

Ne Bis in Idem and International Judicial Cooperation in Criminal Matters: A Fragmented Guarantee in Search of a Unified Framework. A French Law Perspective

Ne bis in idem y la cooperación judicial internacional en materia penal: una garantía fragmentada en busca de un marco unificado. Una perspectiva desde el derecho francés

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Abstract. The principle of *ne bis in idem* – that no person shall be tried or punished twice for the same offence – ranks among the foundational guarantees of criminal procedure. At the international level, however, it has no settled status. Long treated as a purely domestic rule, the principle’s traditional non-application between States has been progressively qualified by certain international conventions and by the statutes of the international criminal tribunals. Within the European Union, the transformation has been more ambitious: the principle has migrated from a domestic safeguard into a transnational fundamental right, constituting, by comparison with general international law, a genuinely European added value.

The analysis that follows is organised around a doctrinal distinction that the literature tends to elide : that between the *res judicata* effect of a foreign

criminal judgment (*autorité de chose jugée*) –, whose negative expression is the *ne bis in idem* bar – and its enforceability (*force exécutoire*). It is argued that maintaining these two categories as analytically separate is the precondition for understanding both what the principle demands across cooperation mechanisms and where its limits lie.

On that doctrinal foundation, the article argues that the resulting guarantee is not a single rule but a system of five overlapping – and at times conflicting – regimes: the ordinary French domestic regime, subject to a territorial-jurisdiction exclusion; the ECHR Protocol No. 7 regime, confined to intra-State situations; the Schengen/Charter regime, genuinely transnational and recently extended to extradition to third States; the classic cooperation-treaty regime, structurally narrower; and the Interpol CCF regime, in which the principle operates at best as an administrative indicium. The article draws on the jurisprudence of the Court of Justice – from *Gözütok* and *Van Esbroeck* to *HF* (C-435/22 PPU) and *Swiftair* (C-701/23) – as well as that of the European Court of Human Rights, the French Court of Cassation, and the

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Interpol Commission for the Control of Files (hereinafter, the “CCF”), and on the newest developments in judicial cooperation, including the 2024 Transfer of Proceedings Regulation and the European Public Prosecutor’s Office, to map the principle across each layer of judicial cooperation and to identify the analytical variables that recur across all of them.

Three structural gaps emerge: the domestic/foreign sentence gap (only partially bridged by the Court of Cassation’s 2013 deduction rule and left open by the ongoing enforcement lacuna identified by Huet); the treaty gap exposed by HF; and the contractual blind spot left by the transnational circulation of DPAs and CJIPs. Alongside these gaps, two frontiers test the principle under maximum stress: corporate liability for atrocity crimes, illustrated by the Lafarge proceedings, and the investigative phase under the EIO and the European Public Prosecutor’s Office (EPPO). The article’s central claim is that the coherent application of *ne bis in idem* now demands a unified analytical framework – held together by the shared “certainty threshold” of C-505/19 – that neither the existing legislation nor the case law has yet supplied.

Resumen

El artículo analiza el principio *ne bis in idem* en el contexto de la cooperación judicial internacional en materia penal desde la perspectiva del derecho francés. La autora sostiene que este principio no constituye una garantía uniforme, sino un sistema fragmentado integrado por diversos regímenes jurídicos nacionales, europeos e internacionales, cuyas diferencias generan importantes desafíos para su aplicación. A partir del examen de la jurisprudencia del

Tribunal de Justicia de la Unión Europea, del Tribunal Europeo de Derechos Humanos, de la Corte de Casación francesa y de la Comisión de Control de los Ficheros de Interpol, el estudio identifica las principales lagunas y tensiones existentes en la protección contra el doble enjuiciamiento. Asimismo, aborda cuestiones contemporáneas relacionadas con la extradición, la orden de detención europea, la cooperación policial internacional, los acuerdos de justicia negociada y la responsabilidad penal de las personas jurídicas. Finalmente, propone la necesidad de construir un marco analítico unificado que garantice una aplicación coherente del principio *ne bis in idem* en los distintos mecanismos de cooperación judicial internacional.

Keywords: *Ne bis in idem*; international judicial cooperation; international criminal law; extradition; European Arrest Warrant; mutual recognition; *res judicata*; Court of Justice of the European Union; French law; criminal cooperation.

Palabras clave: *Ne bis in idem*; cooperación judicial internacional; derecho penal internacional; extradición; orden de detención europea; reconocimiento mutuo; cosa juzgada; Tribunal de Justicia de la Unión Europea; derecho francés; cooperación penal.

Introduction

1. Judicial cooperation in criminal matters may be defined as horizontal assistance between legal orders, triggered by an element of extraneity and operating through instruments as varied as extradition, mutual legal assistance, Interpol police cooperation, the European Arrest Warrant (EAW), the European Investigation Order (EIO) and,

most recently, the EPPO.² What unites these instruments is a single objective: to enhance the conduct of proceedings by recourse to the jurisdictional power of a judge belonging to a legal order to which the proceedings do not *a priori* pertain. That very expansion, however, generates a structural risk. The more effectively criminal justice systems cooperate, the greater the likelihood that a person already tried in one jurisdiction will face a second set of proceedings in another.

2. *Ne bis in idem* is therefore at once a beneficiary and a casualty of enhanced cooperation. It benefits from the circulation of judicial decisions that establish finality. It is threatened whenever several jurisdictions compete to prosecute the same conduct. This dual posture reflects the principle's multifaceted rationale: it operates as a guarantee of judicial protection for the individual against the *ius puniendi* of the State, forming part of the guarantees of due process and fair trial, while simultaneously safeguarding the *res judicata* (*pro veritate habetur*) of final judgments, on which the legitimacy of the legal system and of the State depends.
3. The difficulty of the contemporary situation is attributable principally to the multi-source character of the applicable law. There is no mandatory rule of general international law obliging States to respect *ne bis in idem* between themselves; the principle applies only to the extent that treaties provide for it. The content of those trea-

ties differs markedly. At Council of Europe level, Article 4 of Protocol No. 7 to the ECHR is expressly confined to prosecutions "under the jurisdiction of the same State." Within the Schengen area, Article 54 of the Convention Implementing the Schengen Agreement (CISA) supplies a transnational guarantee of considerably broader scope. At Union level, Article 50 of the Charter of Fundamental Rights elevates the principle to a fundamental right applicable "within the Union." Beyond these instruments, bilateral and multilateral cooperation treaties incorporate *ne bis in idem* as a ground for refusal, but typically only in favour of persons definitively judged by the *requested* State itself – a formulation structurally narrower than EU law, and the source of the most acute tensions in extradition to third States.

4. These divergences constitute the point of departure for the analysis. This article is organised in four Parts. Part I lays the normative and doctrinal foundations, demonstrating that fragmentation operates on two levels simultaneously: the multi-source map of the applicable norms, and the contested content of its two constitutive elements, *idem* and *bis*. The core of the study (Part II) traces the operation of the principle across the channels of cooperation, ordered from the strongest form of the guarantee to the weakest: from the judicial core of the EAW, through its outward extension to extradition to third States, to its dilution at the administrative periphery of Interpol, its near-absence in contractualised criminal justice, and its prospective displacement by the preventive logic

2 On the definition, see K. Mehtiyeva, *La notion de coopération judiciaire*, LGDJ, t. 598, 2018, préf. L. Cadet.

of transfer of proceedings. Part III then turns to the two frontiers on which the principle is placed under the greatest stress: corporate liability for atrocity crimes, and the investigative phase of cross-border cooperation. Finally, Part IV draws the threads together, identifying the recurring analytical variables and the gaps that a coherent architecture would need to close.

5. This article employs a doctrinal and comparative method. It draws on the primary sources of the law – statutes, treaties, regulations and judicial decisions – as interpreted through the legal literature. The institutional perimeter is defined by the mechanisms of international judicial cooperation: the Court of Justice of the European Union, the European Court of Human Rights, the French Court of Cassation, and the Interpol Commission for the Control of Files are the principal adjudicative bodies examined. At the legislative level, the study covers instruments from the 1957 European Convention on Extradition and the 1972 Convention on the Transfer of Proceedings through the 2024 Transfer of Proceedings Regulation and the most recent 2025 CJEU rulings. The primary normative axis is French and European: the article analyses French law both as a case study in the limits of the domestic territorial model and as the lens through which the interaction between national law and supranational instruments is most precisely observable. The comparative dimension is introduced to illuminate those structural contrasts – particularly between the EU guarantee and classic cooperation-treaty re-

gimes – that the French perspective alone would not reveal. The article does not purport to survey all national systems; the selection is dictated by the normative hierarchy under examination. The reference in this abstract to the statutes of the international criminal tribunals identifies a broader historical context – the gradual erosion of the traditional rule of non-application between States – that falls outside the article’s operational scope; it is not further developed in the body of the text, which is confined to the mechanisms of international judicial cooperation as defined above.

I. A Fragmented Principle: Sources and Content

6. The thesis of this Part is that *ne bis in idem* is fragmented before any question of cooperation even arises. Fragmentation operates on two levels. First, the principle is dispersed across a plurality of normative sources of unequal reach (Section A). Second, even where it applies, the content of its two constitutive elements – the *idem* (the “same” offence or facts) and the *bis* (what counts as having been “finally judged”) – was for a considerable period unsettled and has been only partially harmonised (Sections B and C). An understanding of both levels is the precondition for explaining why the principle behaves so differently across the cooperation mechanisms examined in Part II.

A. THE MULTI-SOURCE LANDSCAPE

7. In French legal doctrine, the effects of a foreign criminal judgment divide into two analytically distinct categories. The first is the *res judica-*

ta effect (autorité de chose jugée): the binding character of the decision, which may operate positively (where the judgment is adduced as evidence in subsequent French proceedings) or negatively (where it operates as a bar – the negative authority (autorité négative), equivalent to the *ne bis in idem* rule). The negative authority is characterised as a procedural bar (*fin de non-recevoir*) to the public prosecution in France, precluding proceedings arising from the same facts against the same individual – the *ne bis in idem* rule. The second category is the enforceability (*force exécutoire*): the question whether a foreign penal sanction may be enforced on French territory, which implicates French sovereignty in a more direct and demanding manner. The two must not be conflated. This article concerns the first category – the negative authority – which constitutes the operative form of *ne bis in idem* in French law and in the cooperation instruments examined below.³ Understanding the principle's content at each level of its normative hierarchy – domestic, European Convention, Schengen, and Charter – is the task of this Section.

3 A. Huet, Fasc. 404-10, n° 1-6 (drawing the distinction between *res judicata* (*autorité de chose jugée*) and enforceability (*force exécutoire*), and identifying *ne bis in idem* as an expression of the *autorité négative* of a foreign criminal decision). On the associated humanitarian rationale, Professor Huet observes that considerations of humanity (“des considérations d’humanité”) underlie the principle – it is unjust to try an individual twice for the same act – a rationale that sits alongside the *res judicata* and legal certainty arguments already discussed.

8. At the domestic level, *ne bis in idem* is recognised by each State for application within its own legal order alone. As a general matter it applies only in the criminal field and only to final judgments in criminal matters. Two consequences follow. In many States double prosecution remains entirely permissible, as does the cumulation of punitive administrative sanctions with criminal ones. Even within a single legal system, fundamental definitional questions persist: much of the domestic case law turns on the meaning of *idem* and *bis*. Should the “same” (*idem*) be defined by reference to the legal characterisation of the offences, or to the underlying facts? Does the principle's reach depend on the scope of the offence descriptions or on the legal interests they protect? In other words, national case law has not produced a common standard regarding the scope and application of the principle across domestic legal orders.

9. French law illustrates the point.⁴ Article 6 of the Code of Criminal

4 Cass. Crim. 23 Oct. 2013 (n° 13-83.499), “les décisions rendues par les juridictions pénales étrangères n’ont pas, en France, l’autorité de chose jugée lorsqu’elles concernent des faits commis sur le territoire de la République”. Under French common law (Art. 113-9 Criminal Code and Art. 692 Criminal Procedure Code), the *ne bis in idem* bar rests on the cumulative satisfaction of the following conditions: (i) identity of facts (*mêmes faits*) between the foreign and the prospective French proceedings, assessed materially rather than by legal characterisation; (ii) the act must in principle have been committed outside French territory, the domestic-jurisdiction exception being the principal limitation examined below; (iii) the

Procedure (hereinafter “CCP”) extinguishes the public prosecution by *res judicata*, but this provision has long been understood to refer only to judgments of French courts, or, in the Schengen context, of other Member States. Decisions of foreign courts concerning acts committed on French territory carry no *res judicata* authority in France. The Criminal Chamber of the Court of Cassation confirmed this in its decision of 23 October 2013, holding that “judgments delivered by foreign criminal courts do not have *res judicata* effect in France with respect to offences committed on French territory.”⁵ That territorial logic is subject to one important mitigation – the rule, examined in Part IV.C, that a custodial sentence served abroad must be deducted from any sentence sub-

sequently imposed in France. The limitation is textually anchored: both Article 113-9 of the Criminal Code and Article 692 of the CCP are cross-referential provisions tied to the heads of extraterritorial jurisdiction in Articles 113-6 and 113-7, with the consequence that they are, by their very structure, inapplicable where France’s own territorial jurisdiction under Article 113-2 is engaged. The underlying justifications offered are twofold: respect for national sovereignty, and scepticism as to the evidential value and procedural propriety of the foreign proceedings. Professor André Huet, however, registers the weight of doctrinal criticism: the solution is said to offend against dignity, justice and humanity – particularly in the commonplace case of an international offence only partially committed on French soil (such as a transnational fraud). That criticism is significant: it is precisely in such cross-border cases – the paradigm case of international judicial cooperation – that the domestic territorial exclusion operates most harshly, denying the very protection that cooperation is intended to secure.

foreign decision must constitute a judgment properly so called, the classement sans suite of a foreign prosecutor being insufficient; (iv) the foreign court must have been internationally competent, assessed by reference to French rules of international jurisdiction; (v) the proceedings must have respected the rights of the defence and fundamental procedural guarantees; (vi) the decision must be final (*définitive*), assessed according to foreign law; and, in the case of a conviction, (vii) the sentence must have been served or have become prescribed. Two further procedural points: no exequatur is required to raise the bar, but the court cannot raise it of its own motion – it must be invoked by the accused.

5 K. Mehtiyeva, “Chronique de coopération judiciaire”, *Journal du droit international (Clunet)* (2020), at 592: the classical French domestic doctrine holds that foreign criminal decisions lack *autorité de chose jugée* in France as regards facts committed on the territory of the Republic. See Cass. Crim., 23 octobre 2013, n° 13-83.499.

10. The historical record demonstrates that this was not always the law: Article 7 of the former Criminal Investigation Code (*Code d’instruction criminelle*) (as amended in 1903) admitted a procedural bar against foreigners already tried abroad for acts committed in France; and even today, Article L. 622-2 of the CESEDA carves out an express statutory *ne bis in idem* for the offence of facilitating irregular entry and circulation, extending to facts committed on French

territory. The persistence of these exceptions undermines the contention that the territorial exclusion rests on any principled necessity.

11. A further domestic dimension concerns the interface between French fiscal and criminal law. In nine decisions of 11 September 2019 (lead case n° 18-81.067), the Criminal Chamber deployed for the first time an enriched reasoning (*motivation enrichie*) to explain why parallel fiscal and penal proceedings are compatible with Article 4 of Protocol No. 7.⁶ The reservation entered by France upon ratification limits Article 4 to offences falling, under French law, within the jurisdiction of courts adjudicating criminal matters. On that basis the Court held that “the prohibition on double conviction for the same acts, as provided for by Article 4 of Protocol No. 7, applies, pursuant to France’s reservation entered in respect of that Protocol, only to offences which, under French law, fall within the jurisdiction of

courts adjudicating criminal matters, and does not preclude the imposition of tax penalties alongside the penalties imposed by the criminal court”⁷, adding that it falls to the criminal court itself to give full effect to the reservation – “it is for the criminal court to apply Article 4 of Protocol No. 7 by giving full effect to France’s reservation entered in respect of that Protocol”⁸. Crucially, the Court left open a question to which Part IV.C returns: whether Article 50 of the Charter – which admits of no equivalent reservation – might apply independently where the parallel sanction touches Union law. The point was not raised by the parties and remains available for future litigation.

12. The limits of the domestic French framework – territorial, institutional and, in the fiscal context, constitutional – become fully apparent when the analysis moves to the supranational instruments that govern cross-border situations. Above the national level, the principle was deliberately excluded from the original ECHR and added only

6 K. Mehtiyeva, « Chronique de coopération judiciaire », JDI (2019), at 584 et seq., noting the Chambre criminelle’s « motivation enrichie » technique. The lead judgment is Cass. crim., 11 septembre 2019, n° 18-81.067 (arrêt n° 1175), holding (§ 17): « l’interdiction d’une double condamnation en raison de mêmes faits, prévue par l’article 4 du protocole n° 7 ne trouve à s’appliquer, selon la réserve émise par la France en marge de ce protocole, que pour les infractions relevant en droit français de la compétence des tribunaux statuant en matière pénale et n’interdit pas le prononcé de sanctions fiscales parallèlement aux peines infligées par le juge répressif. » The Court expressly left open the question whether Article 50 of the Charter – which admits of no equivalent reservation – might apply independently.

7 Original French of para. 17 of the judgment : « interdiction d’une double condamnation en raison de mêmes faits, prévue par l’article 4 du protocole n° 7 ne trouve à s’appliquer, selon la réserve émise par la France en marge de ce protocole, que pour les infractions relevant en droit français de la compétence des tribunaux statuant en matière pénale et n’interdit pas le prononcé de sanctions fiscales parallèlement aux peines infligées par le juge répressif ».

8 Original French of para. 20 of the judgment : « il appartient au juge répressif d’appliquer l’article 4 au protocole n° 7 en faisant produire un plein effet à la réserve émise par la France en marge de ce protocole ».

by Article 4 of Protocol No. 7, opened for signature on 22 November 1984. Its scope, however, is confined to the national level – to trial or punishment within one and the same State – while other Council of Europe conventions govern its application across borders. Two such conventions are of particular relevance. The European Convention on Extradition of 13 December 1957 included, in Article 9, not only the classic *res judicata* formulation but also final decisions of a procedural character: “Extradition shall not be granted if a final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested.” That mandatory bar is confined to the requested State’s own courts; refusal on the basis of foreign judgments is merely optional. The 1972 Convention on the Transfer of Proceedings goes further: under Article 35, a person against whom a final and enforceable judgment has been rendered may, for the same act, be neither prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State, provided that he was acquitted, or the sanction has been completely enforced, pardoned, amnestied, or has lapsed by time. The reach of that rule is qualified by Articles 36–37: a State need not recognise the *ne bis in idem* effect, where it has itself requested the proceedings, where the act was directed against a person, institution or thing of public status in that State, or where the State on whose territory the act was committed has not itself requested the proceedings. As Vervaele observes, the

objective of *ne bis in idem* in these conventions is to avoid double *punishment*, not double *prosecution* or *investigation*⁹ – a limitation that EU law would subsequently transcend.¹⁰ (The 1972 Convention’s significance is renewed by Regulation 2024/3011, discussed in Part II.E.)

13. The decisive break came through Schengen. Article 54 CISA shifted the principle to the transnational plane by providing that “a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.” Integrated into EU law as part of the Schengen *acquis*, this instrument became binding and directly applicable between the Member States. Article 50 of the Charter then elevated the guarantee to a fundamental right, providing that “no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance

9 J. A. E. Vervaele, “The Transnational *ne bis in idem* Principle in the EU: Mutual Recognition and Equivalent Protection of Human Rights”, *Utrecht Law Review* 1(2) (2005). For the Convention text, see European Convention on the Transfer of Proceedings in Criminal Matters, ETS No. 73, 15 May 1972, Arts 35–37.

10 European Convention on the Transfer of Proceedings in Criminal Matters, 15 May 1972, ETS No. 73, Art. 35 (mandatory bar after final judgment), Arts 36–37 (exceptions).

with the law.” The Explanations relating to the Charter of Fundamental Rights confirm the transnational reach: the principle “applies not only within the jurisdiction of one State but also within the jurisdictions of several Member States,”¹¹ and corresponds to the *acquis* in Articles 54 to 58 CISA. The underlying rationale is, as the Court has repeatedly affirmed, a corollary of *res judicata*: the principle guarantees legal certainty and equity by ensuring that, once prosecuted and where appropriate convicted, the person concerned knows that he will not be prosecuted again for the same offence. In Vervaele’s reading, this is what distinguishes EU integration from analogous federal debates: rights and remedies for the *market* citizen are transformed into rights and remedies for the *Union* citizen, with the consequence that national criminal decisions acquire an EU-wide effect within a new European territoriality.

14. As established in §9, ordinary French law denies *res judicata* effect to foreign judgments for acts committed on French territory. France enshrined that same limitation within the Schengen framework by availing itself of Article 55 CISA, making a declaration to maintain its domestic exception for acts committed wholly or in part on French territory, as well as for offences falling within the jurisdiction over State interests (*compétence réelle*) of French courts under Article 113-10 of the Criminal Code (attacks on the fun-

damental interests of the Nation). The declaration’s practical impact was demonstrated by the Criminal Chamber of the Court of Cassation on 3 December 1998, which upheld a French prosecution for *abus de biens sociaux* committed in France, notwithstanding a Belgian order finding no grounds for prosecution (*non-lieu*) for the same acts: Article 54 CISA did not apply because France had reserved the right not to recognise the *ne bis in idem* effect of foreign decisions concerning acts committed on its territory. The declaration thus reproduces, within the Schengen framework, the same territorial exclusion that governs French common law – confirming that France’s resistance to a fully transnational *ne bis in idem* is not merely a vestige of the pre-Schengen era but a deliberate and maintained constitutional position.¹²

15. Article 56 CISA supplies the corrective: where a State invokes an Article 55 reservation and proceeds with fresh proceedings notwithstanding a foreign conviction, it is required to deduct from any sanction it imposes any period of deprivation of liberty served in another Contracting State for the same facts. The reservation thus does not permit a State to disregard the foreign judgment altogether; it merely displaces the *ne bis in idem* bar with a less onerous obligation of proportional deduction. This architecture – reservation of the right to

11 Explanations relating to the Charter of Fundamental Rights’ (OJ C 303/17, 14.12.2007).

12 France also declared that the exception for offences falling within Art. 113-10 of the French Criminal Code (fundamental interests of the Nation) constitutes a ground for non-application of Art. 54 CISA, consistently with Art. 55(1)(b) CISA.

prosecute, coupled with mandatory deduction of any foreign sentence – precisely mirrors the French domestic deduction rule identified in Part IV.C: in both settings, sovereign prosecutorial authority is preserved while the individual is partially protected against double punishment through deduction. The parallel demonstrates that the domestic deduction rule is not an isolated judicial creation but forms part of a broader, multi-level architecture designed to manage the tension between State sovereignty and individual protection.

16. The map thus produced is uneven by design. The same words – *ne bis in idem* – denote a strictly intra-State guarantee under Protocol No. 7, a transnational guarantee under Article 54 CISA and Article 50 of the Charter, and a requested-State-only ground for refusal under the classic cooperation treaties. Sections B and C demonstrate that this unevenness of *source* is compounded by a prolonged instability in *content*.

B. THE *IDEM*: CONVERGENCE ON A FACTUAL TEST, AND ITS MARGINS

17. The Court of Justice’s principal contribution to the *idem* has been to anchor it in fact rather than in legal characterisation. In *Van Esbroeck*, *Van Straaten* and *Kretzinger*, the Court held that the only relevant criterion for the purposes of Article 54 CISA is identity of the *material acts*, understood as a set of facts inextricably linked together, irrespective of their legal classification or the legal interest protec-

ted.¹³ *Mantello* (Grand Chamber, C-261/09) confirmed and refined this “inextricably linked circumstances” test, defining the “same acts” as “a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected,” to be assessed in the light of the specific circumstances of each case. The choice of a factual *idem* is not merely technical but protective: it secures a higher standard of protection than a test built on the “same offence,” which routinely permits a second prosecution of the same conduct under a different legal label, and it vindicates the twin pillars of legal certainty and equity recognised by every legal order.¹⁴

- 13 CJEU, Case C-436/04, *Van Esbroeck*, para. 36; Case C-150/05, *Van Straaten v Netherlands and Italy*, paras 48 and 53; Case C-288/05, *Kretzinger*, para. 29: “the only relevant criterion for the purposes of the application of Article 54 of the CISA is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, and that criterion applies irrespective of the legal classification given to those acts or the legal interest protected
- 14 CJEU, Grand Chamber, 16 November 2010, Case C-261/09. The Court confirmed and refined this test, making two contributions that *Van Esbroeck* had not expressly articulated. First, it held that “the same acts” constitutes “an autonomous concept of EU law” that “cannot be displaced by divergent national definitions” but must be applied uniformly across the Member States – a holding that settled the question of whether domestic criminal-law classifications could override the factual test. Second, it required identity of acts to be assessed “in the light of the specific circumstances of each case,” introducing a requirement of individualised assessment that prevents the factual test from being applied mechani-

18. The protective force of the factual test is, however, bounded by an important limit established in *Kraaijenbrink*¹⁵: materially distinct facts are not unified into the *idem* merely because they were committed with a common criminal intent. This limit is of considerable significance in cooperation practice: where a defendant seeks to invoke *ne bis in idem* against a second prosecution covering chronologically distinct or geographically separate acts, a shared underlying purpose does not suffice to establish identity of facts. The *idem* is anchored in the concrete circumstances of each act, not in the subjective design connecting them.¹⁶
 19. Within those limits, the factual test operates as an autonomous concept of EU law, binding uniformly across all cooperation mechanisms. In the EAW context, the Court aligned Article 3(2) of Framework Decision 2002/584 with Article 54 CISA, reasoning that the two provisions pursue the same objectives – Article 3(2) preventing the requested person's settled situation in the executing State from being disturbed, Article 54 ensuring that a person already judged may move freely without fear of fresh prosecution for the same acts. "The same acts," the Court held, is an autonomous concept of EU law: it cannot be displaced by divergent national definitions but must be applied uniformly across the Member States.
 20. Strasbourg converged on the same approach in *Zolotukhin v. Russia* (2009).¹⁷ The applicant, having served three days' detention for a minor administrative offence, was subsequently prosecuted on criminal charges founded on the same conduct. Finding a violation of Ar-
- 15 CJEU, 18 July 2007, C-367/05.
- 16 CJEU, 18 July 2007, Case C-367/05, *Kraaijenbrink*, para. 27: materially distinct facts are not unified into the *idem* merely because they were committed with a common criminal intent.
- 17 Prior to *Zolotukhin*, the Strasbourg case law was contradictory: *Gradinger v. Austria* (1995) upheld the factual approach; *Oliveira v. Switzerland* (1998) adopted the legal approach; *Franz Fischer v. Austria* (2001) sought a compromise; and *Göktan v. France* (2002) reverted to the legal definition. The Grand Chamber resolved the inconsistency in *ECtHR, Sergey Zolotukhin v. Russia*, Application No. 14939/03, 10 February 2009, paras 80–81, holding that the legal approach was "too restrictive on the rights of the individual" and susceptible of "undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention." The Court concluded that "Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same." See also, Bas van Bokel, *The Ne Bis in Idem Principle in EU Law* (Kluwer Law International 2010), pp. 36–38 (discussing *Sergey Zolotukhin v Russia* (GC), App no. 14939/03, 10 February 2009): "The Grand Chamber of the ECtHR has brought its reading of Article 4 of Protocol No. 7 ECHR in line with the interpretation given by the Court of Justice to Article 54 CISA on the *idem* element and has recognized that both Article 4 of the aforementioned Protocol and Article 54 CISA codify the same *ne bis in idem* principle."

ticle 4 of Protocol No. 7, the Grand Chamber expressly recognised that “the existence of a variety of approaches to ascertaining whether the offence ... is indeed the same ... engenders legal uncertainty and is incompatible with a fundamental right, namely the right not to be prosecuted twice for the same offence.” Abandoning its earlier inconsistency, the Court held the offence-based reading to be “too restrictive on the rights of the individual” and apt to undermine rather than render practical and effective the guarantee, concluding that Article 4 “must be understood as prohibiting the prosecution or trial of a second ‘offence’ in so far as it arises from identical facts or facts which are substantially the same.” The result was a single, shared *idem*: the Grand Chamber brought its reading of Article 4 into line with the Court of Justice’s reading of Article 54 CISA, and recognised that both provisions codify the same *ne bis in idem* principle.

21. Convergence at the centre, has not, however, eliminated instability at the margins, where the protected legal interest continues to exert a gravitational pull against the factual test. French practice is instructive. As Hamilton observes, the French formulation makes the essential element of commonality “the real or historical fact”; yet on occasion the French courts have appeared to deny the principle on the basis of differences in legal characterisation when exercising extraterritorial jurisdiction. A 1973 decision on cross-border drug trafficking held that a Canadian conviction for import offences did not bar French prosecution for export

offences arising from the same conduct – a formalistic reading that permitted legally distinct labels for identical underlying facts to justify successive prosecutions. The persistence of this margin is significant because it is precisely where the factual test is weakest – atrocity crimes prosecuted under heterogeneous labels across jurisdictions – that the contemporary stakes are highest. That problem is examined in detail through the Lafarge proceedings in Part III.A; here it suffices to register that the convergence on a factual *idem* remains contested at precisely the point where cooperation is most consequential.

C. THE *BIS*: THE CONTESTED BOUNDARY OF “FINALLY JUDGED”

23. If the *idem* asks *what* must be the same, the *bis* asks *when* a matter has been decided with sufficient finality to bar a second set of proceedings. The Court of Justice has answered generously at one end of the spectrum and restrictively at the other. The space between the two answers is where much of the cooperation litigation now resides.
22. The generous end was fixed in *Gözütok and Brügge* (11 February 2003, C-187/01 and C-385/01). Advocate General Ruiz-Jarabo Colomer articulated the foundational premise: Article 54 is “not a procedural rule but a fundamental safeguard, based on legal certainty and equity, for persons who are subject to the exercise of the *ius puniendi* in a common area of Freedom, Security and Justice,” and the rule “is an expression of mutual trust of the Member States in their criminal justice systems,” penal settlements being “not contractual, but an ex-

pression of criminal justice.”¹⁸ He proposed that the principle should apply to discontinuances ordered by a public prosecutor once the defendant has fulfilled certain conditions, provided those conditions are in the nature of a penalty, the agreement presupposes an express or implied acknowledgement of guilt, and it does not prejudice victims who may bring civil actions. The Court went further than these conditions, holding that the principle applies “to procedures whereby further prosecution is barred ... by which the Public Prosecutor of a Member State discontinues criminal proceedings ... without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor.” The justification was mutual trust: the principle “necessarily implies that Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.”

24. The reach of *Gözütok* gives rise to the unresolved question of contractualised justice, to which Part II.D returns in full. As Vervaele anticipated, the open issue is whether “procedural agreements, such as

plea bargaining or full or partial immunity deals ... fall under the scope of the *ne bis in idem* principle.” The French *Convention judiciaire d'intérêt public* (CJIP), validated by judicial order, fits the *Gözütok* template closely: it discontinues proceedings after conditions are met, including payment of a financial penalty, without a finding of guilt, and its effect – extinction of the public prosecution – is comparable to the Dutch *transactie* and German *Einstellung* that *Gözütok* addressed. Subject to the territorial-jurisdiction gate examined in Part III.A, a CJIP validated by a French court may therefore, in principle, trigger the Article 54 CISA bar in other Schengen/EU Member States investigating the same conduct.

25. The restrictive end of the spectrum is the requirement of a decision on the merits. The guarantee does not apply where the first proceedings ended without any examination of criminal liability. In *AB e.a.* (16 December 2021, C-203/20), the Court held that an amnesty-based closure – taken before any assessment of guilt or innocence – does not bar a subsequent EAW once the amnesty is revoked and the closure annulled, because Article 50 of the Charter requires acquittal or conviction “by a final criminal judgment.” Substance, not mere form, is required. The same logic governs Interpol’s Commission for the Control of Files. In CCF Decision n° 2023-02, the applicant invoked *ne bis in idem* and a foreign refusal of extradition; the CCF, citing Article 14(7) ICCPR – “no one shall be liable to be tried or punished again for an offence for which he has already been finally acquitted or convicted

18 ECJ, 11 February 2003, Joined Cases C-187/01 and C-385/01, Hüseyin Gözütok and Klaus Brügge, [2003] ECR I-1345. The foundational character of mutual trust as the doctrinal justification was developed by Advocate General Ruiz-Jarabo Colomer, Opinion of 19 September 2002, at paras 113-124..

by a final judgment” – applied an exacting standard requiring both identity of facts and “a final decision on guilt or innocence rendered by a court of first instance on the merits”.¹⁹ No such judgment existed, since the earlier no grounds for prosecution order had been rendered not on the substance but because the requesting State had failed to respond to a mutual legal assistance request, and the CCF found the principle inapplicable. This reasoning is doctrinally confused: it conflates the question of applicability with that of satisfaction, suggesting that the principle was within *scope* but could not *operate* for want of a merits judgment – a subtly but importantly different conclusion from a finding of inapplicability.²⁰

- 19 K. Mehtiyeva, *Chronique de coopération judiciaire*, *JDI* (2024): CCF Decision n° 2023-02, citing ICCPR Art. 14(7): *ne bis in idem* requires «une décision définitive sur la culpabilité ou l’innocence prise par un juge du fond.» The earlier no ground for prosecution had been rendered not on the merits but because the requesting State had failed to respond to a mutual legal assistance request – a procedural closure, not a substantive acquittal. Huet surveys the doctrinal debate on whether Article 14(7) ICCPR has transnational scope, and concludes with the position adopted by the Human Rights Committee: the provision is confined to double prosecutions within a single State, and does not impose any obligation upon States Parties to give effect to acquittals or convictions handed down in a foreign jurisdiction. The Committee confirmed this reading in *A.P. v. Italy*.

The CCF’s reasoning is doctrinally confused: *ne bis in idem* was applicable in principle (i.e. within scope) but there was no violation, since no merits judgment existed. Citing C-505/19 and C-435/22 PPU

- 20 K. Mehtiyeva, *Chronique*, (2024): CCF Decision n° 2023-02: refusal grounds

26. The position is clearest at the acquittal end of the spectrum. Where the foreign decision is an acquittal or a discharge, the *ne bis in idem* bar operates without any additional condition: the motive of the acquittal is irrelevant – whether absence of proof, prior amnesty, prescription of the offence, absence of incrimination under foreign law, or any other ground. Moreover, the French judge possesses no power of revision: the bar cannot be displaced on the grounds that the foreign decision appears ill-founded, whether factually or legally. Once finality and identity of facts are established, the bar is absolute. This confirms the coherence of the certainty threshold (Part IV.B): where a final acquittal exists, certainty is established *ipso facto*, and no review of the foreign merits is admissible.

27. Whether a decision reaches the finality threshold that triggers this absolute bar is itself governed by a uniform rule. In *Turansky* (CJEU, 22 December 2008, C-491/07), the Court confirmed that the charac-

“vary and are not always verifiable/communicated; refusal based on the requested State’s limitation rules does not ‘directly’ affect the purpose of the notice because arrest/extradition may still occur elsewhere; remedy is an update/addendum to the notice (not deletion).” Quoted text of Interpol GA Resolution AGN/53/RES/7 (1984), §9: «le refus d’un ou plusieurs pays ... ne signifie pas que la demande est sans objet ... [mais] les refus d’extradition sont signalés ... par voie d’additif.”

CCF Decision n° 2023-07 confirms the same approach: the Commission rejected; the request for deletion of the notice and ordered that the extradition refusal be recorded as an addendum under Resolution AGN/53/RES/7.

ter of a decision as “final” for the purposes of Article 54 CISA must be assessed according to the law of the Member State that delivered it: a decision that does not definitively extinguish the public prosecution under the law of the State that rendered it does not trigger the transnational bar, however formally conclusive it may appear to the courts of another Contracting Party. The principle is identical to Huet’s position in French common law: finality is a question of the *lex fori* of origin. The consistency between the CJEU’s approach and Huet’s domestic analysis confirms that, on this point at least, the transnational and domestic standards have converged around a single underlying criterion.²¹

28. Taken together, the two ends mark out a demanding but coherent threshold: a decision counts as *bis* only if it reflects an actual determination of criminal liability, whether reached by a court or by a prosecutorial disposal of penal character. That threshold – which Part IV.B reformulates as the “certainty” requirement – is the doctrinal hinge on which the cooperation mechanisms in Part II turn.

II. *Ne Bis in Idem* Across the Channels of Cooperation

29. Part I established that the principle is fragmented in source and content. This Part demonstrates that it is fragmented also in *operation*: the same guarantee operates with very different force depen-

ding on the cooperation mechanism through which a competing claim is pressed. The mechanisms are presented here along a spectrum of protective strength. The guarantee is at its most robust in the judicial, mandatory regime of the EAW (Section A); it has been extended outward, by recent jurisprudence, to extradition to third States (Section B); it weakens to a mere “indicium” at the administrative periphery of Interpol (Section C); it is substantially undermined in the transnational circulation of negotiated settlements (Section D); and it is increasingly displaced, prospectively, by the preventive logic of transfer of proceedings (Section E). The spectrum is itself an argument: it demonstrates that the strength of the guarantee tracks the degree to which a mechanism is judicial, mandatory and embedded in the Union’s mutual-recognition framework.

A. THE JUDICIAL CORE: THE EAW AND THE MANDATORY REFUSAL GROUND

30. In the EAW framework the principle finds its most robust operational expression. Under Article 3(2) of Framework Decision 2002/584, the executing authority *shall* refuse execution “if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts, provided that, where there has been sentence, the sentence has been served or is accurately being served or may no longer be executed under the law of the sentencing Member State”. The principal virtue of the regime, as Vervaele observes, is that by

21 ECJ, 22 December 2008, Case C-491/07, Turansky.

recognising *res judicata* as a bar to surrender, it places final judgments and out-of-court settlements from all Member States on a par with those of the requested State: once a final judgment has been rendered in one Member State, all others are bound by it, and the obligation of refusal is absolute.

31. Mutual recognition of this kind presupposes mutual trust, which in turn presupposes that the issuing authority is a genuine judicial body. The Court has required that the issuing judicial authority be capable of providing, within the EAW procedure, effective review satisfying the requirements of effective judicial protection. French courts have on this basis confirmed that French prosecutors qualify as judicial authorities for EAW purposes, given the absence of individual executive instructions and the availability of judicial remedies, including challenges under Article 170 of the CCP.
32. That the EAW's refusal grounds are rooted in fundamental rights, rather than in formal categories, is confirmed by their capacity to expand. In *E.D.L.* (Grand Chamber, 18 April 2023, C-699/21), the Court held that where a requested person produces medical evidence of serious psychiatric disorder and a high risk of suicide, the executing authority may, after consulting the issuing authority, refuse execution if the risk to life or health cannot be excluded within a reasonable time. This health-based ground finds no express basis in the Framework Decision but is derived from Article 1(3) FD 2002/584 read with Article 4 of the Charter. It is instructive because it is closely analogous

to *ne bis in idem*: like the latter, it bars surrender on grounds rooted in the individual's fundamental rights, and it requires the application of the same methodology of proportionality and prior consultation before refusal may be permitted. The EAW thus models the form that a mature, rights-based refusal ground assumes – a benchmark against which the weaker regimes that follow may be measured.

B. EXTENDING THE GUARANTEE OUTWARD: EXTRADITION TO THIRD STATES

33. The benchmark set by the EAW raises an evident question: does the transnational guarantee survive when the second proceeding is sought not by a Member State but by a third State? The most significant recent development answers in the affirmative, and in doing so extends the principle beyond the Union's internal mutual-recognition space.
34. The pivotal development is the Grand Chamber's judgment in *HF* (*Generalstaatsanwaltschaft München v. HF*, C-435/22 PPU, 28 October 2022). The reference from the *Oberlandesgericht München* arose from a United States extradition request to Germany concerning a third-country national, for the prosecution of acts for which he had already been finally convicted in another Member State and had fully served his sentence. HF, a Serbian national, had been placed in provisional detention in Munich on 20 January 2022 on the basis of an Interpol red notice issued at the request of US authorities, who sought his extradition for offences allegedly committed between Sep-

tember 2008 and December 2013, pursuant to an arrest warrant of 4 December 2018 of the US District Court for the District of Columbia for conspiracy to participate in corrupt organisations and conspiracy to commit bank and wire fraud.²²

35. By judgment of the *Okrožno sodišče v Mariboru* of 6 July 2012, final on 19 October 2012, HF had been sentenced to one year and three months' imprisonment for an offence committed between December 2009 and June 2010, commuted to 480 hours of community service and fully served by 25 June 2015. The Slovenian courts had, by de-

- 22 By judgment of the *Okrožno sodišče v Mariboru* (Regional Court of Maribor, Slovenia) of 6 July 2012, having acquired the force of *res judicata* on 19 October 2012, HF was convicted of "attack on an information system" and sentenced to one year and three months' imprisonment (commuted to 480 hours of community service), fully served by 25 June 2015. The Slovenian courts had previously refused a US extradition request on the ground that the relevant facts (prior to July 2010) had already been definitively judged.

Key holding (Chronique 2023, quoting the judgment): « la notion de 'poursuite', au sens de l'article 54 de la CAAS, couvre une demande d'extradition. »

On personal scope: "Article 54 CISA refers to any 'person' definitively judged by a Contracting State, without limiting this to nationals of a Member State or Contracting State. Similarly, Article 50 of the Charter, using the indefinite pronoun 'no one' ('nul'), establishes no link with Union citizenship, and is found ... under Chapter VI ('Justice')."

Normative primacy: *ne bis in idem* "prime ... sur d'autres obligations internationales" (including a bilateral extradition treaty) and differing treatment of Member State judgments would undermine the AFSJ and the principles of mutual trust and mutual recognition

cision of 23 September 2020 confirmed on 8 October 2020, already rejected a prior US extradition request on the ground that the facts prior to July 2010 had been definitively judged at Maribor. The question referred was whether Article 54 CISA, read with Article 50 of the Charter, precludes a Contracting Party that is also a Member State from extraditing a third-country national to a third State where the person has already been definitively judged for the same facts by another Member State and the judgment has been executed – even where refusal would breach an existing bilateral extradition treaty.

36. Advocate General Collins, in his Opinion of 13 October 2022, reasoned that the solution of the *Interpol Red Notice* judgment was fully transposable: if a provisional arrest, whose very object is to prepare an extradition, already falls within the notion of "prosecution" under Article 54 CISA, then *a fortiori* a decision on an extradition request does so too.²³ The Court confirmed this, affirming the

- 23 AG Collins, Opinion in Case C-435/22 PPU (13 October 2022), ECLI:EU:C:2022:775: "if a provisional arrest, whose very object is to prepare an extradition, already falls within the notion of 'prosecution' under Article 54 CISA, then a fortiori a decision on an extradition request does so too." The Advocate General concluded that Article 54 CISA protects any person benefiting from the right to free movement within the Schengen area, whether or not that person holds the status of Union citizen.

The *a fortiori* reasoning is found in the Ruling of the ECJ 12 May 2021, C-505/19. Indeed, the Court already treated a provisional arrest on the basis of a red notice as constituting a 'poursuite pénale' for Article 54 CAAS purposes"; the HF judg-

principle's character as a fundamental principle of Union law, and holding that the notion of prosecution, within the meaning of Article 54 CISA, covers an extradition request, again reasoning *a fortiori* from the *Interpol Red Notice* judgment. On personal scope, the Advocate General observed that Article 54 CISA protects any "person" definitively judged by a Contracting State, without limitation to nationals, and that Article 50 of the Charter, using the indefinite "no one" and located under Chapter VI ("Justice") rather than Chapter V ("Citizenship"), establishes no link with Union citizenship. Third-country nationals may, under certain conditions – a valid residence permit, or exemption from the visa requirement, as in HF's case – also move freely within the Schengen area; and although their freedom of movement is not equivalent to that of Union citizens, equity and civil peace likewise require that, once definitively judged in a Contracting State, they may exercise that freedom without fearing fresh prosecution for the same facts in another Contracting State. The Advocate General added the systemic justification: Article 54 CISA does not serve free movement alone but also, in the area of freedom, security and justice and in the absence of harmonised criminal law, guarantees legal certainty through respect for final decisions of public bodies, resting on mutual trust and mutual recognition of criminal judgments. The conclusion followed: extraditing HF to the United States for

facts identical to those finally judged in Slovenia, and whose sentence had been served, would violate Article 54 CISA read with Article 50 of the Charter.

37. The decisive contribution of HF lies in how it disposed of the conflicting treaty obligation, and it is here that the narrowness of the classic treaty regime – already identified in Part I.A – becomes operative. Article 8 of the Germany–USA Extradition Treaty provides that "extradition shall not be granted if the person sought has already been finally acquitted or convicted by the competent authorities of the requested State for the offence in respect of which extradition is requested". Confined to judgments of the *requested* State's own authorities (Germany), this clause plainly could not reach HF's Slovenian conviction; the treaty's *ne bis in idem* ground was therefore narrower than the EU guarantee. The Advocate General confronted the incompatibility directly: although the EU-USA Agreement does not expressly authorise refusal on *ne bis in idem* grounds, Member States retaining competence to conclude bilateral agreements "must exercise that competence in compliance with EU law and in particular the fundamental rights guaranteed by the Charter, including the *ne bis in idem* principle under Article 50, and therefore cannot subscribe to obligations incompatible with those resulting from EU law." He identified a route through the conflict in Article 17(2) of the EU-USA Agreement, under which "if the constitutional principles of the requested State or final and binding judicial decisions are of such a nature as to

ment extends this reasoning to formal extradition requests

preclude the fulfilment of its obligation to extradite ... the requested State and the requesting State shall consult with each other.” Among such “constitutional principles,” he reasoned, one may count the primacy of EU law and the protection of fundamental rights; and if consultations did not yield withdrawal or limitation of the request, the requested Member State would have no alternative but to give EU law primacy over the bilateral treaty.

38. Nor could the treaty’s anteriority preserve it. Signed on 20 June 1978 and in force from 29 August 1980, the Germany–USA Treaty post-dated 1 January 1958, with the consequence that on a strict reading Article 351(1) TFEU would not apply. The Advocate General nonetheless accepted, with the referring court, the German government and the Commission, a broad interpretation of Article 351(1) covering by analogy conventions concluded after 1 January 1958 but before the Union acquired competence in the field – police and judicial cooperation in criminal matters dating only from the entry into force of the Amsterdam Treaty on 1 May 1999, which postdated the bilateral instrument. Even so, the concession did not rescue the obligation: as the Court had held in *Kadi*, Article 307 EC (now Article 351 TFEU) can in no case permit the undermining of principles forming part of the very foundations of the EU legal order, among them the protection of fundamental rights; Germany could not therefore justify a violation of Article 50 by its treaty obligations. The corresponding duty is clear: Article 351(2) TFEU obliges Mem-

ber States to use all appropriate means to eliminate such incompatibilities – treaty-consistent interpretation, consultation under Article 17(2), and if necessary denunciation. The Advocate General’s proposed formulation captured the holding: Article 54 CISA read with Article 50 of the Charter “must be interpreted as meaning that those provisions preclude the extradition of a person, whether or not that person holds Union citizenship ... to a third State, where that person has already been finally convicted in another Member State for the same acts ... and that judgment has been executed, even where refusal of extradition would only be possible at the cost of violating an existing bilateral extradition treaty with that third State”. The judgment may be read as a precursor to recognising, on a mutual-recognition basis, Member State decisions refusing extradition to third States, and underscores its “structural” significance: to deny effect to another Member State’s judgment would undermine the foundation of the area of freedom, security and justice and the principles of mutual trust and mutual recognition, defeating “legal certainty and equity [...] thereby ensuring civil peace”.

39. *HF* protects against the conflict; it does not abolish it. The asymmetry it leaves was exposed by the reference from the Marseille Judicial Court (C-763/22, 20 March 2025). France had issued an EAW for a French national in Spain, but the Spanish Council of Ministers – whose decision was not subject to judicial review under Spanish law – granted priority to a competing Swiss extradition request. The

Court was asked whether that governmental decision qualified as one of an “authority competent to decide” within Article 6(3) of Framework Decision 2002/584, and how the EAW and extradition regimes should be articulated when they conflict. The case lays bare the core asymmetry of the contemporary system: the EAW is judicial, mandatory and legally constrained, whereas extradition to third States remains executive, discretionary and only loosely subject to fundamental-rights review. The consequence is that a political decision to prioritise extradition can, in practice, nullify both the *ne bis in idem* protection and the EAW simultaneously – precisely the outcome that *HF* sought to prevent.

40. The French courts, for their part, treat extradition as a substantive human-rights exercise rather than a merely procedural one, reinforcing the protective trend from the national side. In Court of Cassation (Criminal Chamber), 30 January 2024 (n° 23-83.549), concerning a Tunisian request for premeditated homicide, the Court required the indictment chamber (*chambre de l’instruction*) to obtain an unambiguous assurance that the death penalty would not be applied to the *specific individual concerned*; a general reference to a thirty-year moratorium and to symbolic international commitments was held insufficient – an exacting standard in the *Soering* line. Similarly, in Court of Cassation (Criminal Chamber), 13 January 2021 (n° 20-81.359), the Court held that where a person enjoys subsidiary protection, extradition is barred for as long as that protection subsists, the risk of

inhuman or degrading treatment being presumed – a near-irrebuttable presumption under Article 3 ECHR read with Article 696-15 of the CCP.

C. THE ADMINISTRATIVE PERIPHERY: INTERPOL AND THE CCF

41. Moving outward from the judicial core, the protective force of the principle diminishes markedly once the relevant institution is administrative rather than judicial. Interpol’s Commission for the Control of Files (CCF) is the most instructive instance. The CCF exercises functions analogous to judicial review over Interpol’s data-processing decisions, including challenges to red, blue, green and yellow notices. Constituted in 1982, with independence and quasi-judicial character consolidated by the 2016 Statute and having published its decisions since 2017–2018, it has for the first time generated a genuine jurisprudence on the lawfulness of Interpol’s cooperation tools. Its jurisdiction is nonetheless limited to compliance with Interpol’s internal regulations – its Constitution, the Rules on the Processing of Data (RPD) and General Assembly resolutions. It is not an international court, and its decisions are not subject to appeal before any external body.²⁴
- 24 K. Mehtiyeva, “Chronique de coopération judiciaire”, *JDI* (2019) (noting that publication of CCF decisions promotes rigour and enables scholarly criticism, without which CCF decisions would lack any avenue of external review); *ibid.*, *JDI* (2023) (the CCF was established simultaneously with the revised headquarters agreement granting Interpol immunity under the International

42. The consequences of that architecture were exposed in *El Omari v. INTERPOL* (US Court of Appeals, 2nd Circuit, 24 May 2022). A US citizen briefly detained at customs on the basis of a UAE-requested red notice sought to bring Interpol before a US court after the CCF rejected his challenge; the court confirmed Interpol's immunity under the International Organization Immunities Act. The CCF had been established simultaneously with the revised headquarters agreement granting that immunity, as a necessary alternative remedy – yet its decisions are final and not subject to appeal. The immunity-for-accountability trade-off thus produces a structural access-to-justice gap, in which the ECtHR or the UN Human Rights Committee may serve only as ultimate and indirect remedies for violations occurring in the underlying national proceedings, subject to exhaustion of domestic remedies in the State that published the notice or effected the arrest.
43. Within these confines, the CCF has nonetheless constructed a coherent practice that bears directly on *ne bis in idem*, beginning with purpose-control. In CCF Decision No. 1 (published 2 March 2017), the Commission held a notice “premature” where the investigation had not sufficiently advanced and the requesting State intended to use

mutual legal assistance or transfer-of-proceedings instruments rather than to seek extradition.²⁵ The key passage provides that “the purpose of a Red Notice is not to obtain the transfer of a person in order to assist in an investigation or give evidence ... [but] to facilitate the seeking of a person's extradition.” A State may not, in other words, employ the Interpol system as a substitute for an international letters rogatory. CCF Decision No. 8 (109th session, July 2019) refined the corollary obligation to pursue extradition, characterising it as a “best-efforts” obligation (*obligation de moyens*) rather than a guarantee of result: temporary inaction may be justified by reasonable grounds, provided the requesting bureau “takes appropriate steps ... *i.e.* to seek the arrest in view of extradition.”

44. The CCF's most delicate task, however, is to determine what weight to accord national decisions – acquittals, no grounds for prosecution orders, or refusals of extradition – without itself adjudicating *ne bis in idem*. The Commission's approach is to treat such decisions as evidential indicia rather than as binding determinations. In CCF De-

25 CCF, Decision No. 1 (published 2 March 2017). The CCF held the red notice premature because the investigation had not advanced to the charging/extradition stage, and noted that the requesting State was seeking to use the red notice for mutual legal assistance rather than extradition. Key passage: “The purpose of a Red Notice is not to obtain the transfer of a person in order to assist in an investigation or give evidence ... [but] to facilitate the seeking of a person's extradition.” (RPD, Art. 82, as interpreted by the Commission.)

Organization Immunities Act, as confirmed in *El Omari v. INTERPOL*, US Court of Appeals, 2nd Circuit, 24 May 2022; Statute Art. 36). The absence of any external appellate body has been questioned in Council of Europe reflections on the adequacy of remedies available against Interpol data-processing decisions.

cision No. 6 (108th session, April 2019), while acknowledging that *ne bis in idem* is ultimately a matter for national courts, the Commission treated multiple national decisions refusing cooperation and/or acquitting the applicant as raising serious concerns about the coherence and evidentiary basis of the accusations, justifying annulment of the notice; those decisions operated as a “bundle of indicia” – not full probative force, but indicators of sufficient weight, on grounds of Interpol’s neutrality and reputation, to warrant withdrawal.²⁶ This is the only tool the CCF’s framework affords for giving practical weight to *ne bis in idem* without formally applying it. The same logic governs the effect of extradition refusals: in CCF Decisions n° 2023-02 and n° 2023-07, the Commission held that a refusal of extradition does not invalidate a notice as such – the person may still be located and arrested in other member countries not

subject to the same constraints – and ordered only that the notice be updated to reflect the refusal. The governing instrument is Resolution AGN/53/RES/7: a refusal does not signify that the request is without merit but must be mentioned as an addition to the notice until the extradition is enforced.

26 Mehtiyeva, *Chronique de coopération judiciaire internationale* (2020); CCF, Decision No. 6 (108th session, 15–19 April 2019), as commented: the applicant invoked *ne bis in idem* (ICCPR Art. 14(7) and Protocol No. 7, Art. 4) and the CCF annulled the notice. Key reasoning (paras 39-41): “39. Three INTERPOL member countries have successively declined to cooperate on this case, due to issues linked to the evidentiary basis and the coherence of the accusations ... 40. ... the determination of the applicability of the *ne bis in idem* principle must be left to the national competent courts ... 41. However [the Commission] found ... that the multiple ... national decisions declining to cooperate ... raise serious concerns as to the overall coherence of the charges ... hindering the possibility of actual international police cooperation.”

45. Two further decisions illustrate the CCF managing the very complexity of the EU-law standard by circumventing it. In CCF Decision 2025-01, a parental-custody dispute with contradictory national decisions was resolved by finding the red notice incompatible with Article 83(1)(a)(i) RPD – which prohibits publication for family-matter offences – and accordingly declining to rule on the subsidiary *ne bis in idem* argument.²⁷ This “hierarchisation” technique – disposing of a notice on a broader ground to avoid engaging a more complex one – constitutes a deliberate choice that may reflect the Commission’s reluctance to engage the EU-law-derived standard, with its requirements of factual identity, final judgment on the merits and the “certainty” threshold, which the CCF’s administrative framework does not easily accommodate. Conversely, CCF Decision 2025-3 demonstrates the Commission’s willingness to act on its own motion: a green

27 Mehtiyeva, *La Chronique de coopération judiciaire internationale*, Journal du Droit international (Clunet), 2025: CCF Decision 2025-01. Key rule: “Article 83(1)(a)(i) of the RPD expressly prohibits the publication of Red Notices for offences relating to family matters.” The CCF found the red notice non-compliant on this ground and accordingly declined to examine the subsidiary *ne bis in idem* argument.

notice was invalidated on a ground raised *ex officio* – non-compliance with Article 11 RPD on the lawfulness of data retention under national law. This power of own-motion legality and proportionality review is doctrinally significant, for it suggests that the CCF can and should review the broader lawfulness of the data processing underpinning a notice, including its conformity with the fundamental rights of the person concerned, even where the applicant has not articulated those grounds. Across all of these decisions, however, the conclusion is the same: at the administrative periphery the principle operates at most as an indicium, never as a mandatory bar.²⁸

D. THE CONTRACTUAL BLIND SPOT: DPAs, CJIPS, AND THE ABSENCE OF TRANSNATIONAL *NE BIS IN IDEM*

46. If Interpol dilutes the guarantee, the transnational circulation of negotiated settlements substantially undermines it – at least outside the Union. The worldwide rise of negotiated justice (US and UK deferred prosecution agreements (DPAs), French CJIPs) directly rai-

ses the question, anticipated in Part I.C, of whether agreements designed to avoid multiple prosecutions circulate across borders.

47. The leading authority is Court of Cassation (Criminal Chamber), 1 April 2020 (*Nigeria LNG*, n° 19-83.969). A defendant had been convicted in the United States after a plea agreement (21 months' imprisonment and a \$50 million fine, both fully served and paid). The Paris Criminal Court had initially pronounced the extinction of the public prosecution on *ne bis in idem* grounds in 2014. The Court of cassation quashed that ruling in 2018, recalling that Article 692 of the CCP restricts transnational *ne bis in idem* to acts committed outside French territory. In 2020 it confirmed the rejection of the defence and added a further holding of constitutional significance: subjecting French prosecutions to a necessity/proportionality review weighing them against an earlier foreign disposal “se heurte à la souveraineté de l'État français et au principe d'opportunité des poursuites.” The same logic had governed the “Pétrole contre nourriture” case (*Cass. crim.*, 14 March 2018): so long as a constitutive element of the charged offence, however minor, occurred on French territory, France asserts territorial jurisdiction, and foreign disposals – including fully executed US plea agreements – cannot extinguish the *action publique*.²⁹

28 *Ibid*, CCF Decision 2025-3. Green Notices serve to warn about persons with criminal activities or who constitute a threat to public safety (RPD Art. 89). The CCF assessed proportionality under Art. 12 RPD and found it satisfied given the NCB's history of multiple convictions and detentions. However, notwithstanding that proportionality was satisfied, the CCF ordered the NCB to confirm, within one month, that data retention was authorised under national law (Art. 11 RPD); failure to do so would lead to invalidation and deletion. This demonstrates the CCF's willingness to act *ex officio* on grounds not raised by the applicant.

29 K. Mehtiyeva, *Chronique* (2020), commenting on *Cass. crim.*, 1 avril 2020, n° 19-83.969 (*Nigeria LNG*): the Court held that Article 692 CCP restricts transnational *ne bis in idem* to acts committed outside French territory, and that subjecting

48. Under French common law, a foreign conviction triggers *ne bis in idem* only if the sentence has been wholly served or has become prescribed. That condition, Huet observes, is theoretically criticisable: the *res judicata* effect of the judgment arises upon its finality, not upon execution of the sentence. The additional requirement of execution is a matter of criminal policy (preventing impunity for fugitives) rather than of doctrinal necessity. The condition is applied strictly: an escape from custody interrupts the running of the sentence, with the consequence that *ne bis in idem* cannot be raised by a person who fled before completing service of the sentence abroad. Huet suggests, however, that French prosecution should be barred where the foreign sentence is currently being served or its execution has merely been suspended (for example through a suspended sentence or conditional release), on the ground that permitting simultaneous prosecution would neutralise the foreign *res judicata* and subject the individual to a double jeopardy in the most literal sense. This suggestion aligns with Article 54 CISA's formula that the sentence must be "actually in the process of being enforced" – a standard more protective than French common law as applied.
49. This position stands in marked contrast to the EU's proportionality-based jurisprudence in the EAW
- and extradition contexts, where proportionality has become a live constraint. In the French domestic setting the prosecutor retains full prosecutorial discretion (*opportunité des poursuites*), and no judicial mechanism permits a defendant to compel the prosecutor to take account of a prior foreign disposal. The result is a genuine blind spot: between fully judicial EU instruments and the contractual disposals that now resolve most transnational corporate cases, *ne bis in idem* provides no automatic transnational protection whatsoever.
50. Where the law supplies no guarantee, prosecutorial coordination provides a practical, if voluntary, substitute. The Airbus tripartite resolution is the leading example. Facing parallel investigations in France, the United Kingdom and the United States, Airbus coordinated three separate disposals – a French CJIP, a UK DPA and a US DPA – with mutual accounting of penalties across the three. Its legal foundation was not *ne bis in idem*, which offers no automatic transnational guarantee outside the EU, but rather the OECD Anti-Bribery Convention's non-mandatory consultation mechanism (Article 4(3)) and the coordinating role of the French National Financial Prosecutor's Office (PNF).³⁰ The
- 30 CJIP concluded on 29 January 2020 between the Procureur de la République financier and Airbus SE, validated by order of the President of the tribunal judiciaire de Paris on 31 January 2020 (ord. n° 20/2020), imposing an amende d'intérêt public of €2,083,137,455. Concurrently, Airbus concluded a DPA with the SFO (approved by the Crown Court at Southwark on 31 January 2020, €983,974,311) and a DPA with the US

French prosecutions to a necessity/proportionality review weighing them against an earlier foreign disposal "se heurterait à la souveraineté de l'État français et au principe d'opportunité des poursuites."

PNF's June 2020 circular reinforces its role in cross-border corruption cases and promotes joint investigation teams enabling shared evidence and coordinated charging. A joint investigation team was constituted between the PNF and the UK Serious Fraud Office in early 2017, following preliminary investigation opened by the PNF on 20 July 2016 and entrusted to the OCLCIFE. All communications between the British and American authorities passed through the PNF, in compliance with the French blocking statute. The JIT agreement allocated investigative priorities between the two authorities on a country-by-country basis. Although this article's focus is the negative authority rather than the enforceability (force exécutoire) set aside in Part I.A, the two categories converge at one point that merits notice here. The converse situation – where France is asked to execute a foreign criminal sanction rather than to prosecute – reveals a further dimension of *ne bis in idem* as an operational refusal ground in French law. French common law does not,

in principle, permit foreign criminal judgments to be enforced on French territory: there is no general exequatur procedure for penal decisions, and the courts have consistently held that foreign criminal judgments cannot be executed in France. Where EU instruments do require France to execute a foreign sanction – most notably under the Framework Decision 2005/214/JHA on financial penalties, transposed as Articles 707-1 et seq. CCP – *ne bis in idem* appears as one of the mandatory grounds for refusing execution: France must refuse if the person has already been finally judged for the same acts and, in case of conviction, the sentence has been served, is in the process of being enforced, or can no longer be enforced under the law of the State of conviction. The same applies to confiscation orders under the Law of 9 July 2010 (Arts 713-36 et seq. CCP): execution must be refused where enforcement would violate *ne bis in idem*, or where the rights of the defence or fundamental liberties have been disregarded. The corollary is significant: the moment France accepts to execute a foreign penal sanction – whether through transfer of sentenced persons (Art. 728-9 CCP), recognition of financial penalties, or enforcement of confiscation orders – it simultaneously assumes a *ne bis in idem* obligation to refrain from fresh prosecution for the same facts. Execution and the bar on double jeopardy are, accordingly, two sides of the same coin.³¹

DOJ before the US District Court for the District of Columbia (€525,655,000), together with a consent agreement with the Department of State under the ITAR. On the coordination, see PNF, Communiqué de presse, 31 January 2020. The agreement produced an allocation of investigative priorities by country between the PNF and the SFO (the PNF took the UAE, China, South Korea, Nepal, India, Taiwan, Russia, Saudi Arabia, Vietnam, Japan, Turkey, Mexico, Thailand, Brazil, Kuwait and Colombia; the SFO took South Korea, Indonesia, Sri Lanka, Malaysia, Taiwan, Ghana and Mexico), a division significant in the light of the non bis in idem principle. The French authorities received roughly 58% of the total penalty.

31 As Huet (Fasc. 404-10) explains, conventions providing for the execution of foreign sentences in another State necessarily imply a derogatory regime of

51. A further procedural asymmetry compounds the contractual blind spot lacuna. Under French common law, the *ne bis in idem* bar derived from a foreign judgment is not a matter of public policy: the court cannot raise it of its own motion, and it must be invoked by the defendant. The timing of that invocation is flexible – the defendant may raise the exception at any stage of the proceedings, including after the commencement of the trial, provided the foreign decision has become final before the French proceedings are concluded. In the CJIP context, this creates a strategic asymmetry: a company that has concluded a US DPA covering the same facts as a pending French CJIP negotiation must itself raise the *ne bis in idem* argument before the homologation judge; the prosecutor will not do so, and the validating judge – whose review is limited to the proportionality of the penalty and compliance with procedural formalities – possesses no authority to raise it of its own motion.

E. THE PREVENTIVE TURN: TRANSFER OF PROCEEDINGS (REGULATION 2024/3011)

52. The mechanisms examined thus far all operate *ex post*, once parallel proceedings have crystallised or a sentence has been rendered

abroad. Regulation 2024/3011 on the transfer of criminal proceedings introduces a different logic – *preventive* rather than reactive – by concentrating prosecution in the most appropriate jurisdiction *before* the double-jeopardy problem can arise. Its normative ancestor is the 1972 Council of Europe Convention discussed in Part I.A, whose Part V (Articles 35–37) already contained a mandatory *ne bis in idem* rule: once a final and enforceable judgment has been rendered in the receiving State, the person may neither be prosecuted, sentenced nor subjected to enforcement for the same act in another Contracting State.³²

53. The 2024 Regulation builds on that logic with a modern cooperation infrastructure – direct inter-authority contact, procedural time limits and digital communication tools – designed to reduce the window of parallel-prosecution risk. Where proceedings are transferred and the receiving State completes prosecution with a final judgment, the

autorité négative: a State that accepts to enforce a foreign conviction “doit s’interdire des poursuites pour les mêmes faits,” a logic now expressed in Art. 728-9 CPP (transfer of sentenced persons). See also Huet, Fasc. 404-20, *op. cit.*, spec. on mandatory grounds for refusal of enforcement of financial penalties and confiscation orders under EU instruments, including *ne bis in idem*.

32 Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the transfer of proceedings in criminal matters (OJ L, 2024/3011, 19 December 2024); Council of Europe Convention on the Transfer of Proceedings in Criminal Matters, ETS No. 73, 15 May 1972. Mehtiyeva, *Chronique (2024): the EPPO Regulation is discussed as the most recent expression of the preventive rather than reactive logic in cross-border criminal proceedings. On the broader doctrinal significance of the Regulation for the European area of criminal justice*, see P. Beauvais, « Le règlement relatif au transfert de procédures pénales », *RTD eur.* 2024.659. See also, Gaurier, « Le règlement sur le transfert des procédures pénales », *Arch. Pol. Crim.* 2024.223.

sending State's proceedings are suspended and ultimately extinguished, and any European Arrest Warrant it might have issued becomes redundant – with the consequence that the double-jeopardy problem is pre-empted rather than resolved after the fact. As Beauvais argues, the Regulation constitutes a genuinely new system for resolving conflicts of jurisdiction in criminal matters within the European area, and, as Gaurier observes, it advances a criminal policy conceived beyond national frontiers. This preventive function is, however, unavailable in the extradition-to-third-States context of Section B, which renders the gap between intra-EU and extra-EU cooperation all the more pronounced.

54. What permits all of the mechanisms examined in this Part to be compared is a single operational test, established in the Interpol Red Notice judgment (C-505/19) and developed across the subsequent case law: the “certainty” threshold. Provisional arrest may proceed so long as “it has not been established that the *ne bis in idem* principle applies” (para. 90). This requirement – that an established, final judicial decision exists before the bar can operate – recurs as the common variable across every mechanism examined in this Part. Part IV.B. takes it up again and develops it as the organising concept of the whole field.

III. Stress Tests and Frontiers

55. The spectrum of Part II describes the principle as it operates across settled mechanisms. This Part turns to two frontiers on which

the principle is placed under particular stress and where its future contours will likely be determined: corporate liability for atrocity crimes, where the factual *idem* is tested at its weakest margin (Section A); and the investigative phase, where the analogues of *ne bis in idem* are only beginning to be articulated (Section B).

A. CORPORATE LIABILITY AND ATROCITY CRIMES: THE LAFARGE PROCEEDINGS

56. The Lafarge proceedings constitute the definitive stress test for transnational *ne bis in idem* in the setting of corporate involvement in international crimes, drawing together the territorial-jurisdiction gate, the contractual-disposal question and the unstable factual *idem* identified in Parts I and II. In parallel proceedings in Paris and New York, the French corporation Lafarge SA faced allegations arising from its dealings with the terrorist groups ISIL and ANF during its cement operations amid the Syrian civil war. In France, Lafarge and several executives are under investigation for charges including financing of a terrorist enterprise, complicity in crimes against humanity and endangering the lives of others. In the United States, under a criminal plea deal with the Department of Justice on 18 October 2022, Lafarge and its Syrian subsidiary agreed to pay \$778 million in fines and asset forfeiture in connection with charges of conspiring to provide material support to terrorism.³³ On their face, as Hamilton

33 T. Hamilton, “Transnational *ne bis in idem* for Corporate Involvement in In-

observes, the French proceedings and the US settlement concern the same factual contours of the situation in Syria, share some common defendants, and, to some extent, mirror one another's charges.

57. Whether the French charges concern the "same facts" as the US settlement turns first on a jurisdictional gate. The initial and fundamental obstacle is territorial (see § 9 and 14 above): the alleged financing of terrorist groups involved, at a minimum, the management of commercial relationships whose contractual framework was partly France-based, engaging at least Article 113-2(2) of the French Penal Code. The consequence is that the territorial exclusion applies, and the mechanical application of that exclusion may be said to offend the considerations of dignity, justice and humanity, which constitute the normative foundation of *ne bis in idem*. Following the Court of Cassation's reasoning in the Vitol case of 2018, a claim of transnational *ne bis in idem* would be admissible in French proceedings only if

ternational Crimes: The Lafarge Proceedings in the U.S. and France", *Opinio Juris* (28 July 2023): "In parallel proceedings in Paris and New York, the French corporation Lafarge SA has recently faced allegations surrounding its dealings with terrorist groups ... In a criminal plea deal with the Department of Justice on 18 October 2022, Lafarge and its Syrian subsidiary Lafarge Cement Syria admitted to entering into business arrangements with ISIL and ANF, agreeing to pay a financial penalty of \$778 million in fines and asset forfeiture for the non-prosecution of charges of conspiring to provide material support to terrorism – a figure that also informed the proportionality analysis of the coordinated disposal."

derived from a head of jurisdiction other than territorial jurisdiction under Article 113-2. The defence might therefore seek to characterise the French jurisdictional basis as passive personal or universal, rather than territorial heads of jurisdiction that would bring Article 692 CCP into play – and on that foundation argue that the US plea agreement satisfies the common-law conditions (same facts, final judgment, sentence served and fine paid in full).³⁴

58. Assuming the territorial gate can be opened, the substantive *idem* question then arises. On the "same facts" question itself, the underlying conduct is, regardless of its varying legal classification, fundamentally the same across the two jurisdictions; on a literal reading, the Lafarge corporation could not be prosecuted in France on charges

34 *Hamilton, op. cit.*: "In France, domestic sources for the application of the *ne bis in idem* principle in the context of transnational proceedings can be found in Article 113-9 of the French Criminal Code and Article 692 of the French Code of Criminal Procedure. Both provisions are formulated through the same wording: 'no prosecution may be initiated against a person who establishes that he was subject to a final decision abroad for the same facts and, in the event of conviction, that the sentence has been served or extinguished by limitation'."

On the "final judgment" requirement: "it entails the existence of a foreign judgment that must have a *res judicata* effect, meaning that no more appeals can be formulated, and that no further prosecutions will be conducted."

Cass. crim., 19 décembre 2018, n° 17-82.897 (*Vitol*): territory-based prosecution is not excluded by a prior foreign settlement; French sovereignty and the *opportunité des poursuites* prevail.

based on the same factual setting as the US settlement. An important qualification follows, however, and it is the margin of the factual test identified in Part I.B. As to the French charges of complicity in crimes against humanity and endangering lives, it remains open whether they rest on the same factual setting as the financing of a terrorist enterprise, since their *actus reus* would derive not only from the financing but also from the exposure of employees to the commission of crimes against humanity and the failure to ensure their security – an aspect of the alleged criminality that the US settlement does not cover. An approach distinguishing the legal interests protected – the terrorism charges concerning victims primarily outside the zone of conflict, the atrocity charges concerning those closest to the violence – “may provide a key to overcoming any claims of *ne bis in idem* from the defence.”³⁵

59. The analysis must, however, be read in the light of a subsequent development examined further (Part IV.D): the Court of Justice has since confirmed in *Swiftair* (C-701/23, 3 April 2025) that legal persons fall outside the personal scope of Article 54 CISA. That holding closes the question of whether Lafarge SA as a corporate entity can in-

voke the Article 54 CISA bar. Two distinct questions nonetheless survive. The first is whether the individual executives – rather than the corporation – might establish a *ne bis in idem* claim in their personal capacity, subject to the jurisdictional and factual conditions set out below. The second, which remains expressly open after MQIG (C-802/23), is whether Article 50 of the Charter – which *Swiftair* did not address – might offer a residual avenue of protection for legal persons in proceedings that engage Union law. The Lafarge analysis below is therefore maintained, but reconfigured: its primary relevance is now to the individual defendants and to the unresolved Charter question.

60. It should be noted that the reference to “legal interests protected” in the present context does not revive the criterion rejected in *Van Esbroeck* and *Mantello*; it serves rather as an indicium of the underlying factual distinctness – the different victim groups, acts and territorial circumstances – which, on a rigorous factual analysis, generate genuinely separate sets of concrete circumstances not inextricably linked with the facts admitted in the US plea agreement. To the extent that French domestic law (outside the CISA framework) might residually admit a legal-interest criterion, that would constitute a departure from the EU standard that requires explicit justification; this article adopts no such departure.
 61. Two further dimensions sharpen the stakes. The first is the corporate legal person: any *ne bis in idem* argument must demonstrate that the same subject features in both sets
- 35 Hamilton, *op. cit.* Irrespective of the arguments ultimately raised in the Lafarge proceedings, the clarification of transnational *ne bis in idem* in this setting can play a decisive role in future cases of alleged corporate involvement in atrocities and terrorism, particularly where heterogeneous legal characterisations across jurisdictions are used to circumvent the principle’s factual identity requirement.

of proceedings. Only the Lafarge corporation is a named defendant in both; accordingly, the question turns on the extent to which the corporate person could claim the bar in France. For the individual French executives, the prospect is remote, as it would require a court to accept that an executive was a subject of the US proceedings despite not being identified there as a charged defendant, in a context where there is no clear indication that those executives were under investigation in their individual capacities. The second, and most consequential, dimension is the position of the victims. Because under French law the victims' claims are closely tied to the criminal proceedings – the civil claim being attached to them – an absence of prosecution of certain charges on *ne bis in idem* grounds risks precluding victims from obtaining indemnification: without a finding of guilt on a given charge, the proceedings cannot give rise to reparations based on that offence, and given the absence of significant precedent on victim reparations for international-crimes charges before domestic courts, the issues remain largely untested. The implication is striking and runs counter to the principle's usual protective valence: here, an over-broad application of *ne bis in idem* would operate against the interests of victims seeking justice in France. Whatever the ultimate outcome, the clarification of transnational *ne bis in idem* in this setting will be decisive for future cases of alleged corporate involvement in atrocities and terrorism.

B. THE INVESTIGATIVE PHASE: SPECIALTY, THE EIO, AND THE EPPO

62. The mechanisms examined in this Section – the specialty principle in mutual legal assistance, the European Investigation Order, and the European Public Prosecutor's Office – are not direct applications of the *ne bis in idem* principle. They operate during the investigative phase, before any final judgment capable of triggering the *ne bis in idem* bar has been rendered. They are examined here as functional analogues and procedurally connected guarantees: they share with *ne bis in idem* the same underlying rationale – protection of the individual against the uncontrolled transnational exercise of the *ius puniendi* – operate through analogous purpose-limitation logic, and generate comparable procedural consequences when violated. The normative bridge that justifies their inclusion is Article 6 TEU and the Charter framework referenced by both the EIO Directive and the EPPO Regulation, under which the fundamental rights guarantees of national criminal procedure – including Article 50 – must be given full effect throughout cross-border proceedings. The analysis that follows draws these analogies where they illuminate the principle's future trajectory but does not assimilate them to *ne bis in idem* in doctrinal terms.
63. The principle's reach into the investigative phase is more recent and more inchoate, but it is governed by analogous logics. The most evident analogue is the specialty principle in mutual legal assistance – the rule that evidence gathered under letters rogatory or an EIO

may be used only for the purpose for which it was provided. Just as *ne bis in idem* prohibits prosecution for the same facts after final judgment, specialty prohibits the use of evidence for purposes extraneous to the original request. The Criminal Chamber of the Court of Cassation, in its Ruling of 21 May 2025 (n° 25-81.595) confirmed the parallel: violating the specialty conditions of a letter rogatory – using documents for an offence other than that for which they were granted – constitutes a public order nullity (*nullité d'ordre public*), touching the sovereignty of the requested State and raisable by any person without proof of personal grievance.³⁶ That classification as a public order nullity – touching State sovereignty and raisable without proof of personal grievance – places specialty in the same procedural category as *ne bis in idem*, in the sense that both operate as absolute bars whose violation cannot be cured by acquiescence. The analogy is procedural rather than doctrinal: specialty and *ne bis in idem* remain distinct guarantees, the former governing the use of evidence obtained during cooperation, the latter the initiation of prosecution after final judgment, but their shared classification as public-order protections confirms that the investigative and post-judgment phases

are governed by analogous principles of institutional loyalty and individual protection.

64. The EIO Directive supplies the next analytical building block by defining the perimeter of the investigative phase. The CJEU held “investigative measure” to be an autonomous concept of EU law: a hearing whose purpose is to allow an accused to make observations on an indictment does not constitute an investigative measure, whereas a hearing aimed at collecting evidence does. The distinction matters for *ne bis in idem* in two respects. First, it determines which evidence-gathering acts fall under the EIO’s purpose-limitation framework and which remain governed by classic mutual legal assistance. Second, it fixes the scope of the fundamental-rights guarantees – including the right not to be tried twice – that the EIO framework imports through its reference to Article 6 TEU and the Charter.³⁷
65. French case law has meanwhile been working out the sovereignty limits of cross-border evidence capture, with direct implications for the integrity of any proceedings in which *ne bis in idem* might later be raised. In Court of Cassation (Criminal Chamber), 17 June 2025 (n° 24-87.110), a keylogger data capture was challenged because the suspect’s phone was temporarily located abroad; the Criminal Chamber held that a device installed in France which operated without the technical assistance of the foreign State did not violate that State’s sovereignty, invoking the statutory

36 K. Mehtiyeva, *Chronique* (2026): *Cass. crim.*, 21 mai 2025, n° 25-81.595: violation of specialty conditions of a *commission rogatoire internationale* – using documents for an offence other than that for which they were granted – constitutes a *nullité d'ordre public*, touching the sovereignty of the requested State, and raisable by any person without proof of personal grievance

37 CJUE, 9 January 2025, C-583/23.

definition of a “technical device designed, without the consent of the person concerned, to access, in any location, computer data and to record, store and transmit it” (CCP, Article 706-102-1) and the Court of Justice’s formulation in C-670/22 (30 April 2024, §114) assimilating the infiltration of terminal devices to an interception of telecommunications. In Court of Cassation (Criminal Chamber), 18 November 2025 (n° 25-83.069), a vehicle-bugging device installed in France continued operating as the vehicle crossed Belgium, Luxembourg and the Netherlands; the Court established a two-rule framework: mere transit of data through a foreign operator’s network does not violate that State’s sovereignty, but where a geolocation or bugging device operates actively on foreign territory, authorisation from the foreign State is required, and its absence gives rise to a nullité d’ordre public raisable without proof of personal grievance, “une telle nullité ayant un caractère d’ordre public et touchant à la bonne administration de la justice.”

66. The EPPO adds a distinctive institutional layer and, with it, a fresh set of *ne bis in idem* concerns. Described as “single and indivisible” in law, the EPPO operates through 24 national delegations applying divergent national procedural laws. In CJEU Grand Chamber, 21 December 2023, C-281/22, the Court distinguished the adoption phase of an investigative measure (governed by the law of the handling delegated prosecutor) from its execution phase (governed by the law of the assisting delegated prosecutor), holding that the executing judge may review

only the formal legality of execution, not the justification or adoption decision. In Court of Cassation (Criminal Chamber), 24 September 2025 (n° 24-82.624), the first French decision applying the execution of a seizure pursuant to an EPPO delegation, confirmed that mutual recognition justifies an absence of formalism – a *saisie* may be authorised “par tout moyen” (CCP, Article 706-154), a solution the Court transposed to intra-European mutual-assistance acts more broadly. The CJEU Grand Chamber then added a fundamental constraint of procedural equivalence: where national law provides a direct remedy against an analogous act in a purely internal procedure, it must offer the same remedy against a comparable act of the European delegated prosecutor, so that the EPPO may not place persons in a less favourable position than those subject to comparable national procedures. This equivalence principle bears directly on *ne bis in idem*: it prevents the EPPO from operating as a jurisdiction-shopping device that erodes the finality protections of national proceedings, and ensures that the fundamental-rights guarantees of national criminal procedure – including Article 50 of the Charter – are not diminished through the EPPO’s multinational procedural patchwork.³⁸

67. A final decision marks the outer limit of cross-border judicial action. In Court of Cassation (Criminal Chamber), 30 April 2025 (n° 24-84.382), the Court held that a French investigating judge transported abroad may conduct only

38 ECJ, 8 April 2025, C-292/23.

auditions: even if an audition may encompass certain forms of questioning, Article 93-1 of the CCP expressly excludes the initial appearance examination (*interrogatoire de première comparution*) followed by a formal charging order – a rights-creating act enabling appearance before a criminal court – regardless of the requested State’s non-objection. The restriction carries an implicit *ne bis in idem* dimension: the *mise en examen* is the formal act activating the suspect’s procedural rights, and performing it abroad without the safeguards of French courts would risk corrupting the integrity of any subsequent French proceedings in which the principle might be raised.

IV. Towards a Coherent Architecture

68. The foregoing analysis of five distinct regimes has established both a common doctrinal vocabulary – the certainty threshold, the factual *idem*, the finality requirement – and the divergences in personal scope, institutional character, and enforcement force that separate those regimes from one another. This Part draws those convergences and divergences together into a unified analytical framework; it identifies the variables that recur across all five regimes (Section A), isolates the certainty threshold as the doctrinal pivot that holds them together (Section B), and maps the three structural gaps that any coherent architecture of the principle would need to close (Section C), before turning to the pending developments most likely to reshape the field (Section D).

A. FIVE REGIMES, ONE PRINCIPLE

69. The Court of Justice and the European Court of Human Rights have shown themselves willing to take a progressive stance and to construe a single, truly European *ne bis in idem* rule out of two similar provisions in two different frameworks. That common trajectory does not erase the distinctions traced throughout this article, which can now be stated as five distinct regimes operating in parallel. The first is the domestic French regime, with its territorial-jurisdiction limitation and its 2013 deduction rule (Part I.A, Part IV.C). The second is the ECHR/Protocol No. 7 regime, confined to intra-State situations and subject to France’s reservation (Part I.A). The third is the Schengen/Charter regime – transnational, reaching third-country nationals, and now extending to extradition to third States (Parts I.A and II.B). The fourth is the classic cooperation-treaty regime, in which *ne bis in idem* typically operates only in favour of persons convicted by the *requested* State’s own courts (Parts I.A and II.B). The fifth is the Interpol CCF regime, operating on an administrative compliance standard in which the principle functions at most as an “indicium” (Part II.C). The protective force of the guarantee, as Part II showed, tracks the position of each regime on the spectrum from judicial mandatory bar to administrative indicium. What distinguishes these five regimes is not only their institutional setting but, more precisely, their relationship to the certainty threshold developed in Part IV.B: only the Schengen/Charter and EAW regimes treat a final ju-

dicial decision rendered in another Member State as independently sufficient to trigger a mandatory bar on prosecution; the classic treaty regime requires the judgment to originate from the requested State's own courts; and the CCF regime requires no final judicial decision at all, treating any national decision as merely one factor in a bundle of indicia. That graduated relationship to finality – not merely the judicial/administrative spectrum – is the structural asymmetry that any coherent architecture of the principle would need to close.

B. THE CERTAINTY THRESHOLD AS THE COMMON VARIABLE

70. The certainty threshold performs two analytically distinct but complementary functions. As a substantive requirement, it designates the minimum quality of prior decision that can trigger the *ne bis in idem* bar: only a final judicial determination on the merits of criminal liability satisfies it. As a procedural/evidentiary standard, it determines when an ongoing cooperation measure – provisional arrest, EAW execution, extradition – must be halted: it may proceed until it is affirmatively established, through a final judicial decision, that the bar operates. The two functions are two faces of the same threshold: the former defines what qualifies, the latter governs when authorities must stop.
71. What allows these five regimes to be analysed as one system, rather than as five unrelated rules, is the “certainty” threshold established in C-505/19 and recurring across every mechanism in Part II. Provisional arrest (Interpol), EAW execu-

tion and a decision on an extradition request may each proceed until certainty is established, through a final judicial decision, that the bar applies. As the Court put it, the prohibition operates only where “it is established, in a final judicial decision that that person has already been finally convicted for the same acts” (pt 106). The threshold is demanding – it requires an *established* and *final judicial* decision, not merely a plausible claim – but it is absolute once met: where a definitive judgment in another Member State exists and is established, refusing to give it effect “would undermine the very foundations of the area of freedom, security and justice” and the principles of mutual trust and mutual recognition. The certainty threshold is, in short, the doctrinal pivot of the entire field: it is the single test that determines, across otherwise heterogeneous mechanisms, when the principle ceases to be a contingent possibility and becomes a binding bar. The following matrix shows how the certainty threshold operates within each of the five regimes, specifying for each the normative source, the authority that decides, the type of prior decision required, the level of finality demanded, whether the effect is mandatory or discretionary, and the remedy available.

C. THE OPEN GAPS

72. Against these unifying variables stand three gaps that any coherent architecture would have to close – the first of which has two distinct facets.
73. Universal in scope – applying whether or not the foreign State is

a Schengen party, a Council of Europe member or wholly external – the rule is best understood as an application of the proportionality of penalties guaranteed by Article 8 of the Declaration of 1789, from which the Conseil constitutionnel has derived the principle that penalties suffered for a single act may not exceed the highest legal maximum.

74. Within the same first gap, a further lacuna, which the Court of Cassation has not yet resolved, is this : where a foreign sentence is in the course of being served at the time of the French prosecution – rather than completed – the French defendant should, in principle, be immune from prosecution, on the ground that simultaneously subjecting a person to foreign enforcement and domestic prosecution neutralises the foreign *res judicata* in its most essential dimension. Whether that immunity extends to suspended sentences, conditional release or probationary periods under foreign law remains an open question, since those are not states of *execution* in the classic sense but nor are they states of prescription. The gap is significant in practice: a defendant mid-way through serving a US sentence when French proceedings are initiated falls into a normative void between the completion-of-service condition of Article 692 CCP and the ongoing-enforcement formula of Article 54 CISA. Legislative or judicial clarification of this intermediate zone would do much to close the domestic/foreign sentence gap identified above.
75. The second is the treaty gap exposed by *HF*. Bilateral extradition treaties whose *ne bis in idem* clau-

ses are confined to judgments of the *requested* State's own courts are incompatible with the EU guarantee as extended to third-State extradition in C-435/22. As Part II.B explained, Article 351(2) TFEU obliges Member States to eliminate such incompatibilities by all appropriate means, and Article 17(2) of the EU-US Agreement supplies an operational vehicle for doing so – but only as a safety valve. A renegotiated EU–US Extradition Agreement incorporating a transnational *ne bis in idem* clause extending to convictions in any Member State would eliminate the incompatibility at source.

76. The third is the DPA/CJIP gap. The question identified by Vervaele – whether procedural agreements such as plea bargaining or immunity deals fall within the scope of the principle – remains fully open. *Gözütok* resolved it for out-of-court disposals in which conditions of a penal nature are fulfilled without court approval; but DPAs and CJIPs, whose content is more complex and whose admission of guilt is typically absent or merely implicit, occupy a normatively ambiguous position, and the Court of Cassation has refused to weigh French prosecutorial discretion against a prior foreign plea agreement (Part II.D). Legislative clarification at EU level of the conditions under which out-of-court corporate disposals generate cross-border *ne bis in idem* protection would materially advance the coherence of the system.

D. RECENT AND PENDING DEVELOPMENTS

77. Two 2025 decisions of the Court of Justice indicate the directions

in which these gaps may be addressed. *Swiftair* (3 April 2025, C-701/23) extends the Court's analysis of the personal scope of Article 54 CISA in the corporate context, confirming that legal persons such as Lafarge SA fall outside its protection – a holding with direct consequences for the corporate defendants in the Lafarge proceedings. MQIG (11 September 2025, C-802/23; D. 2025.2049) addresses the scope of Article 50 of the Charter in cross-border settings where administrative and criminal sanctions combine – terrain directly connected to the unresolved Article 50 and French fiscal sanctions questions left open by the 2019 Criminal Chamber of the Court of Cassation decisions (Part I.A). The parties in those 2019 decisions did not raise Article 50; after *Swiftair* and MQIG, that omission may become a live strategic choice in French litigation.

Conclusion

78. In the European Union, the traditional *ne bis in idem* principle has developed from a domestic legal rule into a transnational human right. The process began with Schengen integration and deepened within the common area of freedom, security and justice; classic inter-State cooperation has been progressively replaced by enhanced judicial cooperation directly between the actors of the criminal justice systems. The corollary, as Vervaele argues, is that Member States must be prepared to leave behind their classic, outdated conceptions of sovereignty and accept a vision of shared sovereignty in

the common judicial area, of which transnational human rights form a substantial part.

79. At the level of French private international law theory, the entire trajectory described in this article can be restated in a single doctrinal frame. *Ne bis in idem* is, at its core, a form of negative authority of *res judicata* of a foreign criminal decision – the decision's capacity to operate as a procedural bar against a second prosecution for the same facts. Its *raison d'être* is humanitarian as much as juridical: considerations of humanity forbid subjecting a person twice to the exercise of the *ius puniendi* for the same conduct. The challenge of the contemporary system is that this negative authority is recognised only conditionally and variably: fully in the Schengen/Charter framework, partially under French common law (subject to the territorial exclusion and the finality conditions set out in Part I), minimally at the level of the Interpol CCF, and scarcely at all for contractualised disposals. The work of the next decade is to narrow the gap between the humanitarian aspiration and its legal operationalisation – a task that is, as the analysis of the five regimes demonstrates, as much political as doctrinal
80. Yet the same scholar who formulated this vision of progressive constitutionalisation also identified its limit: the Union legislator has found it “enormously difficult to give shape and substance to transnational legal principles and this is also true in the case of the *ne bis in idem* principle. It is the ECJ which, through interpretation of the principles of the Community legal or-

der, has to define the legal principles and determine their scope and application.” The trajectory of the case law bears this out. From the Court of Cassation’s 2013 deduction rule, through the nine 2019 decisions on fiscal/penal parallelism, the 2021 *Interpol Red Notice* judgment (C-505/19), the 2022 *HF* decision (C-435/22 PPU), and the 2025 rulings in *Swiftair* and *MQIG*, the principle has undergone a sustained judicial constitutionalisation across every channel of cross-border cooperation. The 2024 Transfer of Proceedings Regulation adds a preventive dimension; the Lafarge proceedings add a corporate and atrocity-crime dimension; and the EPPO decisions add an investigative-phase dimension. Together they confirm Vervaele’s conclusion that “mutual recognition of each other’s judicial decisions ... requires common and equivalent protection of human rights in the area of Freedom, Security and Justice. Common standards of the Rule of Law, at least in line with the minimum standards developed by the ECtHR, are the minimum *minimorum* for mutual trust between States and for mutual trust between the citizens of the EU.”

81. The challenge that remains is therefore institutional rather than doctrinal. The convergence on a factual *idem*, the shared certainty threshold and the outward extension of the guarantee through *HF* have given the principle a recognisable common core; what they have not yet produced is a unified framework capable of holding the five regimes together and of closing the gaps – domestic/foreign deduction, treaty incompatibili-

ty and contractual disposal – that this article has identified. New developments are very likely to cast doubt on the consolidated reading of the principle as codified in national legal orders. Managing that doubt — through treaty renegotiation, legislative consolidation and judicial harmonisation – is the defining task for the European area of freedom, security and justice in the decade ahead.