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# Principle of Ne Bis In Idem in the Context of European Criminal Law

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**Summary:** The academic article deals with one of the essential principles of criminal procedures that is with principle *ne bis in idem*, that has been ranked among the essential legal terms within the criminal procedures of the European Union. At first, the article describes and defines the principle of *ne bis in idem* in general, and afterwards within the broader context, as well as in the context of the European Union, while the European standard arises from the highest-principled international and European documents where it has been embodied.

**Keywords:** Fundamental Principles, Fundamental Principles of Criminal Procedure, The Principle of Ne bis in idem, Double Jeopardy, Not Twice in the Same Thing, Convention for the Protection of Human Rights and Fundamental Freedoms, International Covenant on Civil and Political Rights, Charter of Fundamental Rights of the European Union, Convention implementing Schengen Agreement, Roman Statute of the International Criminal Court, European Convention on Extradition, European Court of Human Rights, Court of Justice of the European Union.

## 1. Introduction

The essential principles of criminal procedures are characterized as the leading legal ideas where its status has been acknowledged by the legislation act itself. Due to its features they are the bases, the whole of the criminal procedures and the adjustment of the functioning of the authorities appearing within the scope of criminal procedure, has been built on. Its significance has been given like this as the whole of the criminal procedure lies on it and it has been considered to be the essential part of the criminal procedure. Inevitably, the significant influence on the whole of the criminal procedure must be admitted, from the very beginning till its final phase and conclusion. Such an influence must be also admitted to the principle *ne bis in idem* known also as the principle not twice in

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the same subject or as double jeopardy. The essential principles of the criminal procedures play significant role while following the aim and the purpose of the criminal procedures, despite this fact it is practically often breached, misused and not respected.

## 2. Essential characteristic of *ne bis in idem* principle

In general and simplified way, the Latin name for *ne bis in idem* principle for the purpose of the criminal procedure, might be determined as the right not to be prosecuted or punished within the criminal procedure twice for the same criminal act – for the same offence.

The principle *ne bis in idem*, known also as *non bis in idem*, can be found also in the Bible, particularly in Nahuma prophet's book, expressed in the form "God will not punish the same thing twice, not in this world and the world to come..."<sup>1</sup> The right not to be punished twice for the same offence, later during the Roman times, comes from the Roman law where it was expressed that „an issue once decided must not be raised again”.<sup>2</sup>

The significance and the aim of the principle *ne bis in idem* lies within providing the legal assurance for the person being lawfully punished for the criminal offence or being dispensed of accusations, not to be punished in the same subject and offence second time and thus the new criminal procedure threat is eliminated. Taking the criminal procedures into consideration, as well as the jurisdiction in general, such doctrine must have a stable and strong status.<sup>3</sup> Justifying the whole of the matter within the criminal procedure is, that once the society realized the legal right to punish the person committing crime, the right to do so was in force, and as it was done, it cannot be executed once again for the same crime.<sup>4</sup> In connection to this there must be reminded that *ne bis in idem* principle is closely connected to and creates an inseparable part of *rei iudicatae* principle, the Latin meaning of word is: a matter/subject (legally) sentenced and judged. The word means a matter where the court brought a verdict and thus such a matter represents an absolute obstacle to accusation from the same reason.

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<sup>1</sup> The Bible, Book of prophet Nahum 1:9 [online]. Available at: <http://biblehub.com/commentaries/nahum/1-9.htm>

<sup>2</sup> BUCKLAND, William, Warwick. *A Text-book of Roman Law from Augustus to Justinian* [online]. Available at: <https://archive.org/details/textbookofromanl00buckuoft>

<sup>3</sup> IVOR, Jaroslav, KLIMEK, Libor, ZÁHORA, Jozef. *Trestné právo Európskej únie a jeho vplyv na právny poriadok Slovenskej republiky*. Žilina: Eurokódex, 2013, pp. 132.

<sup>4</sup> KLIMEK, Libor. *Základy trestného práva Európskej únie*. Bratislava: Wolters Kluwer, 2017, pp. 130-131.

Currently, the *ne bis in idem* principle belongs to one of the basic human rights. We can find it in the international documents, adopted as resolution of the European Council, United Nations Organization and of course of the European Union. Most of such agreements are not documents of criminal procedures, but the ones modifying human rights.<sup>5</sup>

### **3. Principle *ne bis in idem* on the international and European level**

Within the international and the European criminal context, the *ne bis in idem* principle is a part of many international treaties, some of them of territorial character, applicable within the area of the European Union. Some of the international treaties involve *ne bis in idem* principle are applicable to special acts of crime or subjects, others are of general character and are applicable within the autonomous understanding on the whole of criminal law.<sup>6</sup>

The most essential general meaning international documents are Convention for the Protection of Human Rights and Fundamental Freedoms, accepted by Council of Europe in 1950 and The International Treaty of Civil and Political Rights, coming into force in 1966 in UNO.<sup>7</sup> The most significant international documents of territorial character, applicable on the area of the European Union, are The Charter of Fundamental Rights of the European Union, first announced as common memorandum of the European Parliament, Council and Commission in 2000 as well as the Agreement, by which the Schengen Agreement dated back in 1985 is carried out. The international documents, applicable to special subjects and acts of crime are for example the Roman Statute of the International Crime Court, adopted by signatory parties in 1998, and the European Agreement, concerning handing the villains over from 1957, accepted by the European Council and many more.

#### **3.1. Convention for the Protection of Human Rights and Fundamental Freedoms**

The Convention for the Protection of Human Rights and Fundamental Freedoms, coming into force on 4th November 1950 and its protocols involve a few rights

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<sup>5</sup> KLIMEK, Libor. Transnational Application of the *Ne bis in idem* Principle in Europe. *Notitiae ex Academia Bratislavensi Iurisprudentiae*, 2011, vol. 5, no. 3, pp. 15.

<sup>6</sup> VALO, Michal. *Ne bis in idem* v slovenskom (európskom) trestnom práve a potrestanie za priestupok. *Justičná revue*, 2009, vol. 61, no. 6-7, pp. 759.

<sup>7</sup> KLIMEK, Libor. *Základy trestného práva Európskej únie*. Bratislava: Wolters Kluwer, 2017, pp. 123.

where also principle *ne bis in idem* is embodied. The international guarantee not to be punished twice for the same criminal proceeding, is embodied in the Article 4 in Protocol No.7 of this Convention. It is this Article 4 in Protocol No.7 of this Convention for the Protection of Human Rights and Fundamental Freedoms, providing *ne bis in idem* principle in the form to be tried or punished again in the following way:

*“Article 4*

*Right not to be tried or punished twice*

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 re-opening 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 proceeding, which could affect the outcome of the case.*
3. *No derogation from this Article shall be made under Article 15 of the Convention.”<sup>8</sup>*

Based on this right, as stated in the Article 4, Paragraph 1 of Protocol No. 7 of this Convention for the Protection of Human Rights and Fundamental Freedoms, nobody can be punished within criminal proceeding under jurisdiction of the same State for the criminal act he has been punished for or freed, according to jurisdiction of that particular State. What is important is to notice the connection in the Article 4, Paragraph 1 „jurisdiction of the same State“, the realization of which is limited only to the national level. Due to Paragraph No. 1 we can say that *ne bis in idem* principle involves only cases when the person has been sentenced or freed by valid judgement, in accordance with jurisdiction of that particular State. It is required to have the verdict as definite and final. The above mentioned, according to Article 4, Paragraph 2 of Protocol No.7 of Convention for the Protection of Human Rights and Fundamental Freedoms does not mean an obstacle while reopening the trial according to jurisdiction of particular State in cases when new or newly discovered facts or a substantial mistake within the previous proceeding could influence the judgement in the subject. That means that the case can be reopened again if there is evidence of new or newly discovered facts

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<sup>8</sup> European Convention on Human Rights, Article 4 to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

could influence the case result in accordance with the jurisdiction of particular State.<sup>9</sup> There is, in the Article 4 Paragraph 3 of Protocol No. 7 of Convention for the Protection of Human Rights and Fundamental Freedoms stated a fact that the Article 4 cannot draw away.

Within the Article of Convention for the Protection of Human Rights and Fundamental Freedoms there were problems administering the *ne bis in idem* principle, and it was reflected by the decision making procedure of the European Court for Human Rights. It is, for example, applying the principle of offence and criminal act. Important decisions of the European Court for Human Rights were sentenced first in case *Gradinger c/a Austria*<sup>10</sup>, later on *Oliveira c/a Switzerland*<sup>11</sup>, then *Franz Fischer c/a Austria*<sup>12</sup> and *Zolotukhin c/a Russian Federation*<sup>13</sup>. There also was for example the application problem, concerning the language interpretation and translation. It must be mentioned here that it is not important as to meaning of particular notions and terms in Convention for the Protection of Human Rights and Fundamental Freedoms within the jurisdictional systems of particular States. Each of the terms in Convention for the Protection of Human Rights and Fundamental Freedoms has its own autonomous meaning, not depending on the meaning in particular participated State. Such an attitude was pointed out in case *Öztürk c/a Germany*<sup>14</sup> but also in case *Engel and others c/a Netherland*<sup>15</sup>. The terms, having autonomous meaning and particular application problems can be only discovered from the content of decisions of the European Court for the Human Rights.

### **3.2. International Covenant on Civil and Political Rights**

The International Covenant on Civil and Political Right was approved in 1966 by UNO and came into force based on the Article 49 on 23rd March 1976. This

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<sup>9</sup> Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>10</sup> See: Judgment of the European Court of Human Rights of 23 October 1995 in Case No. 15963/90 – *Gradinger c/a Austria*.

<sup>11</sup> See: Judgment of the European Court of Human Rights of 30 July 1998 in Case No. 25711/94 – *Oliveira c/a Switzerland*.

<sup>12</sup> See: Judgment of the European Court of Human Rights of 29 May 2001 in Case No. 37950/97 – *Franz Fischer c/a Austria*.

<sup>13</sup> See: Judgment of the European Court of Human Rights of 10 February 2009 in Case No. 14939/03 – *Zolotukhin c/a Russian Federation*.

<sup>14</sup> See: Judgment of the European Court of Human Rights of 21 february 1984 in Case No. 8544/79 – *Öztürk c/a Germany*.

<sup>15</sup> See: Judgment of the European Court of Human Rights of 8 June 1976 in Case No. 5100/71, 5101/71, 5102/71, 5354/72 a 5370/72 – *Engel and others c/a Netherlands*.

international document states in its Article 14 Paragraph No. 7 the principle *ne bis in idem*, and thus provides the right not to be punished twice for the same subject.

Article 14 Paragraph No. 7 of the International Covenant on Civil and Political Rights states and expresses the *ne bis in idem* principle in the following way:

*“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.”*<sup>16</sup>

Based on the right not to be tried or punished twice for the same offence according to the Article 14 Paragraph No. 7 of the International Covenant on Civil and Political Rights, a criminal procedure cannot be started against someone who was sentenced for the same offence before by the valid legal judgement of the Court, where the accused was found guilty or he was acquitted of the crime offence or accusation.

It is important to draw the attention to a few facts. Expressing the principle *ne bis in idem* within the above mentioned Article results that the obstacle avoids only new criminal procedure, but does not to a new criminal and does not mean that the person sentenced or freed cannot be for the same act of crime, within other crime procedure, punished. Within the context of *ne bis in idem* principle it is not clear what decision means an obstacle to a new procedure, whether it is the valid judgement on being guilty or not or any other valid judgement for the same offence despite the fact that it was not judged as criminal act or offence and the judgement was sentenced in another criminal procedure and it is also important to judge from legal point of view if that is the same crime act, no matter what was the legal judgement. Furthermore, a significant fact is that the mentioned Article does not required the act, the crime proceeding was stopped to be referred to as crime act, or to be handled within the crime procedure. What results from the Article is only that the act, was, by the court decision and its valid judgement, sentenced as guilty or freed. Such a crime procedure, either the accused sentenced as guilty or not, obviously will not be a delinquency or any other actionable tort procedure. The terms sentenced guilty or freed from accusation can be factual only within the crime procedure. The above mentioned Article also shows that the obstacle to a new crime proceeding is created by a valid decision and judgement concerning the act, not about the act of crime, that means about the same fact not the same legally sentenced fact. All the States are compulsory to apply Article 14 Paragraph No. 7 The International Treaty of Civil and Political Rights obviously only for criminal procedure.

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<sup>16</sup> International Covenant on Civil and Political Rights, Part III, Article 14 paragraph 7.

Despite the fact that an additional provision of this international Treaty, expressing the rights and duties, the participating States agreed to provide for their citizens, are set explicitly in a way to executable directly. All the involved States, agreeing to the above mentioned International Treaty of Civil and Political Rights do not grant the rights involved for people directly under their jurisdiction or assumed a commitment based on the Article 2 Paragraph No.2 of the Treaty.<sup>17</sup> The attribute is set in a following way:

*“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”*<sup>18</sup>

Finally, it must be added that the International Treaty of Civil and Political Rights does not state *expressis verbis*, whether the principle *ne bis in idem* should be applied only to domestic decisions or it has an international effect, also in relation to decisions of other State’s bodies or multinational bodies like for example International Crime Court. Based on the recommendation of the Board of UNO for the Human Rights the Article 14 Paragraph No.7 including *ne bis in idem* principle, does not possess international effect and applies only to court decisions of the same State.<sup>19</sup>

### **3.3. The Charter of Fundamental Rights of the European Union**

Within the Charter of Fundamental Rights of the European Union, declared for the very first time at the end of year 2000 there are included the particular parts of essential rights with also the non-criminal rights. It must be said that the range of rights, involved in the Charter of Fundamental Rights, is considerably wider in comparison to any other international document, dealing with human rights. Nearly all the rights are taken from older international documents therefore they cannot be considered as new ones. The Rights are adopted mostly from The European Convention on Human Rights. One of the adopted rights is also the *ne bis in idem* principle, that is explained in the Charter as the Right not to be tried or punished twice in criminal proceedings for the same criminal offence. This right and principle *ne bis in idem* is modified in the Article 50 of the Charter of

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<sup>17</sup> VAEO, Michal. *Ne bis in idem v slovenskom (európskom) trestnom práve a potrestanie za priestupok. Justičná revue*, 2009, vol. 61, no. 6-7, pp. 760.

<sup>18</sup> International Covenant on Civil and Political Rights, Part II, Article 2 paragraph 2.

<sup>19</sup> Recommendation of the United Nations Committee on Human Rights of 2 November 1987 in Case No. CCPR/C/31/D/204/1986 – *A. P. c/a Italy*.

Fundamental Rights of the European Union in part VI. Title called Justice, and it is expressed by the following way:

*“Article 50*

*Right not to be tried or punished twice in criminal proceedings for the same criminal offence*

*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.”<sup>20</sup>*

As quoted in the Article 50 of the Charter of Fundamental Rights of the European Union, no one can be punished within crime procedure for crime act, the one he was, within the European Union freed or sentenced by the legal valid court decision.

As it was said before, this provision is adopted from the European Convention on Human Rights, more specifically in the Article 4 Protocol No. 7.

Firstly, comparing the appropriate provisions of the Charter of Fundamental Rights of the European Union and the the European Convention on Human Rights concerning the *ne bis in idem* principle we can say that the content and the range of the Article 50 of the Charter is identical with the Article 4 of the Protocol No. 7 with Convention.<sup>21</sup> Secondly, applying *ne bis in idem* principle, as it is stated in in the Convention, is possible only on the national level as it has been limited to one State jurisdiction and the difference is that the Charter has a value added by using and limitlessness of principle *ne bis in idem* only to domestic level but allowing to apply it within the whole of the jurisdiction system of the European Union, that means also behind the borders of the member State.<sup>22</sup>

### 3.4. Convention implementing Schengen Agreement

Another guarantee of the European Union while applying *ne bis in idem* principle is the Agreement to apply the Schengen Agreement<sup>23</sup> dated 1985, also called as Schengen Executing Agreement. Despite the fact that the initial aim of this Agreement

<sup>20</sup> Charter of Fundamental Rights of the European Union, Title VI, Article 50.

<sup>21</sup> Draft Charter of Fundamental Rights of the European Union (text of the explanations relating to the complete text of the Charter). CHARTE 4473/00, CONVENT 49, pp. 45.; Commentary of Charter of Fundamental Rights of the European Union. EÚ Network of Independent Experts on Fundamental Rights, 2006, pp. 384.

<sup>22</sup> IVOR, Jaroslav, KLIMEK, Libor, ZÁHORA, Jozef. *Trestné právo Európskej únie a jeho vplyv na právny poriadok Slovenskej republiky*. Žilina: Eurokódex, 2013, pp. 133.

<sup>23</sup> The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of



was to make the free movement of people easier by eliminating the border line controls among the member States of the European Union, there were introduced such steps as the cooperation of police and judicial forces in criminal procedures. The above mentioned steps were introduced to solve the problems concerning the public safety resulting from moderate border line controls.<sup>24</sup> One of the main reasons of cooperation was also applying the *ne bis in idem* principle. The Convention on Schengen Agreement deals with this principle with a complete Chapter No. 3 called *Application of the ne bis in idem principle*<sup>25</sup>, and it consists of five Articles (Articles 54-58). The Article 54 represents the establishing of *ne bis in idem* principle and creates the core of the whole Convention on applying the Schengen Agreement. The principle *ne bis in idem* is expressed there in the following way:

*“APPLICATION OF THE NE BIS IN IDEM PRINCIPLE*

*Article 54*

*A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.”*<sup>26</sup>

As it is quoted, the person to be sentenced or freed by one of the contracting party, cannot be prosecuted for the same criminal act by other Contracting Party under condition that the sentence was served or has actually been served, or according to jurisdiction of the State where the verdict was judged, cannot be executed once again.

The guarantee provided by the Article 54 of Schengen Agreement are basically similar in comparison to Article 4 of Protocol No. 7 Convention for the Protection on Human Rights and Fundamental Freedoms as well as to Article 14 Paragraph 7 of International Covenant on Civil and Political Rights. While the above mentioned documents are closer compared we will discover that the Schengen Agreement has an added value. The principle *ne bis in idem* within the Schengen Agreement has got some of the international impacts, or better to

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Germany and the French Republic on the gradual abolition of checks at their common borders. Official Journal of European Communities L 239, P. 19-62, 22.09.2000.

<sup>24</sup> BANTEKAS, Ilias, NASH, Susan. *International Criminal Law. Second edition*. London – Sydney – Portland: Cavendish Publishing, 2003, pp. 236 –237.

<sup>25</sup> Note: This is a modification of the name in the English version of the Convention implementing the Schengen Agreement, but in other language versions it is in another form, for example, “Prohibition of double punishment”, etc.

<sup>26</sup> The Schengen acquis – Convention implementing the Schengen Agreement, Title III, Chapter 3, Article 54.

say international ones, in contrast with the above mentioned documents, having only domestic impact.<sup>27</sup> Executing the Schengen Agreement, the impact of *ne bis in idem* principle is within the whole Schengen area.<sup>28</sup> Extensive interpretation of the principle regulates the member States of the European Union and they must accept not only the judicial decisions but also the domestic criminal procedures of the member States.<sup>29</sup> Person having the right to move freely on the area without borders, cannot be prosecuted for the same criminal act by other contracting party due to reason of getting beyond the borders. Due to this fact, the member States, as stated in Schengen Agreement, are obliged to respect the results of procedures in other member States.<sup>30</sup>

There is a question arising in the context of *ne bis in idem* principle, whether apart of criminal law, also the administrative procedures fall under. The rightfulness of such question is there as from one point of view, the level of application is limited to criminal law but from other point of view, many of the member States of the European Union the administrative procedures play significant role while penalising certain types of behaviour. Basic fact is that some of the types of procedures belong to criminal law in one State while in the other State the same can also belong to criminal law or both of them. Such differences can impair the patronage, offered by *ne bis in idem* principle, stated in Schengen Agreement.<sup>31</sup>

Of course, there were some application problems with *ne bis in idem* principle in practice in Convention on applying the Schengen Agreement. These were solved by the Court of Justice of the European Union, mainly as to pre-jurisdiction questions by member States. Mainly it was about the application problems as in case of time effect *Van Esbroeck*<sup>32</sup>, absolute discharge by lawful legal discharge in case *Van Straaten*<sup>33</sup>, case of limitation of action in case of *Gasparini*<sup>34</sup>,

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<sup>27</sup> CONWAY, Gerard. *Ne Bis in Idem in International Law*. *International Criminal Law Review*, 2003, vol. 3, pp. 221.

<sup>28</sup> ZÁHORA, Jozef. Aplikácia zásady ne bis in idem v Európskej únii. Jelínek, J. (ed). *O novém trestním zákoníku. Sborník příspěvků z mezinárodní konference Olomoucké právnické dny, květen 2009: trestně právní sekce*. Praha: Leges, 2009, pp. 181.

<sup>29</sup> CHALMERS, Damian, DAVIES, Gareth, MONTI, Giorgio. *European Union Law. Second edition*. New York: Cambridge University Press New York, 2010, pp. 611.

<sup>30</sup> IVOR, Jaroslav, KLIMEK, Libor, ZÁHORA, Jozef. *Trestné právo Európskej únie a jeho vplyv na právny poriadok Slovenskej republiky*. Žilina: Eurokódex, 2013, pp. 462.

<sup>31</sup> VAN BOCKEL, Bas. *The ne bis in idem Principle in EU Law*. Alphen aan den Rijn: Kluwer Law International, 2010, pp. 22.

<sup>32</sup> See: Judgment of the Court of Justice of the European Communities of 9 March 2006 in Case C-436/04 – *Criminal proceedings against Leopold Henri Van Esbroeck*.

<sup>33</sup> See: Judgment of the Court of Justice of the European Communities of 28 September 2006 in Case C-150/05 – *Jean Leon Van Straaten against Staat der Nederlanden and Republiek Italië*.

<sup>34</sup> See: Judgment of the Court of Justice of the European Communities of 9 September 2006 in Case C-467/04 – *Criminal proceedings against Giuseppe Francesco Gasparini and others*.

case of amnesty in *Bourquain*<sup>35</sup>, cases like aborting the accusation, judgement by prosecuting attorney in case *Gözütok & Brügge*<sup>36</sup>, the case of questions, what judgements of prosecutor fall under *ne bis in idem* principle in case *Miraglia*<sup>37</sup>, lawful discharge before accusation in case *Turansky*<sup>38</sup>, etc.

Just to make it complete we can add that before the Convention on applying the Schengen Agreement, in force since 1987 there was an Agreement on dual criminal sanction, planning to introduce *ne bis in idem* principle among the member States of the European Union, but has never come into force as it was not ratified sufficiently. It was this Agreement that served as platform for the Schengen Agreement. At the conclusion, there was introduced a proposal of framework decision in 2003 concerning *ne bis in idem* principle, while the Articles 54-58 of Schengen Agreement should be abolished. The fact is that the framework decision was not agreed and did not come into force.

### 3.5. Roman statute of International Criminal Court

Some of the significant international documents, including *ne bis in idem* principle, belongs the Roman statute of International Criminal Court, accepted on the diplomatic conference on 17th July 1998 in Rome. The document involves the criminal act of genocide, crime against humanity, war crimes and crime of aggression.

The principle *ne bis in idem* is mentioned in Article 20 of the Roman statute of the International Criminal Court, and is expressed in the following way:

“Article 20

*Ne bis in idem*

1. *Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.*
2. *No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.*
3. *No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:*

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<sup>35</sup> See: Judgment of the Court of Justice of the European Communities of 11 December 2008 in Case C-297/07 – *Klaus Bourquain*.

<sup>36</sup> See: Judgment of the Court of Justice of the European Communities of 11 February 2003 joined Cases C-187/01 a C-385/01 – *Hüseyin Gözütok and Klaus Brügge*.

<sup>37</sup> See: Judgment of the Court of Justice of the European Communities of 10 March 2005 in Case C-4369/03 – *Criminal proceedings against Filomeno Mario Miraglia*.

<sup>38</sup> See: Judgment of the Court of Justice of the European Communities of 22 December 2008 in Case C-491/07 – *Criminal proceedings against Vladimír Turanský*.

- (a) *Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or*
- (b) *Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.*<sup>39</sup>

Based on the Article 20 of the Roman statute of the International Criminal Court, the *ne bis in idem* principle determines that no person shall be tried before International Court for behaviour, creating the base of criminal acts, the ones he was sentenced or freed of by this Court. The principle also guarantees that no person will be tried by other Court for the same act of crime, he was sentenced or freed of by International Criminal Court. Of course, these regulations took into consideration acts of crime like genocide, crimes against humanity, war crimes and crime of aggression.

### **3.6. European Convention on Extradition**

Another international document, though not the one of human-rights nature, but the one where *ne bis in idem* principle is reflected, is the European Convention on Extradition. The European Convention on Extradition was released and agreed by the European Council on 13th December 1957 in Paris. The name of the Article, involving *ne bis in idem* principle within the European Convention on Extradition is in the form *non bis in idem*<sup>40</sup>, or is called as the obstacle to valid judgement. The above mentioned principle is modified within the Article No. 9 of the European Convention on Extradition in a following way:

*“Article 9*

*Non bis in idem*

*Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.*<sup>41</sup>

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<sup>39</sup> Rome Statute of the International Criminal Court, Part II, Article 20.

<sup>40</sup> Note: This is a modification in the English version of the European Convention on Extradition, but in other language versions it is in another form, for example, “Obstacle to a lawful matter”, etc.

<sup>41</sup> European Convention on Extradition, Article 9.

Based on quoted clause, the extradition is not allowed in cases when particular authorities of requested Party made the final verdict within the criminal procedure against the claimed person about the one or more acts of crime, why he has been claimed for. The extradition can be rejected when the particular authorities of the requested Party decided not to start or stop the criminal procedure for the same one or more criminal acts.

As to the first sentence of this Article, it concerns the case when the final verdict was made, either the one to claim him guilty or not. Based on this, the extradition should be rejected from the reasons that there is no way to start the criminal procedures again and the final judgement came into force. Under the word final judgement, according to Article 9 of the European Convention on Extradition, it should be understood that all the means of appealing were done, while the delayed verdict as well as the verdict *ultra vires* is not considered to be the final. The second sentence that has permissive character involves such person towards the one verdict has been judged and it actually causes obstacles to proceeding or its completion, mainly in cases when the court decision state that there are no reasons for criminal proceeding. In such cases the extradition can be rejected. If there new or other evidence and facts, having effect on decision, such principle cannot be realized and the person must be extradited, by the exception according to Article 8<sup>42</sup> is the execution of procedure or requested Party against the person based on the objective Article.<sup>43</sup>

Finally I feel to be important to mention that the above mentioned Article No. 9 of the Convention is applicable within the procedure of extradition due to the reason to avoid prosecution of the person more than once for the same act of crime in different jurisdictions.<sup>44</sup> It also must be said that the European Convention on Extradition is out of date and is not applied as to the area of the European Union and the executions on it as it was substituted by extradition of people based on the European warrant of apprehension.<sup>45</sup>

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<sup>42</sup> European Convention on Extradition, Text of the Article 8 – Pending proceedings for the same offences: “The requested Party may refuse to extradite the person claimed if the competent authorities of such Party are proceeding against him in respect of the offence or offences for which extradition is requested.”

<sup>43</sup> Explanatory Report to the Article 9 to the European Convention on Extradition.

<sup>44</sup> BIEHLER, Gernot.: *Procedures in International Law*. Berlin – Heidelberg: Springer, 2008, pp. 255.

<sup>45</sup> IVOR, Jaroslav, KLIMEK, Libor, ZÁHORA, Jozef. *Trestné právo Európskej únie a jeho vplyv na právny poriadok Slovenskej republiky*. Žilina: Eurokódex, 2013, pp. 460.

## 4. Conclusion

The above mentioned principle *ne bis in idem*, within democratic States, belongs to generally respected principles of the criminal procedures and it also belongs to basic rights in crime procedures. As one of the basic human rights there is also the one considered not to be punished twice for the same criminal act, the one when person was punished for or freed of accusation. Some of the judicial codes and norms do not have the *ne bis in idem* principle expressed in the same way. Therefore it is necessary while this principle is applicable, to come out from the wording of this legal enactment, applied to particular case. A helping hand, while decisions are made reviewing the cases, is the wide range of the practice of the courts offered by domestic, as well as, and in substantial extent, by the international courts, having priority in such examples. Taking the importance of *ne bis in idem* principle into consideration, it is necessary to respect and know the practice of the courts as well as the legal norms concerning this principle, either of domestic or international character.