

# ***Ne bis in idem* in Conjunction with the Principle of Complementarity in the Rome Statute**

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## **Abstract**

*The manner of establishing the jurisdiction by the International Criminal Court and commencement of the procedure presents the most important aspect of the relation between the Court and a State. The principle ne bis in idem, as applied at the Rome Statute, had inevitably to be changed in comparison to the principle commonly known in the national law. The analyses of this principle as applied in the Rome Statute has resulted in the conclusion that this principle can be understood, and fully and correctly applied, only in conjunction with the principle of complementarity.*

## **1. Introduction**

*Ne bis in idem* represents one of the corner-stone principles of possibly all modern legal systems. It is a principle<sup>1</sup> which affects the functioning of the entire legal system, whether we consider national or international law separately or in conjunction with each other. The importance of the principle *ne bis in idem* is evidenced also by the fact that nowadays it is not only a principle built into the criminal procedure acts, but also one of basic human rights.

From these few introductory remarks, it could be concluded that *ne bis in idem*, being an old, commonly recognized principle and basic human right, has already been completely clarified, so there is no room left for further analyses, doubts or criticism. However, many questions of both practical and theoretical value can be posed<sup>2</sup>. It is not difficult to incorporate one principle in one act, however it is difficult to make it fully operational and able to cover all possible ambiguous situations.

*Ne bis in idem* is a widely accepted, albeit Latin, phrase.<sup>3</sup> Literally translated into English it reads – ‘not again about the same’. To apply it, we ought to know when the ‘again’ and ‘same’ criteria are satisfied.

The word ‘again’ relates to the prosecution of a crime more than once, either before one and the same court or before different courts. Until now, the effect of this was limited only within the framework of one territorial unit<sup>4</sup>. A more complicated situation arises when the jurisdiction can be established by courts of more than one country. In jurisdiction divided between two states this can pose a very complex question.

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<sup>1</sup> B. Cheng, *General principles of Law as applied by International Courts and Tribunals* (1953) 336-339

<sup>2</sup> C.J.M. Safferling, *Towards an International Criminal Procedure* (2001) 319-339

<sup>3</sup> There is also another version of this expression, similar but different – *non bis in idem* which is accepted at the Statutes of ICTY and ICTR

<sup>4</sup> That approach is also taken at the International Covenant of Civil and Political Rights (Article 14(7)), where it is stated that ‘no one shall be liable to be tried or punished for an offence for which he has already been finally convicted or acquitted in accordance with the penal law and penal procedure of each country’.

## 2. 'Again' Element

The subject of this paper is focused on the relationship between two different levels of law – international and national. This situation is stipulated in the Rome Statute and treats both the ICC and the national courts in the same way. According to Article 20 of the Rome Statute, 'again' means that when the ICC has decided a case then it cannot try that same case again; if the ICC has decided the case then no other court may try that same case; where the national court has decided the case then the ICC cannot try that case. So, the effect of the word 'again' is unified whether a decision is passed by the ICC or by a national court. This approach means that the effect of the principle *ne bis in idem* is extended from a national level framed within one territorial unit, to international and national levels as a whole. Both states and the ICC are obliged to accept and enforce decisions passed by each other.

For a judgment delivered by the national court to provide a *ne bis in idem* effect toward the ICC there is a presumption that that court was authorized to try that particular case under national law and organization of the courts.

Yet, it can be questionable what is meant by 'another court'. From the point of view of treaty law and the general principle of International Public Law, that a state can be obliged only by virtue of its free and clearly expressed will, 'another court' would mean only a court of a state that is a member-state to the Rome Statute. On the other hand, if we apply the principle of universal jurisdiction then 'another court' would refer to a court of any state in the world. This question should be answered by the Statute itself, since jurisdiction is determined in terms of territory of member-states to the Statute or nationality of accused,<sup>5</sup> in terms that the accused can be a national only of a member-state (Article 12). Jurisdiction can be broadened to the territory of non-member-states of the Statute only by special agreement. Thus, the principle of universal jurisdiction is not mentioned in the Statute. The correct approach would be in terms of treaty-law, and as far as the principle of universal jurisdiction<sup>6</sup> is concerned it should exist and function as it did prior to the establishment of the ICC, according to the Geneva Conventions of 1949. In this way, it might happen that one person finds himself/herself tried twice, and that would present a violation of the principle *ne bis in idem*. Non-harmonized relations between exclusive jurisdiction, universal jurisdiction and jurisdiction of the ICC, as well as whether the jurisdiction is based upon the citizenship of the accused or the territory where the crime has been committed, might lead to confusion and to a situation where one person is tried twice, and yet that does not present violation of the principle *ne bis in idem* as set out in the Rome Statute, although basically violation does exist since a person has been tried twice.

Also, 'another court' could be understood as any other international court. At the moment there are two *ad-hoc* international courts but, since they were established prior to the ICC and since they cover situations connected with events which belong to the past, there is little probability that *ad-hoc* Tribunals would overlap with the ICC. If that did happen, the effect of the ICC decision would be covered by Article 20 (2).

The issue of 'another court' happens to be important not only from a jurisdictional point of view, but also from the point of view of the other element that constitutes this principle, the 'same' element. If we want to apply the *ne bis in idem* principle uniformly at both national and international levels, then definitions of crimes should be harmonized. At the moment there is a

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<sup>5</sup> M. Frulli, Jurisdiction *rationae personae*, in A. Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Volume I, (2002) 535

<sup>6</sup> K. Kittichaisaree, *International Criminal Law* (2001) 39-40

diversity of the constitutional elements of crimes at the international level<sup>7</sup>, as well as at national levels. Apparently, only the crime of genocide is uniform, by virtue of the Genocide Convention. All other crimes are subject to separate definitions, whether at national or international level.

### 3. The ‘Same’ Element

The word ‘same’ can refer to the same act, conduct, fact or same crime, same law qualification of the act, conduct, fact or both.

Article 20 of the Rome Statute is not uniform on this issue. The approach varies in all three possible situations of the *ne bis in idem* effect. Article 20 (1) refers to the situation when a person has been convicted by the ICC and prohibits another trial before the ICC for the ‘*same conduct which formed the basis of crimes* for which the person has been convicted or acquitted’. Article 20 (2) refers to the situation when a person has been convicted or acquitted by the ICC and prohibits any other court to try that person ‘for a crime referred to in Article 5’ of the Statute. Article 20 (3) covers the situation when a person has been tried before another court for *conduct proscribed under Article 6, 7 and 8* and prohibits the ICC to try that person again for that conduct (unless...).

The situation described in paragraph 1 presents the clearest position. It was relatively straightforward to prescribe *ne bis in idem* vis-à-vis the Court itself and also the only logical and correct approach. It deals with jurisdiction of one and the same court, and thus allows application of the principle in its full capacity, from both ‘again’ and ‘same’ elements. It would be unimaginable for one court to stand on the position that one and the same conduct can form the basis for more than one crime. One system or legal unit, in this case the Statute of the ICC, must clearly divide crimes. Although international crimes are similar and although *actus reus* can be identical, other elements that form the main criteria of a crime divide one from the other. It should be impossible, therefore, to state that one and the same murder (one and the same victim) can form the basis of both a crime against humanity and a war crime. That is clearly stated in paragraph 1 by the words ‘conduct which formed the basis of the crime’. The concept applied in this paragraph is the best solution. It is not framed by only the crime or only the conduct. *Ne bis in idem* can be fully applied when conduct and crime are examined together and when we have identity of facts and identity of law.

Paragraph 2 sets out the effect of the decision delivered by the ICC toward any other court. In a situation like this, a national court would be prevented from trying a person for a crime that comes under the jurisdiction of the ICC if the ICC has passed a final decision. That means that national judicial mechanism cannot be triggered for crimes such as genocide, crimes against humanity, war crimes or aggression. Since all international crimes prescribe numerous conducts as *actus reus* of that crime, and since each of those conducts can be (and usually are) defined at the national level separately and as ordinary crimes, does this mean that one person can be convicted before the ICC for a crime against humanity and at the national level he/she can be convicted for murder? Obviously, crimes are different, but apparently only in law, not necessarily in facts. There are no doubts or uncertainties as to whether the impact of the decision passed by the ICC refers to the crime or the conduct, or both. It is clearly stated, in paragraph 2 of Article

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<sup>7</sup> P. Kirsch, The Development of the Rome Statute, in L.S. Roy (eds), *The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results* (2002) 458-459; K. Kittichaisaree, *International Criminal Law* (2001) 67; M. Marković, *Međunarodna krivična dela*, *Jugoslovenska revija za međunarodno pravo*, 1/65

20 of the Rome Statute that a person cannot be tried again for a crime referred to in Article 5 if the ICC has passed a decision.

The situation referred to in paragraph 3 of Article 20 should be the most typical and frequently occurring situation. Since national jurisdiction holds primacy over international crimes, it is more likely that the ICC will find itself precluded by the existence of the decision passed by a national court. In this paragraph, the element 'same' obviously refers to the same conduct. It is stated that 'no person who has been tried by another court for conduct also proscribed under Article 6, 7 and 8 shall be tried by the Court with respect to the same conduct unless...'. It appears that if a person was convicted for a murder by a national court, then the ICC is prevented from trying that person for a crime against humanity based on that same murder.

Comparing paragraph 2 and paragraph 3 of Article 20, we come to the conclusion that the effect of the decision delivered by the ICC to the national courts and the effect of the national decisions toward the ICC is quite different. Obviously, the impact of the ICC decision is much narrower than the impact of a national decision toward the ICC. In the first situation, if the ICC has convicted a person for a crime against humanity, then a national court can convict the same person for murder, because these are two different crimes. But, as is set out in the second situation, if a national court convicts a person for murder, then the ICC cannot charge that same person for a crime against humanity based on that same murder, because that conduct has already been prosecuted by the national court. The impact of the national decision is exactly the same if the national court has acquitted a person, for example charged with murder, then the ICC cannot start proceedings for a crime against humanity based on that murder as *actus reus*.

From this it could be concluded that the ICC's hands are completely tied and that a state can misuse its national law if desired. However, paragraph 3 continues with the prescribing of frames and disabling a state to abuse its position. If a charge at national level and the proceeding were aimed at shielding a person from criminal responsibility for international crimes, or if a proceeding was not independent or impartial and showed lack of effort and will to bring the concerned person to justice, then the ICC can assume that case. By virtue of these framings, the word 'conduct' used in paragraph 3 of Article 20 assumes a completely different meaning. It is still not equivalent to the word crime, but again subparagraphs (a) and (b) illuminate the impact of the national decision in another way. Even so, the element 'same' should be applied to the conduct, but if a charge reveals that the aim of that charge was anything other than to genuinely prosecute, then 'same' approaches to the crime. Although this concept was criticized, as well as the lack of direct mentioning of ordinary crimes (as it was done in the Statutes of ad-hoc Tribunals) this main position seems fair enough. The main approach, the option for the conduct rather than the crime, can be understood as taking into account the diversity of definitions of international crimes among national criminal codes. It would be quite difficult to adhere to crime only, when definitions of crimes can vary and indeed in reality they do. It was more logical to adhere to the conduct as long as the charge showed the intention of a state to prosecute a crime taking into account all elements of that conduct. Returning to the previous example, it is possible that a person has to be charged with murder because there is lack of an important element to constitute a charge for a version of a crime against humanity that is adopted in national law. For example, it could be the element that under national law a crime against humanity can be committed only during a war. If multiple murder, with all other elements necessary to constitute a crime against humanity, was committed during peacetime, then a national proceeding is bound by the definition adopted in national law and yet there is no intention to shield that person or in any other terms misuse national law and procedure. Since possible discrepancies may arise in

reality in many more variations than can be imagined, the best solution was to adopt a rule which is flexible enough to cover all of them.

There is also another approach that should be stressed at this point. Since every state party to the Statute has decided by its own free will to become a member of the ICC, the duty then rests on the state to adapt its law to the international treaty they have signed. It would be the best way to avoid all possible misunderstandings.

The conclusion on the elaboration of the meaning of the word 'same' is that it depends on the relationship at international/national level and the court which has rendered the final judgment. The word 'same' can thus mean the identity of both conduct and crime, or only identity of crimes or predominantly identity of conduct. This reveals that during the negotiations, the approach that was taken was directed by the fact that *ne bis in idem* should be applied at different levels of law. The full capacity of the principle *ne bis in idem* and its most common concept was thoroughly applied within one jurisdictional unit. Only within one legal unit is it possible to fulfill the identity of both facts and law. And although this is the best approach, it couldn't be applied in other versions, where there are combinations of different levels of law.

Examining the concept of *ne bis in idem* as prescribed at the Rome Statute from the *ratio* of this principle, it appears that only the effect of the decision of the ICC toward the ICC fulfills the idea of the principle in its most commonly used sense. As stated in the introduction to this paper, the main goals that should be achieved by the application of this principle are to protect an individual from more than one proceeding for the same conduct and also to prevent two or more courts from trying the same offence, for reasons of procedural economy and justice. Apparently, an individual is not guaranteed that he will be tried only once. It is possible, as stated before, that the ICC try a person for one crime and the national court for another, even although they rest on the same conduct. It appears therefore, that this approach is unable to protect an individual and is also in opposition to the idea of procedural economy and justice, since two courts can try for one conduct and justice can be threatened by the passing of two different decisions. So, when reading paragraph 2 it may be concluded that this concept can not fulfill the main idea of the principle *ne bis in idem*.

#### **4. Relationship between Principles *ne bis in idem* and Complementarity**

If this concept is examined from another angle, then we will find that the redactors of the Rome Statute have not failed to apply the principle according to its *ratio*, though it may seem so at first glance. Another approach leads us back to Article 17 and the principle of complementarity. States have primacy to try persons for international crimes. If they fail to do so, then the ICC will assume that particular case. So, the mere fact that the ICC is trying a case shows that a state was unwilling or unable to prosecute that case. From that perspective, it is very unlikely that the state will start prosecuting that particular case again, after the ICC has passed the decision. Paragraph 2 of Article 20 should thus be interpreted not only linguistically, but also according to the rules of systematical interpretation, in this situation in conjunction with the principle of complementarity. From this perspective the main idea of *ne bis in idem* will be fulfilled.

The conjunction of the principles of complementarity and *ne bis in idem* is even more obvious in paragraph 3 of Article 20. Exceptions to the *ne bis in idem* effect of national decision are based on almost identical terms as the admissibility issue. Conjunction of principles of complementarity and *ne bis in idem* is stated directly at Article 17, paragraph 1 (c). It would be better if the whole definition of *ne bis in idem* was under the title – issues of admissibility. It would then be underlined that the position and *ratio* of *ne bis in idem* has another element when

examined at the international level, not only ‘again’ and ‘same’, but also and very importantly - proper law qualification of facts.

The concept of admissibility is based upon any kind of motion of a state with respect to a certain crime, whether it is just at the investigation stage or a trial is already underway. On the other hand, the principle *ne bis in idem* refers to the final decision and thus it assumes also the whole investigating and prosecuting aspect of proceeding. *Ne bis in idem* may cover situations when investigation and prosecution have been carried out properly, but misconduct was revealed at the final stage in the decision. It is also possible that investigation or prosecution has been determined as non-genuine, but a national decision has been passed prior to the Courts decision to assume a case.

Practically, complementarity and *ne bis in idem* form one whole consisting of two procedurally separated parts of a procedure. One covers the stages of investigation and proceedings underway, and the other covers situations where the proceeding has been completed and a final verdict has been pronounced. Both stages of proceeding rest on almost the same conditions.

Basically, the criteria for assuming jurisdiction by the ICC rests on the same conditions<sup>8</sup>. The difference between them lies in the different stages that a case is going through, but in essence all of them have same *ratio*. That is, if a state avoids charging a person for an international crime and qualifies the committed offence as just an ordinary crime or in some other way shows lack of will to take into account all the following elements of certain conduct, the ICC will assume jurisdiction. According to this explanation, the role of the ICC can be determined rather as a control than a complement to national proceeding. Control refers not only to the issue of whether a state has started an investigation, prosecution or passed the decision, but also on whether conducts are qualified properly.

There is also another conclusion that can be arrived at at this point. From the point of view of philosophy of criminal responsibility and justice, it is important to not simply punish a person for misconduct. Punishment does not fulfill its task if the conduct is not properly defined. The goal set before the ICC is, among others, to put an end to impunity for human rights atrocities. Thus, for the sake of prevention, victims and justice it is necessary to qualify conduct in terms of international crimes. The ICC has to play a leading role in bringing responsible persons to justice.

## 5. Weaknesses

Despite the large amount of effort put into the creation of the Rome Statute, there are, nevertheless, some weaknesses that could diminish both its role and even its significance. From the point of *ne bis in idem*, one flaw can be seen in paragraph 3 of Article 20. Why was the crime of aggression omitted? Whatever explanation we accept, this solution presents objective danger for individuals, who could find themselves tried twice for the same conduct and the same crime, since the ICC can obviously retry for the crime of aggression, once that definition is adopted.

Another weak area usually mentioned is that the Rome Statute does not provide exception from *ne bis in idem* effect for ‘ordinary crimes’<sup>9</sup>. This objection arises from the comparison of ICTY and ICTR Statutes with the Rome Statute. Where both ICTY and ICTR Statutes, as an

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<sup>8</sup> J.T. Holmes , The Principle of Complementarity, in L.S. Roy (eds), The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results (2002) 58

<sup>9</sup> Ibid, p.57-58

exception to the *ne bis in idem* effect, directly stipulate ‘ordinary crime’, there is no such provision in the Rome Statute. In it, this provision is replaced with - ‘shielding the person’. It may be noticed that the phrase ‘shielding the person’ is vague, but the expression ‘ordinary crime’ is also vague. There is no definition for either of them and in both cases the Court must, by virtue of its *competence de la competence*, decide on these issues. In fact, both approaches are based on the same idea, that is, the necessity of proper law qualification, proper punishment and satisfaction of victims, justice and preventive effect.

Yet another weakness closely connected to this issue concerns sentencing. If a national court has sentenced a person to a certain period of imprisonment for committing murder, and that person has served a part of the sentence, there is a slight possibility that the Court would take into account the served period of time (Article 78 (2)). Thus, it may happen that a person has already been imprisoned for 3 years, the ICC assumes jurisdiction on the grounds of Article 20 (3 (a) or (b)) and sentences the person to 20 years. That person may find themselves imprisoned for 23 years in total, since the 3 years served under the national decision are treated as a ‘sham’ decision from the point of view of the ICC, and are not included in the subsequent sentence delivered by the ICC. From the point of view of the individual this could seem extremely unfair, since the person ends up being a victim of both poor national procedures and the severe attitude of the ICC a practice which should certainly be modified in the future.

From the point of view of victims and international justice, there is yet another weakness. It is possible that a state rendered judgment after full and diligent proceedings and proper law qualification, could sentence a perpetrator to the most serious punishment. However, states hold rights to grant an amnesty<sup>10</sup>. There is no wording on that issue in the Rome Statute<sup>11</sup>. Since, in the example as described, final verdict has been rendered, then *ne bis in idem* applies and there is no way to reopen the case. This is unfair toward victims, and would also damage justice, but from the legalistic point of view such an amnesty would be lawful.

From a justice point of view there is another weakness, which though not directly related to *ne bis in idem*, is however connected to the principle of complementarity. Article 17, paragraph 1 (d) provides that the ICC will determine a case as inadmissible where such case is not of sufficient gravity. There is no explanation as to what should be considered as ‘sufficient gravity’. This could lead to a situation where one person whose conduct is not considered serious enough finding themselves outwith the reach of justice. This is a serious loophole, which could be understood to encourage the committing of crimes in the hope that they will not be deemed serious enough.

The last weakness that should be underlined, albeit the most important one, is to be found in both Article 17 and Article 20. Situations when the ICC can assume jurisdiction are based on terms which are vague and can leave much scope to the arbitraries. The Prosecutor and the Court will find themselves examining whether a state wanted to shield a perpetrator, or whether a state was unwilling to prosecute or unable, or whether proceedings were not conducted independently or impartially. Certainly, there could be a number of situations where it would be obvious that a state was not proceeding in a genuine manner. But again, there can also be a number of variations where the situation is not sufficiently clear. It is of the utmost importance for the Court, its future work, reputation and significance to examine every single case in an objective, uniform and principled manner. It was not possible when the Rome Statute was created to prescribe a more

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<sup>10</sup> Ibid, p. 726-727

precise definition. Therefore, it is up to the Court itself to take a stance as to how these terms should be applied in practice.

## **6. Conclusion**

The fact remains that what is written in the Rome Statute represents the full extent of agreement that could be attained at the time. As it is presented throughout this paper, the main concept of the *ne bis in idem* principle is reasonable and it can provide fulfillment of the ideas that characterize it. Weaknesses that are underlined can be annulled when deciding on a certain case, if each of the subjects involved bear in mind the main idea and the purpose of the principle *ne bis in idem*.

It is also important to note that this principle, as applied at the Rome Statute, cannot independently be properly understood and applied independently, but needs to be held in conjunction with the principle of complementarity. The common meaning of this principle can be applied only within one legal unit. Within the arena of international *v.* national decision and *vice versa*, some anomalies inevitably arise. These anomalies are to be examined in practice once the ICC starts to proceed, and may inevitably lead to some modifications of this concept in the future.