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Opinion Article

«NE BIS IN IDEM» PRINCIPLE IN CRIMINAL PROCEEDINGS – COMPARATIVE ANALYSIS WITH INTERNATIONAL INSTRUMENTS AND KOSOVO LEGISLATION

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ABSTRACT

Background: *Criminal procedure law consists of legal principles, such as a fair and impartial trial and within a reasonable time, presumption of innocence, the principle "in dubio pro reo," independence of the court, equality of parties, the principle "ne bis in idem"*[3] *etc. Among*

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Principles are rules, which are defined by the Criminal Procedure Code. For these principles in more detail, see: Code of the Republic of Kosovo No 08/L-032 'Criminal Procedure Code' of 14 July 2022 [2022] OG 24, arts 3, 4, 5.

Access to Justice in Eastern Europe
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the main principles recognised by International Conventions, the Constitutions of States, and Criminal Procedure Laws is the principle, "The right not to be tried twice for the same offence," or as it is also known, "ne bis in idem." The principle "in bis in idem" is used in Kosovo's criminal proceedings, and recognition of this principle by international convention, including its recognition by the Law of the European Union, is analysed in this paper.

The legislation of Kosovo was established with the influence and assistance of the international community, which had an administration mandate until 17 February 2008, the date on which Kosovo declared its independence and, hence, separated from the former Yugoslavia. The new state is not a member of the UN but is officially recognised by more than 100 countries. In 2010, the International Court of Justice issued the Advisory Opinion which concluded, "The declaration of independence in respect of Kosovo on 17 February 2008 had not violated general international law."[4]

The purpose of this paper is to emphasise the importance of this principle when dealing with criminal cases before regular courts, the legal security that this principle provides to society, and the implementation of international legal instruments in the national law.

***Methods:** The paper uses methods of analysis and synthesis, the descriptive method, as well as the method of doctrinal interpretation of legal norms of criminal proceedings.*

***Results and conclusions:** This principle has been accepted by international instruments and by Kosovo's constitutional and legal system. The application of this principle in the criminal justice system in Kosovo forms legal certainty for citizens and constitutes protection of the rights and legitimate interests of persons involved in criminal proceedings. Kosovo has applied international standards in the implementation of criminal legislation and has directly incorporated international human rights instruments into its constitutional system (International Covenant on Civil and Political Rights adopted by the UN in 1966, ensued by the European Convention for the Protection of Human Rights and Fundamental Freedoms).*

1 INTRODUCTION

The effectiveness of the legal system in preventing and combating crime depends on the legal norms of the criminal justice. The criminal law consists of material norms and criminal procedure law. The Tort Law is primarily shaped by the Criminal Code[5] as the basic law, which incriminates human actions as illegal acts and foresees criminal sanctions and other special laws governing specific areas (Juvenile Justice Code[6], Law on Criminal Liability of Legal Persons[7], Law on Prevention and Combating Cybercrime[8], etc.). While it is formal, procedural law is regulated by the norms of the Criminal Procedure Code (hereinafter referred to as CPC).[9] Criminal proceedings are the set of legal norms collected in the CPC that foresee the progress of actions to be taken by state bodies (Police, State Prosecutor, and

4 For Advisory Opinion of International Court of Justice, see more: *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion of 22 July 2010) [2010] ICJ Rep 403 <https://www.icj-cij.org/case/141> accessed 10 May 2023.

5 Code of the Republic of Kosovo No 06/L-074 'Criminal Code of the Republic of Kosovo' of 23 November 2018 [2019] OG 2.

6 Code of the Republic of Kosovo No 06/L-006 'Juvenile Justice Code' [2018] OG 17.

7 Law of the Republic of Kosovo No 04/L-030 'On Liability of Legal Persons for Criminal Offences' [2011] OG 16.

8 Law of the Republic of Kosovo No 03/L-166 'On Prevention and Fight of the Cyber Crime' [2010] OG 74.

9 Code No 06/L-074 (n 5).

Courts) for the application of the Tort Law. These listed actions relate to the initiation of investigations by the state prosecutor and continue through to the final ruling rendered by the national courts.

Implementation of the law on criminal procedure is based on the basic principles of the trial, such as a fair and impartial trial and within a reasonable time, presumption of innocence, the principle "in dubio pro reo," independence of the court, equality of parties, etc. Among the main principles recognised by International Conventions, the Constitutions of States, and the Law on Criminal Procedure, is the principle, "*Not to be punished twice for the same criminal offence*" or as it is also known, *"ne bis in idem*."

The principle of ne bis in idem, otherwise known in English as the term, double jeopardy, is a constitutional and procedural right in the constitutions or the domestic legislations of many states. The purpose of a provision is to protect the individual against the arbitrary power of a state and to prevent a state from prosecuting someone for the same offence twice. In addition to being held as a constitutional right and a human right, ne bis in idem is sometimes viewed as a procedural defence to a criminal charge that bars its prosecution.[10]

Several research questions are addressed in this paper, including: How is this principle regulated by international conventions and national law? In which cases should this principle be implemented? Are there cases in which the criminal procedure established by a final decision can be reviewed?

2 "NE BIS IN IDEM" PRINCIPLE IN THE INTERNATIONAL CONVENTIONS

The *ne bis in idem principle* also found strong support from international conventions approved by the UN and the Council of Europe and has also been widely applied in EU law.

This principle is strongly enshrined in the UN International Covenant on Civil and Political Rights, 1966, Article 14, paragraph 7. According to this Covenant:

> *"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."*[11]

Member States of the UN must incorporate this principle into their domestic legislation.

The International Covenant on Civil and Political Rights, as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, are applicable directly to Kosovo's legislation and constitutional system. Although Kosovo is not a member of the UN and the Council of Europe, and has not signed this Convention, it is directly incorporated into their legislation by constitution. According to the Constitution:

> *"Human rights and freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly implemented in the Republic of Kosovo and have priority, in case of conflict, over provisions of laws and other acts of public institutions:*
>
> *(1) Universal Declaration of Human Rights;*

10 'Article 8: Ne Bis in Idem (Double Jeopardy): Commentary' in VM O'Connor and others (eds), *Model Codes for Post-Conflict Criminal Justice, vol 1 Model Criminal Codes* (US Institute of Peace Press 2007) pt 1, s 4, 51.

11 International Covenant on Civil and Political Rights (adopted 16 December 1966 UNGA Res 2200 (XXI) A) art 14/7 <https://undocs.org/en/A/RES/2200(XXI)> accessed 10 May 2023.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

> *(2) The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;*
>
> *(3) International Covenant on Civil and Political Rights and its Protocols; …….].”*[12]

This principle is also included in the European Convention for the Protection of Fundamental Rights and Freedoms, respectively in Protocol No. 7, adopted in 1984 (Article 4). The Convention provides that States may not deviate from a guarantee not to be tried or convicted in the same matter, nor in exceptional circumstances. According to this Protocol:

> *“1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*
>
> *2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.*
>
> *3. No derogation from this Article shall be made under Article15 of the Convention”.*[13]

All Council of Europe members are obliged to respect this principle by incorporating it into their national law. A deterrence of this principle may result in submission of the case to the European Court of Human Rights, and States may be penalised for failing to respect it.

Another important part of the conventions, approved by the Council of Europe, is the European Convention on the International Validity of Criminal Judgments (European Treaty Series – No. 70, The Hague, 28.V.1970). This convention was adopted in 1970 and, in Article 53, the first paragraph details this principle.

> *“1. A person in respect of whom a European criminal judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State:*
>
> *a. if he was acquitted;*
>
> *b. if the sanction imposed:*
>
> *i) has been completely enforced or is being enforced, or*
>
> ii) has *been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or*
>
> *iii can no longer be enforced because of lapse of time;*
>
> *c. if the court convicted the offender without imposing a sanction.”*[14]

This principle is also included in two other international instruments: the Geneva Convention relative to the Treatment of Prisoners of War, dated 12 August 1949, and the Statute of the International Criminal Court. These two conventions relate to the development of war or any armed conflict.

According to the Geneva Convention relative to the Treatment of Prisoners of War:

12 Constitution of the Republic of Kosovo K-09042008 of 9 April 2008 (as amended of 30 September 2020) art 22 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> accessed 10 May 2023.

13 Council of Europe, *European Convention of Human Rights: as amended by Protocols Nos 11, 14 and 15, supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16* (ECtHR 2014) Protocol No 7, art 4 <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c> accessed 2 December 2022.

14 European Convention on the International Validity of Criminal Judgments (adopted 28 May 1970 Hague) art 53/1 <https://rm.coe.int/1680072d3b > accessed 10 May 2023.

> *"No prisoner of war may be punished more than once for the same act or on the same charge."*[15]

The signatory States must apply the provisions of this Convention, even if any of the parties involved in the war or other armed conflict do not accept the state of war.[16]

The principle has also been accepted by the Statute of the International Criminal Court. The acceptance of this principle by the Rome Statute constitutes a significant achievement in the treatment of war crimes and the development in international criminal law. The Rome Statute provides for this principle in Article 20 as follows:

> *"1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.*
>
> *2. No person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court.*
>
> *3. No person who has been tried by another court for conduct also proscribed under Article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:*
>
> (a) Were for the purpose of shielding the person concerned from criminal respons*ibility for crimes within the jurisdiction of the Court; or*
>
> *(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."*[17]

At the international level, as can be seen, numerous important international instruments have been approved, giving important treatment to this principle.

This principle has been addressed by the European Court of Human Rights (hereinafter referred to as ECHR) in the cases known as Blokker v. Netherlands, Kurdov and Ivanov v. Bulgaria, Sergey Zolotukhin v. Russia, R.T. v. Switzerland, Storbrdten v. Norway, Manasson v. Sweden, Franz Fischer v. Austria, Gradinger v. Austria, Oliveira v. Switzerland. We analysed the cases of Blokker v. Netherlands and Franz Fischer v. Austria as the case studies in this paper.

On the 11th of July 2000, in the first case studied (Blokker v. Netherlands, case no. 45282/99), the ECHR rendered a decision declaring the request of H.P. Blokker against the Netherlands as inadmissible. The court concluded that the imposition of an administrative measure on the user of alcohol did not constitute a new criminal case, and that the state of the Netherlands had not violated human rights in such a case, thus, the request was rejected as inadmissible.[18] In this specific case, the Court has created a case law which is valid in the application of the principle, ne bis in idem. According to this decision, the application of additional administrative measures that were not imposed through the court process did not equate to a double jeopardy for the case.

15 Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949 Geneva) art 86 <https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-treatment-prisoners-war> accessed 18 February 2023.

16 ibid, arts 1, 2.

17 Rome Statute of the International Criminal Court (adopted 17 July 1998) art 20 <https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court> accessed 10 May 2023.

18 *Blokker v the Netherlands* App no 45282/99 (ECtHR, 7 November 2000) <https://hudoc.echr.coe.int/eng?i=001-5526> accessed 10 May 2023.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

In the case of Franz Fischer v. Austria, the Court declared admissible the request of the party against Austria on the violation of Article 4 of Protocol 7 of the ECHR.[19] On the 29th of August, 2001, in application no. 37950/97, the ECHR fined the state of Austria concerning the ascertained violation. The appellant alleged that he was convicted twice of driving under the influence of alcohol, first by the District Administrative Authority that ordered him to pay a fine of 22,010 Austrian shillings (ATS) with twenty days imprisonment in absentia. The final sentence included a fine of 9,000 ATS with nine days imprisonment in absentia imposed for driving under the influence of alcohol.

The second conviction came by the Regional Court according to the Criminal Code, which fined the applicant for causing death by negligence while intoxicated due to alcohol consumption with six (6) months of imprisonment. The convicted party filed an appeal to the Court of Appeal, which was rejected; however, the sentence was reduced from six (6) months to five (5) months of imprisonment. According to the applicant, the sentence by the criminal courts violated Article 4 of Protocol No. 7, considering that the sentence was not limited to Article 80 of the Criminal Code, but extended to Article 81 § 2. With this decision, the ECHR recalled that the purpose of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been terminated with a final ruling.[20] In this case, two sentences of imprisonment were imposed by two different state authorities, the Administrative Authority and the Regional Court, for the same legal issue. For this reason, the ECHR decided this case enacted the clause.

Such decisions serve to sublimate case law in respect with the basic principles of justice and criminal justice principles, in particular.

3 EU LAW CONCERNING THE PRINCIPLE "NE BIS IN IDEM"

The legal principle of ne bis in idem limits the possibility that a defendant will be repeatedly prosecuted for the same act, work, or facts. Although few would dispute its importance with the regulation of transnational justice, there is still no universally-accepted rule or provision in bis in idem; although, to some extent, it is recognised and respected in Europe through Article 54 of the Convention on the Implementation of the Schengen Agreement (CISA; integrated into EU law by the Treaty of Amsterdam) and Article 4 of the 7th Protocol to the European Convention on Human Rights. The relevant case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR) has implications for the criminal and administrative law systems in European states, as well as for the interpretation and application of the principle in some areas of EU law.[21]

> *The ne bis in idem principle is included in many national, European and international legal instruments. Within the European Union's area of Freedom, Security and Justice, the main legal sources are Articles 54 to 58 of the Convention Implementing the Schengen Agreement ("CISA") and Article 50 of the Charter of Fundamental Rights of the European Union ("Charter"). In general, the objective of the ne bis in idem principle is to ensure that no one is prosecuted for the same acts in several Member States on account of the fact that he exercises his right to freedom of movement.*[22]

19 *Franz Fischer v Austria* App no 37950/97 (ECtHR, 29 May 2001) <https://hudoc.echr.coe.int/fre-press?i=001-59475> accessed 10 May 2023.

20 ibid.

21 Bas van Bockel, *The Ne Bis in Idem Principle in EU Law* (European Monograph Series, Kluwer Law International 2010).

22 ibid.

The principle is also included as grounds for refusal in several EU instruments on judicial cooperation in criminal matters, including mutual recognition instruments, such as the Framework Decision 2002/584/JHA on the European Arrest Warrant ("FD EAW") and the Directive 2014/41/EU on the European Investigation Order in criminal matters.[23]

Article 54 of the Schengen Agreement conceives the principle "ne bis in idem" as applicable between EU member States. This article states, "*A person whose judgment has been finally settled in a Contracting Party may not be prosecuted in another Contracting Party for the same acts, provided that, if a sentence had been imposed, it has been executed, it is actually in the process of implementation or can no longer be implemented under the laws of the penal Contracting Party.*"[24] The principle is also defined in Article 50 of the Charter of Fundamental Rights of the European Union, stating, "*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.*"[25] The implementation of this principle is an example of the harmonisation of legislation in EU's criminal law.

Incorporation of the principle into the framework of EU law enabled the ECJ to adhere to interpretation by means of preliminary decisions under Article 35 of the UNION, and thereby ensures a consistent application of the principle in all member States.

> *"In addition to answering some specific questions, the Court has given basic instructions on the interpretation of the principle. The Court has consistently ruled that Articles 54-58 CISA are based on the concept of mutual recognition: on its landmark decision on the Gözütok and Brügge issues. 187/01 and 385/01, Gözütok and Brügge, the decision of..., made clear that where further prosecution is (definitively) prohibited under the national law of a Member State, when a decision has been taken, this shall apply to the whole Union."*[26]

Therefore, the Schengen Agreement has also been strengthened by the European Union Court of Justice's decisions, and the case law that recognises this principle has already been established. This is the first time that this principle finds unified application within several States, integrating in a supranational mechanism such as the EU. Regarding approximation of legislation in the field of criminal law, it is one of the most significant achievements made within the EU. With criminal law as one of the most important areas of justice generally, the importance of the principle's unification within the EU can be seen.

4 "NE BIS IN IDEM" PRINCIPLE IN CRIMINAL PROCEEDINGS IN KOSOVO

Criminal procedure law is regulated by law (in Kosovo, with the Criminal Procedure Code) and is based on fundamental principles, such as a fair and impartial trial, within a reasonable time, presumption of innocence, and the principle "*in dubio pro reo,*" independence of the court, equality of parties, etc. One of the main principles that finds wide application in

23 CJEU, *The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union* (Eurojust 2017) 2, doi: 10.2812/828017.

24 Martin Wasmeier, '3. The principle of *ne bis in idem*' (2006) 77 (1-2) Revue internationale de droit pénal 121, doi: 10.3917/ridp.771.0121.

25 Charter of Fundamental Rights of the European Union (2012/C 326/02) art 50 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> accessed 10 May 2023.

26 Cases C-187/01 and 385/01, *Gözütok and Brügge*, judgment of 11.2.2003, [2003] E.C.R. I-1345<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=48044&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=365772>.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

criminal procedure law is the principle, *"The right not to be tried twice for the same offence,"* also known as, *"ne bis in idem" (double jeopardy)*.[27]

Under this principle, a person cannot be prosecuted more than once for the same crime. Its report is twofold: on one hand, to provide judicial protection to persons against the ius puniendi of the state, as they have been subjected to a criminal prosecution (as part of the principles of fair trial and equality) and, on the other hand, to guarantee legal security and compliance with "res judicata."[28]

The principle, in bis in idem, according to which a physical person cannot be tried twice for the same case (the synonymous name for this is res judicata – a matter judged). It is a legal aphorism deriving from ancient Roman sources and expresses the rule that no new criminal process can be conducted against the same person for an act that has been subject to final judgment. The Rule is a consequence of so-called material omnipotence and represents a negative procedural assumption (procedural obstacle) for the development of a new process on the same issue.[29]

The Constitution of the Republic of Kosovo[30] provides for the principle in bis in idem in the second chapter, namely *"Fundamental rights and freedoms,"*[31] i.e., the principle is expressed and is recognised as a human right. Therefore, not only is it a principle in criminal procedure, but is also categorised in the range of fundamental human rights. According to the Constitution:

> *"No one can be tried more than once for the same offence."*[32]

Although the article is concise, the Constitution has laid out the foundations of its application in criminal case law. This principle means that no one can be prosecuted, nor punished, for the offence for which he is acquitted or tried by final court ruling, or for which the indictment was rejected by a final ruling, or for which the procedure was terminated by a final ruling. This article, due to its short length, provides opportunities for challenges, because it does not precisely mention (as is customary in other constitutions) the cases according to which this prohibition occurs. There is no provision given in the constitutional text that this problem will be regulated more closely by law to precisely emphasise cases of no trial for the same criminal offence.[33]

The Constitution does not provide for cases where the same case for criminal offences may be reopened. This is regulated by the Kosovo CPC. In principle, the same case cannot be reopened unless new evidence or facts have been discovered which were not known at the time of the trial, or if there were significant violations in the preliminary procedure that could have influenced its performance.

The Constitution prohibits prosecution and punishment in the same matter, generally providing for this prohibition. This is general and applies to everyone, because in Article 34, it demonstrates its breadth by using the word "nobody." It does not state precisely in which cases the Constitution defines the right of each person not to be tried twice for the same criminal act, but this situation is resolved by the provisions of the criminal law, so that it regulates cases when prosecution and punishment for the same issue are forbidden; the same

27 Code No 08/L-032 (n 3) arts 3, 4, 5.

28 Opinion of Advocate-General Ruiz-Jarabo Colomer in Cases C-187/01 and C-385/01 (delivered on 19 September 2002) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62001CC0187&from=FI> accessed 10 May 2023.

29 Ejup Sahiti, Rexhep Murati dhe Xhevdet Elshani, *Komentar Kodi i Procedurës Penale* (GIZ 2014) 60.

30 Constitution K-09042008 (n 12).

31 ibid, ch 2.

32 ibid, art 34.

33 Enver Hasani dhe Ivan Čukalović, *Komentar Kushtetuta e Republikës së Kosovës*, bot 1 (GIZ 2013) 115.

person cannot be punished twice for the same offence. With the determination that the court decision cannot be changed to the detriment of the defendant while using an extraordinary legal remedy, the Constitution accepts the principle of prohibition as *"reformatio in peius."* This right is guaranteed by Article 34. The Constitution is an absolute protected right and is not subject to avoidance at any cost, that is, even during times of emergency (see Article 56, paragraph 2).[34] This principle defines a constitutional human right in Kosovo.

4.1 Regulation of the principle with the Criminal Code of the Republic of Kosovo

This principle is of practical importance in the sense that, at the same time, two criminal proceedings cannot be conducted on the same issue. The importance of this principle contributes primarily to the realisation of citizens' legal security as well as to the legality of criminal law.[35]

"Ne bis in idem" is well specified in the Kosovo CPC. The code provides for the range of basic principles to follow during the development of all phases of the criminal procedure. According to Article 4:

> *"No one may be prosecuted and convicted of a criminal offence for which he has been acquitted or for which he has been convicted by a final court decision, respectively if the criminal proceedings against him have been terminated by a final decision of a court or the indictment has been rejected by a final court decision. A final decision of a court may be reversed through extraordinary legal remedies, except when otherwise provided by this Code."*[36]

In practice, it is not always easy to prove the identity of the act to determine whether it is the same act or not. Sometimes, provided criteria is sufficient for the place, time, and manner of execution to prove the compliance of the act with the final decision and the act for which the new procedure is being conducted. However, sometimes for procedural necessity, there is compliance of the act even when it is not related to the same occurrence. For example, when a person has been judged for the main offence (theft), he cannot be sued for any other concrete offence (such as causing damage to the item).[37]

Concerning the report of the indictment and the judgment, it is defined as: identity of the act expresses the rule that between the factual description of the act in the indictment and the factual description of the act in the enacting clause of judgment, there must definitively be compliance. Divergences between the act's factual description in the indictment and the enacting clause of judgment may lead to skipping the indictment or the incomplete resolution of the indictment, which is an essential violation of criminal procedure of absolute character.[38]

In the principle, "ne bis in idem," identifying the factual description of the act should not exist from the final judgment. Neither should the factual description of the act for which the new process is conducted or intended to be conducted be identified as this is an obstacle to the conduct of the new procedure. A review of the criminal procedure may be required if, despite the existence of the identity of the act, the new procedure has been conducted under certain legal conditions (Article 423, paragraph 1, under paragraph 1.4.). In accordance with

34 ibid 116.

35 Ismet Salihu, *Leksikon i së Drejtës Penale* (Printing Press 2022) 514.

36 Code No 08/L-032 (n 3) art 4.

37 Sahiti, Murati dhe Elshani (n 29) 60.

38 ibid.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

the principle of ne bis in idem as stated in Article 4, paragraph 1: "*No one may be prosecuted or punished for a criminal offence for which he has been tried in a meritorious manner, the existence of a meritorious judgment in a final form (whether it is about a judgement to release or punish) is an obstacle to a further trial of that criminal case.*" This circumstance should be considered by both the state prosecutor when pressing charges and the court when conducting proceedings and making a decision. The principle also applies to a case where a criminal proceeding has ceased for a criminal case according to a final decision.[39]

No one may be subject to trial for a criminal offence for which he has previously been acquitted or sentenced by a final decision (ne bis in idem – res judicata) in accordance with the law and criminal procedure of a State. However, where there is evidence for new facts, the criminal process may be reviewed in accordance with the law.[40]

The principle, in ne bis in idem, is of relative importance. Consequently, this principle does not apply in the procedures of extraordinary legal remedies in cases where final form judgments may be met, and where criminal proceedings may be conducted.[41]

Paragraph 2 of Article 4 provides for the possibility of amending the final court decision with extraordinary legal remedies only in favour of the convicted person. Based on this paragraph, the general rule emerges, stating that, except for cases where the Code foresees otherwise, the final court decision may be amended only in favour of the convicted person. The effect in favour of the convicted person is expressed even when the Supreme Court finds that the request submitted for the protection of legality to the prejudice of the defendant is founded, but in that case, it only finds the violation of the law without affecting the final decision (Article 438, paragraph 2).[42]

This article then relates to Article 419, paragraphs 1 and 2. According to the Criminal Procedure Code of Kosovo, "*Criminal proceedings terminated by a final ruling or a final judgment may be reopened upon the request of authorized persons only in instances and under conditions provided for by the present Code. The request for reopening of the criminal proceedings is filed with the Basic Court that rendered the decision.*"[43]

1. C*riminal proceedings terminated by a final judgment may only be reopened if*

1.1. it is proven that the judgment rests on a forged document or a false statement of a witness, expert witness or interpreter;

1.2. it is proven *that the judgment ensued from a criminal offence committed by a judge or a person who undertook investigative actions;*

1.3. new facts are discovered or new evidence is produced which, alone or in connection with previous evidence, appears likely to justify the acquittal of the convicted person or his conviction under a less severe criminal provision;

1.4. a person was tried more than once for the same offence or several persons were convicted of the same offence which could have been committed only by a single person or only by some of them; or

1.5. in the case of conviction for a continuous criminal offence, or some other criminal offences which under the law include several acts of the same kind or different kinds, new facts are

39 ibid 61.

40 Ejup Sahiti dhe Ismail Zejneli, *E drejta e procedurës penale e Republikës së Maqedonisë* (Universiteti i Evropes Juglindore në Tetovë 2017) 40.

41 Salihu (n 35) 514.

42 Sahiti, Murati dhe Elshani (n 29) 61.

43 Code No 08/L-032 (n 3) art 419/1.

discovered or new evidence is produced which indicates that the convicted person did not commit an act included in the criminal offence, of which he was convicted and the existence of these facts would have critically influenced the determination of punishment.[44]

There is an exception to the above-mentioned rule under Article 423, paragraph 2 of the CPC.

> *"Criminal proceedings terminated by a final judgment may be reopened only in favour of the defendant, except that if it is proven that the circumstances under paragraph 1.1 and 1.2 of the present Article have been a result of a criminal offence committed by the defendant or a person acting on his behalf against a witness, expert witness, interpreter, state prosecutor, judge or those close to such persons, criminal proceedings terminated by a final judgment may be reopened against the defendant. The reopening of criminal proceedings to the detriment of the defendant is only permissible within five (5) years of the time the final judgment was rendered."* [45]

So, the Code taken in full envisages that the review of the criminal procedure cannot be done to the defendants unless there are circumstances in which, if they were known at the time of the final ruling, would have been different. These situations must make the competent court judgment impartial and non-objective.

4.2 Respecting the Principle of ne bis in idem in Kosovo in the Trial of War Crimes

The Republic of Kosovo is a post-armed conflict society (referring to the war of 1998-1999), and as such, has faced the trial of war crimes. Initially, in the International Criminal Tribunal for the former Yugoslavia (ICTY), several cases of war crimes were tried for the citizens of Kosovo, and no new criminal processes have been developed for these decisions.

It should also be mentioned that post-war Kosovo was placed under the administration of the United Nations, under the "UNMIK"[46] mission. During the UNMIK Interim Administration, the hybrid judicial system was established in Kosovo. In this hybrid system, cases were tried by a mixture of judges, i.e., international and local judges. The ne bis in idem principle has been respected in all judgment cases.

The system of UNMIK courts ended with the Declaration of Independence of Kosovo on 17 February 2008. After the Declaration of Independence, special importance was given to the "EULEX" mission.[47]

"*EULEX's current mandate has been launched to cover the period until 14 June 2023 based on Council Decision CFSP 2021/904. Within its mandate, the Mission undertakes monitoring activities and has limited executive functions. EULEX continues to support the Kosovo Specialist Chambers and Specialist Prosecutor's Office in line with relevant Kosovo legislation.*"[48]

44 ibid, art 423/1.

45 ibid, art 423/2.

46 United Nations Interim Administration Mission in Kosovo (UNMIK) was established by the Security Council in its Resolution 1244 (1999). See, United Nations Resolution 1244 (adopted 10 June 1999) <https://unmik.unmissions.org/united-nations-resolution-1244> accessed 10 May 2023.

47 The European Union Rule of Law Mission in Kosovo (EULEX) was launched in 2008 as the largest civilian mission under the Common Security and Defence Policy of the European Union. EULEX's overall mission is to support relevant rule of law institutions in Kosovo on their path towards increased effectiveness, sustainability, multi-ethnicity and accountability, free from political interference and in full compliance with international human rights standards and best European practices.

48 'What is EULEX?' (*EULEX Kosovo*, 2023) <https://www.eulex-kosovo.eu/?page=2,16> accessed 10 May 2023.

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To clarify the allegations of war crimes and crimes against humanity, Kosovo established "*The Kosovo Specialist Chambers and Specialist Prosecutor's Office.*"[49] The establishment of this special court was made possible with the approval of constitutional amendments, namely amendment no. 24.[50]

The Kosovo Specialist Chambers and Specialist Prosecutor's Office were established pursuant to the international agreement ratified by the Kosovo Assembly, a Constitutional Amendment, and the Law on Kosovo Specialist Chambers and Specialist Prosecutor's Office. These authorities are temporary, holding a specific mandate and jurisdiction over crimes against humanity, war crimes, and other crimes under Kosovo law that were commenced or committed in Kosovo between 1 January 1998 and 31 December 2000, either by or against citizens of Kosovo or the Federal Republic of Yugoslavia. The Kosovo Specialist Chambers and the Specialist Prosecutor's Office have a seat in The Hague, the Netherlands. The staff, Judges, Specialist Prosecutor, and the Registrar are all international. This judicial system constitutes a special structure in the Kosovo justice system. It was established by the institutions of Kosovo and is considered part of the legislation of Kosovo, but its seat is not located in Kosovo. The professional and administrative staff are internationally located. To establish this judicial structure, Kosovo adopted Law No.05/L-053 on the Specialist Chambers and the Specialist Prosecutor's Office. This law, pursuant to Article 17, provides for the principle of ne bis in idem.

> *"In accordance with Article 34 of the Constitution of the Republic of Kosovo, a. no person shall be tried before another court of Kosovo for acts for which he or she has already been tried by the Specialist Chambers; b. no person shall be tried before the Specialist Chambers for acts which he or she has been tried by a court of Kosovo; c. no person shall be tried before the Specialist Chambers for acts which he or she has already been tried by 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 ("ICTY")."*[51]

The Republic of Kosovo, on a constitutional and legal basis, is part of the group of democratic states that respect international standards of justice.

5 CONCLUSIONS

The principle, "*The right not to be tried twice for the same criminal offence,*" commonly known as "*ne bis in idem,*" is among the fundamental principles of criminal proceedings. It also expresses the constitutional right of citizens and constitutes a fundamental right guaranteed by the Constitution. The principle was first incorporated into the International Covenant on Civil and Political Rights in 1966, then became an imperative norm of the signatory countries of the European Convention for the Protection of Human Rights and Fundamental Freedoms, namely Protocol No. 7 adopted in 1984 (Article 4, Paragraph 2). These international instruments underline the necessity of applying this principle to the national legislation of the UN and Council of Europe member states. The Republic of

49 This court was established under the influence of the international community after the approval of Dick Marty's report in the General Assembly of the Council of Europe. See, Dick Marty, Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo: Report Doc 12462 of 07 January 2011 <https://pace.coe.int/en/files/12608/html> accessed 10 May 2023.

50 Decision of the Assembly of the Republic of Kosovo No 05-D-139 'Amendment of the Constitution of the Republic of Kosovo: Amendment no 24' of 3 August 2015 [2015] OG 2.

51 Law of the Republic of Kosovo No 05/L-053 'On Specialist Chambers and Specialist Prosecutor's Office' of 3 August 2015 [2015] OG 27, art 17.

Kosovo, although not a member of the UN and Council of Europe, has directly incorporated these international instruments into its legislation. Within the framework of the Council of Europe, the European Convention on the International Validity of Criminal Judgments has been approved, also regulating this principle. In both international humanitarian law and international criminal law, there are two international instruments that recognize the principle ne bis in idem: the Geneva Convention relative to the Treatment of Prisoners of War dated 12 August 1949, and the Statute of the International Criminal Court. These instruments are applied under circumstances of war and for trial of war crimes.

The most significant progress at the international level while implementing this principle has been made by the European Union. Ne bis in idem has become the obligatory norm within the EU countries through Article 54 of the Convention on the Implementation of the Schengen Agreement (CISA; integrated into EU law by the Treaty of Amsterdam).

In the Republic of Kosovo, it is the constitutional principle provided for by the Constitution of the Republic of Kosovo. While the Criminal Procedure Code has been extensively elaborated and has foreseen cases when the procedure can be opened after the final ruling, these cases are only available where new facts are discovered in connection with the original evidence, or if the ruling was made under the influence of other factors that constitute elements of the criminal offence.

The application of this principle forms legal security for citizens and sets out a stable and respectable legal order. This principle is important to fair and just execution of the law.

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