

Admissibility of Cases and the Prohibition of Double Jeopardy in the Statute and Jurisprudence of the International Criminal Court

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The prohibition of prosecuting a charge that has already been adjudicated and resulted in a final judgment is a fundamental principle present in most national criminal justice systems. This research, conducted using a descriptive-analytical method, examines the admissibility of cases and the prohibition of double jeopardy in the statute and jurisprudence of the International Criminal Court. The research findings indicate that when an international criminal court adjudicates a charge, the judgment issued has the authority of *res judicata* in national courts as well as before other international criminal tribunals. Thus, the principle of double jeopardy concerning an identical charge precludes the possibility of re-prosecution for the same act not only within a single national legal system but also across different legal systems. Moreover, the rule of double jeopardy concerning judgments issued by national courts is not absolute before the Court and other international criminal tribunals, and it is only applicable when the conditions prescribed for domestic proceedings have been fulfilled.

Keywords: *Double Jeopardy, International Criminal Court, Statute, Jurisprudence.*

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1. Introduction

The prohibition of prosecuting a charge that has already been adjudicated and resulted in a final judgment is a fundamental principle present in most national criminal justice systems, which has also extended into the domain of international law and holds a special position. Accordingly, if a judgment cannot be appealed further, either through appellate or cassation stages, it is considered final (Larguier, 1999). This principle encompasses both individual and societal interests. Considering these foundations, the authority of

res judicata in criminal matters is recognized as a rule related to public order (Aliabadi, 2013).

It is necessary to explain these individual and societal aspects. From the individual perspective, the foundation of interest can be interpreted as the respect for human dignity and status, as well as ensuring the protection of fundamental human liberties, not only during the trial process but also once the criminal case reaches its final and conclusive point, necessitating the acknowledgment of the case's finality (Khazani, 1998). This principle also influences the correction and rehabilitation of offenders. The individual foundation of the rule prohibiting double jeopardy aligns with modern human rights approaches



and contributes to the protection of these rights. This is because various international and regional human rights documents, including civil and political rights, recognize the rule of double jeopardy as a component of fair trial standards, which ultimately protects individuals' rights (Katouzian, 2004).

On the other hand, the basis of public order can also be considered for this rule. From the perspective of public order, if the right to initiate a lawsuit is granted to the parties only once, societal interests are protected, and the litigants cannot endanger this public interest. Additionally, a person who has gone through a complex and lengthy criminal trial has the right to feel secure after receiving a final judgment—whether favorable or unfavorable—and be assured of not being prosecuted again on the same matter. Moreover, the judicial system, as an essential part of governance, benefits from having every criminal case concluded in a timely manner, preventing excessive costs.

Having explored the foundations of this rule in domestic law, it is necessary to consider its foundations in international law as well. The primary necessity and significance of such a rule in international law are explained in situations where a crime has occurred containing one or more foreign elements. In such cases, different states may assert jurisdiction and pursue the offender. Since it is not possible to establish a conflict resolution rule in international criminal law, each state independently, without regard to others, and based on its specific interests and considerations, determines the jurisdictional scope of its courts and laws. Consequently, the possibility of multiple states being competent to prosecute the same charge is conceivable (Khaleghi, 2021).

In international law, under the rule of double jeopardy, if one of the states that asserts jurisdiction prosecutes the accused, other states must refrain from re-prosecution. This rule is not limited to national courts and also applies when a charge is adjudicated by an international criminal tribunal. This means that if an international criminal court addresses a charge, the judgment issued carries the authority of *res judicata* in both national courts and other international criminal tribunals. Thus, "the principle of double jeopardy concerning an identical charge eliminates the possibility of re-prosecution for the same act, not only within a single national legal

system but also across other legal systems." (Kiety Sheyai Zari, 2014)

It is essential to note that the acceptance of the authority of *res judicata* and the avoidance of re-prosecution based on such acceptance generally does not pose significant challenges within a single legal system, given its dependence on one sovereign authority. However, if the judicial decisions originate from foreign courts, the acceptance of those decisions and reliance on the rule of double jeopardy face skepticism and difficulties. This is because granting absolute validity to foreign criminal court judgments is perceived as a disregard for the principle of sovereignty.

The principle of double jeopardy is provided for in the statutes of the ad hoc international criminal tribunals and the International Criminal Court. This rule was first emphasized in the Nuremberg Tribunal Statute. According to Article 11 of this statute, any defendant convicted by the Tribunal could still be tried in other national courts, except for the charge of membership in a criminal group or organization. The Tribunal had the authority to impose an independent punishment or an additional one to that imposed by the Nuremberg Military Tribunal if guilt was established. Under this statute, the Tribunal could identify certain criminal groups or organizations and provide a list of them. Therefore, it can be analyzed that Article 11 of the Nuremberg Tribunal Statute ensured protection from retrial for the crime of membership in organizations whose criminality had been established. However, it is important to note that the statute remains silent regarding double jeopardy for other crimes in national courts.

Similarly, this rule is also recognized in the statutes of the former Yugoslavia and Rwanda Tribunals. Article 10 of the Yugoslavia Tribunal Statute addresses the following:

1. No person shall be tried before a national court for violations of humanitarian law under this statute after being tried by an international tribunal for the same act.
2. If an individual has been tried by a national court for acts constituting a violation of international humanitarian law, the individual may only be tried by an international tribunal under the following specific circumstances:
3. • (a) The act for which they were tried was characterized as an ordinary crime; or

4. • (b) The national court proceedings were not impartial or independent, conducted with the purpose of shielding the accused from international criminal responsibility, or lacked due diligence in prosecution.
5. The international tribunal shall consider any punishment imposed by a national court when deciding on a sentence for the same act under this statute.

Article 9 of the Rwanda Tribunal Statute similarly provides for the double jeopardy rule, using language comparable to that of the Yugoslavia Tribunal Statute. In the International Criminal Court Statute, this rule is articulated in Article 20. According to this article:

1. Except as otherwise provided in this statute, no person shall be tried before the Court for conduct for which they have already been convicted or acquitted by the Court.
2. A person convicted or acquitted of a crime referred to in Article 5 by the Court shall not be tried again by another court for the same act.
3. A person who has been tried by another court for conduct constituting crimes under Articles 6, 7, or 8 may not be tried by the International Criminal Court for the same conduct, unless:
 4. • (a) The proceedings in the other court were intended to shield the person from criminal responsibility for crimes within the jurisdiction of the Court; or
 5. • (b) The proceedings in the other court were not conducted impartially or independently, and in a manner inconsistent with an intent to bring the person to justice, without meeting recognized international standards of fairness.

From the foregoing, it can be concluded that the rule of double jeopardy, as articulated in Article 20 of the Statute, must be considered in conjunction with Article 17. According to Article 17, one of the main barriers to the admissibility of a case before the Court is the principle of double jeopardy. Due to its close connection with the issue of case admissibility, this principle is treated as a procedural rule within the Court. The reliance on this principle is significant enough that it may prevent the Court from accepting a case, thereby limiting the jurisdiction of the International Criminal Court. Therefore, this research examines the rule of double jeopardy from this perspective.

According to subsection (c) of Article 17 of the International Criminal Court Statute, if a person has already been tried for the act in question, they cannot be retried, rendering the case inadmissible before the Court. The previous trial or, in other words, the authority of *res judicata*, serves as a reason for the case's inadmissibility. However, the challenge lies in determining which judicial decisions and under what conditions are recognized as having such authority before the Court, which requires a thorough examination of the provisions of Article 20. These provisions clearly outline the conditions for invoking the double jeopardy rule. A comprehensive review of this article reveals that reliance on the principle of double jeopardy can be based on either the judgment of the Court or the judgment of domestic courts.

2. Double Jeopardy in the Context of the International Criminal Court's Judgment

2.1. *The Authority of the ICC's Judgment Internally*

According to paragraph 1 of Article 20 of the Rome Statute, no person shall be tried before the Court for conduct that has already been adjudicated by the Court, whether resulting in a conviction or acquittal, except as provided in the Statute (MirMohammad Sadeghi, 2016). Therefore, the rule against double jeopardy is not absolute in this case and has exceptions. The exception to this principle is outlined in Article 84 of the Statute under the provision for revision of a judgment. This article stipulates that if new evidence is discovered that was not available during the trial and is not attributable, in whole or in part, to the applicant for revision, the conviction may be reconsidered. Furthermore, if it becomes evident that the fundamental evidence used in the judgment was false or fraudulent, or if the judges issuing the decision engaged in misconduct, there is a possibility for a retrial in compliance with the relevant provisions of the article.

The rule of double jeopardy applies only when the decision of the Court is final and not subject to appeal or review. In other words, as long as there are options for appeal or cassation, such as objections or requests for retrial, the case cannot be considered *res judicata*. Consequently, until the ordinary avenues of appeal have been exhausted, invoking the rule against double jeopardy is not relevant (Khaleghi, 2021). This point

indicates that appealing decisions of the International Criminal Court as stipulated in Article 81 of the Statute does not contradict the principle of double jeopardy (MirMohammad Sadeghi, 2016). However, the situation differs with the provision for retrial, as at this stage, the ordinary course of judicial proceedings has concluded, and standard means of review and appeal have been exhausted, thereby making the *res judicata* principle applicable. Accordingly, paragraph 1 of Article 20 refers to the exception to double jeopardy, specifically the revision of judgment as provided in Article 84 of the Statute.

2.2. *The Authority of the ICC's Judgment in National Courts*

According to paragraph 2 of Article 20 of the Rome Statute, a person who has been convicted or acquitted of a crime referred to in Article 5 by the International Criminal Court shall not be tried by another court for the same conduct. The International Criminal Court has jurisdiction over specific crimes. Under the Statute, each crime has particular conditions that must be fully satisfied for the Court to exercise jurisdiction. For example, pursuant to subparagraph (a) of paragraph 1 of Article 7, murder is considered a crime against humanity. However, the mere occurrence of murder does not suffice for the Court's jurisdiction; the murder must have been committed as part of a widespread or systematic attack against a civilian population, with knowledge of the attack.

The question arises: If the Court does not find that the required conditions are met to qualify the act as a crime against humanity and acquits the defendant for that charge, can the defendant be retried in national courts? It is argued that in such a case, prosecuting the defendant for ordinary crimes, such as murder or causing severe bodily harm, in national courts is permissible. The author supports this argument by stating that the ICC's judgment only precludes retrial for charges within the Court's jurisdiction. In other words, the defendant cannot be retried for the same offense adjudicated by the ICC, but this does not prevent the defendant from being prosecuted under national law for other offenses arising from the same conduct.

Thus, although the defendant may be prosecuted twice for the same act or series of acts, the subject matter of the prosecution differs. The ICC or international tribunal prosecution seeks to establish international criminal

responsibility, whereas national court prosecution addresses the individual's liability under domestic law for ordinary crimes. Accordingly, retrial in national courts in such circumstances does not constitute an exception to the absolute rule in paragraph 2 of Article 20 but falls outside the scope of this provision. Specifically, paragraph 2 of Article 20 refers to prohibiting retrial for crimes listed in Article 5, not for the same conduct under a different legal characterization. This argument is supported by the fact that paragraph 2 mentions "crimes" rather than "conduct." Therefore, prosecuting the defendant under domestic law for offenses defined as ordinary crimes in the national legal system is not prohibited.

However, if the ICC acquitted the defendant on the grounds that they had not committed any acts, retrial for those acts under any legal characterization, whether domestic or international, is prohibited, and the ICC's acquittal serves as the basis for invoking the rule against double jeopardy.

Another question is whether a defendant convicted by the ICC for a crime under Article 5, such as murder or causing severe bodily harm as a crime against humanity, can be retried in national courts for ordinary crimes like intentional murder. It is argued that "a person convicted by the ICC for a crime such as genocide can be retried in national courts for the ordinary crime of intentional murder." The proponent of this view laments the lack of provisions in the Statute to at least account for the previous sentence imposed by the ICC during national proceedings (Escarameia, 2017).

Accepting this interpretation of the Statute is problematic. Even though various elements of the acts committed by the defendant may constitute distinct criminal offenses under national law, such as intentional murder or causing bodily harm, since the totality of acts constitutes a single criminal offense for which the individual has been held responsible once, holding them accountable again for part of that offense seems inconsistent with the rule against double jeopardy. This principle also holds in domestic legal systems, where if a set of acts constitutes a specific criminal offense, the defendant is only punishable under that singular legal characterization.

3. **Double Jeopardy with Respect to National Court Judgments**

A person who has been tried for conduct criminalized under Articles 6, 7, or 8 of the Rome Statute by another court cannot be tried again for the same conduct before the International Criminal Court (ICC). This general principle is recognized in paragraph (3) of Article 20 of the Rome Statute, paragraph (2) of Article 9 of the Statute of the International Criminal Tribunal for the former Yugoslavia, and paragraph (2) of Article 10 of the Statute of the International Criminal Tribunal for Rwanda. All three statutes include exceptions to this general rule.

According to subparagraphs (a) and (b) of paragraph 3 of Article 20 of the Rome Statute, exceptions to the double jeopardy rule for judgments issued by national courts are: (a) the proceedings were conducted with the purpose of shielding the accused from criminal responsibility for crimes within the ICC's jurisdiction, or (b) the proceedings were not independent and impartial according to internationally recognized standards, and they were conducted in a manner inconsistent with the intent to bring the person to justice.

Paragraph (3) of Article 20 of the Rome Statute uses the phrase "another court," whereas the Statutes of the Yugoslavia and Rwanda Tribunals specifically refer to "national court." Consequently, the initial judgment that can be invoked at the ICC may come from other international courts, such as the Rwanda or Yugoslavia Tribunals (Ocampo, 2009). Another point of distinction between these statutes is found in subparagraph (a) of paragraph (2) of Articles 9 and 10 of the Statutes of the Rwanda and Yugoslavia Tribunals, which state that a crime characterized as an ordinary crime by national courts does not possess *res judicata* status before the respective international tribunals. Moreover, if the national court prosecution was conducted without due diligence, it also lacks *res judicata* status before international courts. These conditions are not explicitly provided for in the Rome Statute. However, the Rome Statute includes a provision requiring "independent and impartial" proceedings "in accordance with internationally recognized standards," which is absent in the statutes of the Yugoslavia and Rwanda Tribunals.

Thus, the double jeopardy rule concerning judgments issued by national courts is not absolute at the ICC or other international criminal tribunals and applies only if the conditions for fair domestic proceedings are met. "The decision as to whether the conditions in

subparagraphs (a) and (b) of paragraph 3 of Article 20 of the Statute are satisfied rests with the Court, not national courts." This holds true for the statutes of both the Yugoslavia and Rwanda Tribunals.

The purpose of these conditions is to prevent the improper use of the double jeopardy rule, which could otherwise become a loophole allowing perpetrators of serious international crimes to evade criminal responsibility. This could occur if domestic courts, intending to shield perpetrators, conduct sham prosecutions without adhering to proper judicial standards. During discussions in the Preparatory Committee, the Committee emphasized the need to interpret the double jeopardy principle in a way that does not allow criminals to escape meaningful prosecution (Ellis, 2002). The logic behind these regulations is to protect against the misuse of *res judicata* to prevent the proper administration of justice. The validity of a national court's judgment depends on the nature of the decision. Based on the characterization of the defendant's conduct by the national court, two scenarios are possible:

First, if the act for which the defendant was tried in a national court is described as an international crime. Some countries have incorporated international crimes into their domestic legal frameworks, in line with international treaties. For instance, international crimes such as genocide, crimes against humanity, and war crimes have been criminalized domestically under the same definitions and conditions as provided in international conventions and the Rome Statute. If domestic courts investigate, prosecute, and try perpetrators for these international crimes, and if other conditions, such as independence and impartiality and the absence of intent to shield offenders, are met, such judgments carry *res judicata* status and can invoke the double jeopardy rule at the ICC or other international courts. However, the second scenario is more complex.

The second scenario arises when the act is characterized as an ordinary crime in the national court. For example, the defendant may be tried and convicted for intentional homicide when their conduct collectively constitutes a crime against humanity (Ohlin, 2009). The question then is whether the defendant can be retried before an international court for the crime against humanity. As previously mentioned, the statutes of the Yugoslavia and Rwanda Tribunals address this scenario as an exception

to the double jeopardy rule. If the defendant's conduct is characterized as an ordinary crime in the national court, the ruling does not carry *res judicata* status, and the international tribunals may prosecute the defendant. This issue is not explicitly addressed in the Rome Statute. The question arises: What is meant by the term "ordinary crime"?

In the *Bagasora* case, the Rwanda Tribunal ruled that since the defendant had already been tried in Belgian courts for the same conduct, the prosecutor could not pursue charges of genocide or crimes against humanity. The defendant had been tried for intentional homicide and major breaches of the 1949 Geneva Conventions and their Additional Protocols, not for genocide or crimes against humanity, as Belgium had no legislation criminalizing these offenses at that time.

This ruling was based on a specific interpretation of the term "ordinary crime," meaning that it does not refer to a crime defined as such under domestic law. Instead, "ordinary crime" refers to an offense considered minor and carrying a lenient punishment in the domestic legal system, contrary to international expectations. When a domestic authority prosecutes a serious international crime under a minor criminal designation, it is presumed that the authority's intent is to shield the perpetrator from justice, allowing international courts to intervene. Therefore, if a domestic system takes international crimes seriously and imposes penalties consistent with international standards, the double jeopardy rule cannot be circumvented (Kiety Sheyai Zari, 2014).

This interpretation is easier to accept for the Rome Statute because, unlike the statutes of the Yugoslavia and Rwanda Tribunals, it does not contain similar provisions, allowing for the absolute application of the double jeopardy rule. Additionally, in support of the argument that a person tried for ordinary crimes in a national court cannot be retried at the ICC, it is noted that paragraph 2 of Article 20 refers to crimes under Article 5, while paragraph (3) references Articles 6, 7, and 8, which outline specific crimes within the ICC's jurisdiction. This may indicate that national courts are only prohibited from retrying the four major crimes listed in Article 5 if previously tried by the ICC, whereas the ICC is prohibited from retrying offenses listed in Articles 6, 7, and 8, such as murder, severe injury, enslavement, or racial discrimination, if they were adjudicated in another court,

including a domestic one (MirMohammad Sadeghi, 2003).

Thus, if a person has been prosecuted in a national court for acts listed in Articles 6, 7, and 8 of the Rome Statute and a decision has been made in compliance with subparagraphs (a) and (b) of paragraph (3) of Article 20, they cannot be retried at the ICC. Even if a case is admissible due to noncompliance with these subparagraphs, such as lack of independence or impartiality or intent to shield the offender from responsibility, paragraph (2) of Article 78 of the Statute mandates that any time served in national detention be considered when executing the ICC's sentence.

4. Modification and Amendment of Charges by the Prosecutor with Reference to Jurisprudence

Article 61 of the Rome Statute, which established the International Criminal Court (ICC), introduces a unique process called the confirmation of charges hearing among international criminal institutions. Specifically, this article provides that before a suspect is brought to trial, a Pre-Trial Chamber of the ICC holds a hearing to assess whether the Prosecutor has presented sufficient evidence to establish substantial grounds to believe that the suspect is responsible (Moffett, 2015). This hearing may occur with or without the presence of the suspect. It is important to note that this mechanism should not transform into a trial of the suspect before the main trial. The confirmation process serves multiple purposes, including ensuring the fairness and efficiency of the prosecution, protecting the rights of the suspect, and promoting judicial economy. The presence of the suspect or their counsel is required only if the Pre-Trial Chamber deems it necessary to serve the interests of justice. In such cases, the charges and the supporting evidence must be provided to both the suspect and the Pre-Trial Chamber before the hearing. The Prosecutor may amend or withdraw the charges, and any such changes must be communicated to the suspect.

After several hearings, multiple outcomes are possible: First, if the Pre-Trial Chamber finds the Prosecutor's evidence sufficient, the suspect is sent to the Trial Chamber. Second, if the evidence is deemed insufficient, the Pre-Trial Chamber will decline to confirm the charges. Another possibility is that the confirming judge may classify the crimes differently. The non-confirmation of charges by the Pre-Trial Chamber does

not preclude the Prosecutor from resubmitting a request for confirmation of charges (Stahn, 2017).

If the Prosecutor wishes to add, reduce, or replace charges, the hearing must be repeated. Once the trial has commenced, the Prosecutor can only withdraw charges with the Pre-Trial Chamber's approval. The process of reviewing the indictment, known as "indictment review," is also present in the statutes of some ad hoc tribunals. Under this process, the case is referred to a Pre-Trial Chamber. The key difference from the ICC's procedure is that in the ad hoc tribunals, an arrest warrant is issued for the accused, and only after the arrest does the Pre-Trial Chamber review the charges.

An example is the case of *Prosecutor v. Alfred Yekatom*. Alfred Yekatom, also known as Rambo, a former leader of the Central African Republic's Anti-Balaka militia, was arrested in 2018 for war crimes. After preliminary reviews, the Prosecutor decided to modify the charges. According to the Pre-Trial Chamber's report, on December 11, 2019, the Chamber issued its "Decision on the Confirmation of Charges against Alfred Yekatom and Patrice-Edouard Ngaïssona," wherein specific charges were identified and confirmed. On March 2, 2019, the Prosecutor submitted a "Request for Reconsideration or, in the Alternative, Leave to Appeal the Confirmation Decision concerning Alfred Yekatom and Patrice-Edouard Ngaïssona." On March 11, 2019, the Chamber rejected this request. On March 31, 2020, the Prosecutor made two requests to the Pre-Trial Chamber:

1. To amend the confirmed charge of rape and replace it with sexual violence under Counts 40 and 41 of the document containing the charges.
2. To correct the reference number of the article mentioned for Count 40, clarifying that, in the Prosecutor's view, the charge pertains to a crime against humanity rather than a war crime.

Thus, as demonstrated by this case, the Prosecutor retains the authority to amend charges, a power explicitly defined in the Rome Statute.

5. Conclusion

Key sources of the double jeopardy rule in international criminal law include Article 9 of the Statute of the International Criminal Tribunal for Rwanda, Article 10 of the Statute of the International Criminal Tribunal for the former Yugoslavia, and Article 20 of the Rome Statute of the International Criminal Court. Noncompliance with

this rule by national courts may lead to intervention by the Assembly of States Parties or the United Nations Security Council, which will address the violation. A comparison of the statutes of permanent and ad hoc international criminal tribunals reveals that the ad hoc tribunals provide greater clarity and precision regarding this rule, while the permanent court's statute contains more ambiguities. This difference arises because, in ad hoc tribunal statutes, ordinary crimes are explicitly recognized as exceptions permitting retrial by an international court. In contrast, the permanent court acknowledges the protection of the accused by national courts as an exception to double jeopardy.

The findings of this research indicate that the exclusion of ordinary crime exceptions from the ICC Statute is not based on substantive reasons but rather on the ambiguity surrounding the concept. Although both terms remain undefined and ambiguous, the removal of "ordinary crime" could lead to abuse by states, who might classify charges against their nationals as ordinary crimes to impose lesser penalties. Therefore, compared to ad hoc tribunal statutes, Article 20 of the Rome Statute represents a regression from a human rights perspective, as it does not mandate the compulsory recognition of sentences imposed by national courts, unlike the ad hoc tribunals.

The ICC's superiority in handling vertical jurisdictional conflicts over ad hoc tribunals is limited, as the ICC, based on the principle of complementarity, only has the right to prosecute when another court has failed to observe principles of impartiality and independence or has acted to shield the accused from criminal responsibility. Nevertheless, determining whether a national trial has adhered to internationally recognized judicial standards lies with the ICC, underscoring its authority over national courts. Consequently, if national courts fail to adhere to due process standards, the ICC's intervention does not violate the double jeopardy rule.

Authors' Contributions

Authors contributed equally to this article.

Declaration

In order to correct and improve the academic writing of our paper, we have used the language model ChatGPT.

Transparency Statement

Data are available for research purposes upon reasonable request to the corresponding author.

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