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The Application of the Principle of Prohibition of Double Jeopardy *(ne bis in idem)* in the Case-Law of the European Court of Human Rights and National Courts

The principle of prohibition of double jeopardy (ne bis in idem) is an international legal and constitutional obligation. This criminal procedure guarantee implies imposing a restriction on state authorities regarding re-prosecuting an individual for the same act based on their previously made decisions. The present paper discusses the main problematic issues of the principle of prohibition of double jeopardy as they exist in legal doctrine and judicial practice.

Keywords: *double jeopardy, European Convention on Human Rights, Constitution of Georgia, Constitutional Court of Georgia, Strasbourg Court, Supreme Court, newly revealed circumstances.*

1. Introduction

The prohibition of double jeopardy/punishment for the same offence is a manifestation of the principle of humanity in criminal law.[1] This rule is enshrined in both international and national legislation and entails the "binding" of state authorities by their own decisions in the criminal justice process to prevent the re-prosecution of an individual for the same act.

In legal literature, some authors indicate that the principle of *ne bis in idem* is a "general principle of entire international law."[2] In contrast, others recognize it as a sectoral principle, specifically a general principle of international criminal law.[3]

A general principle of international law constitutes the third primary source of international law, as defined by the Statute of the International Court of Justice, a general principle of law recognized by civilized nations.[4] General principles acknowledged in national legal systems are used to fill gaps in international law, provided they apply to the global context.[5]

Therefore, the principle of *ne bis in idem* is recognized as a principle of international criminal law by the Statute of Rome[6], where Article 20 is entirely dedicated to the rule prohibiting double

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1 Compare *Pradel J*., Comparative Criminal Law, 1999, 412 (In Georgian).

2 Compare *Pataraia D*., Public International Law, Book One, 2023, 91 (In Georgian).

3 See *Conway G*., *Ne Bis in Idem* and the International Criminal Tribunals, Criminal Law Forum 14, 2003, 351-383.

4 See Statute of the International Court of Justice, Article 38. 1. c).

5 See *Orakhelashvili A*., Akehurst's Modern Introduction to International Law, 9th ed., London/New York: Routledge, 2022, 49.

6 Statute of the International Criminal Court.

jeopardy. According to this provision, "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..."[7]

A similar right is guaranteed by Article 4 of Protocol No. 7 to the European Convention on Human Rights, which states that 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 they have already been finally acquitted or convicted in accordance with the law and penal procedure of that state.

This principle is also enshrined in Article 14. 7 of the 1966 International Covenant on Civil and Political Rights, which stipulates that no one shall be tried or punished again for an offence for which they have already been finally convicted or acquitted in accordance with the law and penal procedure of any country.

Under Article 31.8[8] of the Constitution of Georgia, no one shall be convicted twice for the same offence.

It can be said that, compared to the texts of the European Convention and the Constitution of Georgia, a clearer guarantee of the right to protection is established by Article 18.2 of the Criminal Procedure Code of Georgia.[9] This provision indicates that not only it is prohibited to convict a person for an offence for which they have already been acquitted or convicted, but it is also inadmissible to bring charges against that person in such a case.[10] Under subparagraph "g" of Article 105 of the same Code, an investigation or criminal prosecution shall be terminated if there is a court judgment that has entered into legal force regarding the same charges or a court ruling on the termination of criminal prosecution for the same charges. Therefore, according to the Criminal Procedure Code, the rule prohibiting double jeopardy serves as a basis for both the termination of investigation and prosecution.[11]

Although Article 4.1 of Protocol No. 7 of the European Convention refers to "being tried or punished," the case-law of the European Court of Human Rights clarifies that Article 4 of Protocol No. 7 provides three specific guarantees against double jeopardy for the same offence: 1) no one shall be tried; 2) no one shall be convicted; and 3) no one shall be punished twice.[12] In the term "being tried," the Strasbourg Court's case-law interprets it to include proceedings before the trial, i.e., criminal prosecution as well.[13]

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7 For more information, see *Dgebuadze G.*, The Principle of Complementarity – Support for National Justice or "Discretionary Intervention", Collection of Articles, in the collection; The Influence of European and International Law on Georgian Criminal Procedural Law, 2019, 723-725 (In Georgian).

8 The current version of the Constitution. The aforementioned rule was also specified in Article 42.4 of the old version of the Constitution (In Georgian).

9 Hereinafter CPCG.

10 This latter provision in the Criminal Procedure Code appeared after the legislative amendment of 14 June 2013 (In Georgian).

11 Compare *Kharanauli L.*, General Part of Criminal Law, Commentary, Authors' Collective, Volume I, 2021, 49.

12 See the judgment of the Grand Chamber of the European Court of Human Rights of 10 February 2009 in the case of Zolotukhin v. Russia, application no. 14939/03, paragraph 110.

13 See the judgment of the European Court of Human Rights of 4 September 2014 in the case of Trabelsi v. Belgium, application no. 140/10, paragraph 164.

Thus, the European Convention and the Constitution of Georgia, as well as Georgian legislation, unequivocally and explicitly prohibit both re-conviction and re-charging for the same offence. This provision reinforces the constitutional/conventional principle of the prohibition of double jeopardy. It is rightly noted by authors in legal literature that the prohibition of double jeopardy serves to ensure lawfulness and thereby protect human dignity.[14]

The Constitutional Court of Georgia considers the prohibition of double jeopardy to be an essential manifestation of the fundamental principle of a legal state, noting that this principle "on the one hand, protects individuals from repeated criminal prosecution and conviction for the same act and, on the other hand, serves to bind state authorities to the final decisions made in the process of criminal justice."[15]

The principle of the prohibition of double jeopardy operates somewhat differently within the European Union framework. Specifically, in EU criminal law, the principle of *ne bis in idem* gained particular relevance from Article 54 of the Schengen Agreement, effective since 1995. According to this article, a person who has been finally judged by one of the contracting parties to the agreement cannot be prosecuted again for the same act by another contracting party, provided that the imposed sanction has already been enforced, is in the process of being enforced, or can no longer be enforced under the laws of the convicting state.[16] This provision enables some scholars to develop the argument that *ne bis in idem* should be recognized as a principle of international law, with its scope extending to transnational relations as well.[17]

Thus, the principle of *ne bis in idem* constitutes a significant, imperative constitutional/conventional obligation in criminal law, meaning that the state is obliged to equip the law enforcer with guiding norms that prevent the re-conviction of an individual for the same act and ensure the practical implementation of this fundamental constitutional principle.[18] However, despite this, the

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[14] See: *Turava M*., Commentary on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, 550; M. Turava, European Criminal Law, 2010, 137 (In Georgian).

[15] See the Decision of the Constitutional Court of Georgia of 29 September 2015, No. 3/1/608,609, on the case: Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Article 306.4 of the Criminal Procedure Code of Georgia and Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Subparagraph "g" of Article 297 of the Criminal Procedure Code of Georgia, paragraph 35 (In Georgian).

[16] Cf.: *Turava M*., European Criminal Law, 2010, 137; M. Turava, Criminal Law, Doctrine of Crime, 2011, 140; B. Jishkariani, Prohibition of Double Punishment (*ne bis in idem*) within the European Union, in the Journal: Journal of International Law, 1/2009, 216; *Jishkariani B*., European Criminal Law, 2nd Edition, 2018, 267-268; *Tandilashvili Kh*., Problems of Applying the Principle of Prohibition of Double Jeopardy (*ne bis in idem)* in the Legal Space of the European Union, Justice, and Law, 2017, N4(56), from 110; *Kharanauli L*., General Part of Criminal Law, Commentary, Authors' Collective, Volume I, 2021, 52-53. (In Georgian). Also cf.: *Satzger H*., Internationales und Europäisches Strafrecht, 3. Auflage, 2009, 180; *Wessels J*., *Beulke W*., Strafrecht, Allgemeiner Teil, 38. Auflage, 2008, Rn. 75.

[17] See *Conway G*., *Ne Bis in Idem* in International Law, International Criminal Law Review, No. 3, 2003, 217-244; also see *Mirianashvili G*., Dissertation on Conflicting Human Rights Standards in the Field of Extradition within the Council of Europe and the European Union, 2020, 79 (In Georgian).

[18] Cf.: Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016, in Georgian citizen Davit Tsintskiladze vs. Parliament of Georgia, paragraph 22 (In Georgian).

principle of *ne bis in idem* has many contentious aspects, each associated with theoretical and practical difficulties. Given the scope and multitude of issues, the present paper will address only the main problems that have emerged in legal doctrine and judicial practice. Accordingly, the paper aims to clarify the following:

1. Does the principle of prohibition of double jeopardy protect a person only from repeated conviction and prosecution within the same state, or does it also have a transnational application?
2. What should be understood by the term "the same act," and how should it be interpreted – formally or materially? Specifically, does "the same act" also include administrative and disciplinary[19] responsibility?
3. In the context of the prohibition of double jeopardy, is it sufficient to have a verdict from a first-instance court on the same case, or is a so-called "final" decision by a third-instance court required?
4. Based on the content of this principle, does the simple suspension/termination of a criminal process constitute an obstacle to the renewal of prosecution?
5. Would the principle of *ne bis in idem* be violated if a new conviction occurs within the same criminal illegality, for instance, when the prosecutor brings a new charge for an act committed under aggravating circumstances?
6. How does the principle of *ne bis in idem* apply to a wanted accused person?

This article will examine how the principle of prohibition of double jeopardy is applied in the practice of national and international courts. Accordingly, a detailed analysis of court decisions will be conducted. The provisions of Georgian criminal procedure law that ensure the practical realization of this fundamental constitutional principle will also be reviewed.

2. The Scope of the Principle of *Ne Bis in Idem* in the Practice of the European Court Of Human Rights and National Courts

2.1. Judicial Practice of the European Court

The European Court extends the principle of *ne bis in idem* only within the jurisdiction of a single state and excludes it at the transnational level. The European Court of Human Rights has a consistent case-law. Several cases can be cited to illustrate this.[20] For example, *Krombach c. France*[21] concerned a rape committed on German territory and the criminal prosecution of the applicant in both Germany and France.

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19 This refers to the case where disciplinary proceedings are qualified as criminal proceedings and not as civil proceedings under Article 6 of the Convention.

20 See the judgment of the European Court of Human Rights of 28 June 2001 in Amrollahi v. Denmark, application no. 56811/00; the judgment of the European Court of Human Rights of 18 December 2012 in Sarria c. Pologne, application no. 45618/09, paragraph 24.

21 See the judgment of 29 March 2018 of the European Court of Human Rights in Krombach c. France, application no. 67521/14, paragraphs 34-42.

The European Court clarified that since the criminal prosecution against the applicant was carried out by the judicial authorities of two different states, the requirements of Article 4 of Protocol No. 7 of the European Convention on Human Rights did not apply in this case.

The Court noted that accepting the applicant's argument would equate to interpreting Article 4 of Protocol No. 7 as a prohibition against a person who has been acquitted or convicted by one participating state's legal and judicial process from being subsequently prosecuted or punished for the same offence, not only within that state but also under the jurisdiction of the courts of any other participating state of the Convention. [22]

The European Court did not accept the applicant's argument and pointed out that the phrase "by the courts of the same state" limits the application of this provision to the national level only.[23]

Similarly, in *Böheim c. Italie*, the Strasbourg Court declared the application inadmissible. The applicant argued that he was tried for the same acts by both German and Italian courts, thereby violating the principle of *ne bis in idem*. In this case, as well, the European Court of Human Rights stated that the principle of *ne bis in idem* applies only within the jurisdiction of one country and does not restrict another country from prosecuting the person for the same act.[24]

The Court reiterated the same approach in the case of *Trabelsi v. Belgium*, involving the extradition of a Tunisian citizen to the United States on charges of participating in terrorist acts. The Court stated that the principle of *ne bis in idem* does not protect a person from criminal prosecution and punishment for the same offence in different states.[25]

Thus, through uniform practice, the European Court applies the principle of *ne bis in idem* only within the jurisdiction of a single state, excluding its application at a transnational level.

2.2. National Judicial Practice

In the Georgian judicial practice, the issue of the scope of the *ne bis in idem* principle has repeatedly come to the forefront. A notable example of this is the ruling by the Investigative Chamber of the Tbilisi Court of Appeals on 23 October 2024,[26] concerning the following case:

On 12 October 2023, M.H. was convicted by the Tbilisi City Court for crossing the Georgian border illegally, resulting in a guilty verdict under Article 344 of the Georgian Criminal Code[27] (illegal crossing of the state border of Georgia).

On October 11, 2024, M.H., who was wanted by the Republic of Armenia, was detained by the officers of the Georgian Ministry of Internal Affairs on the premises of the Special Penitentiary

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22 See the judgment of 29 March 2018 of the European Court of Human Rights in Krombach c. France, application no. 67521/14, paragraphs 34-42.

23 See the judgment of 29 March 2018 of the European Court of Human Rights in Krombach c. France, application no. 67521/14, paragraphs 34-42.

24 See the judgment of 22 May 2007 of the European Court of Human Rights in Böheim c. Italie, application no. 35666/05.

25 See the judgment of 4 September 2014 of the European Court of Human Rights in Trabelsi v. Belgium, application no. 140/10, paragraph 164.

26 See the ruling of 23 October 2024 of the Investigative Panel of the Tbilisi Court of Appeals in criminal case No. 190802224010200521 (In Georgian).

27 Hereinafter: CC

Service's Facility No. 16 in Rustavi for the purpose of extradition. M.H. was accused of illegally crossing the state border, an offence defined under Part 1 of Article 469 of the Armenian Criminal Code.

On 26 April 2024, the Yerevan Criminal Court of First Instance of the Republic of Armenia sentenced M.H. to imprisonment and declared him wanted. The initiating state of the search requested the detention and arrest of the wanted individual for the purpose of his subsequent extradition.

Since M.H. had already been convicted by the court of one country – Georgia – while another country, Armenia, was requesting his extradition for prosecution, the Rustavi City Court, in its ruling on 11 October 2024,[28] did not satisfy the prosecutor's motion to impose extradition detention. According to the ruling, the Rustavi Court noted that "it is prohibited to prosecute or try a person a second time for an offence arising from identical or substantially similar facts."[29]

The court clarified that a person cannot be tried twice for the same offence committed at the same time and place. To support this position, the Rustavi Court referred to the Constitution of Georgia and the Criminal Procedure Code, which prohibits punishing a person for the same fact under different grounds at different times. Regardless of whether the person was acquitted or convicted initially, they cannot be punished again.[30]

Therefore, the Rustavi City Court found that the offence for which M.H.'s extradition was requested had already been adjudicated by a Georgian court. Additionally, the offence in question was entirely or partially committed on Georgian territory.[31]

However, this ruling was overturned by the Investigative Chamber of the Tbilisi Court of Appeals, which satisfied the prosecutor's motion for extradition detention. The appellate court reviewed both national legislation and the established practices of the European Court and correctly pointed out that Article 4 of Protocol No. 7 of the European Convention on Human Rights does not prevent the courts of a Convention member state from prosecuting or punishing a person for the same offence for which they were acquitted or convicted by a final judgment in another member state.[32]

The Supreme Court of Georgia has also established a similar precedent. In its decision of 17 May 2018, concerning a defendant charged under Article 344 of the Georgian Criminal Code (illegal crossing of the state border of Georgia for entry into the Russian Federation), the court explained that there can be no violation of Article 4 of Protocol No. 7 when the person has been subjected to or is undergoing legal procedures by the appropriate authorities of a neighbouring state for the same act.[33]

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28 See the ruling of 11 October 2024 of the Rustavi City Court in criminal case No. 190802224010200521 (In Georgian).

29 See the ruling of 11 October 2024 of the Rustavi City Court in criminal case No. 190802224010200521 (In Georgian).

30 See the ruling of 11 October 2024 of the Rustavi City Court in criminal case No. 190802224010200521 (In Georgian).

31 See the ruling of 11 October 2024 of the Rustavi City Court in criminal case No. 190802224010200521 (In Georgian).

32 See the ruling of 23 October 2024 of the Investigative Panel of the Tbilisi Court of Appeals in criminal case No. 190802224010200521 (In Georgian).

33 See the Supreme Court's decision of 17 May 2018, in case No. 699AP-17.

Thus, as shown from the aforementioned discussions, both the European Court of Human Rights and national courts consider that Article 4 of Protocol No. 7 does not prevent different courts in Convention member states from prosecuting or punishing a person for the same offence for which they were acquitted or convicted by a final judgment in another member state. This perspective is also prevalent in legal literature, which holds that the principle of *ne bis in idem* applies only within the jurisdiction of a single state.[34]

3. Criteria/Elements of the Principle of *Ne Bis in Idem* in the Case-Law of the European Court of Human Rights and National Courts

3.1. Brief Overview of the Question

In accordance with the consistent practice established by the European Court of Human Rights, three main criteria/elements can be identified under the principle of *ne bis in idem* when determining the issue of double jeopardy for the same offence. These criteria can be grouped as follows:

1. Nature of the Sanction/Procedures: The sanction or procedures must be of a criminal nature; 2. Identity of the Acts *(Idem)*: The acts for which the applicant is being prosecuted must be the same, and the prosecution must be repeated *(bis)*;[35] 3. Final Judgment: There must be a final decision by the court.

Similarly, the Constitutional Court of Georgia, in the case of *Georgian citizen Davit Tsintsqiladze v. the Parliament of Georgia*[36], outlined three essential elements to determine the presence of constitutionally prohibited double jeopardy: a) Completed Criminal Procedure: There must be a completed criminal procedure concerning a specific offence; b) Risk of Repeated Prosecution *(Bis)*: The individual must face the risk of repeated prosecution; c) Same Offence *(Idem)*: The individual must be prosecuted for the same offence.[37]

Particular emphasis should also be placed on the Supreme Court's decision of 12 October 2015,[38] where the court, reviewing a decision[39] by the European Court of Human Rights, identified four main criteria:

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34 See: *Turava M*., European Criminal Law, 2010, 137-138; *Turava M*., Criminal Law, Doctrine of Crime, 2011, 140-141; *Mirianashvili G*., Dissertation: Conflicting Standards of Human Rights Protection within the Council of Europe and the European Union in the Field of Extradition, 2020, 78; *Papiashvili L*., Commentary on Article 18 of the Criminal Procedure Code of Georgia in the work: Commentary on the Criminal Procedure Code of Georgia, 2015, 137; *Tskhomelidze O*., Dissertation: The relationship between the complementary jurisdiction of the International Criminal Court and the *ne bis in idem* principle in cases of criminal prosecutions carried out by de facto authorities, 2020, 89-90.

35 This criterion can, in turn, be divided into two parts: (a) whether the acts for which the complainant's criminal prosecution was initiated were the same, and (b) whether the legal proceedings are being repeated *(bis)*. For example, see the European Court of Human Rights judgment of 10 February 2015, in Österlund v. Finland, application no. 53197/13. However, it can also be considered as a single element, as it encompasses the same substantive thesis.

36 See Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in Georgian citizen Davit Tsintskiladze vs. Parliament of Georgia (In Georgian).

37 See Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in Georgian citizen Davit Tsintskiladze vs. Parliament of Georgia, para. 9 (In Georgian).

38 See the Supreme Court decision of 12 October 2015, in case No. 67AP-14 (In Georgian).

1. Whether the sanction/procedures were of a criminal nature.
2. Whether the acts for which the complainant's criminal prosecution was initiated were the same.
3. Whether there was a repetition of legal proceedings.
4. Whether there was a final decision.

These criteria, as defined by both European and national courts, will be discussed below. However, it should be noted that each of these elements/criteria has often been the subject of discussion in legal literature and court practice.[40] Furthermore, it is important to highlight that when analysing these criteria, there may be an overlap between individual elements, which points to their complex nature and essence.

3.2. Criminal Nature of the Sanction/Proceedings

3.2.1. Case-Law of the European Court

The European Court has pointed out that any legal proceedings and the confirmation of an offence through such proceedings do not automatically constitute a criminal charge.

From the outset, it should be noted that the European Court of Human Rights applies the so-called "Engel criteria"[41] to determine whether a person has been charged with a "criminal offence" and, accordingly, whether the proceedings fall within the scope of Article 4 of Protocol No. 7. These criteria are: (1) the classification of the offence under domestic law; (2) the nature of the offence; and (3) the severity of the sanction imposed for the offence.[42]

For example, in *Kurdov et Ivanov c. Bulgarie* [43], the applicants, who were employees of the Bulgarian railway company in 1995, performed various welding works on a railway wagon, which led to a fire inside the wagon. An administrative procedure was initiated against the first applicant for violating safety regulations and he was fined, while both applicants faced criminal proceedings for property damage. The first applicant argued that his *ne bis in idem* rights had been violated.

In this case, the European Court determined that the administrative proceedings, which resulted in a fine of 150 Bulgarian Levs for the first applicant, did not meet the criteria for the act to be considered a criminal charge. Consequently, the Court did not uphold the application.[44]

In another case, both administrative and criminal responsibility were based on two provisions of the General Tax Code, which concerned entirely separate offences with different constituent elements.

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39 See the judgment of 10 February 2015 of the European Court of Human Rights in Österlund v. Finland, application no. 53197/13.

40 Cf. *Turava M*., Commentary on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, 550 (In Georgian).

41 See the judgment of the European Court of Human Rights, Full Court, 8 June 1976, in Engel and Others *v.* the Netherlands, Applications no. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, § 80 et seq.

42 See the judgment of the Grand Chamber of the European Court of Human Rights of 10 February 2009 in Zolotukhin v. Russia, application no. 14939/03, paragraph 53.

43 See the judgment of the European Court of Human Rights of 31 May 2011 in Kurdov et Ivanov c. Bulgarie, application no. 16137/04, paragraph 45.

44 See the judgment of the European Court of Human Rights of 31 May 2011 in Kurdov et Ivanov c. Bulgarie, application no. 16137/04, paragraph 45.

Specifically, the tax offence was intended to punish a person solely for **failing to declare their tax obligations within the prescribed timeframe**, while the criminal offence aimed to prosecute a person for the **intentional non-payment of taxes**. Since the two sets of proceedings imposed different types of responsibility for two distinct offences, the Court ruled that the prohibition of double punishment did not apply in this case and, therefore, the application was not admitted for substantive examination.[45]

In *Smirnova v. Russia*, the applicant argued that the prohibition against being convicted twice for the same offence had been violated when previously discontinued proceedings were reopened. The Court dismissed the application as inadmissible, stating that "the termination of criminal proceedings by a prosecutor does not constitute either a conviction or an acquittal and, therefore, Article 4 of Protocol No. 7 does not apply."[46]

Similarly, the European Court of Human Rights ruled in another case that the failure of a jury to reach a unanimous verdict did not prevent the resumption of proceedings and, in this case, there was no violation of the *ne bis in idem* principle.[47]

Thus, as it turns out, the European Court applies the following criteria to determine whether a "criminal charge" exists in a given case: 1. The classification of the proceedings and the measures applied to the individual under national law; 2. The nature of the act; and 3. The severity of the imposed or potential sanction.

Moreover, according to the Strasbourg Court's position, the termination or mere suspension of criminal proceedings, the failure of a jury to reach a unanimous verdict and subsequent decisions to resume proceedings in any of the above cases do not constitute legal barriers to prosecution.[48] Such decisions do not have the effect of a final judgment and, therefore, they do not amount to a violation of the *ne bis in idem* principle.

3.2.2. National Judicial Practice

At the national level, an illustrative example of this issue can be found in a decision by the Supreme Court of Georgia[49], which involved the following facts:

- On 26 December 2012, Giorgi[50] was found administratively responsible by the court for the unlawful use of narcotic substances without a doctor's prescription.
- On 8 September 2013, Giorgi again unlawfully consumed narcotic substances.
- On 3 November 2013, Giorgi once again used narcotic substances illegally.
- On 5 November 2013, Giorgi was convicted for the 8 September 2013 incident.
- On 2 December 2013, Giorgi was convicted for the 3 November 2013 incident.[51]

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45 See the judgment of the European Court of Human Rights of 14 September 1999 in Ponsetti and Chesnel v. France, applications no. 36855/97 and 41731/98, paragraph 5.

46 See the judgment of the European Court of Human Rights of 3 October 2002 in the case of Smirnova v. Russia, applications no. 46133/99 and 48183/99.

47 See *Trechsel S*., Human Rights in the Criminal Justice Process, 2010, 434 (In Georgian).

48 Cf. *Turava M*., Commentary on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, 551 (In Georgian).

49 Cf. Supreme Court's decision No. 67AP-14 of 12 October 2015. (In Georgian)

50 The name is arbitrary.

However, on 10 February 2014, the Criminal Chamber of the Tbilisi Court of Appeals overturned the Tbilisi City Court's 2 December 2013 judgment and acquitted Giorgi. Specifically, he was found not guilty and acquitted of the charges under Article 273 of the Georgian Criminal Code.[52]

The Court of Appeals reasoned that since both convictions were based on the same initial administrative sanction, this constituted a violation of the *ne bis in idem* principle, which prohibits double jeopardy. The Court argued that a single offence (the administrative violation) could not serve as the basis for two separate criminal convictions within one year.[53&54]

The prosecution appealed this decision to the Supreme Court, seeking to overturn the acquittal and reinstate a guilty verdict.[55]

The Cassation Chamber upheld the prosecution's appeal and overturned the Tbilisi Court of Appeals' acquittal.

According to the Supreme Court's position, the principle of prohibition of double jeopardy or punishment (*ne bis in idem*) is a constitutional and international legal standard aimed at preventing a person from being tried or punished twice for the same offence.[56]

In this case, the Cassation Court had to assess whether the actions leading to both convictions constituted the same offence**,** meaning whether the convictions were based on identical or substantially similar facts**.**

According to the evidence in the case, Giorgi was administratively sanctioned for the unlawful use of narcotic substances without a doctor's prescription by a decision issued on 26 December 2012**.** After this, he again unlawfully used narcotic substances twice, as confirmed by drug tests conducted on 8 September 2013 and 3 November 2013.

Although both these offences (from 8 September and 3 November 2013) were linked to the initial 26 December 2012, administrative sanction**,** Giorgi's actions involved two separate acts – two distinct instances of drug use at different times**.** From the Cassation Court's perspective, this should not be considered the same offence.[57]

The Supreme Court reasoned that these actions (two separate instances of illegal drug use) constituted two independent criminal episodes, while the previous administrative sanction was merely a separate legal element of the criminal offence. The court ruled that this could not be interpreted as punishing Giorgi twice for the same offence. Therefore, the Court of Cassation did not justifiably share the reasoning of the Tbilisi Court of Appeal, which allegedly threatened Giorgi with repeated conviction for the same crime.[58]

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51 Cf. Supreme Court's decision No. 67AP -14 of 12 October 2015. (In Georgian)

52 Cf. Supreme Court's decision No. 67AP -14 of 12 October 2015. (In Georgian)

53 Cf. Supreme Court's decision No. 67AP -14 of 12 October 2015. (In Georgian)

54 Under Article 39 of the Code of Administrative Offenses, if a person subjected to an administrative penalty does not commit a new administrative offense within one year from the date of penalty enforcement, they will be considered not to have been administratively penalized.

55 Cf. Supreme Court's decision No. 67AP -14 of 12 October 2015 (In Georgian).

56 Cf. Supreme Court's decision No. 67AP-14 of 12 October 2015 (In Georgian).

57 Cf. Supreme Court's decision No. 67AP-14 of 12 October 2015 (In Georgian).

58 Cf. Supreme Court's decision No. 67AP-14 of 12 October 2015 (In Georgian).

This ruling by the Supreme Court is entirely valid as Giorgi's conviction under Article 273 of the Criminal Code (for two separate episodes) did not stem from identical or substantially similar facts. Each conviction was based on two distinct and independent acts – the illegal use of narcotic substances at different times. However, a potential issue could have arisen if both administrative and criminal sanctions were based on the same act**.** This issue will be analysed further below.

3.3. Same Acts (*idem*) and Repetition of Proceedings *(bis)*

3.3.1. European Judicial Practice

Determining whether the actions for which a person is held criminally responsible twice constitute the same act (idem) is crucial. In such cases, it must be clarified whether the "act" is considered from a purely criminal or material perspective or a formal-normative viewpoint. The act is understood in its broadest sense, including administrative offences.[59]

It is well known that the European Court of Human Rights (ECHR) does not intervene in domestic legislation on this matter.[60] A legal system in one country may regard certain factual circumstances as a single offence, whereas in another country, they might be considered two separate acts. For instance, in Germany, Austria and Switzerland, minor offences are addressed within the criminal code while similar actions are outlined in Georgia's Code of Administrative Offences.

In the legal systems of such countries, administrative offences law comprises "minor criminal law" (in German, *kleines Strafrecht*).[61] In the Georgian legislative framework, both the Criminal Code and the Code of Administrative Offences function separately. The unlawful actions outlined in each of these codes are clearly differentiated and identifiable. For example, consider the offence of hooliganism, which is classified as a minor offence in the Code of Administrative Offences (Article 166) but regarded as a criminal offence in the Criminal Code (Article 239). The distinction lies not only in the specific elements of the offence, including the objective and subjective components but also in the penalties prescribed by the norms.

As a result, the Strasbourg Court takes into account all possible variations and considers the issue within the framework of the legislative system of the specific country.[62] However, it is always disputed whether the same act, which is considered both an administrative offence on the one hand and a criminal offence on the other, constitutes one unified crime, i.e., whether it is regarded as a single offence.

It should be noted from the outset that this issue has been resolved in different ways over time by the European Court of Human Rights.[63] For example, in the case of *Gradinger v. Austria*,[64] the

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59 A simple disciplinary misconduct of a public servant is not included in this. On this, see the judgment of the European Court of Human Rights of 30 May 2000 in: RT v. Switzerland, application no. 31982/96, paragraph 3.

60 Cf. *Trechsel S.*, Human Rights in the Criminal Justice Process, 2010, 439.

61 Cf.: *Rengier R.*, Strafrecht, Allgemeiner Teil, 2. Auflage, 2010, 7; M. Turava, Criminal Law, Doctrine of Crime, 2011, 13 (In Georgian).

62 Cf. *Trechsel S.*, Human Rights in the Criminal Justice Process, 2010, 439.

63 Cf. *Trechsel S.*, Human Rights in the Criminal Justice Process, 2010, 437.

Court indicated that since the disputed decisions were based on the same act, there was a violation of the Convention.

Specifically, the applicant was fined for violating traffic regulations, which resulted in the unintentional killing of a person. If the fine was not paid, imprisonment was foreseen. Later, Gradinger was fined again for committing the same act under aggravating circumstances – based on another expert's opinion, it was determined that his blood alcohol content exceeded the permissible limit. Specifically, the applicant was fined 12,000 Austrian schillings and failure to pay it also resulted in imprisonment. In this case, both actions were considered administrative offences; however, since the consequence of not paying the fine was imprisonment, the European Court regarded the legal proceedings as criminal proceedings.[65] According to the Court, the identity of the acts (facts) was of decisive importance, which led the Court to conclude that there was a violation of the Convention.[66]

However, in *Oliveira v. Switzerland*, the same Court distinguished this case from *Gradinger*. According to the Court, since one act constituted different offences, it found that the principle of *ne bis in idem* had not been violated even though the facts in the case also related to a traffic offence.[67] Specifically, the applicant failed to control the steering wheel and crashed into another car, injuring the driver severely. Initially, the applicant was fined 200 Swiss francs for speeding and later he was fined 2,000 Swiss francs for causing severe bodily harm to the second driver due to negligence. Despite this, the Court did not find sufficient grounds to establish a violation of the *ne bis in idem* principle.[68] The European Court considered that the two legal proceedings were not "cumulative" because when the final fine was imposed, the larger amount was reduced by the smaller amount, applying the principle of absorption of sentences.[69]

It can be said that Oliveira's case was essentially the instance where the Strasbourg Court changed its previously established trend favouring the prohibition of double jeopardy. In this specific case, the Court distinguished the loss of control over the vehicle due to excessive speed from the bodily harm caused by negligence. The Court held that the prosecution of different offences sequentially or in parallel by different courts did not violate the *ne bis in idem* principle even when those offences might have been based on a single specific act relevant to criminal law.

Later, the European Court itself had to acknowledge that its approach in these two cases was "somewhat contradictory."[70] The most controversial aspect turned out to be the criterion used to link

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64 See the judgment of the European Court of Human Rights of 23 October 1995 in Gradinger v. Austria, application no. 15963/90.

65 See the judgment of the European Court of Human Rights of 23 October 1995 in Gradinger v. Austria, application no. 15963/90, paragraph 36.

66 Ibid. Cf. also, *Trechsel S.*, Human Rights in the Criminal Justice Process, 2010, 438.

67 See the judgment of the European Court of Human Rights of 30 July 1998 in Oliveira v. Switzerland, application no. 25711/94.

68 Cf. *Trechsel S.*, Human Rights in the Criminal Justice Process, 2010, 440-441 (In Georgian).

69 See the judgment of the European Court of Human Rights of 30 July 1998 in Oliveira v. Switzerland, application no. 25711/94, paragraph 27.

70 See the judgment of the European Court of Human Rights of 29 May 2001 in the case of Franz Fischer v. Austria, application no. 37950/97, paragraph 23. Cf.: *Trechsel S.*, Human Rights in Criminal Proceedings, 2010, 441; *Turava M.*, Commentary on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, 550 (In Georgian).

the first and second judicial proceedings, specifically whether or not the acts for which the applicant's criminal prosecution or conviction had taken place were the same.

In a short period of time following the above-mentioned decisions, the Strasbourg Court was again required to address a case of a similar nature, in which it found a violation of Article 7, Protocol No. 4 of the Convention. Specifically, in *Franz Fischer v. Austria*,[71] the applicant, who was driving under the influence of alcohol, fatally injured a cyclist. Instead of assisting the victim, the driver fled the scene. The regional administrative authority imposed a fine of 22,000 Austrian schillings (with imprisonment for 20 days in case of non-payment) for violating traffic rules under the influence of alcohol. Later, the district court charged the applicant with manslaughter under aggravating circumstances and sentenced him to six months in prison.[72]

According to the Court's position, there are cases where one action constitutes, seemingly, more than one offence, but a thorough examination of the case shows that only one offence should lead to the prosecution of the person as it encompasses all the negative consequences covered by the others.[73] Specifically, in the Court's view, when a person faces prosecution for various offences arising from one action, the Court must examine whether these offences share the same "essential elements."[74] In the case of Franz Fischer, since the applicant was first prosecuted administratively for driving under the influence of alcohol and then criminally for manslaughter through negligence, the Court held that Article 7, Protocol No. 4 of the Convention was violated as the two offences did not differ in their "essential elements."[75]

The European Court of Human Rights' reasoning in *Zolotukhin v. Russia*[76] was assessed as a rejection of the "legal qualification of two offences" approach. Consequently, the "essential elements" criterion was also dismissed.[77] In this case, the Grand Chamber explained that double prosecution or conviction occurs when it is based on identical or essentially the same facts.[78] In the same case, the Court provided the following explanation for the action: "...a combination of specific circumstances relating to the same defendant, which are inextricably linked in time and space, and which need to be proved to enable prosecution or criminal proceedings."[79]

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71 See the judgment of the European Court of Human Rights of 29 May 2001 in Franz Fischer v. Austria, application no. 37950/97.

72 See the judgment of the European Court of Human Rights of 29 May 2001 in Franz Fischer v. Austria, application no. 37950/97, paragraphs 7-10.

73 Ibid., paragraph 25.

74 See the judgment of the European Court of Human Rights of 29 May 2001 in Franz Fischer v. Austria, application no. 37950/97, paragraph 25.

75 Ibid., paragraph 29.

76 See the judgment of the Grand Chamber of the European Court of Human Rights of 10 February 2009 in Zolotukhin v. Russia, application no. 14939/03.

77 See *Harris D*., *O'Boyle M*., *Bates E*., *Buckley C*. et al., Law of the European Convention on Human Rights, 4th ed., Oxford: Oxford University Press, 2018, 966.

78 See the judgment of the Grand Chamber of the European Court of Human Rights of 10 February 2009 in Zolotukhin v. Russia, application no. 14939/03, paragraph 82.

79 Ibid., paragraph 84. Also cf. *Turava M*., Commentary on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, 550-551 (In Georgian).

In this particular case, the applicant verbally insulted and assaulted a public official. The first legal proceeding at the national level, under Russian law, was administrative in nature, but the European Court classified it as a criminal proceeding. In the second national-level proceeding, which was a criminal proceeding under national law, the applicant was convicted for violating public order, which included verbal abuse, threats of violence against the public official and resisting them.[80] According to the European Court, it did not matter that the sanctions imposed were significantly different from one another as both proceedings were essentially conducted for the same action. Therefore, in this case, the Court found a violation of Article 4 of Protocol No. 7 of the European Convention.[81]

In all the cases mentioned above, one legal proceeding followed the other. However, it is also possible for legal proceedings to take place simultaneously as was the case in *A and B v. Norway*,[82] which was heard by the Grand Chamber. Specifically, administrative fines were imposed on the applicants for failing to declare certain income and, in parallel, they were held criminally responsible for large-scale tax evasion in a criminal proceeding. In this case, the Court considered the administrative proceedings to be part of criminal proceedings for the purposes of Article 4 of Protocol No. 7 of the Convention.[83]

In the mentioned case, the Grand Chamber explained that Article 4 of Protocol No. 7 does not exclude the possibility of parallel legal proceedings, provided certain conditions are met. In such cases, the respondent state must convincingly demonstrate that the parallel proceedings are sufficiently closely connected in terms of both content and timing. This means that not only should the objectives set out and the means used to achieve them be complementary (mutually reinforcing) and timely, but also that the effects of the response to the act should be proportional and foreseeable for the individual.

The material factors for determining whether parallel proceedings were sufficiently close in substance include the following elements: (a) Whether the different proceedings pursued complementary objectives and, accordingly, addressed different aspects of the public offence; (b) Whether the parallel proceedings had foreseeable results, both in legislation and practice; (c) Whether the parallel proceedings were conducted in a way that, as far as possible, avoided duplicating the process, in terms of obtaining and assessing evidence. Specifically, whether there was adequate communication between the competent authorities to ensure that, for example, the establishment of facts in one legal proceeding was also used in the other; and (d) Whether the sanction imposed as a result of the first concluded legal proceeding was taken into account in the second legal proceeding, which is concluded later chronologically.

The Court explained that "States should be able to legitimately choose additional legal responses to public wrongs (such as violations of traffic regulations, tax evasion) through different

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80 See the judgment of the Grand Chamber of the European Court of Human Rights of 10 February 2009 in Zolotukhin v. Russia, application no. 14939/03, paragraphs 12-25.

81 See the judgment of the Grand Chamber of the European Court of Human Rights of 10 February 2009 in Zolotukhin v. Russia, application no. 14939/03, paragraphs 120-122.

82 See the judgment of the Grand Chamber of the European Court of Human Rights of 15 November 2016 in A. and B. v. Norway, applications no. 24130/11 and 29758/11.

83 Ibid., paragraphs 112-116.

legal proceedings, which form a consistent, unified system in response to different aspects of public injustice, provided that, in its entirety, the response does not impose an excessive burden on the individual concerned."[84]

Thus, as it turned out, in the case of non-parallel legal proceedings, the European Court of Human Rights approach is not consistent and unified. However, it should also be noted that in its most recent decisions, the Court has continued to take a position favourable to the convicted person. Specifically, the Court has stated that the same act/crime is evident when the second prosecution or conviction is based on identical or essentially the same facts, meaning that the distinction between whether the "act" is purely criminal or formal-legal (including in the broader sense of administrative legal matters) no longer matters.

To illustrate this reasoning, an example can be provided: A military soldier refuses to carry out an order. The military commander punishes him with a disciplinary sanction (disciplinary punishment) and places him in detention for 5 days. After some time, the same soldier is tried for the same act (refusal to execute the superior's order[85]) and is sentenced to 10 months of imprisonment. The question arises: would this situation be considered a violation of the *ne bis in idem* principle?

Some authors believe that in such a situation, the violation of the *ne bis in idem* principle is at hand[86], as the first and second actions are identical, continuously linked in time and space, and aim toward the same common goal – the strict punishment of the military service member, with the sanction being severe – imprisonment. On the other hand, a second group of authors believes that cases involving disciplinary measures, professional activity bans, revocation of permissions, post-conviction deportation or extradition, etc., are not covered by the scope of Article 4 of Protocol No. 7 of the European Convention.[87]

The first group of authors' position is strengthened by the clarification that the punishment imposed by a military commander on a soldier in disciplinary terms (detaining them in prison – deprivation of liberty) can be considered a criminal proceeding for the purposes of Article 6 of the European Convention, based on the nature of the act and the severity of the sanction.[88] Therefore, the position of the first group of authors seems more accurate, while the second group of authors, in this context, may require more specificity and clarity.

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84 See the judgment of the Grand Chamber of the European Court of Human Rights of 15 November 2016 in the case of A. and B. v. Norway, applications no. 24130/11 and 29758/11, paragraph 121.

85 In Georgia, such a crime is provided for under Article 383 of the Criminal Code of Georgia (failure to comply with a superior's order – in this case, it applies only to military personnel).

86 Cf. *Kublashvili K*., Fundamental Rights, 2003, 344 (In Georgian).

87 Cf. *Loladze B., Pirtskhalashvili A*., Fundamental Rights, Commentary, electronic version of the book, 2023, 817 (In Georgian). See also: European Court of Human Rights, 31 May 2011, judgment in the case of Kurdov et Ivanov c. Bulgarie, application no. 16137/04; European Court of Human Rights, 19 February 2013; judgment of the European Court of Human Rights of 19 February 2013 in Müller-Hartburg v. Austria, application no. 47195/06; Cf. also: BVerfGE 21, 391 (401).

88 See: European Court of Human Rights Grand Chamber judgment of 8 June 1976, in the case of Engel and Others v. the Netherlands, applications no. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, paragraph 80 et seq.

It is known that, under the meaning of Article 6 of the European Convention, the *ne bis in idem* principle generally does not apply to cases of disciplinary proceedings, such as professional activity bans, revocation of licenses or disciplinary responsibility of judges,[89] as these cases are considered civil proceedings.[90] As for deportation/extradition proceedings, these do not concern the determination of civil rights and obligations or the establishment of criminal charges[91] and thus fall outside the scope of Article 6. Therefore, the provisions of Article 7, Protocol No. 4, do not apply to them.

According to the recent position of the European Court, the principle of *ne bis in idem* primarily pertains to a fair trial, which falls under the scope of Article 6 of the Convention and is less related to substantive criminal law compared to Article 7. Therefore, the Court confirms its deliberate choice to apply the so-called "Engel criteria" to determine whether the proceedings are "criminal" for the purposes of Article 7, Protocol 4. However, the same European Court also clarifies that when administrative and criminal sanctions are applied together, a so-called calibrated, or individually tailored, approach is required for each case.[92]

3.3.2. National Judicial Practice

Using the example of Georgia, the Constitutional Court, in one of its cases, stated[93] that the guarantee established by the Constitution of Georgia implies a prohibition on conviction in cases where a repeated charge against a person is based on the same or essentially the same factual circumstances for which a final and binding decision has already been rendered.[94]

More specifically, according to the position of the Constitutional Court, to determine whether a person is being subjected to double jeopardy, it is essential to define what the Constitution means by the concept of "the same offence" (idem). Additionally, it is important to identify the circumstances that serve as the basis for establishing similarities between the elements of two or more offences that stem from the same act.[95]

In the given case, the Constitutional Court interprets "conviction" and "offence" with an autonomous, constitutional meaning. While it considers "the legal classification of a specific act or

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89 See Judgment of the European Court of Human Rights of 5 February 2009 in Olujić v. Croatia, application no. 22330/05.

90 See: European Court of Human Rights Grand Chamber judgment of 23 October 1985, in the case of Benthem v. the Netherlands, application no. 8848/80, paragraph 36; European Court of Human Rights judgment of 7 July 1989, in the case of Tre Traktörer Aktiebolag v. Sweden, application no. 10873/84, paragraph 43.

91 See: European Court of Human Rights Grand Chamber's judgment of 5 October 2000, in the case of Maaouia v. France, application no. 39652/98, paragraph 38; European Court of Human Rights' decision of 16 April 2000, in the case of Peñafiel Salgado c. Espagne, application no. 65964/01.

92 See the judgment of the Grand Chamber of the European Court of Human Rights of 15 November 2016 in A. and B. v. Norway, applications no. 24130/11 and 29758/11, paragraph 107.

93 See Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in Georgian citizen Davit Tsintskiladze vs. Parliament of Georgia (In Georgian).

94 See Decision of the Constitutional Court of Georgia of 29 December 2016, No. 2/7636, in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia, paragraph II, 5 (In Georgian).

95 See Decision of the Constitutional Court of Georgia of 29 December 2016, No. 2/7636, in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia, Section II, 5, Section II, Section 12 (In Georgian).

measure and its place in the legislation," it assigns decisive importance to "the nature of the coercive measure, its actual essence and the degree of its severity."[96].

The Constitutional Court considers that, for the purposes of the prohibition of double jeopardy established by Article 42, Paragraph 4 of the Constitution (old edition), the decisive factor is not the legislative classification of different elements of an offence but rather whether the new charge against a person is based on the same or essentially the same factual circumstances for which a final and binding decision has already been issued. However, if there is a new fact or evidence that serves as the basis for reopening criminal prosecution, the situation may differ.[97]

More specifically, the Court indicates that in order to determine the similarity between the elements of comparable offences (acts), it is crucial to clearly identify the essential factual circumstances, which must be inseparable in terms of their spatial and temporal aspects and must pertain to the same individual (the accused).[98] For example, if a person, with a common intent, commits two or more unlawful acts in different locations (spatial element) or at different points in time (temporal element), then, according to the Court, the constitutional guarantee against double jeopardy would not apply to them.[99]

Specifically, the Court asserts that "if a person is subjected to repeated prosecution for an act (or acts) committed in the same place and within a specific timeframe, based on a different legal basis, but where the elements of the offence (including subjective *(mens rea)* and objective *(actus reus)* elements, the purpose of the crime, and the assessment of public and private interests) are essentially similar to those considered in the initial conviction and, if the repeated prosecution is based on essentially the same factual circumstances, such a case should fall within the scope of the right protected by Article 42, Paragraph 4 of the Constitution."[100]

This decision will be analysed in detail below but it should be noted that, according to both European and national courts, the determination of identity between the acts in the first and second proceedings must be based solely on facts and circumstances rather than their legal qualification.[101]

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96 See the Decision of the Constitutional Court of Georgia of 29 December 2016, No. 2/7636, in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia, II, paragraphs 10-11. Also, cf. *Loladze B., Pirtskhalashvili A*., Fundamental Rights, Commentary, electronic version of the book, 2023, 816-817 (In Georgian).

97 See Decision of the Constitutional Court of Georgia of 29 December 2016, No. 2/7636, in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia, paragraph II 13 (In Georgian).

98 Ibid.

99 See Decision of the Constitutional Court of Georgia of 29 December 2016, No. 2/7636, in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia, paragraph II 13 (In Georgian).

100 See Decision of the Constitutional Court of Georgia of 29 December 2016, No. 2/7636, in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia, paragraph II 13 (In Georgian).

101 Ibid., also cf.: European Court of Human Rights, Ruotsalainen v. Finland, No. 13079/03, paragraph 48, 16 June 2009; European Court of Human Rights, Maresti v. Croatia, Application No. 55759/07, paragraph 62, 25 June 2009; European Court of Human Rights, Tsonyo Tsonev v. Bulgaria, Application No. 2376/03, paragraph 51, 1 October June 2009. Similar reasoning is developed by the Court of Justice of the European Union, which analyses the issue from a material perspective, namely, if the actions committed in different States constitute a set of facts that are continuously/inseparably linked to each other in terms of time, space

Therefore, in establishing whether an act is the same, the decisive factor is not its legal classification, subsumption or the protected legal interest, but rather the totality of facts continuously linked in time and space and directed toward a common objective.[102]

3.4. A Final Decision

3.4.1. European Judicial Practice

The principle of *ne bis in idem* implies the existence of another criterion/element: whether the first court decision has acquired a final character, that is, whether such a decision has acquired formal legal force – *res judicata.*[103]

This issue has also often been the subject of discussion in the decisions of the European Court of Justice. In particular, when a court decision enters into legal force – whether immediately after the decision is made by the court of first instance or after the decision is made by the court of last instance when the court decision acquires "finality". The connection between the two points determines the definition of the concept of "finality".

Hypothetically, in such a case, four possible scenarios could arise before the European Court:

1. Domestic legislation does not provide for the right to appeal.
2. All available appeal remedies must have been exhausted.
3. The applicant missed the appeal deadline by their own fault.
4. An initial complaint was submitted but the applicant later withdrew it voluntarily.[104]

Each state has different legal regulations regarding when a judgment becomes final.[105] It is entirely possible that a procedural ruling is considered not final in one state but it may be deemed final under the laws of another state. This is because domestic legislations of Convention signatory states vary from one another. For example, in Switzerland, a court decision becomes final only after all legal remedies available at the cantonal level have been exhausted.[106]

In the case of Georgia, under Article 279.1 of the Criminal Procedure Code of Georgia, a judgment enters into legal force and becomes enforceable upon its public announcement by the court. This provision does not specify which instance of the court it refers to, first, second or final instance.

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and purpose, then the "same crime" has been committed. For more information, see *Jishkariani B*., European Criminal Law, 2nd edition, 2018, 271.

102 Cf. *Tandilashvili Kh*., Problems of Applying the Principle of Prohibition of Double Jeopardy (*ne bis in idem*) in the legal space of the European Union, Justice and Law, 2017, N4(56), 117 (In Georgian).

103 Cf.: Judgment of the European Court of Human Rights of 20 July 2004 in Nikitin v. Russia, application no. 50178/99, paragraph 37; European Court of Human Rights, Horciag v. Romania, Application no. 70982/01, 15 March 2005; *Turava M*., Commentary on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, 551; (In Georgian). *Trechsel S*., Human Rights in Criminal Proceedings, 2010, 435 (In Georgian).

104 See *Trechsel S*., Human Rights in the Criminal Justice Process, 2010, 435.

105 Cf. *Tandilashvili Kh*., Problems of Applying the Principle of Prohibition of Double Jeopardy (*ne bis in idem)* in the Legal Space of the European Union, Justice and Law, 2017, N4(56), 122 (In Georgian).

106 See *Trechsel S*., Human Rights in the Criminal Justice Process, 2010, 435 (In Georgian).

This is also indicated by the court's decisions at the national level that are directly related to this issue and the analysis of which will be presented below.

3.4.2. National Judicial Practice

3.4.2.1. Citizen of Georgia Davit Tsintskiladze v. Parliament of Georgia

In the given case,[107] the claimant considered it problematic that, after the first-instance court's decision, the prosecutor had the right to appeal the decision and request either the conviction of an acquitted person or the imposition of a harsher sentence on a convicted individual. According to the applicant, the court's authority to review the lower-instance court's decision and, as a result, either convict an acquitted person or impose a harsher sentence on a convicted individual violated the constitutional principle of *ne bis in idem*.

According to the claimant's position, for a person to be considered as being convicted twice for the same crime, it is necessary to establish the existence of a final decision that has entered into legal force.[108] Therefore, the claimant argued that the disputed norms contradicted the principle of the presumption of innocence as recognized by Article 40, Paragraph 1 of the old version of the Constitution of Georgia.[109]

The Constitutional Court, after a detailed examination of the *ne bis in idem* principle concerning the presumption of innocence, identified three key elements that must be present for constitutionally prohibited double jeopardy to occur:

a) There must be a completed criminal procedure concerning a specific offence;
b) The person must face “repeated” conviction (*bis*);
c) The prosecution must be for the “same offence” (*idem*).[110]

The Constitutional Court held that in the case under review, each of these elements must be assessed individually, and if they exist cumulatively, it would constitute a violation of the prohibition against double jeopardy for the same act.

According to the Court, the constitutional guarantee against repeated conviction applies only to the repetition of a criminal procedure that has been concluded with a final decision that has entered into legal force.[111]

Specifically, according to the Constitutional Court’s opinion, the moment in time when a decision attains its final effect *(res judicata)* is when it becomes irreversible, and no reasonable

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107 See Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in Citizen of Georgia Davit Tsintskiladze vs. Parliament of Georgia (In Georgian).

108 Cf. Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in Georgian Citizen Davit Tsintskiladze v. Parliament of Georgia, I, paragraph 9 (In Georgian).

109 Ibid, I, para. 12.

110 Cf. Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in the case: Georgian citizen Davit Tsintskiladze v. Parliament of Georgia, II, paragraph 9 (In Georgian).

111 Cf. Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in the case: Georgian citizen Davit Tsintskiladze v. Parliament of Georgia, II, paragraph 16 (In Georgian).

mechanisms for appeal remain available under the law.[112] Such a situation arises when the decision has been made by the highest instance court or when the legally prescribed time limits for appeal have expired and the parties have voluntarily chosen not to exercise their right to appeal.[113]

Considering the above, the Constitutional Court concludes that:

"The *ne bis in idem* principle provides guarantees against the initiation of repeated prosecution for two or more actions arising from essentially similar factual circumstances, unified in time and space, when there already exists a final decision that has entered into legal force regarding the person's conviction or acquittal, or when certain procedural circumstances exist that effectively signify the termination of legal proceedings (such as the prosecution dropping charges, the expiration of limitation periods, or amnesty)."[114]

Thus, based on the analysis of this decision, it can be concluded that the Constitutional Court links the finality of a decision to its entry into legal force either through a final ruling by the third-instance court or the existence of procedural circumstances that effectively equate to the termination of legal proceedings.

In our view, the Constitutional Court's position should not be considered correct as it clearly contradicts both Article 279.1 of the Criminal Procedure Code of Georgia (CPCG) and Article 105(g) of the same Code.

More specifically, under Article 279.1 of the CPCG, as mentioned above, a verdict enters into legal force and becomes enforceable immediately upon its public announcement by the court. A public announcement is conducted by all three court instances. Additionally, Article 3.14 of the CPCG defines a verdict as a decision made by the first-instance, appellate or cassation court that either convicts or acquits the defendant. Consequently, all references in the Criminal Procedure Code to a court verdict inherently include the first-instance court since it publicly announces its verdict (whether convicting or acquitting) and thus the verdict immediately attains legal force upon announcement.

Regarding Article 105(g) of the CPCG, this provision states that an investigation or criminal prosecution must be terminated if there is a court verdict that has entered into legal force on the same charge or a court ruling terminating the criminal prosecution on the same charge.

In this provision, when the legislator refers to a court verdict that has entered into legal force, it also includes decisions made by the first-instance court. Otherwise, this provision would contradict both Article 279.1 and Article 18.2 of the CPCG, which explicitly and categorically states that a person cannot be convicted or charged for a crime for which they have already been acquitted or convicted.

However, another important aspect to consider is a subsequent decision by the Constitutional Court in the case of *Georgian Citizen Davit Tsintsqiladze v. The Parliament of Georgia*, which was issued shortly after the ruling discussed above.

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112 Ibid.
113 Ibid.
114 Ibid, II, para. 19.

3.4.2.2. Georgian Citizen Nikanor Melia v. Parliament of Georgia

According to the constitutional claim under review[115], the claimant, Nikanor Melia, had his parliamentary mandate terminated prematurely on 12 December 2019, based on the verdict issued by the Tbilisi City Court on 2 December 2019. According to this verdict, Nikanor Melia was found guilty of committing the crime stipulated under Article 332.1 of the Georgian Criminal Code (Abuse of Official Authority). As a penalty, he was fined 25,000 GEL and, as an additional punishment, he was deprived of the right to hold office for three years.[116]

Nikanor Melia's premature termination from his parliamentary mandate was based on the first-instance court's guilty verdict, despite the fact that he had the right to appeal the decision to the appellate and Supreme Courts. Therefore, the claimant argued that, for the purposes of terminating a parliamentary mandate, a first-instance court decision should not have been considered as having entered into legal force.[117]

As mentioned earlier, the Constitutional Court had to address this issue again in the present case. Specifically, the key question before the Court was whether the Parliament of Georgia had made a constitutionally sound decision when it terminated Nikanor Melia's mandate prematurely. The Constitutional Court, within its competence, thoroughly examined whether the Parliament had correctly interpreted the term "court verdict that has entered into legal force" as used in Article 39.5(d) of the Constitution (current version).[118]

The Constitutional Court held that the Parliament's application of this constitutional provision in the same sense as Article 279.1 of the Criminal Procedure Code was entirely legitimate in prematurely terminating Nikanor Melia's authority on constitutional grounds.[119]

The Court noted that, while constitutional concepts and terms have an autonomous meaning, as it had previously stated in multiple decisions, this does not mean that the Court should never consider the interpretation of the same terms in other legislative provisions.[120]

In this case, the Constitutional Court relied on Article 279.1 of the Criminal Procedure Code and held that the true meaning of the term "court verdict that has entered into legal force" in the Constitution aligns with the content of the norm in Article 279.1 of the Criminal Procedure Code. The Court found no need to interpret the constitutional provision differently as the Parliament, when adopting its resolution, was required to act based on the true meaning of the norm implied in the

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115 Cf. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in Citizen of Georgia Nikanor Melia vs. Parliament of Georgia (In Georgian).

116 Cf. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in Citizen of Georgia Nikanor Melia vs. Parliament of Georgia (In Georgian).

117 Cf. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in Citizen of Georgia Nikanor Melia vs. Parliament of Georgia (In Georgian).

118 Cf. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in Citizen of Georgia Nikanor Melia vs. Parliament of Georgia (In Georgian).

119 Ibid.

120 Cf. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in Citizen of Georgia Nikanor Melia vs. Parliament of Georgia (In Georgian).

Constitution. Consequently, the Constitutional Court deemed the Parliament's contested resolution to be legitimate as it was based on the above-mentioned interpretation of constitutional terms.[121]

With a clear and unequivocal stance, the Constitutional Court stated that the public announcement of a verdict by a first-instance court signifies its entry into legal force and its immediate enforceability, which is not directly linked to the finality of the verdict.[122]

Therefore, the Constitutional Court concluded that, for the purposes of prematurely terminating a Member of Parliament's mandate, the entry into legal force of a court verdict refers to a guilty verdict issued by the first-instance court. Accordingly, the Parliament of Georgia's resolution "On the premature termination of Nikanor Melia's parliamentary mandate" did not contradict the requirements of Article 39.5(d) of the Georgian Constitution and, as a result, the constitutional claim was not upheld.[123]

In this final decision, where the Court once again had to deliberate on this issue, it reaffirmed that a first-instance court's decision attains legal force immediately upon its public announcement. In such cases, the decision formally possesses the effect of legal force – *res judicata*. As for its finality, this should not be linked to the acquisition of legal force but rather to the exhaustion of all appeal possibilities or the issuance of a final decision by the highest-instance court – material legal force.

Based on the above, in the context of the prohibition of double jeopardy, the existence of a first-instance court verdict in the same case is sufficient as it attains legal force immediately upon its public announcement.[124] Accordingly, the review of the case by higher-instance courts (in the event of an appeal) cannot and should not be regarded as a violation of the principle prohibiting double punishment.[125]

4. *Ne bis in idem* Principle Under Newly Revealed Circumstances

4.1. A Short Review of the Issue

As is known, the revision of a judgment due to newly discovered circumstances does not constitute an independent stage of the criminal process.[126] In this case, the basis for revising the judgment is the party's motion, not an appeal. A judgment may be revised due to newly discovered circumstances even when all avenues for appealing the court's decision have been exhausted and it

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121 Cf. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in Citizen of Georgia Nikanor Melia vs. Parliament of Georgia (In Georgian).

122 Cf. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in Citizen of Georgia Nikanor Melia vs. Parliament of Georgia (In Georgian).

123 The above decision is accompanied by a dissenting opinion of the judges of the Constitutional Court: I. Imerlishvili, G. Kverenchkhiladze, T. Tughushi and T. Tsabutashvili. In this reasoning, the judges indicate that "the judgment of the court of first instance, which is being appealed, naturally cannot be considered to have entered into legal force," paragraph 18 (In Georgian).

124 Cf. *Akubardia I.*, Criminal Procedure Law of Georgia, Collection of Articles, 2017, 714-716 (In Georgian).

125 Cf. Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia (In Georgian).

126 See *Tumanishvili G.*, Criminal Procedure, General Review, 2014, 47 (In Georgian).

can no longer be appealed.[127] Therefore, the law allows for the revision and correction of an erroneous judgment in any case and there are no procedural deadlines established for this.

Based on the principle of subsidiarity, which is affirmed in the preamble of the European Convention, it is pointed out that it is the obligation of national courts to thoroughly examine the protection of the rights guaranteed by the Convention. Accordingly, the court examines whether the reopening of proceedings against the convicted individual violates the minimum standards of a fair trial and their right not to be tried twice.

In this context, it is important to examine the relationship between Article 18.2 of the Criminal Procedure Code of Georgia (CPCG) and Article 310(g). Specifically, Article 18, Paragraph 2 of the Georgian (CPCG), as mentioned above, states that no one can be charged or convicted for the same crime for which they have already been acquitted or convicted. On the other hand, Article 310 of the Georgian CC, which concerns the revision of a judgment due to newly discovered circumstances, highlights new facts or evidence that were not known at the time of the original judgment and, together with other established circumstances, proves the commission of a more serious crime by the convicted individual.

This provision in the law may create practical or doctrinal problems. Specifically, it needs to be clarified what is meant by new facts or evidence that must prove the commission of a more serious crime by the convicted individual, without violating the *ne bis in idem* principle established in Article 18.2 of the CPCG. Additionally, it is important to separately consider cases where there is a reopening of proceedings against a convicted person. In this regard, the approach of the European Court of Human Rights and the national Constitutional Court is of particular interest.

4.2. The Approach of European and National Courts

The European Convention's Protocol No. 7, Article 4 protects individuals from both double punishment and retrial.[128] According to the consistent interpretation in the practice of the European Court of Human Rights, the reopening of a criminal case is generally in *prima facie* conformity with the Convention.[129]

More specifically, Paragraph 2 of Article 4 of Protocol No. 7 explicitly permits the state to reopen proceedings *inter alia* due to newly discovered facts or a substantial procedural error in the previous proceedings, which could have had an impact on the outcome of the case.

Therefore, the application of the *ne bis in idem* principle is not violated when it concerns the reopening of proceedings due to new circumstances. However, the European Court, in applying Article 4.2 of Protocol No. 7, clearly indicates that such a reopening is possible when there is a newly

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127 Ibid.

128 See *Trechsel S.*, Human Rights in the Criminal Justice Process, 2010, 441 (In Georgian).

129 See the judgment of the European Court of Human Rights of 20 July 2004 in the case of Nikitin v. Russia, application no. 50178/99, paragraph 57; Judgment of the Grand Chamber of the European Court of Human Rights of 11 July 2017 in Moreira Ferreira v. Portugal (no. 2), application no. 19867/12, paragraph 62. The above reasoning is also in line with the minimum standards of Article 6 of the European Convention, on this see the judgment of the European Court of Human Rights of 15 January 2013 in the case of Velichko v. Russia, application no. 19664/07, paragraph 69.

discovered fact (evidence) or when the previous proceedings were conducted with a substantial flaw that could have affected the outcome of the case. [130]

This is also pointed out by the Constitutional Court of Georgia in one of its decisions. Specifically, the court notes that the essence of the right protected by Article 42.4 (old version) of the Constitution implies, as an exception, situations "where the proceedings may be reopened due to newly discovered or revealed evidence or when significant procedural flaws emerge that could have affected the outcome of the proceedings and serve as grounds for restarting the process based on clear, foreseeable and pre-established legislation. However, aside from these exceptions, the principle of prohibition of double jeopardy constitutes an absolute and imperative constitutional obligation."[131]

In *Citizen of Georgia Davit Tsintskiladze v. the Parliament of Georgia*, the Constitutional Court notes that "the scope protected by Article 42.4 of the Constitution does not cover the exceptional cases established by law, which provide for the possibility of reopening proceedings due to newly discovered or revealed evidence or when significant procedural flaws emerge that could have affected the outcome of the proceedings and serve as grounds for restarting the process based on clear, foreseeable and pre-established legislation."[132]

Therefore, during the reopening of proceedings, the principle of *ne bis in idem* is generally not violated if, of course, the case involves newly discovered facts (evidence) or if the previous legal proceedings were conducted with significant procedural flaws that could have affected the outcome of the case.[133] However, as mentioned above, the issue arises regarding what should be understood by newly discovered facts/evidence.

4.3. Analysis of Some Norms of the Georgian Criminal Procedure Code

Part 2 of Article 18 of the Criminal Code of Georgia, as mentioned, explains that a person cannot be charged and/or convicted for a crime for which he/she has already been acquitted or convicted. Article 310(g) of the Criminal Procedure Code of Georgia, which is related to the revision of a sentence due to newly discovered circumstances, indicates a new fact or evidence that was not known at the time of the revised sentence and, together with other established circumstances, proves

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130 See the judgment of the European Court of Human Rights of 20 July 2004 in the case of Nikitin v. Russia, application no. 50178/99, paragraph 45, also cf.: *Turava M*., Commentary on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, 551-552; *Papiashvili L*., Commentary on Article 18 of the Criminal Procedure Code of Georgia in the work: Commentary on the Criminal Procedure Code of Georgia, 2015, 136-137 (In Georgian).

131 See the Decision of the Constitutional Court of Georgia of 29 September 2015 No. 3/1/608,609 in Constitutional submission of the Supreme Court of Georgia on the constitutionality of Article 306.4 of the Criminal Procedure Code of Georgia and Constitutional submission of the Supreme Court of Georgia on the constitutionality of Article 297(g) of the Criminal Procedure Code of Georgia.

132 See Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia, paragraph 17.

133 Cf.: *Turava M*., Commentary on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, 551-552; *Papiashvili L*., Commentary on Article 18 of the Criminal Procedure Code of Georgia in the work: Commentary on the Criminal Procedure Code of Georgia, 2015, 136-138 (In Georgian).

the commission of a more serious crime by the convicted person. Accordingly, it is necessary to determine what is meant by the newly discovered fact/evidence so as not to duplicate the process and not violate the principle of *ne bis in idem*. For example, one such case can be cited:

Peter was convicted of concealing a particularly serious crime – premeditated murder – without prior promise (Article 375.3 of the Criminal Code) since Peter disposed of the body and buried it in the ground. After the guilty verdict entered into legal force, law enforcement agencies, within the framework of the investigation of a separate criminal case, suspected that Peter not only covered up the crime but also directly participated in the commission of the murder together with other persons (Article 109(i) of the Criminal Code – premeditated murder committed by a group). To confirm the above circumstances, the investigation identified a new eyewitness who was previously unknown to the investigation. On this basis, Peter's legal situation was aggravated by a new charge under Article 310(g) of the Criminal Code of Georgia even though he already had a guilty verdict for covering up a crime.

The concealment of a crime and participation in murder, in the narrow sense of criminal law, are different offences. However, the concealment of a crime, like failure to report a crime, is one form of criminal involvement. More specifically, legal literature recognises that, alongside the co-conspirators of a crime, criminal responsibility may also arise for actions that do not directly facilitate the commission of the crime, – meaning they do not constitute participation – yet are inherently linked to the offence.[134] Accordingly, the concealment of a crime is a "special case/form" of criminal participation, which is treated as an independent offence – ***delictum sui generis***. This is why, when national courts reclassify an initial act as concealment of a crime or failure to report a crime, the so-called "principle of the immutability of charges" is generally not violated.[135] In such cases, the requalification of the act does not constitute the introduction of a new charge that qualitatively or substantively exceeds the originally filed accusation[136].

Based on the above, within the framework of the new conviction, the court must determine to what extent participation in the murder and the removal/concealment of the corpse constitute a set of facts that are inextricably linked in time and space.[137]

More specifically, in order to establish similarity between the elements of comparable crimes (acts), the court must first clearly identify the essential factual circumstances, which must be

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134 For more details, see: *Surguladze L*., Criminal Law, Crime, 2005, 388-412; *Mchedlishvili-Hedrich K*., Criminal Law, General Part, Separate Forms of Crime Detection, 2011, 256-264, also, cf. the judgment of the Tbilisi Court of Appeal of 3 October 2024 in case No. 1B/682-24 (In Georgian).

135 See the decision of the Tbilisi Court of Appeal of 3 October 2024 in the criminal case No. 1B/682-24, also cf.: the decision of the Supreme Court of Georgia of 10 April 2024 No. 1105AP-23; the decision of the Supreme Court of Georgia of 19 April 2023 No. 1120AP-22; decision; the decision of the Supreme Court of Georgia of 12 January 2024 in the case No. 777AP-23 (In Georgian).

136 On this, see *Maglakelidze L*., Understanding the Principle of Immutability of Charges According to the Practice of the Georgian and European Court of Human Rights, 2017, German-Georgian Electronic Journal of Criminal Law (http://www.dgstz.de/), 3rd Edition, 75-79 (In Georgian).

137 Cf. *Tandilashvili Kh*., Problems of Applying the Principle of Prohibition of Repeated Conviction (*ne bis in idem*) in the Legal Space of the European Union, Justice and Law, 2017, N4(56), 121-122 (In Georgian).

inseparable in terms of their action in space and time.[138] I.e., at the initial stage, the court is required to determine the elements of time and gravity. After that, if the court considers that participation in the murder and the removal/concealment of the body are continuously connected in time and space, then there will be a violation of the *ne bis in idem* principle. If the court considers that in this particular situation, the two circumstances mentioned are not connected, then it will be entirely possible to convict the person under a more severe article.

This issue is highly contentious and every such new fact or piece of evidence requires individual assessment. Each case must be decided based on its specific circumstances. Within the framework of existing legislation at the national level, we believe there should be no issue with retrying a person under a more severe charge. However, this reasoning should not be understood to mean that every new fact or circumstance automatically aligns with the *ne bis in idem* principle.

For instance, if the same person, Peter, was convicted of Paul's murder (Article 108 of the Criminal Code), but later a more severe charge was brought against him on the grounds that he killed Paul for financial gain or as part of a group (Article 109, subsections "i" and "m" of the Criminal Code), this would clearly not be in accordance with the *ne bis in idem* principle.[139] In this case, the aggravation of charges would occur within the scope of the same unlawful act – murder – which remains continuously linked in terms of time and space. Consequently, imposing an additional or harsher punishment on a person already convicted within the framework of the same criminal unlawfulness is impermissible.[140]

On a similar issue, the Constitutional Court explains that the scope of constitutional protection should include cases where actions committed by a person at the same place and within a specific timeframe (referring to both the subjective element – *mens rea* – and the objective element – *actus reus* – of the offence) are essentially similar.[141] The European Court of Human Rights (ECtHR) has clarified that the *ne bis in idem* principle distinguishes between a second prosecution and a second trial, both of which are prohibited by Article 4.1 of Protocol No. 7. However, in exceptional cases provided by law, the reopening of proceedings is permissible under Article 4.2 and such a reopening does not violate the *ne bis in idem* principle.[142] More specifically, the Court's position is that reopening criminal proceedings for the same charge due to newly discovered facts or evidence or due

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138 See: Decision of the Constitutional Court of Georgia of 29 December 2016, No. 2/7636, in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia; Decision of the European Court of Human Rights of 10 February 2009, in the case: Zolotukhin v. Russia, Application No. 14939/03, paragraph 84 (In Georgian).

139 A situation where a person has already been convicted for a crime involving bodily harm, and the victim later dies, cannot be considered a newly discovered fact or circumstance justifying the reopening of the case and the defendant's retrial for this "new" offense. In such cases, the victim's death does not constitute a valid ground for reopening proceedings and imposing a second punishment. See: *Kublashvili K.*, Fundamental Rights, 2003, 343 (In Georgian).

140 See.: *Kublashvili K.*, The Basic Rights, 2003, 343-344 (In Georgian).

141 See Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016, in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia (In Georgian).

142 See the judgment of the European Court of Human Rights of 29 July 2008 in Xheraj v. Albania, application no. 37959/02, paragraph 2 (In Georgian).

to a fundamental procedural flaw in the initial proceedings does not contradict the *ne bis in idem* principle.[143]

In cases where a national court grants the prosecution's motion to reopen proceedings without the existence of newly discovered facts, evidence, or a fundamental procedural violation in the previous trial, a violation of the *ne bis in idem* principle occurs.[144]

Thus, the *ne bis in idem* principle may be violated when a person is convicted again within the same legal classification of the offence, even if new charges are brought under aggravating circumstances. However, if the aggravated charge falls under an entirely different category of criminal wrongdoing – one that was previously unknown to the investigation – meaning that new evidence or facts have emerged, then there is no violation of the *ne bis in idem* principle.

It is interesting as well, how the *ne bis in idem* principle applies in cases involving fugitive defendants.

4.4. *Ne bis in idem* Principle in Reopening Cases of Fugitive Defendants

In the case-law of the European Court of Human Rights, a violation of Article 4 of Protocol No. 7 is not established when criminal proceedings conducted *in absentia* against a fugitive defendant are reopened multiple times due to newly discovered factual circumstances or a fundamental procedural violation that could have affected the outcome of the case.

For example, in *Xheraj v. Albania*,[145] the applicant was convicted *in absentia*. The Court of Appeal upheld the conviction on 27 November 1996 and the Albanian Supreme Court refused to hear the fugitive defendant's lawyer's cassation appeal. However, several years later, on 14 December 1998, based on newly discovered evidence, the conviction of 27 November 1996 was overturned and an acquittal was issued in favour of the applicant. This acquittal became final on 24 December 1998.[146]

On 8 October 1999, following an appeal by the prosecutor, which argued that a fundamental procedural violation had occurred in the previous proceedings, a request was made – based on a domestic legal provision – for the case to be reopened. This request was granted.[147]

In the reopened proceedings, on 20 June 2001, the Criminal Chamber of the Supreme Court of Albania annulled the acquittal and issued a conviction against the fugitive defendant.[148]

According to the European Court, such cases must be assessed by national courts based on the subsidiarity principle and should take into account the following factors:

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143 See the judgment of the European Court of Human Rights of 29 July 2008 in Xheraj v. Albania, application no. 37959/02, paragraph 2.

144 See the judgment of the Grand Chamber of the European Court of Human Rights of 8 July 2019 in Mihalache v. Romania, application no. 54012/10.

145 See the judgment of the European Court of Human Rights of 29 July 2008 in Xheraj v. Albania, application no. 37959/02, paragraphs 9, 15-25.

146 See the judgment of the European Court of Human Rights of 29 July 2008 in Xheraj v. Albania, application no. 37959/02, paragraphs 9, 15-25.

147 Ibid.

148 See the judgment of the European Court of Human Rights of 29 July 2008 in Xheraj v. Albania, application no. 37959/02, paragraphs 9, 15-25.

1) The impact of the reopening of proceedings on the individual situation of the person concerned and whether the reopening was requested by the applicant.
2) The grounds on which the final judgment was annulled.
3) The compliance of the reopened proceedings with the requirements of domestic law.
4) The existence of appropriate procedural safeguards in the national legal system to prevent the arbitrary use of this mechanism by national authorities and their effective application to the circumstances of the case.

Additionally, there may be other relevant circumstances that the national court must consider.[149]

In cases where new charges are brought or charges are reclassified in reopened proceedings against a fugitive based on newly discovered facts or evidence that were not known at the time of the first final judgment, the European Court case *Palazzolo v. Italy is* an important precedent.[150]

In this case, the applicant was a fugitive. By the time of the ruling in 2013, he had been arrested in Bangkok, Thailand, in preparation for his extradition to Italy.[151]

The applicant before the European Court of Human Rights claimed a violation of Article 4 of Protocol No. 7 to the Convention, arguing that in the first trial, the judgment of acquittal by the Rome court on 28 March 1992, and in the second trial, the final judgment of conviction by the Court of Cassation on 29 April 2009, concerned the same facts.[152]

The European Court of Human Rights did not consider the application for substantive examination as it was deemed clearly unfounded. This was because the evidence available in the second trial was not present in the first trial when the Rome court was examining the case and the Rome court could not have been aware of it.[153]

The issue of fairness in legal proceedings may arise if, in the case of a fugitive's conviction, the arrested or declared person does not have the opportunity to appeal the final judgment.

According to Article 292.3 of the Criminal Procedure Code of Georgia, a convicted person against whom a court judgment of conviction has been made in their absence has the right to appeal the judgment within one month from: their arrest; or the moment of their voluntary appearance before the relevant authorities; or from the date of the first-instance court's decision, if the convicted person requests the appeal to be considered without their participation.

If the fugitive convict is arrested or voluntarily appears before the relevant authorities, they are fully entitled to have all the evidence in the criminal case re-examined in the appellate court with direct participation from the outset. This is indicated by Subparagraph "f" of Article 297 of the Criminal Procedure Code, which specifies that an appeal is considered by the first-instance court based on the substantive examination of the case only when the first-instance court's judgment was

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149 See the judgment of the European Court of Human Rights of 24 May 2007 in Radchikov v. Russia, application no. 65582/01, paragraph 44.

150 See the judgment of the European Court of Human Rights of 24 September 2013 in Palazzolo v. Italy, application no. 32328/09.

151 Ibid, para. 1.

152 Ibid, para. 64.

153 See the judgment of the European Court of Human Rights of 24 September 2013 in Palazzolo v. Italy, application no. 32328/09, para. 78.

made in the absence of the defendant and the appeal is considered in appellate procedure with their direct participation and request.

Therefore, even if the prosecution decides to re-qualify the charge under the same legal provision, despite the fact that the court has already made a decision on the same act, the defendant still has the right to examine the evidence in person and challenge/nullify such evidence in the substantial process before the judge.

Thus, the fact that Georgian legislation allows the possibility of appealing the judgment for a fugitive defendant/convict is fully consistent with European standards.

The national court recognises that the state's obligation to ensure the defendant's right to be present during the trial in the courtroom, whether in the initial trial or in the renewed trial (following an appeal of the judgment in their absence by a detained or declared convict), is considered one of the fundamental requirements under Article 6 of the European Convention.[154]

The state's refusal to allow the renewal of legal proceedings, except when the convicted person explicitly waives their right, falls into the category of the most severe violations of Article 6 of the Convention and is classified as a "clear disregard of justice."[155]

5. Conclusion

In conclusion, the prohibition of double jeopardy (*ne bis in idem*) constitutes an imperative obligation under both international law and constitutional law. However, exceptions exist in cases where legal proceedings may be reopened due to newly discovered or revealed evidence, or when significant procedural errors are identified that could have influenced the outcome of the proceedings.

The *ne bis in idem* principle may be violated when a person is retried or re-convicted for the same criminal offence even if the new charges relate to the same act committed under aggravating circumstances. Consequently, the imposition of an additional or harsher punishment for the same criminal offence is inadmissible. However, if the aggravation of the charges occurs within a different legal framework due to newly discovered facts or evidence that was previously unknown to the investigation, or due to substantial procedural flaws, the *ne bis in idem* principle is not violated in such cases.

To determine whether a trial or conviction is "repeated," it is crucial to assess whether the legal process is being duplicated. According to the position of the European Court, the principle of the prohibition of double jeopardy applies not only to cases where a person is punished twice but also when a second sanction is imposed or a similar proceeding is conducted against them. Consequently, the European Convention prohibits not only repeated convictions but also repeated prosecutions. This

154 See: European Court of Human Rights, judgment of 24 March 2005 in the case of Stoichkov v. Bulgaria, application no. 9808/02, paragraph 56; European Court of Human Rights, judgment of 12 June 2018 in the case of M.T.B. v. Turkey, application no. 47081/06, paragraph 61.

155 See: Judgment of the Grand Chamber of the European Court of Human Rights of 1 March 2006 in the case of Sejdovic v. Italy, application no. 56581/00, paragraph 84; Judgment of the European Court of Human Rights of 27 August 2019 in the case of Magnitskiy and Others v. Russia, applications no. 32631/09 and 53799/12, paragraph 280.

prohibition extends even to cases where the first legal proceeding resulted in an acquittal rather than a conviction.

Additionally, the key theses that emerged in the analysis of the *ne bis in idem* principle should be presented as separate points. Consequently, the conclusion can be formulated as follows:

(a) The prohibition of double jeopardy protects an individual only from repeated prosecution and conviction within the same state and does not have transnational applicability.

(b) The mere suspension of criminal proceedings does not constitute a legal barrier to the reopening of prosecution.

(c) The termination of criminal prosecution by a prosecutor does not amount to either a conviction or an acquittal; therefore, Article 4 of Protocol No. 7 of the Convention does not apply in such cases.

(d) The failure of the courts to reach a unanimous decision does not prevent the continuation of legal proceedings, and thus, in such instances, the *ne bis in idem* principle is not violated.

(e) Article 4 of Protocol No. 7 of the Convention prohibits not only repeated conviction for the same act but also repeated prosecution.

(f) Article 4 of Protocol No. 7 of the Convention, as a rule,[156] does not protect a person from additional disciplinary responsibility for the same act.

(g) In the context of the prohibition of double jeopardy, the existence of a judgment by a first-instance court, which acquires legal force upon its public announcement (*res judicata* – formal legal power), is sufficient. The appeal of a first-instance court's decision in higher instances does not constitute a violation of the prohibition against repeated punishment.

(h) According to the case-law of the European Court, in determining whether the same act has been prosecuted, the decisive factor is not its legal qualification, subsumption or the protected legal interest but rather the totality of facts that are continuously connected in time and space and directed toward a common goal.

(i) The term “same act” should be understood not only in the criminal law (substantive) sense but also in relation to administrative offences and, in exceptional cases, disciplinary violations. If such violations, by their nature and the severity of the imposed sanction, fall within the scope of Article 6(1) of the European Convention on Human Rights**,** they may be considered criminal in nature. However, the European Court emphasises the necessity of a calibrated, case-specific **approach** in such situations. Consequently, this last thesis remains open to further analysis and debate.

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[156] For more details see para. “i”.

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45. Decision of the Constitutional Court of Georgia of 29 September 2015, No. 3/1/608,609, on the case: Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Article 306.4 of the Criminal Procedure Code of Georgia and Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Subparagraph "g" of Article 297 of the Criminal Procedure Code of Georgia, paragraph 35 (In Georgian).
46. Judgment of the Grand Chamber of the European Court of Human Rights of 15 November 2016 in A. and B. v. Norway, applications no. 24130/11 and 29758/11.
47. Judgment of the European Court of Human Rights of 28 June 2001 in Amrollahi v. Denmark, application no. 56811/00.
48. Judgment of the Grand Chamber of the European Court of Human Rights of 23 October 1985 in Benthem v. the Netherlands, application no. 8848/80.
49. Judgment of the European Court of Human Rights of 22 May 2007 in Böheim c. Italie, application no. 35666/05.
50. Judgment of the Plenum of the European Court of Human Rights of 8 June 1976 in Engel and Others v. the Netherlands, applications no. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72.
51. Judgment of the European Court of Human Rights of 29 May 2001 in Franz Fischer v. Austria, application no. 37950/97.
52. Judgment of the European Court of Human Rights of 23 October 1995 in Gradinger v. Austria, application no. 15963/90.
53. Judgment of the European Court of Human Rights of 15 March 2005 in Horciag v. Romania, Application no. 70982/01.

54. Judgment of the European Court of Human Rights of 29 March 2018 in Krombach c. France, application no. 67521/14.
55. Judgment of the European Court of Human Rights of 31 May 2011 in Kurdov et Ivanov c. Bulgarie, application no. 16137/04.
56. Judgment of the Grand Chamber of the European Court of Human Rights of 5 October 2000 in Maaouia v. France, application no. 39652/98.
57. Judgment of the European Court of Human Rights of 27 August 2019 in Magnitskiy and Others v. Russia, applications no. 32631/09 and 53799/12.
58. Judgment of the European Court of Human Rights of 25 June 2009 in Maresti v. Croatia, application no. 55759/07.
59. Judgment of the Grand Chamber of the European Court of Human Rights of 8 July 2019 in Mihalache v. Romania, application no. 54012/10.
60. Judgment of the Grand Chamber of the European Court of Human Rights of 11 July 2017 in Moreira Ferreira v. Portugal (no. 2), application no. 19867/12.
61. Judgment of the European Court of Human Rights of 12 June 2018 in M.T.B. v. Turkey, application no. 47081/06.
62. Judgment of the European Court of Human Rights of 19 February 2013 in Müller-Hartburg v. Austria, application no. 47195/06.
63. Judgment of the European Court of Human Rights of 20 July 2004 in Nikitin v. Russia, application no. 50178/99.
64. Judgment of the European Court of Human Rights of 5 February 2009 in Olujić v. Croatia, application no. 22330/05.
65. Judgment of the European Court of Human Rights of 30 July 1998 in Oliveira v. Switzerland, application no. 25711/94.
66. Judgment of the European Court of Human Rights of 10 February 2015 in Österlund v. Finland, application no. 53197/13.
67. Judgment of the European Court of Human Rights of 24 September 2013 in Palazzolo v. Italy, application no. 32328/09.
68. Decision of the European Court of Human Rights of 16 April 2000 in Peñafiel Salgado c. Espagne, application no. 65964/01.
69. Judgment of the European Court of Human Rights of 14 September 1999 in Ponsetti and Chesnel v. France, applications no. 36855/97 and 41731/98.
70. Judgment of the European Court of Human Rights of 24 May 2007 in Radchikov v. Russia, application no. 65582/01.
71. Judgment of the European Court of Human Rights of 30 May 2000 in RT v. Switzerland, application no. 31982/96.
72. Judgment of the European Court of Human Rights of 16 June 2009 in Ruotsalainen v. Finland, application no. 13079/03.
73. Judgment of the European Court of Human Rights of 18 December 2012 in Sarria c. Pologne, application no. 45618/09.
74. Judgment of the Grand Chamber of the European Court of Human Rights of 1 March 2006 in Sejdovic v. Italy, application no. 56581/00.

75. Judgment of the European Court of Human Rights of 3 October 2002 in Smirnova v. Russia, applications no. 46133/99 and 48183/99.
76. Judgment of the European Court of Human Rights of 24 March 2005 in Stoichkov v. Bulgaria, application no. 9808/02.
77. Judgment of the European Court of Human Rights of 4 September 2014 in Trabelsi v. Belgium, application no. 140/10.
78. Judgment of the European Court of Human Rights of 7 July 1989 in Tre Traktörer Aktiebolag v. Sweden, application no. 10873/84.
79. Judgment of the European Court of Human Rights, Tsonyo Tsonev v. Bulgaria, application no. 2376/03, 1 October 2009.
80. Judgment of the European Court of Human Rights of 15 January 2013 in Velichko v. Russia, application no. 19664/07.
81. Judgment of the European Court of Human Rights of 29 July 2008 in Xheraj v. Albania, application no. 37959/02.
82. Judgment of the Grand Chamber of the European Court of Human Rights of 10 February 2009 in Zolotukhin v. Russia, application no. 14939/03.