110] Mihalache v. Romania [GC], App. No. 54012/10, 115 (July 8, 2019), https://hudoc.echr.coe.int/fre?i=001-194523.

[111] *Id.* at 117–25.

[112] Sundqvist v. Finland (dec.), App. No. 75602/01, (Nov. 22, 2005), https://hudoc.echr.coe.int/fre?i=001-71668.

[113] Smirnova v. Russia, App. Nos. 46133/99 & 48183/99 (Oct. 3, 2022), https://hudoc.echr.coe.int/eng?i=001-22725.

[114] Harutyunyan v. Armenia (dec.), App. No. 34334/04 (Dec. 26, 2006), https://hudoc.echr.coe.int/eng?i=001-78739.

Croatia [GC],[115] the E.Ct.H.R. ruled that termination of proceedings by amnesty for grave breaches of human rights—such as war crimes—falls outside the protection of Article 4, as granting impunity for such crimes would contravene Articles 2 and 3 of the E.C.H.R. (§§). Similarly, in *Horciag v. Romania (dec.),*[116] a prosecutor's order for provisional psychiatric internment was excluded from the scope of "final" decisions.

Finally, the E.Ct.H.R. has clarified that the relevance of finality may depend on whether the case involves dual but integrated proceedings. In *Johannesson and Others v. Iceland,*[117] it was unnecessary to determine when the tax proceedings became final, as they formed part of a single integrated response. By contrast, in *Nodet v. France*[118] and *Korneyeva v. Russia,*[119] the Court examined finality more closely because the two proceedings could not be treated as a single proceeding. Thus, while finality is a precondition for A4P7 to apply, its practical importance varies depending on whether the case concerns duplicative or complementary proceedings.

1.3. E.U. CHARTER OF FUNDAMENTAL RIGHTS (C.F.R.)

The establishment of the European Union's Area of Freedom, Security and Justice [hereinafter - A.F.S.J.] has significantly shaped the development of E.U. criminal law and the protection of fundamental rights. As Koen Lenaerts explains, the A.F.S.J. is rooted in the progressive communitarisation of justice and home affairs, culminating in the Treaty of Lisbon,[120] which conferred binding legal status to the Charter of Fundamental Rights of the European Union [hereinafter - C.F.R.].[121] This shift acknowledged that free movement within the E.U. required not only mutual recognition of judgments, but also minimum procedural guarantees to foster mutual trust within the E.U. legal order among

[115] Marguš v. Croatia [GC], App. No. 4455/10, 120–141 (May 27, 2014), https://hudoc.echr.coe.int/fre?i=001-144276.

[116] Horciag v. Romania, App. No. 70982/01, (Mar. 15, 2005), https://hudoc.echr.coe.int/eng?i=001-68815.

[117] Johannesson & Others v. Iceland, App. No. 22007/11, 48 (May 18, 2017), https://hudoc.echr.coe.int/eng?i=001-173498.

[118] Nodet v. France, App. No. 47342/14, 46 (June 6, 2019), https://hudoc.echr.coe.int/fre?i=001-193457. *See* Mario Libertini, *Cumulative Enforcement of European and National Competition Law and the Ne Bis In Idem Principle: Case Comment to the Judgement of EU Court of Justice of 3 April 2019 Powszechny Zaklad Ubezpieczen na Zycie S.A. v Prezes Urzedu Ochrony Konkurencji i Konsumentow (Case C-617/17)*, YARS, (Aug. 2019), at 231 (Pol.).

[119] Korneyeva v. Russia, App. No. 72051/17, 48, 58 (Oct. 8, 2019), https://hudoc.echr.coe.int/fre?i=001-196372. *See* Ben Wild, *E.Ct.H.R. Cases October-December 2019*, 11 New J. Eur. Crim. L. 93 (2020) (Eur.).

[120] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (Dec. 13, 2007), 2007 O.J. (C 306) 1.

[121] Charter of Fundamental Rights of the European Union art. 50, (Dec. 7, 2000), 2000 O.J. (C 364) 1; *see also* Koen Lenaerts, *The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice*, 59 Int'l & Comp. L.Q. 255, 256-57 (2010) (U.K).

Member States. However, since the Tampere Programme,[122] legislative initiatives have largely prioritized prosecutorial efficiency over defence rights, raising concerns about whether the balance between freedom, security, and justice remains sustainable.[123]

The *ne bis in idem* rule, also known as the prohibition of double jeopardy, has long been recognized in international human rights law and in the domestic systems of all European Economic Area states.[124] While Article 14(7) of the I.C.C.P.R. and A4P7 to the E.C.H.R. enshrine the principle, their application is confined to proceedings within the same state. The C.F.R. subsequently introduced a regional guarantee in Article 50, ensuring its application across the E.U. legal order. As Fletcher observes, the first genuine attempt to extend this protection to the inter-state level within the E.U. emerged in the 1987 Convention under the European Political Cooperation framework,[125] which—though never ratified—paved the way for its formal incorporation into the Schengen acquis through Article 54 of the C.I.S.A.[126] In parallel, the E.Ct.H.R. has built a robust jurisprudence, from *Zolotukhin v. Russia*[127] to *A and B v. Norway,*[128] clarifying the factual scope of "same offence" and the permissible limits of dual proceedings. Against this backdrop, a critical assessment of E.U. policy has noted that, particularly since Tampere, emphasis has been placed on prosecutorial efficiency rather than minimum procedural safeguards.[129] This imbalance raises concerns about the E.U. 's ability to ensure a coherent and rights-oriented A.F.S.J., particularly in light of the reliance on mutual recognition mechanisms. For candidate states such as Serbia, this dual framework—anchored in both Strasbourg and Luxembourg jurisprudence—poses an additional challenge: harmonising domestic law with evolving supranational standards.

[122]Presidency Conclusions, Tampere European Council (15–16 October 1999), https://www.europarl.europa.eu/summits/tam_en.htm.

[123]*Id.* at 257–58.

[124]*See* Boštjan M. Zupančič, *Ne Bis in Idem – Zabrana Ponovnog Suđenja za Isto Delo – La Belle Dame Sans Merci*, 2 Crimen 171 (2011) (Serb.).

[125]Convention Between the Member States of the European Communities on Double Jeopardy, (May 25, 1987), 1987 O.J. (C 151) 2 (not in force).

[126]*See* Maria Fletcher, *Some Developments to the Ne Bis In Idem Principle in the European Union: Criminal Proceedings Against Hüseyn Gözütok and Klaus Brügge*, 66 Mod. L. Rev. 769, 769–70 (2003) (U.K.); *see also* Marina Matić Bošković & Jelena Kostić, *The Application of the "Ne Bis in Idem" Related to Financial Offences in the Jurisprudence of the European Courts*, 25 NBP: Nauka, Bezbednost, Policija 67 (2020) (Serb.).

[127]Sergey Zolotukhin v. Russia [GC], App. No. 14939/03 (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

[128]A. and B. v. Norway, App. Nos. 24130/11 & 29758/11, (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972.

[129]*See* Laurens van Puyenbroeck & Gert Vermeulen, *Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU*, 60 INT'L & COMP. L.Q. 1017, 1017–38 (2011) (U.K.).

The Lisbon Treaty's elevation of the C.F.R. gave Article 50 binding legal force, thereby consolidating *ne bis in idem* as a core component of E.U. fair trial rights.[130] The provision prohibits a person from being tried or punished twice for the same offence once a final judgment has been rendered, and—unlike national double jeopardy rules—it applies transnationally across Member States, thus strengthening legal certainty and mutual trust in cross-border cooperation.[131] The C.J.E.U. has interpreted Article 50 broadly, focusing on the material facts of the case (*idem factum*) rather than its legal characterisation,[132] and has stressed uniform application across the Union.[133] This jurisprudence confirms the central role of Article 50 C.F.R. in shaping the balance between mutual recognition and fundamental rights protection within the A.F.S.J.[134]

This functional approach has been consistently applied in landmark cases. In *Van Esbroeck*[135] and *Van Straaten,*[136] the C.J.E.U. held that *ne bis in idem* applies where prosecutions involve the same set of factual circumstances, regardless of national legal

[130] Aart de Vries, *The Principle of Ne Bis In Idem (Article 50 of the Charter) at the Cross-Border Interface of Punitive Administrative and Criminal Proceedings in the European Union*, REV. EUR. ADMIN. L., July 2024, at 123 (Neth.); *see also* Jonathan Tomkin, *Right Not to Be Tried or Punished Twice in Criminal Proceedings for the Same Criminal Offence*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 1373 (Steve Peers et al. eds., 2021) U.K.); *see* Magdalena Ličková, *Article 50: The Elusive Shape of the Ne Bis In Idem Rule*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS IN THE MEMBER STATES 385 (Michal Bobek & Jeremias Adams-Prassl eds., 2022) (U.K.).

[131] *See* André Klip, *Jurisdiction and Transnational Ne Bis In Idem in Prosecution of Transnational Crimes*, *in* THE OXFORD HANDBOOK OF CRIMINAL PROCESS 477 (Darryl K. Brown et al eds., 2019) (U.K.).

[132] *See* Case C-617/10, Åklagaren v. Åkerberg Fransson, ECLI:EU:C:2013:105 (Feb. 26, 2013). *See also* Ulf Bernitz, *The Scope of the Charter and its Impact on the Application of the ECHR The Åkerberg Fransson Case on Ne Bis in Idem in Perspective*, in Sybe de Vries, Ulf Bernitz & Stephen Weatherill, The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing 155-173 (Bloomsbury, 2015), 163; Ger Coffee, An Interpretative Analysis of the European Ne Bis in Idem Principle Through the Lens of ECHR, CFR and CISA Provisions: Are Three Streams Flowing in the Same Channel?, 14 New J. Eur. Crim. L. 345 (2023), https://doi.org/10.1177/20322844231160246.

[133] *See, e.g.*, Annegret Engel, Xavier Groussot & Emilia Holmberg, *The Digital Markets Act and the Principle of Ne Bis In Idem: A Revolution in the Enforcement of EU Competition Law?*, *in* NEW DIRECTIONS IN DIGITALISATION: PERSPECTIVES FROM EU COMPETITION LAW AND THE CHARTER OF FUNDAMENTAL RIGHTS 187 (Annegret Engel et al eds., 2025) (U.K.).

[134] *See* Tomkin, *supra* note 130; Ličková, *supra* note 130.

[135] Case C-436/04, Criminal Proceedings Against Van Esbroeck, 2006 E.C.R. I-2333. *See also* Michiel Luchtman, *Transnational Law Enforcement in the European Union and the Ne Bis in Idem Principle*, 4 in REALAW, REVIEW OF EUROPEAN ADMINISTRATIVE LAW 5 (December 2011); Eleanor Sharpston & José Maria Fernández-Martín, *Some Reflections on Schengen Free Movement Rights and the Principle of Ne Bis in Idem*, 10 Cambridge Y.B. Eur. Legal Stud. 413 (2008), https://doi.org/10.1017/S1528887000001385; Alessandro Rosano, *Ne Bis Interpretatio in Idem? The Two Faces of the Ne Bis in Idem Principle in the Case Law of the European Court of Justice*, 18 GERMAN L.J. 39 (January 2017).

[136] Case C-150/05, Jean Leon Van Straaten v. Staat der Nederlanden and Republiek Italië, 2006 E.C.R. I-9327.

definitions.[137] In *Kraaijenbrink,*[138] the C.J.E.U. introduced the "essential elements" test to assess whether materially identical conduct could nonetheless constitute separate offenses due to differing legal components.[139] Later, in *M and Others,*[140] the C.J.E.U. reaffirmed that administrative and criminal proceedings concerning the same facts may trigger Article 50 if the sanctions are punitive in nature.[141]

The jurisprudence evolved further in *Åkerberg Fransson*[142] and *Menci,*[143] which addressed the limits of dual proceedings involving tax and financial offenses. The C.J.E.U. acknowledged that administrative and criminal sanctions may coexist if they pursue

[137]In the first place, *Van Esbroeck* (Case C-436/04, Criminal Proceedings Against Van Esbroeck, 2006 E.C.R. I-2333) involved an individual prosecuted in Belgium for importing narcotics into the country, after having already been convicted in Norway for exporting the same narcotics. The CJEU held that the *ne bis in idem* principle applies to "the same acts", rather than offenses defined by specific national laws. Therefore, the CJEU looked at the material facts of the case (the acts) rather than the legal characterization of the offenses in each country. This case established the standard that the "same offense" should refer to the same set of facts, not necessarily the same legal classification of the offense. Secondly, Van Straaten (Case C-150/05, Jean Leon Van Straaten v. Staat der Nederlanden and Republiek Italië, 2006 E.C.R. I-9327) was convicted in Italy for narcotics trafficking and then faced prosecution in the Netherlands for transporting the same drugs. The CJEU ruled that if the material acts that constituted the offense were the same, and there had already been a final decision in one EU country, a second prosecution was barred by the *ne bis in idem* principle. Accordingly, this case reinforced that the focus is on the actual conduct rather than the specific legal definitions, confirming that the CJEU's interpretation centers on material facts.

[138]Case C-367/05, Criminal Proceedings Against Kraaijenbrink, 2007 E.C.R. I-6619.

[139]The *Kraaijenbrink* case (Case C-367/05, Criminal Proceedings Against Kraaijenbrink, 2007 E.C.R. I-6619) concerned financial crimes and involved an individual prosecuted in Belgium for laundering money earned through criminal activities committed in other EU countries. The CJEU clarified that where offenses are distinct in their legal classification but involve materially identical conduct—i.e., the same concrete facts—the principle of *ne bis in idem* may apply. However, if the offenses include additional and separate elements, such as different victims or intents, they may constitute separate offenses. In this way, the CJEU introduced what has become known as the "essential elements" test, explaining that multiple prosecutions may be permissible when the offenses are not materially identical despite factual overlap.

[140]Case C-398/12, Criminal Proceeding Against M, ECLI:EU:C:2014:1057 (June 5, 2014).

[141]The *M and Others* case (Case C-398/12, Criminal Proceeding Against M., ECLI:EU:C:2014:1057 (June 5, 2014)) involved an individual subject to sanctions in Italy and then in the UK for similar anti-money laundering offenses. The CJEU reiterated that offenses are considered the "same" for the purposes of *ne bis in idem* if they concern identical material acts (same facts) and are indivisibly linked. It also held that administrative penalties may trigger the principle if they have a punitive nature. This case reinforced the focus on identical material acts and emphasized that both administrative and criminal sanctions could fall under *ne bis in idem* if the administrative sanctions are punitive.

[142]Case C-617/10, Åklagaren v. Åkerberg Fransson, ECLI:EU:C:2013:105 (Feb. 26, 2013). *See* Dawid Miasik & Kamil Kapica, *The Duty of National Administrative Authorities to Respect the EU's Fundamental Rights in Fining Procedures and the Consequences Thereof*, 28 BIAŁOSTOCKIE STUDIA PRAWNICZE 35 (2023).

[143]Case C-524/15, Criminal Proceedings Against Luca Menci, ECLI:EU:C:2018:197 (Mar. 20, 2018).

complementary aims, are proportionate, and avoid excessive punitive duplication.[144] Since *Menci*, the C.J.E.U. has refined these criteria in a series of judgments.[145] In *Garlsson Real Estate* (2018),[146] it held that financial penalties imposed by a supervisory authority precluded subsequent criminal proceedings where both addressed the same conduct with punitive effect. Similarly, in *Di Puma and Zecca* (2018),[147] the C.J.E.U. clarified that the discontinuation of criminal proceedings due to insufficient evidence barred further

[144]The *Luca Menci* case (Case C-524/15, Criminal Proceedings Against Luca Menci, ECLI:EU:C:2018:197 (Mar. 20, 2018) concerned tax offenses, where an individual faced both administrative and criminal proceedings for failing to pay VAT. The CJEU acknowledged that certain types of dual proceedings—administrative and criminal—could be compatible with *ne bis in idem*, provided they pursue different aims and are proportionate. However, if the penalties are for the same facts and serve no additional purpose, then *ne bis in idem* would apply. The *Menci* case clarified the criteria for when both administrative and criminal penalties might apply and helped define the limits of the *ne bis in idem* principle in relation to dual proceedings. Finally, the *Åkerberg Fransson* case (Case C-617/10, Åklagaren v. Åkerberg Fransson, ECLI:EU:C:2013:105 (Feb. 26, 2013) concerned a person faced both administrative and criminal sanctions in Sweden for tax evasion. The CJEU found that the *ne bis in idem* principle may prevent double penalties for the same tax-related offenses if they are of a criminal nature. However, it allowed some flexibility, noting that both sanctions could be permissible if they met certain proportionality and necessity criteria. This case highlighted the possibility of separate sanctions under specific conditions and provided a framework for proportionality and necessity in dual sanctions. About this case *see also* Ulf Bernitz, *The Scope of the Charter and its Impact on the Application of the ECHR: The Åkerberg Fransson Case on Ne Bis in Idem in Perspective*, in THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT: FIVE YEARS OLD AND GROWING 155, 155-173 (Sybe de Vries et al. eds.); *see* Anna Błachnio-Parzych, *Gloss to the Judgment of the Court of Justice of the European Union in Case C-524/15, Criminal Proceedings against Luca Menci*, 45 REV. EUR. & COMP. L. 207 (2021). We could say that these cases together illustrate the CJEU's approach to interpreting "same offense" based on the material facts rather than solely on the legal characterization of the offense, allowing *ne bis in idem* to apply even in cases of dual administrative and criminal proceedings under certain conditions.

[145]*See* Koen Lenaerts, *Limits on Limitations: The Essence of Fundamental Rights in the EU*, 20 GERMAN L.J. 779 (2019).

[146]Case C-537/16, Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e la Borsa (Consob), ECLI:EU:C:2018:193 (March 20, 2018). *See also* Sanda Ileana Pelea, Ne Bis in Idem - Addition of Criminal and Fiscal or Administrative Proceedings. The Case of Italy, 2020 CDP 42 (2020); Gianni Lo Schiavo, *The Principle of Ne Bis in Idem and the Application of Criminal Sanctions: Of Scope and Restrictions*, 14 EUROPEAN CONSTITUTIONAL LAW REVIEW 644 (2018); Case C-537/16, Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e la Borsa (Consob), ECLI:EU:C:2018:193 (Mar. 20, 2018); Joined Cases C-596/16 and C-597/16, Enzo Di Puma v. Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) v. Antonio Zecca, ECLI:EU:C:2018:192 (Mar., 20, 2018); Jeroen Dewispelaere & Joren Vuylsteke, *Request for a Preliminary Ruling on the Non Bis in Idem Principle in Competition Law Matters, or How to Reconcile Homogeneity and Effectiveness*, 4 EUR. COMPETITION & REG. L. REV. 111 (2020); Giulia D'Agnone, *On the Criteria Used for the Interpretation of the Charter of Fundamental Rights of the European Union: Some Short Remarks after Twenty Years from Its Proclamation*, 13 ITALIAN J. PUB. L. 619 (2021).

[147]Joined Cases C-596/16 and C-597/16, Enzo Di Puma v. Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) v. Antonio Zecca, ECLI:EU:C:2018:192 (Mar. 20, 2018). *See also* Max Vetzo, *The Past, Present and Future of the Ne Bis in Idem Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma*, 11 REALAW, REVIEW OF EUROPEAN ADMINISTRATIVE LAW 55 (2018); Anita Clifford, Introductory Note to Menci & Garlsson Real Estate SA and Others v. Commissione Nazionale per la Societa e la Borsa (Consob) & Joined Cases Di Puma v. Consob and Consob v. Zecca (CJEU) 57 INT'l LEGAL MATERIALS 583 (2018); Zoran Buric, *Ne Bis in Idem in European Criminal Law - Moving in Circles?*, 3 ECLIC 507 (2019); Vesna B. Ćorić & Ana S. Knežević Bojović, *Autonomous Concepts and Status Quo Method: Quest for Coherent Protection of Human Rights before European Supranational Courts*, 2020 STRANI PRAVNI ŽIVOT 27 (2020); Michael Chatzipanagiotis, *Disrupted Flights and Information Duties of Air Carriers: The Interplay Between Regulation (EC) No 261/2004 on Air Passenger Rights and the Unfair Commercial Practices Directive*, 43 AIR & SPACE L. 431 (2018).

administrative prosecution of the same facts. More recently, in *bpost* (2022)[148] and *Nordzucker* (2022),[149] the C.J.E.U. confirmed that parallel administrative and criminal proceedings may be permissible only when they pursue complementary objectives and are closely coordinated in time and substance. The pending and subsequent judgments, including *Volkswagen (C-27/22, 2023)*,[150] further highlight the cross-border implications of Article 50 C.F.R. in complex economic crime cases.

Taken together, these decisions illustrate the four cumulative requirements under EU law: the proceedings must concern the same person, relate to matters of a criminal nature, involve the same material facts (*idem factum*), and amount to a duplication of proceedings (*bis*). Where these conditions are satisfied, Article 50 C.F.R. provides robust protection against double prosecution. At the same time, the C.J.E.U. has emphasized that Member States remain free to provide a higher level of protection domestically. Still, Article 50 sets a binding minimum threshold that governs both national and cross-border enforcement.

While Article 50 C.F.R. provides a robust transnational guarantee within the E.U's legal framework, the broader international application of the *ne bis in idem* principle remains uneven. As Van den Wyngaert and Stessens have observed, the principle serves three distinct functions at the international level: as a bar to territorial prosecutions, to extraterritorial jurisdiction, and as a ground for refusal in international cooperation procedures.[151] However, national legal systems diverge significantly in their recognition of foreign judgments as having res judicata effect. In many civil law jurisdictions, such as Belgium, Austria, and France, foreign convictions or acquittals do not preclude domestic prosecution for the same act. In contrast, some common law countries—most notably the United States—grant constitutional status to the *ne bis in idem* principle and are more

[148] Case C-117/20, bpost SA v. Autorité belge de la concurrence, ECLI:EU:C:2022:202 (Mar. 22, 2022). *See also* Marco Cappai & Giuseppe Colangelo, *Applying Ne Bis In Idem in the Aftermath of Bpost and Nordzucker: The Case of EU Competition Policy in Digital Markets*, 60 COMMON MKT. L. REV. 431 (2023) (U.K.); Pieter Van Cleynenbreugel, *BPost and Nordzucker: Searching for the Essence of Ne Bis in Idem in European Union Law*, 18 EUCONST 357 (2022); Alessandro Nascimbeni, *The Italian Supreme Court and the European Ne Bis in Idem Principle: A Correct Decision Worthy of Some Criticism*, 3 ITALIAN REV. INT'L & COMPAR. L. 555 (2023) (It.).

[149] Case C-151/20, Bundeswettbewerbsbehörde v. Nordzucker AG and Others, ECLI:EU:C:2022:203 (Mar. 22, 2022). *See also* Carmen Balaci, *Relația dintre Curtea Europeană a Drepturilor Omului și Curtea de Justiție a Uniunii Europene în contextul cooperării judiciare internaționale în materie penală* [*The Relationship Between the European Court of Human Rights and the Court of Justice of the European Union in the Context of International Judicial Cooperation in Criminal Matters*], 31 REVISTA DREPTUL 115 (2020); Auke Willems, *The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal*, 20 GERMAN L.J. 468 (2019) (U.K.).

[150] Case C-27/22, Volkswagen Group Italia S.p.A. e Volkswagen Aktiengesellschaft v. Autorità Garante della Concorrenza e del Mercato (AGCOM), ECLI:EU:C:2023:663 (Sep. 14, 2023).

[151] *See* Christine Van den Wyngaert & Guy Stessens, *The International Non Bis In Idem Principle: Resolving Some of the Unanswered Questions*, 48 INT'L & COMPAR. L.Q. 779, 783 (1999) (U.K.).

willing to respect foreign res judicata.[152] These disparities reflect the challenges of harmonizing legal standards across jurisdictions and underscore the need for more comprehensive international consensus on the scope and binding force of the principle beyond the E.U. context.

As scholars and jurists have observed, divergent national interpretations of *ne bis in idem* risk undermining the coherence and effectiveness of judicial cooperation in criminal matters within the E.U. Siniša Rodin has warned that reasoning about *ne bis in idem* strictly within national procedural frameworks can have adverse systemic consequences, including legal uncertainty and even impunity.[153] This underscores the need for a transnational, E.U.-wide interpretation of the principle, such as that provided by the C.J.E.U. under Article 50 C.F.R. Only by interpreting *ne bis in idem* through a harmonized, supranational lens—focused on factual identity and finality of judgment—can mutual recognition function effectively in a shared legal space.

1.4. SCHENGEN AREA AND ARTICLE 54 OF THE C.I.S.A.

While Article 50 C.F.R. enshrines the *ne bis in idem* principle within the E.U.'s constitutional order, the foundation for its transnational application was laid earlier through the Schengen acquis. As Van den Wyngaert and Stessens recount, the pursuit of an effective multilateral *non bis in idem* regime emerged from the failure of prior Council of Europe treaties to secure sufficient ratification.[154] In contrast, the 1990 Schengen Implementation Convention [hereinafter C.I.S.A.] succeeded where earlier instruments fell short, offering binding *erga omnes* protection among participating States. Article 54 C.I.S.A. explicitly provides that a person who has been finally judged by one Contracting Party "may not be prosecuted by another Contracting Party for the same acts," provided that any sentence imposed has been served, is being served, or can no longer be executed. This framework introduced a novel form of transnational res judicata within the European legal space—one that, unlike earlier efforts, was directly tied to the abolition of internal border controls and the need for mutual trust among Member States.

Article 54 of the C.I.S.A. articulates the *ne bis in idem* principle in the context of transnational criminal justice within the Schengen Area. It provides that an individual whose trial has been "finally disposed of" in one Contracting Party may not be

[152] *Id.* at 783-784.
[153] *See* Siniša Rodin, *Constitutional Relevance of Foreign Court Decisions*, 64 AM. J. COMPAR. L. 815, 827 (2016).
[154] *See* Van den Wyngaert & Stessens, *supra* note 151, at 781–783 (1999) (U.K.).

prosecuted in another for the same acts, provided that any penalty imposed has been enforced, is in the process of enforcement, or can no longer be executed under the sentencing state’s law. This provision is pivotal in ensuring cross-border legal certainty and preventing multiple prosecutions across Member States for the same factual conduct. Consistent with the C.J.E.U.’s interpretation in *Van Esbroeck* and *Van Straaten*, the “same acts” standard refers to the material facts of the case, irrespective of legal classification under national laws. Thus, a prosecution in one Schengen state bars further action in another, even where the offense is categorized differently.

A key condition for triggering Article 54 is finality—the judgment must no longer be subject to appeal—and enforceability of the sentence. This ensures that the rule cannot be used to escape accountability by exploiting jurisdictional boundaries within the E.U. The effectiveness of Article 54 rests on the principle of mutual recognition and mutual trust among Schengen states. In *Kretzinger* (C-288/05), the C.J.E.U. reaffirmed that such trust underpins cross-border cooperation, allowing national courts to rely on the finality and fairness of each other’s judicial outcomes.[155] This doctrine of trust facilitates legal integration while upholding individual rights and procedural safeguards in the shared E.U. judicial space.

1.5. RELATIONSHIP BETWEEN ARTICLE 50 C.F.R. AND ARTICLE 54 C.I.S.A.

In this place, it is necessary to explain the geographic, historic, and legal relationship between Article 50 C.F.R. and Article 54 C.I.S.A. The relationship between Article 50 of the C.F.R. and Article 54 of the C.I.S.A. is a complex interplay of geographic, historical, and legal factors, centered around the *ne bis in idem* principle, which protects individuals from being prosecuted or punished twice for the same offense. The geographic dimension of this relationship stems from the partial overlap between the territorial scope of E.U. law and the Schengen Area, as the Charter applies to E.U. Member States. At

[155] The C.J.E.U. emphasized the importance of mutual trust for smooth cross-border cooperation and the recognition of judicial outcomes in *Kretzinger* (Case C-288/05, Criminal proceedings against Jürgen Kretzinger, E.C.R. 2007 I-06441). In this case, the C.J.E.U.underscored that mutual trust among Member States is fundamental to the Schengen Area’s functioning, particularly in applying the *ne bis in idem* principle under Art. 54 of the *Convention Implementing the Schengen Agreement* (CISA). In *Kretzinger*, the CJEU explored how mutual trust underpins the Schengen framework and enables Member States to recognize and respect each other’s legal outcomes. The C.J.E.U. reasoned that trust is crucial to maintaining a system where individuals are not prosecuted multiple times across Member States for the same acts, provided the criteria under Art. 54 are met. The case helped clarify that such mutual trust facilitates cooperation in judicial matters and enhances the efficiency of cross-border justice. This principle has since been reinforced in subsequent C.J.E.U. cases, affirming its importance in ensuring smooth legal operations within the EU and the Schengen Area.

the same time, the Schengen acquis—including Article 54 C.I.S.A.—extends both to most E.U. Member States and to several associated non-EU countries (e.g., Norway, Switzerland, Iceland, and Liechtenstein). Article 50 C.F.R. applies to all E.U. Member States. In contrast, Article 54 C.I.S.A. is directly applicable within the Schengen Area, supporting the *ne bis in idem* principle in cross-border criminal justice cooperation.

The relationship between Article 50 C.F.R. and Article 54 C.I.S.A. illustrates the historical layering of supranational safeguards against double prosecution. Article 54 first introduced a cross-border *ne bis in idem* guarantee within the Schengen framework, extending also to associated non-E.U. states such as Norway and Switzerland. With the Lisbon Treaty, Article 50 C.F.R. elevated this protection to Union-wide status, consolidating it as a general principle of E.U. law. Together, the two provisions establish a coherent transnational shield against repeated prosecution, though operating within distinct institutional frameworks.

Historically, Article 54 C.I.S.A. predates the C.F.R., having been introduced to ensure legal safeguards in the context of open borders established by the Schengen Agreement (1985) and its 1990 Convention. It created a judicial mechanism to prevent multiple prosecutions for the same acts across national boundaries. The C.F.R., adopted in 2000 and gaining binding status through the Treaty of Lisbon (2009), consolidated fundamental rights protections within the E.U., including ne bis in idem, into a unified legal instrument.

Legally, the two provisions are complementary but distinct. Article 50 C.F.R. provides a general prohibition of double jeopardy under E.U. law, applicable both within and across Member States when E.U. law is engaged. In contrast, Article 54 C.I.S.A. is specifically tailored to cross-border cooperation, applying only to final judgments involving "the same acts," provided any sentence has been executed or is unenforceable under the law of the first forum.

The C.J.E.U. has played a central role in clarifying this relationship. While both articles uphold *ne bis in idem*, Article 54 is more procedurally bounded: it applies only after

a judgment has res judicata status and includes enforceability conditions.[156] Although these criteria are not explicitly part of Article 50 C.F.R, the C.J.E.U. has interpreted the two provisions harmoniously, promoting a coherent standard of legal certainty and mutual trust.

In sum, Article 50 C.F.R. and Article 54 C.I.S.A. work together to form a cohesive framework protecting individuals from duplicative criminal proceedings within the E.U. and Schengen Area. Article 50 affirms a foundational right applicable throughout the Union, while Article 54 operationalizes that right in transnational judicial cooperation. Together, they reinforce the E.U.'s commitment to fundamental rights and the rule of law in a shared legal space.

[156]The C.J.E.U. has specified various limits to the *ne bis in idem* principle under Art. 54 of the Convention Implementing the Schengen Agreement (CISA) in several key cases. These cases have clarified the conditions under which the *ne bis in idem* principle applies, focusing particularly on the "finality" of judgments, the requirement that penalties have been "executed" or "enforceable," and the concept of the "same offense". Besides the already mentioned *Van Esbroeck* (Case C-436/04, Criminal proceedings against Leopold Henri Van Esbroeck, E.C.R. 2006 I-02333), *Kretzinger* (Case C-288/05, Criminal proceedings against Jürgen Kretzinger, E.C.R. 2007 I-06441), *Gözütok and Brügge* (Joined Cases C-187/01 and C-385/01, Criminal proceedings against Hüseyin Gözütok (C-187/01) and Klaus Brügge (C-385/01), E.C.R. 2003 I-01345) cases, the C.J.E.U. ruled that the *ne bis in idem* principle applies not only to judicial convictions but also to situations where a prosecution was discontinued under certain conditions, such as when a settlement has been reached. The principle applies even if the case was resolved without a formal judgment, as long as it was discontinued in a way that prevents further prosecution for the same offense in that state. This established that the *ne bis in idem* principle can apply to cases not resulting in a traditional verdict, broadening the scope of Article 54 CISA to include alternative resolutions. In *Gasparini* (Case C-467/04, Criminal proceedings against Giuseppe Francesco Gasparini and Others, E.C.R. 2006 I-09199), the C.J.E.U. dealt with a case where a person was acquitted in one state and then prosecuted in another for the same offense. The C.J.E.U. ruled that an acquittal due to insufficient evidence still qualifies as a "final judgment" under Art. 54, thus barring further prosecution in another Member State, so this ruling affirmed that an acquittal, even if based on procedural grounds, could trigger ne bis in idem protection under Art. 54. In *Kozłowski* (Case C-66/08, Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski, E.C.R 2008 I-06041) the CJEU addressed what it means for a sentence to be "enforced" or "executable" under Article 54 CISA. The C.J.E.U. found that for Art. 54 to apply, the person must have either served the sentence or be in a situation where enforcement has effectively commenced or can still be carried out. The decision clarified that the *ne bis in idem* principle does not apply if a penalty has been imposed but not executed and is not enforceable in the state of the first conviction. (Case C-398/12, Criminal Proceeding Against M, ECLI:EU:C:2014:1057 (June 5, 2014)) examined situations where different offenses arising from the same factual circumstances could lead to prosecutions in different countries. The C.J.E.U. ruled that prosecutions for different legal interests (e.g., tax versus customs offenses) could proceed, even if based on the same facts, as long as the nature of the offenses differs significantly. This judgment introduced a limit on the *ne bis in idem* principle by allowing prosecutions for offenses that protect different legal interests, even if they share factual overlaps. In *Spasic* (Case C-129/14 PPU Zoran Spasic, ECLI:EU:C:2014:586 (May 27, 2014)), the C.J.E.U. addressed whether a conviction in one Member State barred prosecution in another if the sentence was not yet fully enforced. This court held that *ne bis in idem* applies only if the sentence has either been executed or is no longer enforceable in the issuing state. This decision reinforced that the execution or enforceability of a sentence is crucial to invoking the *ne bis in idem* principle under Art. 54 CISA. *See* Libor Klimek, *Ne Bis in Idem as a Modern Guarantee in Criminal Proceedings in Europe*, 4 AJEE 101 (2022).

1.6. THE *NE BIS IN IDEM* PRINCIPLE IN INTERNATIONAL CRIMINAL LAW: I.C.C. AND AD HOC TRIBUNALS

In the domain of international criminal law, Serbia has accepted the jurisdiction of the I.C.C. through ratification of the Rome Statute.[157] Article 20 of the Rome Statute enshrines the *ne bis in idem* principle by prohibiting the I.C.C. from retrying individuals who have already been finally convicted or acquitted for the same conduct. At the same time, it restricts domestic courts from prosecuting individuals for crimes within the I.C.C. 's jurisdiction who have already been tried, unless the prior proceedings were conducted to shield the accused from accountability or were manifestly lacking in independence and impartiality. This dual structure reinforces the principle of complementarity by ensuring that both international and national proceedings respect the finality of judgments while preventing impunity through sham trials.[158]

The Statutes of international tribunals such as the I.C.T.Y. and I.C.T.R. likewise embed the principle of *ne bis in idem*.[159] Article 10 of the I.C.T.Y. Statute grants the Tribunal primacy over national courts, ensuring that once proceedings have occurred at the international level, domestic prosecutions cannot conflict with or undermine them (downward effect).[160] Conversely, the Statute also recognizes an upward effect: a final

[157] Law on Ratification of the Rome Statute of the International Criminal Court, Official Gazette of the FRY - International Treaties, no. 5/2001. *See* Banović et al., *supra* note 16.

[158] *See* Rome Statute of the International Criminal Court art. 20, (July 17, 1998). In art. 20 para. 1 it is prescribed that "no one shall be tried before this Court for conduct that constitutes a criminal offense for which this Court has already convicted or acquitted him, except in cases provided by the Statute", while the same article in para. 3 provides that "anyone who has been tried before another court for a criminal offense from art. 6, 7 or 8 shall not be tried before this Court, unless the proceedings before another court are conducted: (a) In order to avoid criminal responsibility for criminal acts within the jurisdiction of the Court; or (b) because the trial was not conducted in a way that would ensure independence in decision-making and impartiality in accordance with the principles of conducting the proceedings, or the proceedings were conducted in a manner that, under the given conditions, was inconsistent in carrying out the intention to bring the defendant to justice." This is about the principle of complementarity. *See generally* Evode Kayitana, *Complementarity and Completed Trials: Reforming the Ne Bis In Idem Clause of Article 20(3) of the Rome Statute*, AFR. J. HUM. RTS. 1 (2017); Gerard Conway, *Ne Bis In Idem in International Law*, 3 INT'L CRIM. L. REV. 217 (2003); ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 899-931 (Otto Triffterer & Kai Ambos eds., 2016); Kai Ambos, Rome Statute of the International Criminal Court: Article-by-Article Commentary 1094-1128 (2022); Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis In Idem*, 8 SANTA CLARA J. INT'L L. 165 (2010).

[159] *See* KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME II – THE CRIMES AND SENTENCING 278 (2014) (U.K.).

[160] *See* Statute of the International Criminal Tribunal for the Former Yugoslavia art. 10, S.C. Res. 827 (May 25, 1993). *See also* Nezir Pivić & Leila Zilić-Čurić, *Ne bis in idem i pravna sigurnost građana (norma i praksa u Bosni i Hercegovini)* [*Ne Bis In Idem and Legal Security of Citizens (Norm and Practice in Bosnia and Herzegovina)*], *in* NAČELO NE BIS IN IDEM I PRAVNA SIGURNOST GRAĐANA (MEĐUNARODNI PRAVNI STANDARDI, REGIONALNA ZAKONODAVSTVA I ISKUSTVA U PRIMENI) [THE PRINCIPLE OF NE *BIS IN IDEM* AND LEGAL SECURITY OF CITIZENS (INTERNATIONAL LEGAL STANDARDS, REGIONAL LEGISLATION AND EXPERIENCES IN APPLICATION)] 269, 273 (Stanko Bejatović & Nataša Novaković eds., 2022).

decision by a national court may, under certain conditions, preclude prosecution before the Tribunal, provided that the prior proceedings were impartial, independent, and not intended to shield the accused from responsibility.[161] These dual-direction protections elevate *ne bis in idem* into a fundamental safeguard of international criminal justice, preserving legal certainty, preventing duplicative prosecutions, and reinforcing the finality of authoritative decisions.

2. *NE BIS IN IDEM* PRINCIPLE IN SERBIAN LEGAL SYSTEM - LEGAL FRAMEWORK AND ITS EFFECTS

2.1. CONSTITUTIONAL FRAMEWORK OF THE *NE BIS IN IDEM* PRINCIPLE IN SERBIA

The *ne bis in idem* principle is enshrined in several international legal instruments, most of which have been ratified by the Republic of Serbia. In Serbian national legislation, the principle of *ne bis in idem* is primarily upheld by the Constitution of the Republic of Serbia, the highest legal act governing fundamental relations in the state and society. According to Article 16 of the Constitution of the Republic of Serbia, ratified international treaties and generally accepted rules of international law form an integral part of the domestic legal order and are directly applicable, provided they do not conflict with the Constitution. This framework grants international standards—especially those safeguarding due process—a direct influence on domestic jurisprudence, including the application of *ne bis in idem* across criminal and quasi-criminal domains.

The Constitution of the Federal Republic of Yugoslavia of 1992 was the first to elevate the prohibition of double jeopardy to the status of a constitutional principle, codifying it in Article 28.[162] This provision was nearly identical to the current constitutional formulation and marked a departure from earlier Yugoslav constitutions, which did not prohibit it.

Specifically, the Constitution stipulated that no one could be reconvicted or punished for a crime if the legal proceedings had been definitively terminated—whether by dismissal of the indictment, suspension of proceedings, or a final acquittal or

[161] *See* Robin Geiß & Jelena Bäumler, *Ne bis in idem*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT'L LAW (Rüdiger Wolfrum ed., updated Aug. 2022), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e66?d=%2F10.1093%2Flaw%3Aepil%2F9780199231690%2Flaw-9780199231690-e66&p=emailAW1dJLD3T5Wds.

[162] Constitution of the Federal Republic of Yugoslavia, Official Gazette of the FRY, no. 1/92.

conviction. The Constitution of the Republic of Serbia has maintained and expanded this safeguard. Article 34(4) of the current Constitution provides:

"No one can be prosecuted or punished for a criminal offense for which they were acquitted or convicted by a final verdict, nor for an offense where the charge was finally rejected, or proceedings were finally suspended. Additionally, no court decision can be changed to the detriment of the defendant in procedures based on extraordinary legal remedies."

Importantly, the Constitution broadens the scope of *ne bis in idem* to cover proceedings beyond purely criminal matters. Article 34(5) prohibits not only renewed prosecution for the same offense, but also proceedings for other criminal offenses when essential elements overlap. This expansive formulation goes beyond the protections guaranteed under Protocol No. 7 to the E.C.H.R, which generally permits concurrent or successive proceedings of a criminal and non-criminal nature.[163]

Nonetheless, this constitutional guarantee is not absolute. Paragraph 5 of Article 34 permits the reopening of proceedings when new, significant facts emerge that could materially affect the outcome, or when grave procedural violations marred prior proceedings. Such retrials are narrowly construed and must adhere to due process guarantees. This broader framing of the *ne bis in idem* principle in Serbia's Constitution reflects an evolving legal landscape that increasingly emphasizes human rights protections. In line with international standards, Serbian law seeks to enhance legal certainty by expanding safeguards against double jeopardy. This evolution mirrors a broader trend in contemporary constitutional jurisprudence, in which principles such as *ne bis in idem* are regarded as fundamental to the rule of law and the protection of individual liberties.

[163]The Constitution expressly prohibits the simultaneous or successive initiation and conduct of another, non-criminal (misdemeanor, commercial offense) court proceeding against the same person for illegal behavior with essential elements of a criminal offense, for which a criminal proceeding has already been conducted before, which is a difference in relation to the Protocol VII to the European Convention, which in principle allows simultaneous or successive conduct of criminal and non-criminal proceedings for the same offense. *See* Miodrag N. Simovic & Vladimir M. Simovic, *Načelo ne bis in idem u kaznenom zakonodavstvu Bosne i Hercegovine i praksa Evropskog suda za ljudska prava i Ustavnog suda Bosne i Hercegovine* [*The Principle of Ne Bis In Idem in the Penal Legislation of BiH and the Practice of the European Court of Human Rights and the Constitutional Court of BiH*], *in* Načelo ne bis in idem i pravna sigurnost građana (međunarodni pravni standardi, regionalna zakonodavstva i iskustva u primeni) [The principle of Ne bis in idem and legal security of citizens (international legal standards, regional legislation and experiences in application)] 181 (Stanko Bejatović & Nataša Novaković eds., 2022).

2.2. CRIMINAL PROCEDURE CODE AND THE STRUCTURE OF PUNITIVE PROCEEDINGS

Before examining the specific provisions in Serbian criminal legislation that enshrine the principle of *ne bis in idem*, commonly understood as "'not twice for the same thing," it is essential to outline the structure of punitive legal proceedings in Serbia. National legislation distinguishes between three primary categories: criminal,[164] misdemeanor,[165] and economic offense proceedings.[166] This tripartite classification addresses various degrees of legal violations and sanctions. However, disciplinary procedures—which may involve serious breaches of professional duty or misconduct—present an area of ongoing debate within both legal scholarship and judicial practice, raising the question of whether such proceedings should be treated as punitive or as a distinct legal category.

Article 4 of the Serbian Code of Criminal Procedure [hereinafter C.P.C.] explicitly incorporates the *ne bis in idem* principle, providing that:

"No one can be prosecuted for a criminal offense for which they were acquitted or convicted by a court decision, or for which the charge was dismissed, or the proceedings were legally suspended. A legally binding court decision cannot be changed to the detriment of the defendant."[167]

This statutory provision reflects and reinforces the guarantees enshrined in Article 34 of the Constitution. However, it is somewhat narrower in scope. While the Constitution extends *ne bis in idem* protections to other forms of punishable conduct beyond criminal offenses, the C.P.C. confines its application solely to criminal proceedings. Nonetheless, both legal sources converge on their core objective: to ensure legal certainty and to shield individuals from the burden of repeated prosecution for the same factual conduct once a final judgment has been rendered.

The C.P.C. thus affirms that the prohibition against double jeopardy is not merely a procedural technicality, but a substantive guarantee linked to the broader human

[164]*See* art. 14, KRIVIČNI ZAKONIK [CRIMINAL CODE], *Sl. glasnik RS*, Nos. 85/2005, 88/2005 (corr.), 107/2005 (corr.), 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 & 94/2024 (Serb.) (defining a criminal offense as an unlawful, culpable act that has been designated by law as a criminal offense).

[165]*See* art. 2, Zakon o prekršajima [Law on Misdemeanors], *Sl. glasnik RS*, Nos. 65/2013, 13/2016, 98/2016 (CC decision), 91/2019, 91/2019 (other law) & 112/2022 (CC decision) (Serb.) (defining a misdemeanor as an unlawful act determined by law or other regulation of a competent authority as a misdemeanor, for which a misdemeanor sanction is prescribed).

[166]*See* art. 2, Zakon o privrednim prestupima [Law on Economic Offenses], *Sl. list SFRJ*, Nos. 4/77, 36/77 (corr.), 14/85, 10/86 (consol.), 74/87, 57/89 & 3/90, *Sl. list SRJ*, Nos. 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96 & 64/2001, and *Sl. glasnik RS*, No. 101/2005 (other law) (defining an economic offense as a socially harmful violation of regulations on economic or financial operations that caused or could have caused serious consequences, and which has been determined as such by the competent authority).

[167]ZAKONIK O KRIVIČNOM POSTUPKU [CRIMINAL PROCEDURE CODE] art. 4, Sl. glasnik RS [Official Gazette of the RS], no. 72/2011, with subsequent amendments.

rights framework. It supports the finality and authority of judicial decisions, which is fundamental to the integrity of criminal justice and public confidence in the rule of law. Moreover, this alignment with international standards—such as A4P7—underscores Serbia's commitment to harmonizing domestic legal protections with its international obligations.

2.2.1. MISDEMEANORS AND ECONOMIC OFFENSES: STATUTORY APPLICATION OF THE *NE BIS IN IDEM* PRINCIPLE

a) Law on Misdemeanor Procedure

At this point, a brief doctrinal clarification is necessary. Unlike legal systems in which misdemeanours are conceived as a subcategory of criminal offences, Serbian law adopts a structurally dualistic approach. In Serbian criminal law theory, the relationship between criminal offences and misdemeanours has long been debated from both quantitative and qualitative perspectives.[168] According to the quantitative view, misdemeanours are understood as less serious forms of punishable conduct, reflecting a lower degree of social harm. By contrast, the qualitative approach emphasizes a substantive distinction between the two categories, arguing that criminal offences and misdemeanours differ not merely in degree but in nature, particularly about culpability and the socio-ethical condemnation attached to criminal punishment.[169] Contemporary Serbian doctrine predominantly endorses a mixed approach, which does not deny the existence of unlawfulness and social harm in misdemeanours. Nonetheless, it maintains that their lower level of wrongdoing and reduced socio-ethical reproach justify their regulation within a separate punitive regime. This doctrinal framework—reflected in distinct statutory sources, procedural rules, and institutional competences—explains why misdemeanours are not treated as a subset of criminal law in Serbia. When combined with the autonomous Convention concept of a "criminal matter," this structural dualism renders the interaction between misdemeanor and criminal proceedings a legally significant and non-trivial issue for the application of the *ne bis in idem* principle.

Article 8 of the Law on Misdemeanor Procedure enshrines the *ne bis in idem* principle by explicitly prohibiting the retrial or re-sanctioning of an individual for a misdemeanor offense that has already been adjudicated through a final decision.[170] Once

[168]*See* Emir Ćorović, *supra* note 8, at 69-70.
[169]*See* Zoram Stojanović, *Krivično Pravo* [Criminal Law] at 10 (2019) (Serb).
[170]*See* art. 8, Zakon o prekršajima [Law on Misdemeanors], Official Gazette of the Republic of Serbia, No. 65/2013, 13/2016, 98/2016 (CC decision), 91/2019, 91/2019 (other laws), 122/2022 (CC decision).

a judgment becomes final, the accused may not be subjected to another misdemeanor proceeding for the same act, thereby aligning national procedural guarantees with broader constitutional and international protections against double jeopardy. However, the law permits the reopening of proceedings in narrowly defined circumstances—such as when new evidence emerges or when serious procedural violations are identified—ensuring that fairness is maintained without compromising the finality of judgments. Moreover, Article 8 extends the scope of *ne bis in idem* across different offense categories by stipulating that a person already found guilty of a criminal or economic offense with identical elements cannot face additional misdemeanor proceedings for the same conduct.[171] If a misdemeanor proceeding has already commenced, it must be terminated upon recognition of a corresponding criminal or economic conviction. This inter-categorical safeguard reflects a legislative effort to ensure coherence and prevent overlapping sanctions.

In the Serbian legal system, the relationship between misdemeanor and criminal proceedings has posed considerable practical challenges for the application of the *ne bis in idem* principle. Before legislative reform, it was not uncommon for both proceedings to be initiated simultaneously for the same underlying conduct. Because a final decision by a misdemeanor court could trigger the *ne bis in idem* bar against subsequent criminal prosecution, defense counsel often sought to expedite misdemeanor proceedings to secure a judgment that would preclude criminal liability for the more serious offense. This practice created a structural imbalance: the less serious proceeding could effectively undermine the primacy of criminal adjudication.[172]

This problem has been directly addressed in *Milenković v. Serbia.*[173] In that case, the applicant was first convicted in misdemeanor proceedings for disturbing the peace, which the E.Ct.H.R. qualified as "criminal proceedings" within the autonomous Convention meaning of the term. Despite this final conviction, the applicant was subsequently prosecuted and convicted for a criminal offense arising from the same conduct and based on substantially the same facts. The E.Ct.H.R. held that this constituted a violation of A4P7, emphasizing that the Serbian Constitutional Court had failed to apply the principles set out in *Zolotukhin v. Russia* and thus had not remedied the applicant's situation. The judgment illustrates that, regardless of domestic classifications that distinguish between criminal and misdemeanor proceedings, the Strasbourg

[171]*Id.*

[172]It should be noted that, although the legislative intent was to prevent the misuse of *ne bis in idem* through tactical acceleration of misdemeanor proceedings, this approach could be problematic. In certain instances, misdemeanor sanctions may exceed in severity those prescribed for some criminal offenses, thereby raising concerns about proportionality and coherence within the punitive framework.

[173]Milenković v. Serbia, App. No. 50124/13, 35 (Mar. 1, 2016), https://hudoc.echr.coe.int/eng?i=001-161001.

standard requires that any punitive proceeding of a criminal nature trigger the *ne bis in idem* guarantee. Accordingly, the initiation of criminal proceedings following a final misdemeanor conviction is incompatible with the Convention, highlighting the need for Serbian law and practice to be brought closer into alignment with supranational human rights standards.

To address this issue, the Law on Misdemeanor Procedure was amended to provide that, once criminal proceedings are pending, any parallel misdemeanor proceedings must be stayed and cannot be continued until the criminal case is concluded. This ensures that the outcome of the criminal trial,given its greater gravity and broader societal implications, takes precedence over the resolution of misdemeanor liability. At the same time, once a final judgment has been rendered in either forum, the principle of *ne bis in idem* applies reciprocally: a final acceleration of misdemeanor proceedings. This approach could be problematic. In certain instances, misdemeanor sanctions may exceed in severity those prescribed for some criminal offenses, thereby raising concerns about proportionality and coherence within the punitive framework.

A misdemeanor judgment will bar criminal prosecution for the same conduct, and *vice versa*. The rule thus reflects a deliberate attempt to reconcile the need to protect individuals from double prosecution with the imperative to safeguard the integrity and effectiveness of criminal justice.[174]

b) Law on Economic Offenses

A similar structure applies under the Law on Economic Offenses. Article 14 provides that "a responsible person who has been legally declared guilty of a criminal offense that has characteristics of an economic offense shall not be punished for the economic offense."[175] Additionally, Article 26a ensures that any fine imposed in a prior misdemeanor proceeding is credited toward the sentence for an overlapping economic offense, reinforcing the prohibition of dual punishment.[176] These provisions underscore Serbia's commitment to implementing *ne bis in idem* consistently across legal classifications.

Nevertheless, the Law on Economic Offenses includes only these two provisions directly addressing the principle. This limited framework is insufficient to prevent dual

[174]Unfortunately, the ongoing amendments to the Serbian Code of Criminal Procedure do not address the issue of *ne bis in idem*. As a result, this matter remains largely entrusted to judicial practice, leaving legal certainty dependent on case law developments rather than comprehensive legislative reform.

[175]Art. 14, ZAKON O PRIVREDNIM DELIKTIMA [LAW ON ECONOMIC OFFENCES] SFRY, no. 4/77, 36/77 (corrected), 14/85, 10/86 (corrected), 74/87, 57/89, 3/90; Official Gazette of the FRY, Nos. 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96 & 64/2001; Official Gazette of the Republic of Serbia, No. 101/2005.

[176]*See id.* art. 26a.

or parallel proceedings in practice. In particular, corporate legal entities are not explicitly covered by the prohibition in Article 14, leaving a potential gap where companies may still face duplicative sanctions for the same act.

Furthermore, Article 63, paragraph 3 of the Criminal Code[177] provides that "imprisonment or a fine that the convicted person has served or paid for a misdemeanor or economic offense [...] shall be included in the sentence imposed for a criminal offense whose features include misdemeanors, economic offenses, or violations of military discipline." While this provision prevents excessive accumulation of sanctions, it does not necessarily preclude separate proceedings, thereby raising concerns over fragmented enforcement. These ambiguities highlight a legislative gap, particularly when a single act satisfies the legal elements of multiple offenses. Without more explicit procedural bars to dual proceedings, the application of *ne bis in idem* remains vulnerable to circumvention.

2.2.2. NORMATIVE TENSIONS AND INSTITUTIONAL FRAGMENTATION: CHALLENGES TO THE COHERENT APPLICATION OF *NE BIS IN IDEM*

Analyzing the legislative framework governing punitive proceedings in Serbia reveals a discernible trend toward harmonizing the application of the *ne bis in idem* principle across criminal, misdemeanor, and economic offense procedures.[178] This legislative convergence—evident in the general clauses of the C.P.C., the Law on Misdemeanors, and the Law on Economic Offenses—signals a broader intent to create a unified safeguard against double jeopardy. However, despite such efforts, the formal distinction among these categories persists, particularly in the legal treatment of economic offenses, which remain a separate and active classification despite ongoing discussions about their potential abolition.

The persistence of economic offenses creates structural and doctrinal challenges, particularly in cases involving overlapping legal qualifications. For example, a single act may simultaneously constitute a misdemeanor and a criminal offense, raising the risk of parallel or sequential proceedings. Article 4 of the C.P.C. prohibits the prosecution of an individual for an offense for which they have already been acquitted, convicted, or where proceedings have been terminated. However, the language of the provision focuses

[177]Art. 63, Krivični Zakonik [Criminal Code], Službeni glasnik RS, Nos. 85/2005, 88/2005 (corr.), 107/2005 (corr.), 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 & 35/2019.

[178] *See* Zakonik o krivičnom postupku [criminal procedure code] (Serb.), Službeni glasnik RS No. 72/2011, art. 4; *Zakon o prekršajima* [Law on Misdemeanors] (Serb.), Službeni glasnik RS No. 65/2013, art. 8; *Zakon o privrednim prestupima* [Law on Economic Offences] (SFRY), Službeni list SFRJ No. 4/77, arts. 14, 26a.

exclusively on "prosecution, "omitting "punishment"—a subtle omission that may create ambiguity regarding its full protective reach.

Both the Constitution and the C.P.C. adopt a more expansive formulation of *ne bis in idem* compared to most international instruments, as they explicitly cover not only acquittals and convictions, but also final dismissals of charges and terminated proceedings. Still, the availability of extraordinary legal remedies permits retrials under specific conditions.[179] Article 34, paragraph 5 of the Constitution allows for retrial in cases where new facts or procedural defects could have influenced the outcome, mirroring Article 473 of the C.P.C., which outlines the formal grounds for reopening proceedings. Importantly, any retrial must respect the constitutional prohibition on worsening the defendant's position in such circumstances.

Despite legislative attempts at coherence, institutional fragmentation remains an obstacle. Jurisdictional boundaries between courts for criminal, misdemeanor, and economic offenses are rigid, with no legal mechanism allowing transfer of proceedings between court types. Criminal courts have no jurisdiction over misdemeanors, and vice versa. This strict segmentation can lead to inconsistent outcomes, especially when the same factual conduct is assessed in separate forums under different legal labels.

In the domain of misdemeanors, Article 8(3) of the Law on Misdemeanor Procedure prevents proceedings if the same conduct has already resulted in a conviction for a criminal or economic offense. Although this creates a vertical ordering of legal responses—giving priority to criminal over misdemeanor procedures—it fails to define which types of decisions are legally binding and to whom they apply, leaving gaps in interpretation. Likewise, in the Law on Economic Offenses, Article 14 only applies to "responsible persons," potentially excluding legal entities from the *ne bis in idem* protection, and Article 26a allows partial crediting of misdemeanor fines without necessarily precluding further proceedings.[180] These narrow formulations permit maneuvering that undermines legal certainty.

In summary, although Serbia's legal system exhibits a normative commitment to *ne bis in idem*, its practical application is weakened by overlapping legal categories, jurisdictional fragmentation, and insufficient statutory clarity—especially in the area of economic offenses. A more holistic legislative reform is needed to ensure the effective prevention of double proceedings and to align Serbia's practice with international

[179]*See* María L. Villamarín López, *Report on Spain*, *in* PERSONAL PARTICIPATION IN CRIMINAL PROCEEDINGS: A COMPARATIVE STUDY OF PARTICIPATORY SAFEGUARDS AND IN ABSENTIA TRIALS IN EUROPE 421, 430 (Serena Quattrocolo & Stefano Ruggeri eds., 2019) (Swaz.).

[180]*See* Nikša Bulatović & Dejana Đorđić, *Privredni prestupi od prijave do presude u Republici Srbiji [Commercial Offenses from Reporting to Judgment in the Republic of Serbia]*, 49 BAŠTINA 179 (2019) (Serb.).

standards and the requirements stemming from the Council of Europe and the European Union.

The Law on Economic Offenses, though somewhat outdated as it was adopted in 1977, contains limited *ne bis in idem* provisions. Article 14 stipulates that a responsible person convicted of a criminal offense with characteristics of an economic offense cannot be penalized for the economic offense itself. However, this wording limits the principle's application to the responsible individual, creating a possible loophole for entities (such as corporations) that could technically be prosecuted for the same act. Furthermore, Article 26a, which allows fines from one type of offense to be credited toward penalties in overlapping economic or misdemeanor offenses, could inadvertently permit double jeopardy. This undermines the *ne bis in idem* principle and highlights a need for legislative clarification to prevent repeated prosecution for the same conduct under different classifications.

2.3. THE EFFECTS OF THE *NE BIS IN IDEM* PRINCIPLE

Before turning to the detailed analysis of Serbian law and its interaction with international standards, it is necessary to consider the broader effects of the *ne bis in idem* principle and how it structures legal certainty in practice. The prohibition operates at multiple levels: it defines the scope of protected decisions and their finality, it shapes the conduct of prosecutors through mechanisms such as conditional deferral of prosecution, and it extends beyond national borders into supranational and international frameworks. Taken together, these dimensions illustrate that *ne bis in idem* is not merely a procedural safeguard but a foundational guarantee of legal certainty, judicial economy, and fairness in both domestic and cross-border criminal justice.

2.3.1. SCOPE AND STRUCTURE OF THE PROHIBITION

The practical effect of the *ne bis in idem* principle is central to assessing whether it is fully and effectively implemented in the Republic of Serbia's criminal legislation. Within the Serbian legal system, it is not uncommon for multiple punishable offenses to arise from a single set of factual circumstances. This creates specific challenges in the consistent and fair application of the principle.

At its constitutional foundation, the *ne bis in idem* principle in Serbia encompasses two distinct prohibitions. The first concerns the prohibition of reopening

criminal or other punitive proceedings against an individual once the matter has been conclusively resolved. According to Serbian law, a case is deemed resolved when a judgment or procedural decision acquires the status of res judicata—that is, legal finality—which bars any subsequent prosecution or punishment for the same offense. This safeguard is essential to upholding procedural fairness and the rights of the accused, preventing repeated state action for conduct that has already been adjudicated.

The second prohibition targets the simultaneous conduct of multiple proceedings based on the same factual conduct. This ensures that an individual is not subjected to overlapping or parallel prosecutions for a single offense, thereby reinforcing legal certainty and avoiding unnecessary emotional, reputational, or financial burdens. In this way, the principle plays a vital role in guaranteeing legal security and public trust in the administration of justice.

Nonetheless, the application of *ne bis in idem* in Serbia is not absolute. Domestic procedural law provides for exceptional avenues to reopen or revise final judgments—such as retrials (*ponavljanje postupka*)—in cases involving newly discovered evidence or grave procedural violations. These mechanisms are permissible under the Constitution and the C.P.C., provided they serve the interests of justice and due process. Crucially, even in such cases, the Constitution explicitly prohibits any outcome that would place the defendant in a worse position than before the retrial. Thus, while the *ne bis in idem* principle is broadly effective in shielding individuals from double jeopardy, its application remains qualified, allowing narrowly defined exceptions that aim to strike a balance between procedural finality and substantive justice. This nuanced approach reflects a legal philosophy that prioritizes fairness, accuracy, and the legitimacy of judicial outcomes.

A further complexity arises from the extraordinary legal remedies available under the Law on Misdemeanors. Articles 280–284 explicitly regulate the possibility of reopening final misdemeanor proceedings under narrowly defined circumstances, such as reliance on false evidence, criminal misconduct by judicial officers, or the discovery of new facts or evidence. Significantly, Article 280(1)(3) provides that a misdemeanor judgment may be reopened if the convicted individual had already been punished for the same act in criminal or economic offense proceedings. This provision illustrates the legislator's awareness of potential conflicts between different categories of punishable conduct and attempts to mitigate inconsistencies in the application of *ne bis in idem*.

From a systemic perspective, however, this solution is double-edged. On the one hand, it strengthens legal coherence by ensuring that parallel or successive proceedings do not result in contradictory outcomes. On the other hand, it weakens the finality of misdemeanor judgments by allowing them to be set aside to preserve the primacy of

criminal adjudication. Critics have argued that this framework implicitly privileges criminal proceedings over misdemeanors, even when misdemeanor sanctions may be more severe than those for certain criminal offenses. As a result, although the principle of *ne bis in idem* formally applies across categories of offenses, its practical effect remains conditioned by the hierarchical structure of Serbian procedural law, with criminal proceedings retaining a dominant role.

The Law on Economic Offenses adopts a similar approach to extraordinary remedies. Articles 128–129 provide that proceedings concluded by a final judgment may be reopened not only in the situations enumerated under the C.P.C. but also where it is established that the responsible person convicted for an economic offense has already been finally convicted in criminal proceedings for the same act. This provision reflects the legislator's attempt to reconcile overlaps between economic and criminal liability by ensuring that criminal adjudication prevails and by avoiding contradictory outcomes. As with misdemeanors, however, this solution entails a trade-off: while it enhances systemic coherence, it also undermines the stability of final judgments in economic offense cases.

The second prohibition is particularly challenging in the Serbian legal context, where criminal, misdemeanor, and economic offense proceedings coexist as separate punitive frameworks. While the constitutional and statutory provisions of *ne bis in idem* should, in principle, preclude the initiation of new proceedings irrespective of their formal classification, in practice, overlaps do occur. It remains possible that a person convicted in one category of proceedings may subsequently face prosecution in another, despite the underlying conduct being identical. This has generated inconsistent case law at the lower-court level, with some interpreting the prohibition narrowly by reference to the type of proceeding. In contrast, others have adopted a broader conduct-based approach consistent with the Strasbourg and Luxembourg standards. The Supreme Court of Cassation has increasingly emphasized that the decisive criterion is not the legal label attached to the proceeding but whether the prior decision addressed the same punishable conduct (*idem factum*), thereby aligning domestic jurisprudence with the requirements of the E.Ct.H.R. and C.J.E.U. This judicial tendency reflects a gradual shift towards a harmonized standard, even if statutory provisions remain fragmented and leave room for divergent interpretations.

2.3.2. FINALITY AND THE RANGE OF PROTECTED DECISIONS

The scope of the *ne bis in idem* principle in Serbian law is not limited solely to acquittals and convictions. Rather, Serbian legislation adopts a broad interpretation, under which other final procedural outcomes—such as rejection or dismissal decisions—may also trigger protection against double jeopardy. This broader application distinguishes Serbia from many other jurisdictions, where *ne bis in idem* generally applies only to final judgments of acquittal or conviction. The Serbian approach reflects a strong commitment to procedural finality and the protection of individual rights.

Pursuant to Article 422 of the C.P.C., a rejecting judgment is rendered when permanent procedural obstacles exist. More specifically, Article 422 CPC provides that a rejecting decision (*odbijajuća presuda*) shall be rendered when:

- The public prosecutor withdraws the indictment or the injured party withdraws the request for prosecution;
- The defendant has already been finally convicted or acquitted of the same offense, or the indictment has been finally rejected, or the proceedings have been finally terminated;
- The defendant has been released from prosecution by virtue of an amnesty or pardon, or when prosecution is barred by limitation or by another circumstance permanently precluding criminal prosecution.

Dismissal decisions in Serbian criminal procedure take the form of rulings (*rešenja o obustavi postupka*) and are primarily regulated by Articles 338 and 352 of the C.P.C. Article 338 C.P.C. provides that, upon examining the indictment, the panel shall issue a ruling that there are no grounds for prosecution and that the criminal proceedings are to be dismissed if it finds that:

- The act alleged in the indictment does not constitute a criminal offense, and there are no grounds to apply a security measure.
- criminal prosecution has become statute-barred, or the act is covered by amnesty or pardon, or other circumstances exist which permanently preclude prosecution;
- There is insufficient evidence to support a reasonable suspicion that the accused committed the act charged.

Article 352 C.P.C. further stipulates that the presiding judge shall issue a ruling dismissing the criminal proceedings if it is established that:

- the public prosecutor has withdrawn the indictment, or the injured party has withdrawn the motion for prosecution;

- the accused has already been finally convicted or acquitted for the same criminal offense, or the indictment has already been finally rejected, or the proceedings have been finally terminated;

- The accused has been released from prosecution by virtue of an amnesty or pardon, or criminal prosecution is otherwise permanently barred by limitation or another statutory impediment.

When grounded on such permanent impediments, these outcomes acquire res judicata status and trigger the protection of *ne bis in idem*.[181] The inclusion of such decisions serves not only to protect the defendant's rights but also to reduce the burden on judicial resources by preventing repetitive trials for conduct that has already been definitively addressed. However, not all suspensions of proceedings confer res judicata effect. Serbian criminal procedure law also provides for situations in which proceedings are interrupted without producing the finality necessary to trigger the *ne bis in idem* guarantee. A clear example is the interruption of an investigation under Article 307 C.P.C. The public prosecutor must suspend the investigation where, after the commission of the offense, the suspect develops a mental illness or other serious condition preventing participation in the proceedings, or where prosecution is temporarily barred for lack of the injured party's proposal or the authorization of a competent state body. The investigation may also be suspended if the suspect's whereabouts are unknown or if the suspect has absconded and cannot be reached by state authorities. In such circumstances, the suspension is provisional in nature: once the impediment ceases to exist—for instance, the suspect recovers or becomes available—the proceedings can be resumed. These decisions, therefore, do not attain res judicata status, since they do not represent a conclusive determination of the case but rather a temporary halt in the procedure. Distinguishing between final and non-final suspensions is essential to prevent confusion and to ensure that the protective function of *ne bis in idem* is reserved only for outcomes that definitively preclude further prosecution.

[181] *See* PAUL A. MCDERMOTT, THE LAW ON RES JUDICATA AND DOUBLE JEOPARDY (1999) (Ir.).

2.4. CONDITIONAL DEFERRAL OF PROSECUTION AND THE ROLE OF PROSECUTORIAL DISCRETION

A particularly contentious area in Serbian criminal procedure concerns prosecutorial discretion, especially in the form of conditional deferral of prosecution (*odlaganje krivičnog gonjenja*). Under Articles 283 and 284(3) of the C.P.C., a public prosecutor may conditionally dismiss a criminal complaint even where reasonable suspicion exists, provided the suspect agrees to fulfill specific obligations (e.g., compensating the injured party, performing humanitarian work, or undergoing therapy).[182] These obligations must be completed within a period not more than one year. If fulfilled, the prosecutor formally dismisses the complaint without initiating formal proceedings.[183]

Importantly, in such cases, the injured party is not entitled to object to the dismissal, as Article 51(2) C.P.C. explicitly disallows such recourse. This asymmetry raises legitimate concerns about victims' rights, particularly precedence in their interests in pursuing justice through standard criminal adjudication. Although the principle of legality requires the use of the res in the prosecution of all criminal acts, the principle of opportunity takes precedence in such cases, allowing flexibility when the offense and the suspect's conduct justify a deviation from formal prosecution.

From the perspective of the suspect, conditional dismissal provides legal certainty and a strong guarantee against further prosecution—assuming all obligations

[182]*See* Veljko Turanjanin & Dragana Čvorović, Pojednostavljene forme postupanja u krivičnim stvarima [Simplified Forms of Procedure in Criminal Matters] (2023) (Serb.).

[183]*See* Zakonik o krivičnom postupku [Criminal Procedure Code] (Serb.), arts. 283, 51(2). The public prosecutor may postpone criminal prosecution for criminal offenses punishable by a fine or a prison sentence of up to five years, if the suspect accepts one or more of the following obligations: 1) to remove the harmful consequences caused by the commission of a criminal offense or to compensate for the damage caused; 2) to pay a certain amount of money to the account prescribed for the payment of public revenues, which is used for humanitarian or other public purposes; 3) to perform certain socially useful or humanitarian work; 4) to fulfill due support obligations; 5) to undergo withdrawal from alcohol or narcotic drugs; 6) to undergo psychosocial treatment in order to eliminate the causes of violent behavior; 7) to fulfill the obligation established by a legally binding court decision, i.e. respect the limitation established by a legally binding court decision. In the order on the postponement of the criminal prosecution, the public prosecutor will determine the deadline in which the suspect must fulfill the obligations, with the fact that the deadline cannot be longer than one year. Supervision over the execution of obligations is carried out by a commissioner from the administrative body responsible for the execution of criminal sanctions, in accordance with the regulation issued by the minister responsible for judicial affairs.If the suspect fulfills the obligation from para. 1 of this article within the deadline, the public prosecutor will dismiss the criminal complaint by decision and inform the injured party about it, and the provision of art. 51, para. 2 of the Code will not be applied. Paragraphs 3 of the Criminal Procedure Code: In the case of criminal offenses for which a prison sentence of up to three years is prescribed, the public prosecutor may dismiss the criminal complaint if the suspect, due to genuine remorse, prevented the occurrence of damage or has already fully compensated for the damage, and the public prosecutor, according to the circumstances of the case, assesses that the imposition criminal sanctions would not be fair. Under these conditions, the provisions of art. 51, para. 2 of this Code shall not be applied.

are met. However, for the injured party, this mechanism may feel inadequate, especially if it forecloses the possibility of a full criminal trial and judgment. The result is a tension between prosecutorial efficiency and victim participation, with the *ne bis in idem* principle operating as a legal barrier to further proceedings even in unresolved emotional or moral contexts.

2.5. SUPRANATIONAL AND INTERNATIONAL DIMENSIONS OF THE *NE BIS IN IDEM* PRINCIPLE

While the *ne bis in idem* principle operates primarily within national legal systems, its scope and significance are increasingly shaped by supranational oversight and international judicial cooperation. For Serbia, this dimension is reflected in its obligations under the E.C.H.R., the jurisprudence of the E.Ct.H.R., and its engagement with international criminal tribunals such as the I.C.T.Y. and the I.C.C.

International legal instruments play a significant role in shaping Serbia's approach to the *ne bis in idem* principle. Serbia ratified the E.C.H.R. on March 3, 2004, along with Protocol No. 7, which introduced Article 4 prohibiting double jeopardy in criminal proceedings.[184] The E.Ct.H.R. plays a pivotal role in this regard. Its capacity to review national decisions involving potential violations of *ne bis in idem*—particularly under A4P7 to the ECHR—serves as an indirect but powerful acknowledgment of the principle's cross-border relevance. By subjecting itself to E.Ct.H.R. oversight, Serbia accepts that final judicial decisions within its territory may be scrutinized against the human rights standards of the Council of Europe and the Convention system, thereby extending the practical reach of *ne bis in idem* beyond national borders. Landmark E.Ct.H.R. decisions have confirmed that the scope of criminal proceedings under the ECHR is not restricted to formal criminal law, but may include other punitive administrative processes.[185] From the perspective of Serbia, the E.Ct.H.R. judgment in

[184]Law on the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, amended in accordance with Protocol No. 11, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which ensures certain rights and freedoms which are not included in the Convention and the first Protocol to it, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 12 to the Convention for the Protection of Human Rights and fundamental freedoms and Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances, Official Gazette of SCG - International Treaties, no. 9/2003, 5/2005, 7/2005 - corr. and Official Gazette of the RS - International Agreements, Nos. 12/2010 & 10/2015.

[185]*Sergey Zolotukhin v. Russia* [GC], App. No. 14939/03, 52 (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

Milenković v. Serbia[186] is of particular significance. Although not a landmark case in Strasbourg jurisprudence, it clarified the domestic implications of A4P7 by extending the scope of "criminal proceedings" to encompass certain punitive administrative processes. As such, the judgment highlights the challenges Serbia faces in aligning its legal order with the evolving Strasbourg standards on *ne bis in idem*.

The E.Ct.H.R. plays a pivotal role in defining the content and scope of the *ne bis in idem* principle under Article 4 of Protocol No. 7 to the E.C.H.R. Its function is not to extend the principle across borders, but to ensure that national decisions comply with the standards of the Convention as interpreted by Strasbourg jurisprudence. In this way, the E.Ct.H.R. provides authoritative guidance on how domestic judgments must respect the prohibition of double jeopardy. For Serbia, this oversight means that final judicial decisions are subject to review against supranational human rights standards, thereby reinforcing the importance of applying *ne bis in idem* consistently within the domestic legal order.[187]

Further evidence of Serbia's commitment to the supranational effect of the principle can be found in its relationship with the I.C.T.Y. Under the Law on Cooperation with the I.C.T.Y.,[188] Serbia recognizes the binding force of judgments rendered by this international tribunal. This domestic legislation, enacted in compliance with U.N. Security Council Resolution 827, effectively integrates I.C.T.Y. decisions into Serbia's legal system. As a result, final decisions of the I.C.T.Y. carry res judicata effect in Serbia, precluding renewed prosecution for the same conduct by domestic courts.

[186] *See* Milenković v. Serbia, App. No. 50124/13, 35 (Mar. 1, 2016), https://hudoc.echr.coe.int/eng?i=001-161001 (finding that the dismissal of a misdemeanour case did not preclude subsequent criminal proceedings, thereby raising issues under Art. 4 of Protocol No. 7). This is the first judgment against Serbia that refers to the violation of the principle of *ne bis in idem*. Namely, in the aforementioned verdict, it was about the fact that in Oct. 2006 the applicant, together with another person, participated in an incident, after which the police initiated misdemeanor proceedings against him for disturbing public order and peace, and in Nov. 2007, the applicant convicted and sentenced to a fine in the amount of 4,000.00 dinars, which in case of non-payment would turn into a prison sentence. In the meantime, in Apr. 2007, criminal proceedings were initiated against the applicant due to the same incident for serious bodily injury, and in 2011 he was sentenced to three months' imprisonment. The applicant turned to the Court claiming that his right was violated, covered by the principle of ne bis in idem, which is guaranteed by the Constitution of the Republic of Serbia, the Code of Criminal Procedure and the Law on Misdemeanors. The Government accepted that the conviction of the applicant in the misdemeanor proceedings of 6 Nov. 2007 was "criminal" in nature. However, she argued that the offense for which the applicant was prosecuted should be distinguished, both factually and legally. *Milenkovic v. Serbia*, s. 28.

[187] *See* Convention Implementing the Schengen Agreement art. 54, (June 14, 1985), 2000 O.J. (L 239) 19.

[188] Zakon o saradnji Srbije i Crne Gore sa Međunarodnim tribunalom za krivično gonjenje lica odgovornih za teška kršenja međunarodnog humanitarnog prava počinjena na teritoriji bivše Jugoslavije od 1991. godine [Law on Cooperation of Serbia and Montenegro with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991] (FRY), Službeni list SRJ No. 18/2002; (SCG) Službeni list SCG No. 16/2003.

Through these mechanisms, Serbia has effectively accepted a multilevel framework in which the *ne bis in idem* principle may be triggered by judgments rendered by international or foreign courts. This reflects an important normative evolution: the principle is no longer confined solely to national legal systems but is increasingly embedded in a transnational legal order shaped by mutual recognition, judicial cooperation, and supranational oversight. Consequently, Serbia's legal system not only acknowledges the cross-border dimension of *ne bis in idem* in theory but also facilitates its application in practice, particularly in cases involving international criminal tribunals, the European Court of Human Rights, and other Convention-based human rights bodies. This commitment affirms Serbia's alignment with global standards of legal certainty and the finality of judgments, reinforcing the protective value of *ne bis in idem* as a cornerstone of both domestic and international criminal justice.

3. THE APPLICATION OF THE PRINCIPLE OF *NE BIS IN IDEM* AND PROBLEMS IN SERBIA

3.1. METHODOLOGICAL FRAMEWORK FOR ANALYZING THE *NE BIS IN IDEM* PRINCIPLE

To determine whether the *ne bis in idem* principle has been violated, it is necessary to employ a clear, structured analytical framework. The principle's application, though seemingly straightforward, is in practice nuanced and requires a multi-layered assessment grounded in both legal theory and the jurisprudence of the E.Ct.H.R. and the C.J.E.U. Four cumulative elements must be established before the protection of A4P7 or Article 50 C.F.R. can be invoked.

(1) Is the matter "criminal in nature"? This first element concerns the scope of application of the principle. While domestic law may formally classify certain offenses as disciplinary, administrative, or criminal, the E.Ct.H.R. applies an autonomous interpretation under Article 6 E.C.H.R. through the *Engel criteria*: (a) the legal classification of the offence under national law; (b) the intrinsic nature of the offence; and (c) the severity of the sanction that may be imposed. These criteria, which are alternative rather than strictly cumulative, ensure that even proceedings formally designated as non-criminal may fall within the "criminal" sphere of the Convention. This step is thus broader than a formal qualification under domestic law, and requires a substantive assessment of whether the proceedings are "criminal in nature."

(2) Are there two distinct proceedings (*bis*)? The principle presupposes the existence of two separate sets of proceedings capable of leading to criminal liability. The E.Ct.H.R. has emphasized that the decisive issue is whether the proceedings are genuinely distinct or whether they may be regarded as forming part of an "integrated scheme of sanctions" with a sufficiently close connection in substance and in time.[189] Thus, "bis" does not arise where two procedures constitute a single coherent response, but only where an individual is exposed to multiple proceedings of a criminal nature that are not sufficiently coordinated.

(3) Are the charges factually identical or substantially the same (idem)? The *ne bis in idem* principle protects against repeated prosecution for the same underlying conduct. Since *Zolotukhin v. Russia [GC],*[190] the E.Ct.H.R. has interpreted "same offence" to mean identity of facts (*idem factum*), rather than legal characterization (*idem crimen*). In subsequent jurisprudence, including *A and B v. Norway*, the Court refined the test, clarifying that the factual basis of the charges must be "identical or substantially the same".[191] This criterion ensures that the principle is not circumvented by reclassifying the same conduct under different legal headings.

(4) Has there been a final judgment (res judicata)? Finally, the principle applies only where one of the proceedings has been concluded by a "final" decision, that is, a judgment or equivalent decision which is binding and no longer subject to ordinary appeal. As clarified in *Mihalache v. Romania [GC],*[192] the "final" character of a decision depends on whether domestic remedies have been exhausted or the time limit for their use has expired, consistent with the principle of legal certainty. Only in such circumstances can *ne bis in idem* prevent the re-opening of new proceedings for the same matter.

Taken together, these four elements—criminal nature, dual proceedings, factual identity, and finality—provide a structured methodology for assessing whether the *ne bis in idem* principle has been violated. This analytical framework ensures consistency with Strasbourg and Luxembourg jurisprudence, safeguards individuals against undue cumulative proceedings, and reinforces the authority of final judicial decisions.

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[189] A. and B. v. Norway, App. Nos. 24130/11 & 29758/11, 130 (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972.

[190] Sergey Zolotukhin v. Russia, App. No. 14939/03, 82 (Mar. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

[191] A. and B. v. Norway, App. Nos. 24130/11 & 29758/11,¶108 (15 Nov. 2016),https://hudoc.echr.coe.int/eng?i=001-168972.

[192] Mihalache v. Romania, App. No. 54012/10, (88–89) (July 8, 2019), https://hudoc.echr.coe.int/eng?i=001-194523;

3.2. THE CRIMINAL NATURE REQUIREMENT - RELATIONSHIP BETWEEN CRIMES, MISDEMEANORS, AND OTHER ADMINISTRATIVE OFFENSES

3.2.1. THE CONSTITUTIONAL DIMENSION OF *NE BIS IN IDEM* IN SERBIA: DOCTRINAL EVOLUTION AND JURISPRUDENTIAL CONSOLIDATION

The first analytical step in assessing the application of *ne bis in idem* in Serbia concerns the question whether the matter is “criminal in nature” within the meaning of the E.C.H.R. According to the E.Ct.H.R, this determination is guided by the *Engel* criteria, which require an assessment of (1) the legal classification of the offence under domestic law, (2) the intrinsic nature of the offence, and (3) the type and severity of the sanction at stake. While the first criterion serves as a starting point, the Court has repeatedly stressed that it is not decisive; even proceedings classified as “administrative” or “disciplinary” under domestic law may fall within the scope of Article 6 E.C.H.R. and A4P7 if they involve punitive objectives or severe sanctions. Landmark cases such as *Engel and Others v. Netherlands,*[193] *Öztürk v. Germany,*[194] *Jussila v. Finland,*[195] and *A and B v. Norway*[196] illustrate how the Strasbourg Court interprets “criminal nature” broadly, extending Convention guarantees beyond traditional criminal law.

Against this background, Serbian constitutional jurisprudence has progressively aligned with Strasbourg standards, particularly after *Zolotukhin v. Russia.*[197] Article 34(4) of the Constitution enshrines the prohibition of double jeopardy, and the Constitutional Court has played a central role in clarifying how this protection extends to misdemeanors and, in certain contexts, even to other punitive proceedings.

The principle of *ne bis in idem*, enshrined in Article 34(4) of the Constitution of the Republic of Serbia, prohibits the repeated prosecution or punishment of an individual for the same criminal offense once a final judgment has been rendered. The Serbian Constitutional Court has played a crucial role in interpreting and enforcing this guarantee, progressively aligning its jurisprudence with the standards articulated by the E.Ct.H.R, most notably in the *Zolotukhin v. Russia* judgment.[198] The E.Ct.H.R. ’s evolving case law demonstrates both consistency in applying the material identity test (*idem*) and

[193]Engel and Others v. Netherlands, App. Nos. 5100/71; 5101/71; 5102/71; 5354/72 & 5370/72, (June 8, 1976) https://hudoc.echr.coe.int/eng?i=001-57479.
[194]Öztürk v. Germany, App. No. 8544/79, 51 (Feb. 21, 1984), https://hudoc.echr.coe.int/eng?i=001-57553.
[195]Jussila v. Finland, App. No. 73053/01, 30-31 (Nov. 23, 2006), https://hudoc.echr.coe.int/eng?i=001-78135.
[196]*A. and B. v. Norway*, App. Nos. 24130/11 & 29758/11, (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972.
[197]*Sergey Zolotukhin v. Russia*, App. No. 14939/03, ¶ 82 (Mar. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.
[198]*Id.*

a growing attentiveness to the functional overlap between misdemeanor and criminal proceedings.

A particularly illustrative case is Už-11106/2013, where the Court found a violation of Article 34(4) because the applicant was subjected to criminal proceedings after a misdemeanor case had already been resolved with finality. The applicant had been acquitted in misdemeanor proceedings for allegedly assaulting a fisheries inspector. Nonetheless, he was later convicted in criminal court for the same act. Applying the Engel criteria and referencing Zolotukhin, the Court found that both proceedings were based on the same factual conduct and shared a punitive nature, thus triggering constitutional protection against double jeopardy.[199]

In *Už-1285/2012*, the Court likewise found a violation of the *ne bis in idem principle*. The applicant had already been sanctioned in misdemeanor proceedings for verbal and physical altercations and was later criminally convicted for the same conduct. The Court reaffirmed that the identity of facts—not the legal classification of the offense—is the decisive criterion.[200] This case also highlighted the inadequacies of Serbian procedural law in distinguishing misdemeanors from criminal offenses, which often leads to overlapping sanctions and legal uncertainty.

The jurisprudence took a contrasting turn in *Už-9476/2019*, where the Court rejected the applicant's complaint. Despite the prior initiation of misdemeanor proceedings for the same incident, the Court held that there was no violation because the facts underpinning the two proceedings were not identical. The criminal court addressed different methods of assault and legally distinct protected interests—bodily integrity as opposed to public peace. The Court emphasized that a factual continuum can be segmented into separate legal reactions, provided the courts observe the limits of their respective jurisdictions.[201]

Similarly, in *Už-2227/2020*, the Court held that the applicant's criminal conviction for endangering public traffic did not violate the *ne bis in idem principle*, even though he had previously been sanctioned in a misdemeanor proceeding for driving under the influence. The Court reasoned that the criminal conviction was based on distinct conduct—failing to drive on the right side of the road and causing an accident—while the misdemeanor conviction concerned only the applicant's intoxication.[202]

[199]*Ustavni sud Republike Srbije* [Constitutional Court of Serbia], Už-11106/2013, (Mar. 16, 2017).
[200]*Ustavni sud Republike Srbije* [Constitutional Court of Serbia], Už-1285/2012 (Mar. 26, 2014), Official Gazette of the Republic of Serbia No. 45/2014.
[201]*Ustavni sud Republike Srbije* [Constitutional Court of Serbia], Už-9476/2019 (14 July 2022).
[202]*Ustavni sud Republike Srbije* [Constitutional Court of Serbia], Už-2227/2020 (Apr. 6, 2023).

In *Už-9397/2016*, the Court dealt with the interplay between military disciplinary procedures and criminal prosecution. The applicant was first subjected to disciplinary proceedings for abuse of office, which were later terminated due to the cessation of his professional military service. He was then criminally prosecuted for the same conduct. The Court held that the disciplinary proceedings did not have a punitive character within the meaning of *Engel*, and thus did not preclude subsequent criminal prosecution. The decision clarified that only proceedings with penal characteristics and a final judicial outcome can trigger the *ne bis in idem* guarantee.[203]

This approach was echoed in *Už-9956/2016*, where the Court addressed the legal consequences of a prosecutorial decision to discontinue criminal proceedings following the application of the opportunity principle. The applicant alleged that a misdemeanor proceeding concerning the same conduct violated the *ne bis in idem principle*. However, the Court ruled that since a court never adjudicated the original criminal case, the prohibition of double jeopardy was not applicable.[204]

Conversely, the Court reaffirmed the binding nature of final misdemeanor judgments in *Už-2513/2014*. The applicant had previously been acquitted in a misdemeanor case for physical aggression, only to be subsequently convicted of minor bodily harm in criminal court. The Constitutional Court found that the misdemeanor judgment constituted res judicata and barred further prosecution for the same conduct. The case strengthened the domestic application of the material facts test and clarified that finality in misdemeanor adjudication suffices to invoke constitutional protection.[205]

By contrast, in *Už-8463/2018*, the Court dismissed the constitutional complaint due to procedural default. The applicant, convicted of abuse of office, claimed that a pending misdemeanor case for the same conduct violated her rights under Article 34(4). However, the Court found that she failed to raise the *ne bis in idem* argument before the ordinary courts, particularly in her request for protection of legality before the Supreme Court of Cassation. This case underlined the procedural preconditions for invoking constitutional protection.[206]

A similar outcome occurred in Už-6986/2018, where the applicant was fined in customs misdemeanor proceedings and later convicted of smuggling. Despite the material overlap, the Court, invoking the E.Ct.H.R's *A and B v. Norway* judgment, held that the two

[203]*Ustavni sud Republike Srbije* [Constitutional Court of Serbia], Už-9397/2016 (3 Dec. 2020) (Dec. 3, 2020); Gheorghe Reniță, Cumulation of Criminal and Disciplinary Liability in the Case of the Manipulation of the Sports Competitions: European Standards and the Experience of the Republic of Moldova, 16 Cogito: Multidisciplinary Res. J. 94 (June 2024).
[204]*Ustavni sud Republike Srbije* [Constitutional Court of Serbia], Decision Už-9956/2016 (Oct. 28, 2021).
[205]Ustavni sud Republike Srbije [Constitutional Court of Serbia], Už-2513/2014, (Oct. 15, 2020).
[206]Ustavni sud Republike Srbije [Constitutional Court of Serbia], Už-8463/2018, (July. 1, 2021).

proceedings pursued complementary objectives and were sufficiently connected in time and substance.[207]

Finally, the case Už-1320/2018 emphasized the courts' obligation to assess double jeopardy claims substantively. The Supreme Court of Cassation had dismissed a request for protection of legality due to a clerical error in the application, ignoring the substantive *ne bis in idem* argument. The Constitutional Court found this omission to violate the applicant's right to a fair trial under Article 32(1).[208]

3.2.2. ORDINARY COURTS AND THE APPLICATION OF *NE BIS IN IDEM* TO MISDEMEANOR AND CRIMINAL MATTERS

In line with the methodological framework developed by the E.Ct.H.R, the application of the *ne bis in idem* principle requires a cumulative assessment of four elements: (i) whether the matter is "criminal in nature," as defined through the Engel criteria (*Engel and Others v. Netherlands*); (ii) whether there has been a duplication of proceedings (*bis*) that are not "sufficiently connected in substance and time" (*A and B v. Norway [GC]*); (iii) whether the charges are "identical or substantially the same" in terms of the underlying facts (*Zolotukhin v. Russia [GC]*); and (iv) whether one of the proceedings has been concluded by a final and binding decision (*Mihalache v. Romania [GC]*).

Serbian ordinary courts have been required to interpret these elements in practice, particularly in cases involving the overlap of misdemeanor and criminal proceedings. The jurisprudence illustrates both convergence with Strasbourg standards and persistent inconsistencies, especially regarding the relationship between *idem* and *bis* in contexts where the same factual matrix is split across separate punitive tracks.

Serbian courts have, at least in principle, acknowledged the applicability of res judicata between misdemeanor and criminal proceedings. This approach was notably affirmed in a 2014 appellate judgment, where it was emphasized that the prohibition against double jeopardy applies not only to criminal offenses in the strict sense but to any punishable act. As stated:

"[C]ontrary to the position of the Court of Appeal, the provisions of the Code of Criminal Procedure and the Constitution of the Republic of Serbia guarantee the exercise of the right to legal certainty in criminal proceedings by prohibiting the conduct of

[207]Ustavni sud Republike Srbije [Constitutional Court of Serbia], Už-6986/2018, (Mar. 18, 2021).
[208]Ustavni sud Republike Srbije [Constitutional Court of Serbia], Už-1320/2018, (Apr. 29, 2021).

proceedings and a trial not only for a 'criminal offense' but for any punishable offense."[209]

In this context, the Tax Administration's decision in misdemeanor proceedings was considered legally relevant in assessing whether the criminal charge concerned the same matter. The Appellate Court in Kragujevac confirmed this approach, recognizing *idem factum* and *eadem persona* between the misdemeanor judgment (VAT offense) and the criminal indictment (tax evasion), thereby concluding that the matter had already been adjudicated.

The European Court of Human Rights further examined the principle in *Stamenković v. Serbia.*[210] The E.Ct.H.R. ruled that the *ne bis in idem* guarantee had been violated, even though the misdemeanor charge included an additional element of continuous behavior. The Court held that both the misdemeanor and criminal charges stemmed from the same violent act—committed at the same time and place—and that this factual overlap constituted a violation of the *idem* criterion under Article 4(1) of Protocol No. 7.[211]

While the proceedings were not conducted in parallel and the criminal case began seven months after the misdemeanor ruling, the E.Ct.H.R. determined that the

[209]*See* Judgment of the Appellate Court in Niš, No. 19 Kž 1 3842/13 (Dec. 17, 2014). Similarly, the first-instance court, acting in accordance with the objections presented in the decision of this court Kž 1-1590/15 (Jan. 05, 2016), correctly determined that in this criminal case, in the sentence of the first-instance verdict, the charge should be rejected for the reasons stated in the explanation of the contested verdict, since in that part it is about a decided matter, because the first-instance court, by comparing the factual description from the indictment proposal of the public prosecutor and the factual description of the final verdict of the Misdemeanor Court in Kragujevac 5 Pr. No. 25573/10 (Apr. 28, 2015), correctly determined that there is an identity of the act and the person-perpetrator, between the matter included in the judgment of the Misdemeanor Court and the criminal matter included in that part of the indictment, which was part of the extended criminal offense of tax evasion from Art. 229 st. 2 in connection with para. 1 and Art. 61 CC. Therefore, the first-instance court correctly applied the provisions of Art. 34(3) of the Constitution of the Republic of Serbia, Art. 4th para. 1, CPC and Art. 4 of Protocol No. 7 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, given that it appears from the case file that the judgment of the Misdemeanor Court in Kragujevac, the accused as a legal entity, were found guilty of the misdemeanor from Art. 60 para. 1 point 12 and paragraph 2 of the Law on value added tax, where the factual description of the misdemeanor from the aforementioned judgment of the misdemeanor court is identical to the factual description of the criminal offense of tax evasion from Art. 229 st. 2 in connection with Art. 61 of the CC, in relation to the value added tax, described in paragraph one of the detailed indictment, in terms of the time, place of the executor and type of tax liability, i.e. it is an identical factual situation, so according to the opinion of the Appellate Court, the correct conclusion of the first instance court is that in the specific case, for the actions described in more detail in the sentence of the first-instance judgment, it is about a decided matter, and accordingly, the appeal of the public prosecutor in that part was assessed as unfounded, because with the proper application of the provisions of Art. 422 point 2 of the CPC, the charge against the defendant in that part was dismissed. Apelacioni sud u Kragujevcu [App. Ct. in Kragujevac] Apr. 19, 2016, Kž1-418/16; *see more in* Veljko Turanjanin, *Anatomija privrednih krivičnih dela* [Anatomy of Economic Crimes] 49 (Faculty of Law, University of Kragujevac 2019).

[210]Stamenković v. Serbia, App. No. 30009/15, (Mar. 1, 2022), https://hudoc.echr.coe.int/eng?i=001-215918.

[211]*See id.*

lack of temporal proximity and independent collection of evidence were insufficient to break the substantive link between the two cases. Ultimately, the Court emphasized that the nature and timing of the proceedings are decisive in determining whether a breach of *ne bis in idem* has occurred.[212]

This nuanced interpretation by the E.Ct.H.R. underscores the importance of both factual and temporal links in determining the applicability of the *ne bis in idem principle*. The question of whether proceedings constitute the same criminal matter does not depend solely on the simultaneous conduct of the procedures but also on their substantive connection. In light of these standards, it is essential to examine how Serbian courts have approached the relationship between misdemeanor and criminal proceedings in practice. A series of domestic judgments provides insight into the application of the principle and highlights both alignment and divergence from the European Court's case law. Having examined the core elements of the *ne bis in idem* principle—including the criteria of *idem*, *bis*, and the requirement of a final decision—this section turns to the practical application and challenges in the Serbian legal system.

The judgment issued by the High Court in Čačak on October 28, 2021 (Kz 198/2021) exemplifies a case where the principle of *ne bis in idem* does not apply, as the offenses in question stem from different factual bases. Specifically, the court ruled that a defendant cannot be subjected to both criminal and misdemeanor proceedings based on the same life event if the offenses involve unrelated elements. In this case, the defendant was charged with the criminal offense of endangering public traffic due to unsafe driving, and with a misdemeanor for operating a foreign-registered vehicle without the required insurance under Serbian law. The court concluded that because the offenses did not share essential elements—one being related to public safety in traffic and the other to the administrative matter of insurance—the offenses were not considered to derive from the same factual basis. Therefore, the principle of *ne bis in idem*, which protects individuals from being prosecuted for the same offense twice, was not violated. This judgment reinforces the idea that for *ne bis in idem* to apply, the legal charges must be based on the same factual circumstances, and merely involving the same defendant or event is insufficient. The separation between the two types of offenses (criminal and misdemeanor) in this case ensures that each proceeding addressed distinct issues, without overlapping in substance or legal basis.

In its ruling Kzl 118/2020 of October 8, 2020, the High Court in Čačak addressed a case involving both a misdemeanor and a criminal offense stemming from the same event. The defendant was initially punished in a misdemeanor proceeding for violating

[212]*See id.* ¶ 9.

an emergency measure that prohibited him from contacting his wife, a victim of domestic violence. He had disregarded this prohibition by entering the family home and forcing his wife to leave. The misdemeanor court found him guilty of this violation under the Law on Prevention of Domestic Violence.[213] However, the defendant was also facing criminal charges for threatening his wife verbally within the family home, a crime under the criminal law. The factual description in the criminal indictment included threats not mentioned in the misdemeanor court's final judgment. Despite this difference in the specifics of the charges, the High Court in Čačak concluded that both the misdemeanor and criminal proceedings were based on the same underlying event, i.e., the defendant's conduct within the family home on the same occasion. Therefore, the court ruled that the principle of res judicata applied, and the defendant could not be prosecuted again for the same factual basis, as the matter had already been adjudicated. We could say that this case highlights the application of *ne bis in idem* to both misdemeanor and criminal offenses arising from the same event, emphasizing that if the underlying facts of the two proceedings are identical, a new trial or punishment is prohibited, even if the legal characterizations of the offenses differ.

The judgment of the High Court in Valjevo, Kzl 55/2018, from March 20, 2018, provides an interesting example of the application of the *ne bis in idem* principle. In this case, the same defendants were prosecuted in two separate proceedings: one criminal and one misdemeanor. The criminal court found the defendants guilty of violent behavior in conjunction with grievous bodily harm, based on their actions that led to the physical harm of another individual. Specifically, the defendants were responsible for inflicting serious and minor injuries to the victim, following a confrontation during which the victim had warned them against their behavior. In parallel, the Misdemeanor Court had found the same defendants guilty of shameless and reckless behavior under the Law on Public Order and Peace. They were penalized for violating public order by urinating in a public space, which had led to a disruption of public peace. The High Court ruled that *ne bis in idem* did not apply in this case, even though both proceedings arose from the defendants' actions on the same occasion. The court found that the misdemeanor and criminal charges were not based on the same set of facts. While the criminal offense was linked to the violent actions that caused physical harm to the victim, the misdemeanor charge was connected to a different aspect of the defendants' behavior—their public indecency and disregard for public order. In other words, the High Court differentiated between the two proceedings by considering the nature and

[213] Zakon o sprečavanju nasilja u porodici [Law on Prevention of Domestic Violence], Official Gazette of the Republic of Serbia, No. 64/2016 & 10/2023 (Serb.).

consequences of the actions. The actions described in the misdemeanor verdict, which dealt with public indecency, were deemed to precede and contribute to the more serious criminal event (the violence). Therefore, the criminal conduct (violent behavior and bodily harm) was considered separate from the misdemeanor (disrupting public peace), despite the events being temporally and contextually linked.

Additionally, the consequences of the criminal offenses were deemed to be significantly more severe than those of the misdemeanor, further supporting the court's decision that they were not the same offense. This ruling underscores how *ne bis in idem* is applied with nuance, especially when the legal nature and consequences of the charges differ, even when they arise from the same life event. It also highlights the principle that different types of responsibility—criminal and misdemeanor—are not interchangeable and that res judicata in criminal law may not apply when the factual bases of the offenses are distinct.

On January 29, 2018, the Court of Appeal in Kragujevac issued the verdict Kzl 84/2018, in which it addressed whether criminal proceedings could be pursued after a misdemeanor case had already been legally suspended. The court concluded that when the factual description of the misdemeanor clearly pertains to the same defendants, the same life event, occurring at the same time and place, involving the same actions of the defendants that resulted in the same consequences, the criminal charge against the defendants must be rejected due to the principle of res judicata. In this specific case, the defendants were accused of both a misdemeanor and a criminal offense arising from the same set of facts: their failure to comply with safety regulations and technical standards on a construction site, which resulted in a fatal accident. The tragic incident involved a concrete panel falling from a crane and fatally injuring an individual. The Court of Appeal determined that, since both the misdemeanor and the criminal charges were based on identical factual circumstances and the same actions leading to the same fatal outcome, the matter had already been decided in the misdemeanor case. As such, the court ruled that the criminal case could not proceed, invoking the principle that a defendant should not be tried twice for the same offense or event. This decision illustrates the application of the *ne bis in idem* principle and reinforces the notion that when the core facts are identical, the legal matter has already been adjudicated.

Together, these cases establish a robust framework for interpreting *ne bis in idem* in Serbian constitutional jurisprudence. The Constitutional Court of Serbia has shown increasing sensitivity to the material identity of facts, procedural safeguards, and the necessity of harmonizing domestic standards with the human rights requirements stemming from the European Convention on Human Rights. Its jurisprudence affirms

that final judgments in misdemeanor cases can trigger constitutional protection, while simultaneously insisting on procedural diligence from litigants to preserve their rights.

These decisions confirm that while *ne bis in idem* protects individuals against legal uncertainty and abusive duplications of prosecution, it must be applied in a balanced manner. The Court’s reasoning reflects a convergence with E.Ct.H.R. standards, especially post-*Zolotukhin*, but also incorporates a domestic sensitivity to the structure of Serbia’s dual-track punitive system (criminal and misdemeanor). The constitutional case law thus provides an increasingly refined model for distinguishing when procedural duplication becomes constitutionally impermissible. The cases analyzed above demonstrate that Serbian courts have progressively adopted a more refined approach to the *ne bis in idem* principle, especially in contexts where misdemeanor and criminal offenses stem from the same factual matrix. While some judgments affirm a strict adherence to the identity of facts and legal consequences, others reveal a tendency to differentiate proceedings based on the legal characterization or severity of the offenses. This evolving jurisprudence suggests that although the principle of res judicata is increasingly recognized, its consistent and harmonized application remains a challenge. Further alignment with the E.Ct.H.R’s jurisprudence—particularly regarding the material and temporal connection between proceedings—would enhance legal certainty and better safeguard the rights of the accused under A4P7.

In conclusion, the case law of Serbian ordinary courts reveals both progress and persistent challenges in applying the *ne bis in idem* principle to the relationship between misdemeanor and criminal matters. While certain judgments—particularly those of appellate courts—demonstrate a clear alignment with the Strasbourg standards by focusing on the identity of facts and the finality of decisions, other rulings still rely heavily on formalistic distinctions between different categories of punishable conduct. This fragmented approach undermines legal certainty and opens the door to inconsistent judicial practice. To ensure full compliance with A4P7, Serbian courts must adopt a uniform interpretation that prioritizes the material reality of proceedings over their formal classification. Strengthening the consistency of domestic jurisprudence along the lines articulated in *Zolotukhin* and *A and B v. Norway* would not only safeguard individual rights but also enhance public trust in the fairness and predictability of the criminal justice system.

3.3. THE RELATIONSHIP BETWEEN DISCIPLINARY AND CRIMINAL PROCEEDINGS

Building upon the examination of the interplay between misdemeanor and criminal proceedings, this section turns to another important intersection in the Serbian legal system—the relationship between disciplinary and criminal procedures and its implications for the ne bis in idem principle.

The Republic of Serbia demonstrates a varied approach in interpreting and applying the principle of *ne bis in idem*, particularly regarding its interaction with disciplinary procedures. As previously mentioned, the legal nature of disciplinary procedures is a subject of ongoing debate in Serbian legal literature, and this debate influences the judicial interpretation of the principle of double jeopardy in these cases.

The Supreme Court of Cassation has issued several rulings that highlight its stance on the potential conflict between disciplinary and criminal proceedings. In particular, the Court has ruled that criminal proceedings can be initiated after disciplinary actions have been taken, without violating the *ne bis in idem* principle. This is based on the understanding that disciplinary measures and criminal responsibility are distinct forms of liability. The judgment in case *UZP 143/2022 (April 29, 2022)* exemplifies this reasoning. In this case, the Court concluded that an employee could be subject to disciplinary liability for breaches of the employer's work obligations and, simultaneously, face criminal liability if the circumstances warrant it. The Court emphasized that these are two separate types of responsibility, and as such, the principle of *ne bis in idem* does not apply.[214]

Similarly, in judgment *Kzz 1179/2021 (February 10, 2021)*, the Supreme Court assessed that there was no violation of *ne bis in idem* when both criminal and disciplinary proceedings were conducted concerning the same event. This decision was based on the fact that the legal nature of disciplinary sanctions is linked to status or labor law, rather

[214]In this case, two separate proceedings were conducted based on the same underlying event: one disciplinary and one criminal. The disciplinary proceeding addressed a serious breach of official duty under art. 207, para. 1, point 1, of the Law on Police, while the criminal proceeding concerned the offense of abuse of official position under art. 359, paragraph 1 of the Criminal Code. The disciplinary proceeding, conducted due to a significant breach of duty under art. 207, para. 1, point 7, of the Law on Police, resulted in a disciplinary fine imposed on the prosecutor. This fine, however, pertains solely to labor law, as disciplinary sanctions are designed to limit or revoke certain employee rights or privileges within the scope of employment, applying only as long as the person maintains their employment status. Given the labor-specific nature of disciplinary sanctions, the Administrative Court concluded that conducting a criminal proceeding on the same event did not violate the *ne bis in idem* principle. The court emphasized that the disciplinary procedure's outcomes relate to employment status rather than criminal liability, allowing separate proceedings to address distinct legal concerns. The Supreme Court of Cassation concurred with this reasoning, affirming the Administrative Court's conclusion that no legal barrier existed to prevent the criminal case from proceeding independently.

than to the criminal law context. In this view, the Court determined that imposing both criminal and disciplinary sanctions does not constitute “double punishment” for the same offense, as they serve different legal purposes: criminal sanctions aim to address criminal conduct, while disciplinary sanctions focus on maintaining the proper functioning of employment relationships or professional standards.

The Supreme Court of Cassation’s ruling regarding the application of the *ne bis in idem* principle in cases involving both disciplinary and criminal proceedings is insightful, especially in the context of Serbian jurisprudence. As stated in the explanation, the Constitutional Court of the Republic of Serbia aligns its interpretation with the E.Ct.H.R., setting specific criteria to assess whether two proceedings for the same act represent a violation of *ne bis in idem*. These criteria are:

- Whether both proceedings are for an act that, by its nature, constitutes a punishable offense, and whether the sanction in the disciplinary procedure is criminal in nature.
- Whether the acts for which the defendant is being prosecuted are the same (*idem*).
- Whether there has been a double procedure (*bis*).

In the case discussed, the Supreme Court of Cassation held that disciplinary proceedings under the Law on Civil Employees do not meet the criteria for criminal charges, primarily because the sanctions in the disciplinary process are of a labor-law nature rather than criminal in nature. These sanctions, such as limiting or removing certain rights or positions, are designed to regulate the employment relationship and cease to have effect once the person is no longer employed. The Court emphasized that the sanctions in question are not criminal in nature, as they do not carry the same punitive and repressive purpose as criminal sanctions. Therefore, despite disciplinary and criminal proceedings concerning an event that shared some of the same facts, the Supreme Court ruled that the *ne bis in idem* principle was not violated. The legal distinction between labor-law sanctions and criminal punishment was crucial in this judgment. The Court clarified that the disciplinary procedure, which ended before the criminal procedure commenced, did not constitute a final legal resolution of the matter related to the criminal offense (in this case, falsification of a document). Consequently, there was no procedural barrier preventing the initiation of criminal proceedings. This ruling underscores the principle that different legal systems—disciplinary versus criminal—can address the same event without infringing the prohibition against double

jeopardy, provided the proceedings are grounded in distinct legal foundations and objectives.

Finally, we can say that these cases underscore the complex and evolving nature of legal interpretations regarding *ne bis in idem* in Serbia. While disciplinary and criminal proceedings may sometimes overlap in the facts or circumstances of a case, Serbian courts have found that the distinct legal functions of these proceedings permit their parallel application without violating the constitutional principle prohibiting double punishment for the same offense.

Together with the findings presented in the previous section, these judgments illustrate how the principle of *ne bis in idem* is interpreted in Serbia not only in terms of the substantive identity of offenses but also through the lens of the nature and function of parallel procedures—whether misdemeanor, disciplinary, or criminal. In sum, the Serbian approach to the relationship between disciplinary and criminal proceedings reflects a dual focus: on the one hand, protecting individuals from duplicative criminal sanctions, and on the other, preserving the autonomy of distinct legal regimes such as labor or professional law. The prevailing view of the Supreme Court of Cassation is that disciplinary measures do not possess a "criminal nature" within the meaning of the Engel criteria, and therefore do not trigger the *ne bis in idem* guarantee when followed by criminal prosecution. This jurisprudence shows partial convergence with the standards of the E.Ct.H.R, which emphasizes the substantive nature of the sanction rather than its formal classification. However, it also reveals areas of potential friction: in cases where disciplinary sanctions take on punitive or deterrent characteristics beyond mere labor-law regulation, Serbian courts will need to reassess their current position carefully.

3.4. RES JUDICATA IN DISMISSALS BASED ON THE PRINCIPLE OF OPPORTUNITY

The application of res judicata in criminal law is particularly complex when a criminal complaint is dismissed under the principle of opportunity. This prosecutorial mechanism, codified in Article 283 of the Serbian Code of C.C.P., allows the public prosecutor to defer prosecution on condition that the defendant fulfills specific obligations (such as paying a sum to charity, undergoing treatment, or compensating the injured party). Once these obligations are met, the prosecutor issues a decision formally dismissing the complaint. Although such dismissals occur without judicial adjudication,

they raise important questions regarding legal certainty, finality, and the scope of the *ne bis in idem* guarantee.[215]

Amid public debates on the amendments to the C.C.P., it is envisaged that the scope of the *ne bis in idem* principle will be formally defined regarding criminal complaints dismissed by the public prosecutor under the conditional application of the principle of opportunity. Where a criminal complaint has been dismissed based on fulfilled obligations imposed by conditional deferral of prosecution, the suspect may not be prosecuted again for the same offense. This is considered a sound solution from the standpoint of legal certainty, as it resolves a formal problem that had previously been addressed in Serbian judicial practice only through interpretative positions adopted by the Supreme Court of Cassation.[216]

According to the A4P7 and the E.Ct. H.R's Grand Chamber judgment in *Mihalache v. Romania,*[217] the protection under A4P7 requires that there be both an "acquittal or conviction" and a "final decision". The E.Ct.H.R. has emphasized that it is the substance of the decision that matters: where the prosecutorial body has assessed the merits of the case, evaluated evidence, and imposed a sanction with punitive or deterrent character, the resulting dismissal can amount to a "conviction" even in the absence of judicial intervention.[218] By contrast, as clarified in *Smoković v. Croatia (dec.)*,[219] a decision based purely on procedural grounds, such as the expiry of statutory limitation periods, does not qualify as either an acquittal or a conviction.

In Serbian practice, this issue came to the forefront in a 2017 case (*KT 1876/16, 5 Apr. 2017*). The prosecutor had conditionally deferred prosecution against an accused for endangering public traffic, imposing an obligation to pay 20,000 RSD for humanitarian purposes. Upon compliance, the prosecutor dismissed the complaint. However, in 2018 (*KTO 586/18, 9 July 2018*), the same person was indicted for a more serious traffic offense arising from the same factual matrix—same event, time, place, and injuries caused. Lower courts rejected the *ne bis in idem* plea on the theory that there was no res judicata because, formally, a "criminal proceeding" had not been commenced within the

[215]Vojislava Nikolić, Načelo *ne bis in idem* i odluke javnog tužioca, [The Principle of Ne Bis in Idem and Decisions of the Public Prosecutor], 15 Crimen 234 (2024) (Serb.).

[216]*See* Milan Škulić, *Nova rešenja u Nacrtu zakona o izmenama i dopunama Zakonika o krivičnom postupku (kriminalno-politički razlozi normiranja i očekivanja od primene)* [New Solutions in the Draft Law on Amendments to the Criminal Procedure Code (Criminal-Policy Reasons for Regulation and Expectations from Application)], in *Nova rešenja u krivičnom zakonodavstvu (kriminalno-politički razlozi normiranja i očekivanja od primene)* [New Solutions in Criminal Legislation (Criminal-Policy Reasons for Regulation and Expectations from Application)] 34–78 (Veljko Turanjanin & Dragana Čvorović eds., Zlatibor, 2025) (Serb.).

[217]Mihalache v. Romania, App. No. 54012/10, (July 7, 2019), https://hudoc.echr.coe.int/fre?i=001-194523.

[218] *Id.* 95-101.

[219]Smoković v. Croatia, App. No. 57849/12, (Nov. 12, 2019), https://hudoc.echr.coe.int/eng?i=001-199300.

meaning of Article 7 C.P.C. (no order to investigate, no confirmed indictment, etc.), and the earlier stage involved only deferred prosecution. The Supreme Court of Cassation reversed. It held that the decisive inquiry is not the formal commencement of proceedings under Article 7 C.P.C., but whether there has been a final disposition of the case in the criminal justice system such that the person may not be prosecuted again for the same facts. The Court reasoned that, in the deferral setting, the prosecutor acts as an organ of criminal justice; once the accused fulfils the conditions and the prosecutor dismisses the complaint, the matter is finally disposed of in that phase. That finality engages Article 4(1) C.P.C.'s guarantee that no one may be prosecuted again for an offense for which they have been finally acquitted or convicted, the indictment finally dismissed, or the proceedings finally discontinued. Accordingly, bringing a new charge drawn from the same factual matrix violates *ne bis in idem*.[220]

This approach aligns Serbian law with the standards of both the E.Ct.H.R. and the C.J.E.U. The C.J.E.U. in *Hüseyin Gözütok and Klaus Brügge*[221] held that a prosecutor's decision to discontinue proceedings after the accused complies with imposed conditions amounts to a final disposal barring renewed prosecution for the same facts under Article 54 C.I.S.A. Conversely, in *Miraglia,*[222] the C.J.E.U. emphasized that where national authorities discontinue a case without examining the merits of the accusation—for instance, due to prosecutorial discretion or reasons of procedural economy—the principle of *ne bis in idem* is not triggered. This distinction is crucial: only dismissals that include an assessment of the factual basis and criminal responsibility engage the protection. The E.Ct. H.R's *Mihalache* confirmed this logic, stressing that prosecutorial decisions qualify as "final" when they definitively resolve the case, are enforceable, and are not subject to further ordinary remedies.[223]

[220]VKS, (Nov. 2, 2020), Kzz 740/2020.

[221]This interpretation aligns with the CJEU's reasoning in *Gözütok and Brügge*, where prosecutions in the Netherlands and Germany had been terminated by public prosecutors following out-of-court settlements with the defendants. The CJEU was asked whether such discontinuations, without judicial involvement, could activate the *ne bis in idem* safeguard under Art. 54 of the Convention Implementing the Schengen Agreement (CISA). The CJEU responded affirmatively, emphasizing that the absence of court participation did not preclude the application of *ne bis in idem*, provided that the obligations imposed on the accused had been fulfilled. While some national systems may require judicial validation of such settlements, Art. 54 CISA is not contingent upon harmonization of criminal procedures. Rather, it presumes a foundational principle of mutual trust among Member States, accepting diverse prosecutorial practices as equally capable of producing final and binding legal effects. *See* Mitsilegas and Giuffrida, *supra note* 1, at 153.

[222]Case C-469/03, Criminal Proceedings Against Miraglia, E.C.R. 2005 I-02009; *see also*, Case C-505/19, WS v. Bundesrepublik Deutschland, ECLI:EU:C:2021:376 (May 12, 2021), the Court confirmed that *ne bis in idem* applies even to decisions by public prosecutors to discontinue proceedings, provided that the decision is final and based on an assessment of the merits of the case (73–74); Mitsilegas and Giuffrida, *supra note* 1, at 154.

[223]Mihalache v. Romania, App. No. 54012/10, 115-125 (July 7, 2019), https://hudoc.echr.coe.int/fre?i=001-194523.

In line with this reasoning, the Serbian Supreme Court of Cassation has explicitly confirmed that a prosecutorial decision on deferred prosecution under Article 283 of the C.C.P. produces res judicata effects. In its judgment *Przz 18/2016* (22 Dec. 2016), the Court emphasized that the application of opportunity presupposes that the prosecutor first establishes the existence of a criminal offense and then imposes specific obligations on the suspect, such as payment of a sum for humanitarian purposes. Fulfillment of this obligation amounts to a form of punishment, providing the legal basis for the dismissal of the criminal complaint. Consequently, initiating a subsequent misdemeanor proceeding for the same conduct constitutes a violation of Article 8(3) of the Misdemeanor Act, which prohibits double proceedings for an identical factual event. This reasoning places Serbian jurisprudence in harmony with the standards developed in the case law of the European Court of Human Rights and the Court of Justice of the European Union, articulated in *Mihalache v. Romania*[224] and *Hüseyin Gözütok and Klaus Brügge,*[225] where prosecutorial settlements were recognized as final decisions triggering the *ne bis in idem* protection.[226]

The Serbian Supreme Court invoked this jurisprudence to underscore that what matters is the substantive finality of the prosecutorial decision within the criminal justice system, not the act's formal label or whether a court participated in the proceedings. This reasoning is also consonant with the evolution of Strasbourg and Luxembourg case law on dual proceedings and finality. The E.Ct. H.R's Grand Chamber in *A and B v. Norway* accepted that dual tracks may be permissible only where they are sufficiently connected in substance and time; conversely, where an earlier disposition is genuinely final, renewed prosecution for the same facts is barred.[227] The E.Ct.H.R.'s *Mihalache v. Romania* further emphasized that prosecutorial decisions can qualify as "final" under A4P7 where they definitively terminate the case and are not subject to further ordinary remedies, thereby triggering *ne bis in idem*.[228] Likewise, the C.J.E.U.'s *Menci* confirmed that duplication is not automatically precluded, but it must satisfy proportionality and complementarity; where a prior disposition achieves finality in a penal sense, a second prosecution on the same facts will generally offend the principle.[229]

[224] *Id.*

[225] Joined Cases Case C-187/01 & C-385/01, Criminal proceedings against Hüseyin Gözütok (C-187/01) and Klaus Brügge (C-385/01), 2003 E.C.R. I-1345.

[226] Vrhovni kasacioni sud [VKS] [Supreme Court of Cassation], Przz 18/2016, (Dec. 22, 2016) (Serb.).

[227] A. and B. v. Norway, App. Nos. 24130/11 & 29758/11 (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972.

[228] Mihalache v. Romania, App. No. 54012/10, (July 7, 2019), https://hudoc.echr.coe.int/fre?i=001-194523.

[229] Case C-524/15, Criminal Proceedings Against Luca Menci, ECLI:EU:C:2018:197 (Mar. 20, 2018).

Seen from this perspective, dismissals based on the principle of opportunity in Serbia clearly fall within the protective scope of the *ne bis in idem* principle. They involve the prosecutor's assessment of the merits, include punitive or deterrent obligations, and result in a binding dismissal once the conditions are met. Treating such decisions as final enhances legal certainty, prevents prosecutorial overreach, and harmonizes Serbian practice with the standards developed in the case law of the European Court of Human Rights and the Court of Justice of the European Union. Importantly, the mechanism is not marginal: data suggest that more than twenty percent of criminal cases in Serbia are resolved annually through conditional deferral, which underscores its systemic significance.[230]

By acknowledging the res judicata effect of opportunity-based dismissals, Serbian courts strengthen the protection of individuals from repeated prosecution, promote consistency with E.Ct.H.R. and C.J.E.U. jurisprudence, and reinforce public trust in the integrity of criminal justice. At the same time, this interpretation maintains the necessary balance. While dismissals based on assessed merits activate *ne bis in idem*, those lacking such substantive evaluation (as in *Miraglia*) remain outside its scope. This ensures that the principle is applied coherently, without undermining prosecutorial flexibility in purely procedural or discretionary decisions.

3.5. THE RELATIONSHIP BETWEEN CRIMINAL AND CIVIL PROCEEDINGS

While the principle of *ne bis in idem* primarily governs the criminal sphere, its potential reach across other domains—such as civil proceedings—raises important questions of scope and applicability. Unlike misdemeanor or disciplinary cases, which may fall within the "criminal" sphere under Article 6 E.C.H.R. as interpreted through the *Engel* criteria, civil proceedings remain largely autonomous. The E.Ct.H.R. has consistently underlined that *ne bis in idem* under A4P7 applies only to proceedings of a "criminal nature".[231] Consequently, the coexistence of civil and criminal procedures stemming from the same factual background does not, in principle, trigger double jeopardy concerns, as the two branches of law serve distinct purposes—punitive versus compensatory.

[230] *See* STANKO BEJATOVIĆ ET AL., PRIRUČNIK ZA PRIMENU NAČELA OPORTUNITETA KRIVIČNOG GONJENJA [MANUAL FOR THE APPLICATION OF THE PRINCIPLE OF OPPORTUNITY FOR CRIMINAL PROSECUTION] (2019) (Serb.).
[231] Ravnsborg v. Sweden, App. No. 14220/88, 34 (Mar. 23, 1994), https://hudoc.echr.coe.int/eng?i=001-57871.

Serbian jurisprudence reflects this doctrinal separation. In its decision Kzl 23/2022 (High Court in Čačak, February 2, 2022),[232] the court addressed the legal implications of non-payment of alimony. The court clarified that a final civil judgment establishing the duty to pay alimony does not preclude criminal prosecution for the offense of non-payment of maintenance. The civil ruling imposes a duty of performance but does not itself create criminal liability. The subsequent criminal proceedings—where the court may impose a suspended sentence conditional upon repayment—address a distinct violation: the failure to fulfill the legal obligation in a manner defined as punishable under criminal law. Therefore, no violation of *ne bis in idem* occurs, as the proceedings concern different forms of legal responsibility.

Similarly, in *Rev 1091/2017* (Supreme Court of Cassation, 14 June 2017), the Court held that even an acquittal or dismissal of criminal charges does not bar civil courts from establishing civil liability and awarding damages for the same conduct. The Court emphasized that criminal trials determine guilt and impose punishment, while civil proceedings adjudicate private rights and compensation for harm. Thus, the existence of a final criminal judgment does not trigger res judicata effects in civil litigation.

These decisions confirm that the Serbian judiciary adheres to the standard developed in the case law of the E.Ct.H.R.: *ne bis in idem* is confined to the criminal sphere and does not create a universal procedural bar across legal domains. Civil proceedings pursue fundamentally different objectives—restitution and compensation—rather than penal sanction. The consistent separation between criminal and civil law in both E.Ct.H.R. and Serbian jurisprudence ensures that parallel proceedings may coexist without infringing on the prohibition of double jeopardy. This doctrinal clarity reinforces legal certainty, while also preserving courts' ability to address different aspects of liability—punitive and compensatory—through the appropriate legal forums.

[232]Art. 195 of the Nedavanje izdržavanja [Serbian Criminal Code] states: (1) Ko ne daje izdržavanje za lice koje je po zakonu dužan da izdržava, a ta dužnost je utvrđena izvršnom sudskom odlukom ili izvršnim poravnanjem pred sudom ili drugim nadležnim organom, u iznosu i na način kako je to odlukom odnosno poravnanjem utvrđeno, kazniće se novčanom kaznom ili zatvorom do dve godine. (2) Neće se kazniti učinilac dela iz stava 1. ovog člana, ako iz opravdanih razloga nije davao izdržavanje. (3) Ako su usled dela iz stava 1. ovog člana nastupile teške posledice za izdržavano lice, učinilac će se kazniti zatvorom od tri meseca do tri godine. (4) Ako izrekne uslovnu osudu, sud može odrediti obavezu učiniocu da izmiri dospele obaveze i da uredno daje izdržavanje. [(1) Whoever does not provide maintenance for a person whom he is obliged by law to support, and this duty is determined by an enforceable court decision or an enforceable settlement before a court or other competent authority, in the amount and in the manner determined by the decision or settlement, shall be punished by a fine or imprisonment for up to two years. (2) The perpetrator of the offense referred to in paragraph 1 of this article will not be punished if he did not provide maintenance for justified reasons. (3) If, as a result of the act referred to in paragraph 1 of this article, serious consequences have occurred for the dependent person, the perpetrator will be punished with imprisonment from three months to three years. (4) If it imposes a suspended sentence, the court may order the perpetrator to settle the due obligations and to properly provide maintenance.].

4. PRINCIPLE OF *NE BIS IN IDEM* DURING THE PANDEMIC CAUSED BY THE COVID-19 VIRUS

While the *ne bis in idem* principle is generally applied under stable legal conditions, extraordinary circumstances—such as public health emergencies—can challenge its scope and consistency. The COVID-19 pandemic offers a critical lens through which to examine how this principle operates under crisis-driven legal frameworks. The pandemic caused by the SARS-CoV-2 virus profoundly impacted every inhabitant of our planet on multiple levels. To address the rapidly changing global situation, it became necessary to adapt to new circumstances, which, first and foremost, required changes to legal regulations. These adjustments were crucial to regulating people's behavior and mitigating the spread of this infectious disease. In the Republic of Serbia, a state of emergency was declared four times, with the fourth being specifically due to the COVID-19 pandemic. On March 15, 2020, the President of the Republic, the President of the National Assembly, and the Prime Minister jointly adopted a decision declaring a state of emergency[233]. This state of emergency was later repealed by a Decision on the Abolition of the State of Emergency, adopted by the National Assembly.[234] It is important to note that during a state of emergency, certain human and minority rights guaranteed under the Constitution are temporarily suspended. This necessitates careful consideration when adopting new regulations, particularly given that some actions that would not typically be considered criminal offenses under normal circumstances may be classified as violations during an emergency. In this context, following the government's decision, and with the President's co-signature, the Decree on Measures during the State of Emergency[235] was issued. This decree was amended and modified several times to address the evolving needs of the situation.

Subsequently, the Decree on Offenses for Violating the Minister's Order on the Restriction and Prohibition of Movement[236] was also enacted. This followed the earlier

[233]Odluka o uvođenju vanrednog stanja [Decision on Declaring a State of Emergency], Official Gazette of the Republic of Serbia, No. 29/2020 (Serb.).

[234]Odluka o ukidanju vanrednog stanja [Decision on Suspending the State of Emergency], Official Gazette of the Republic of Serbia, No. 65/2020 (Serb.).

[235]Uredba o merama za vreme vanrednog stanja [Regulation on measures during a state of emergency], Official Gazette of the Republic of Serbia. Nos. 31/2020, 36/2020, 38/2020, 39/2020, 43/2020, 47/2020, 49/2020, 53/2020, 56/2020, 57/2020, 58/2020, 60/2020 & 126/2020 (Serb.).

[236]Uredba o prekršaju za kršenje Naredbe ministra unutrašnjih poslova o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije [Decree on a Misdemeanor for Violation of the Order of the Minister of Internal Affairs on the Restriction and Prohibition of the Movement of Persons on the Territory of the Republic of Serbia], Official Gazette of the Republic of Serbia, Nos. 39/2020 & 126/2020 (Serb.).

issuance of the Order of the Minister of the Interior,[237] which, with the approval of the Minister of Health, imposed restrictions on movement throughout the country. Additionally, COVID-19 was officially classified as an infectious disease under the Law on the Protection of the Population from Infectious Diseases.[238] The regulatory framework during this crisis was not only aimed at controlling the spread of the virus but also raised important legal and constitutional questions about the balance between public health and individual freedoms.

During a state of emergency, certain human and minority rights are temporarily suspended, leading to restrictions on freedoms and rights in the Republic of Serbia.[239] These legal measures were necessary to address the public health crisis caused by the COVID-19 pandemic. In cases of non-compliance with the restrictions, individuals faced penalties, including misdemeanor or criminal proceedings. For example, from the onset of the state of emergency, violations of the Order on the Restriction and Prohibition of Movement became common, with numerous individuals being criminally liable in the early days of enforcement.[240] The Criminal Code further established penalties for non-compliance with health regulations during an epidemic. Specifically, Article 248 of the Criminal Code addresses failure to comply with prescribed health measures during an epidemic. It states: "Anyone who, during an epidemic of any dangerous infectious disease, fails to comply with regulations, decisions, or orders designed to control or prevent its spread, shall be punished by a fine or imprisonment for up to three years." This provision creates a blanket criminal offense, meaning it applies to violations of a wide range of legal rules set out in various public health regulations, including those introduced during the pandemic. The application of this legal framework, particularly the criminalization of violations of public health orders, represents a significant intersection of public health policies and individual rights, raising important discussions

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[237]Naredba ministra unutrašnjih poslova o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije [Order of the Minister of Internal Affairs on Restriction and Prohibition of the Movement of Persons on the Territory of the Republic of Serbia], Official Gazette of the Republic of Serbia, Nos. 34/2020 (Mar. 18, 2020), No. 39/2020 (Mar. 21, 2020), No. 40/2020 (Mar. 22, 2020), No. 46/2020 (Mar. 28, 2020), & No. 50/2020 (Apr. 3, 2020) (Serb.).

[238]Zakon o zaštiti stanovništva od zaraznih bolesti [Law on the Protection of the Population from Infectious Diseases], Official Gazette of the Republic of Serbia, Nos. 15/2016, 68/2020 & 136/2020 (Serb.).

[239]*See* Veljko Turanjanin, *Unforeseeability and Abuse of Criminal Law During the Covid-19 Pandemic in Serbia*, 5 EU & Compar. L. Issues & Challenges Series 223 (2021); Veljko Turanjanin, *Migrants and Safety in Serbia During and After Coronavirus Pandemic*, 6 EU & Compar. L. Issues & Challenges Series 410 (2022); Veljko Turanjanin, *Social Implications Caused by State Reaction on COVID-19 and Human Rights in Republic of Serbia*, Teme - Časopis za Društvene Nauke, 2021, at 1081.

[240]Veljko Turanjanin, Social implications Caused by State Reaction on COVID-19 and Human Rights in Republic of Serbia, 1081-96, (2021).

about the balance between public safety and individual freedoms during a health crisis.[241]

Several legal challenges were brought before the Constitutional Court of Serbia regarding the constitutionality and legality of certain provisions in the *Decree on Measures During the State of Emergency* and the *Decree on Misdemeanors for Violation of the Order of the Minister of Internal Affairs on the Restriction and Prohibition of the Movement of Persons on the Territory of the Republic of Serbia.* These challenges focused on the legality of specific articles in both decrees, particularly Articles 4d and 2. The Constitutional Court responded by adopting Decision *No. IUo-45/2020 on September 17, 2020*, maintaining that these provisions were consistent with the Constitution.

Article 4d of the *Regulation on Measures during a State of Emergency* was particularly controversial. It stated that individuals who violated certain prohibitions could be fined between 50,000 and 150,000 dinars. The provision also allowed for misdemeanor proceedings to be initiated even if criminal proceedings were ongoing against the individual for the same act, contradicting the principle of *ne bis in idem*, which prohibits double jeopardy or being tried twice for the same offense. Similarly, Article 2 of the *Regulation on Misdemeanors for Violation of the Minister's Order* allowed for misdemeanor

[241] Veljko Turanjanin & Darko Radulović, *Coronavirus (COVID-19) and Possibilities for Criminal Law Reaction in Europe*, 49 (suppl. 1) IRAN. J. PUB. HEALTH 4 (2020).

proceedings to be initiated even if a criminal case had already been filed for the same action, further violating this principle.[242]

This legal arrangement created a situation in which individuals could face multiple legal actions for the same conduct, raising concerns about legal certainty and fairness. The principle of *ne bis in idem* is a fundamental part of legal systems in democratic societies, and its violation under these decrees could be seen as contrary to the rule of law. These provisions drew significant criticism from legal experts, who argued that such dual legal proceedings undermine citizens' basic rights and could set a dangerous precedent for abuse of legal power.

In its Decision, the Constitutional Court of Serbia addressed a critical issue regarding the potential violation of the *ne bis in idem* principle—i.e., the prohibition against double punishment for the same offense. The Court ruled that the provisions from the *Decree on Measures During the State of Emergency* and the *Decree on Misdemeanors for*

[242] *See* Art. 1 of the Uredba o prekršaju za kršenje Naredbe ministra unutrašnjih poslova o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije [Regulation on misdemeanors for violating the Order of the Minister of Internal Affairs on the restriction and prohibition of the movement of persons on the territory of the Republic of Serbia] refers to the punishment of persons who violate Art. 1 and 2 of the Order on the restriction and prohibition of the movement of persons on the territory of the Republic of Serbia by in the event that they violate the aforementioned provisions, they will be fined for the offense in the amount of 50,000 to 150,000 dinars. Art. 1 and 2 of the Order on the Restriction and Prohibition of the Movement of Persons in the Territory of the Republic of Serbia stipulates that: Radi suzbijanja i sprečavanja širenja zarazne bolesti Covid-19 i zaštite stanovništva od te bolesti zabranjuje se kretanje na javnim mestima, odnosno van stanova, prostorija i objekata za stanovanje u stambenim zgradama i izvan domaćinstva (okućnica), i to: licima sa navršenih 65 i više godina života – u naseljenim mestima preko 5000 stanovnika; licima sa navršenih 70 i više godina života – u naseljenim mestima do 5000 stanovnika. Zabrana iz stava 1. ove tačke ne odnosi se na period nedeljom, od 03 do 08 časova. Zabranjuje se svim licima izlazak van stanova, prostorija i objekata za stanovanje u stambenim zgradama i izvan domaćinstva (okućnica), u vremenu od 17 do 05 časova, osim subotom kada zabrana traje od 17 do 03 časova. Izuzetno od stava 1. ove tačke, dozvoljeno je izvođenje kućnih ljubimaca u periodu od 20 do 21 čas, u trajanju od 20 minuta, najviše 200 m udaljenosti od mesta prebivališta, odnosno boravišta. Zabrana iz tač. 1. i 2. ove naredbe ne odnosi se ni na fizička lica kojima je neodložno potrebna zdravstvena pomoć i najviše dva lica u pratnji tog lica. Nepoštovanje zabrane iz tač. 1. i 2. ove naredbe kazniće se za krivično delo u skladu sa Krivičnim zakonikom, a za prekršaj u skladu sa Uredbom o prekršaju za kršenje Naredbe ministra unutrašnjih poslova o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije. [1. In order to suppress and prevent the spread of the infectious disease Covid-19 and to protect the population from this disease, it is prohibited to move in public places, i.e. outside apartments, rooms and residential facilities in residential buildings and outside the household (household), namely: 1) persons aged 65 and over - in populated areas with more than 5,000 inhabitants; 2) persons aged 70 and over - in populated areas with up to 5,000 inhabitants. The ban from paragraph 1 of this point does not apply to the period on Saturdays, from 4 a.m. to 7 a.m. 2. It is forbidden for all persons to leave apartments, rooms and residential facilities in residential buildings and outside the household (household), between 5 pm and 5 am on weekdays, as well as from 1 pm on Saturdays until 5 am on Mondays. As an exception to paragraph 1 of this item, it is allowed to take pets out from 11 p.m. to 1 a.m. the next day, as well as on Sundays from 8 a.m. to 10 a.m., for a duration of 20 minutes, up to 200 m away from the place of residence. i.e. residence, starting from April 4, 2020. At the time when it is in accordance with paragraph 1 and 2 at this point, the exit of persons is allowed, it is forbidden for more than two persons to move together or stay in a public place in an open space. The prohibition from paragraph 3 of this point does not apply to parents with minor children. 2. It is prohibited to move in all parks and public areas intended for recreation and sports, starting from March 21, 2020, from 8 p.m.].

Violation of the Minister of Internal Affairs' Order could lead to a situation where a person might be punished twice for the same act. The Court emphasized that this was contrary to the constitutional protection of legal certainty outlined in Article 34, paragraph 4 of the Serbian Constitution, which prohibits double jeopardy, and aligns with international human rights standards. The Court noted that these decrees allowed for parallel misdemeanor and criminal proceedings for the same offense, and the possibility of multiple punishments for a single act. This approach, as the Court found, violated the *ne bis in idem* principle, which is a cornerstone of legal certainty in criminal law. This principle ensures that no individual should face multiple legal consequences for the same conduct, a protection also enshrined in the E.C.H.R, particularly in A4P7.

Crucially, the Court's reasoning echoed the established jurisprudence of the E.Ct.H.R., which has consistently underscored the centrality of *ne bis in idem* for legal certainty and fairness.[243] In line with Strasbourg, the Constitutional Court stressed that pandemic-related restrictions could not justify derogations from the *ne bis in idem* principle. This is reinforced by Article 4(3) of Protocol No. 7, which explicitly stipulates that "No derogation from this Article shall be made under Article 15 of the Convention". Unlike certain other rights, the prohibition of double jeopardy is therefore absolute and immune from suspension, even during a state of emergency.

Ultimately, the COVID-19 pandemic served as a constitutional stress test for the application of the *ne bis in idem* principle in Serbia. While emergency conditions demanded swift and robust public health responses, they also exposed the risks of legal overreach and normative ambiguity. The Constitutional Court's decision reaffirmed that even in times of crisis, fundamental rights such as protection against double jeopardy must remain intact. This episode highlights the importance of preserving legal certainty and proportionality in sanctioning mechanisms. It serves as a reminder that constitutional safeguards cannot be suspended without a clear and narrowly tailored justification.

CONCLUSION

The principle of *ne bis in idem* is a fundamental component of both international and domestic human rights law. It safeguards legal certainty and protects individuals from being tried or punished twice for the same offence. Its application, however, becomes

[243] Gradinger v. Austria, App. No. 15963/90, (Oct. 23, 1995), https://hudoc.echr.coe.int/eng?i=001-57958; Sergey Zolotukhin v. Russia [GC], App. No. 14939/03, (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

particularly complex when multiple punishable acts arise from the same event committed by the same individual. In Serbia, misdemeanor proceedings often conclude more quickly than criminal ones, and an early decision in a misdemeanor case may acquire res judicata status. This raises the possibility that such a ruling could preclude a subsequent criminal trial, even where criminal prosecution might seem more appropriate.

Serbian criminal procedure law also confers res judicata effect on certain prosecutorial decisions, even in the absence of judicial adjudication. Whether this approach consistently advances justice remains to be tested in practice. A persistent issue in Serbian law is the overlap between criminal offences and misdemeanors, particularly in the fields of public order, taxation, and traffic violations. Ambiguous legal classifications increase the risk of inconsistent applications of the *ne bis in idem* principle. Legislative reform is therefore urgently needed to clarify the distinction between misdemeanors and crimes and to modernize outdated provisions on economic offences. Moreover, questions remain as to whether Serbian courts consistently align their reasoning with the jurisprudence of the E.Ct.H.R. and the C.J.E.U.

Although *ne bis in idem* offers robust protection, it is not absolute. Each case must be assessed against the Engel criteria and subsequent refinements developed in Strasbourg and Luxembourg jurisprudence, including *A and B v. Norway*, which introduced the concept of "sufficiently close connection in substance and in time." Serbian courts have made notable progress, particularly regarding the interplay between misdemeanor and criminal proceedings, but their reasoning is not always consistent. As illustrated in *Stamenković v. Serbia*, proceedings based on the same facts—even if temporally separated—may breach the principle where no meaningful distinction exists between the charges.

In the context of disciplinary proceedings, Serbian jurisprudence has emphasized its distinct legal character and objectives relative to criminal liability. Disciplinary measures, rooted in labour or professional law, do not generally trigger *ne bis in idem*. Similarly, civil proceedings remain outside the scope of the principle, as they pursue compensatory rather than punitive aims.

One of the most critical stress tests for the application of *ne bis in idem* in Serbia occurred during the COVID-19 pandemic. Certain emergency decrees permitted parallel misdemeanor and criminal proceedings for the same act, creating legal uncertainty and undermining constitutional safeguards. The Constitutional Court ultimately ruled that these provisions violated Article 34(4) of the Serbian Constitution and Article 4 (3) of Protocol No. 7 to the E.C.H.R. Importantly, Article 4(3) of Protocol No. 7 expressly

prohibits derogation, even in times of emergency under Article 15 E.C.H.R. The E.Ct.H.R.'s decision, therefore, reaffirmed that *ne bis in idem* remains fully applicable even under crisis conditions, underscoring that extraordinary circumstances cannot justify the erosion of fundamental guarantees.

In conclusion, the Serbian experience demonstrates that the application of *ne bis in idem* is both dynamic and evolving. While courts have progressively refined their scope, further legislative clarification and continued harmonization with E.Ct.H.R. and C.J.E.U. standards remain essential. Only through consistent jurisprudence, updated legislation, and adherence to international human rights law can *ne bis in idem* fulfil its foundational role in ensuring the integrity of the legal system and protecting individual rights.

CONTRIBUTORSHIP STATEMENT

This article has been jointly authored by Dr. Veljko Turanjanin and Ms. Milica Pavlović Turkalj. Dr. Turanjanin was responsible for authoring the Introduction, Part 1 (Legal Regulation of the *Ne Bis in Idem* in International Law), and Part 4 (Principle of *Ne Bis in Idem* During the Pandemic Caused by the COVID-19 Virus). Ms. Pavlović Turkalj contributed to Part 2 (*Ne Bis in Idem* Principle in Serbian Legal System - Legal Framework and Its Effects), Part 3 (The Application of the Principle of *Ne Bis in Idem* and Problems in Serbia), and the Conclusion. All sections were reviewed and revised collaboratively to ensure consistency and academic integrity across the manuscript.

FUNDING DETAILS

The authors declare that no funding was received for the research, authorship, and/or publication of this article.

DISCLOSURE STATEMENT

The authors report there are no competing interests to declare.

DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no new data were created or analysed in this study.