THE EXCLUSION OF *NE BIS IN IDEM* AT THE INTERNATIONAL CRIMINAL COURT: AN UNBALANCED CONCEPT OF JUSTICE?*

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Abstract

Ne bis in idem has always been understood and implemented as a non-derogable principle that gives legal protection to Defendants in court proceedings. The International Criminal Court (**"ICC"**), however, allows *ne bis in idem* to be excluded by invoking Article 20(3) of the Rome Statute if certain conditions are met. Not only this rule could potentially threaten the concept of finality of a judgment, it also arguably drifts away from the whole understanding of *ne bis in idem* in the first place. Regardless, the exclusionary clause was finalised, leaving one unanswered question: *Is there an imbalance concept of justice from invoking Article 20(3)?* This Article therefore aims to provide two legal analysis relating to *ne bis in idem* in the context of ICC. *First*, on any potential harms to Defendants rights that could be violated. *Second,* on the justification laid out by the exclusionary clause if there are any rights being violated.

Intisari

Ne bis in idem *adalah sebuah prinsip yang dimengerti dan diimplementasikan sebagai 'non derogable principle' atau prinsip yang tidak dapat dikurang-kurangi, yang mana memberikan perlindungan hukum bagi pihak terdakwa di dalam proses persidangan.* International Criminal Court *(**"ICC"**), memberikan beberapa persyaratan untuk mengecualikan prinsip* "ne bis in idem" *melalui Pasal 20(3) Statuta Roma. Tidak hanya ketentuan ini berpotensi untuk mengurangi putusan yang tetap dan bersifat mengikat, namun ketentuan ini juga jauh dari pengertian* "ne bis in idem" *itu sendiri. Meskipun begitu, dengan ditetapkannya klausa pengecualian, hal ini menyisakan satu pertanyaan yang belum terjawab: Apakah dengan mengecualikan Pasal 20(3) menyebabkan ketidakseimbangan hukum? Artikel ini bertujuan untuk memberikan dua analisis sehubungan dengan pengertian ne bis in idem dalam konteks ICC. Pertama, mengenai potensi kerugian yang akan berpengaruh pada hak pihak terdakwa. Kedua, mengenai pembenaran yang diberikan oleh klausa pengecualian jika ada hak-hak yang dilanggar.*

Keywords: International Criminal Court, *ne bis in idem*, exclusion, Article 20(3) of the Rome Statute.

Kata Kunci: *Mahkamah Pidana Internasional,* ne bis in idem, *pengecualian, Pasal 20(3) Statuta Roma*

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A. Introduction

The development of criminal law has embarked the establishment of a principle that a person shall not be prosecuted twice for the same act, fact or offence. This principle is commonly known as *ne bis in idem,* or equivalently referred as 'against double jeopardy',[2] which is a cardinal rule that serves as one strong foundation in criminal law (*Cullen v. The King*, Supreme Court of Canada, 1949; Finlay, 2009, p. 223).

Ne bis in idem is also one of many fundamental principles of law adopted by the Rome Statute, explicitly enshrined in Article 20. The provision of *ne bis in idem* under Article 20(1) and (2) applies respectfully towards alleged Defendants in respect to fairness, individual human rights and the protection towards the integrity of the judicial system (Tallgren and Reisinger, 2008, pp. 902-903; Finlay, 2009, p. 223). Despite the means of protection is clearly regulated, this permanent international court also takes a different approach into the implementation of *ne bis in idem* by including an exclusionary clause within Article 20(3). The ICC has the ability to dismiss the importance of this principle only if the national proceedings were conducted based to 'shield' or the judge was 'not independent or impartial'. The exclusion itself could somewhat avert the whole concept of *ne bis in idem* in the premises of the ICC, and because Article 20(3) has never really contested in the Court, its implications are left uncertain.

B. *Ne Bis In Idem* as an Internationally Accepted Principle

a. Origins

Historically, the original sense of this principle can be traced back to the ancient Greek and Roman laws (van Bockel, 2010, p. 30), where it derives from the maxim *nemo debet bis vexari pro una et eadem causa,* that in a literal meaning translates to "no one should be twice troubled for the same cause".[3] The Roman procedural law was actually built with the basic understanding that a case, may be civil or criminal, could only be brought once to court (Lelieur, 2013, p. 199). The whole reason is reflected on the belief of legal certainty and final court decision known as *res judicata* (Theofanis, 2003; Conway, 2003, p. 217). Since then, the principle of *ne bis in idem* have continued to manoeuvre into the modern laws.

Nowadays, this principle is regarded as one amongst several firmly established principles in both domestic and international level. The objective is to protect individuals from being subjected to "*embarrassment, expense and ordeal, … anxiety also insecurity …*" (*Green v. United States*, U.S Supreme Court, 1957), also serves as method to defend individuals from abuses of state's right to punish (Wyngaert & Ongena, 2002, pp. 707-710; Rastan, 2017, p. 19; van Bockel, 2016, p. 13).

b. Universal Acceptance of *Ne Bis In Idem*

There are currently over fifty nationals that have codified the principle of *ne bis in idem* as their constitutional rights (Finlay, 2009, p. 224). The significance of such principle to international law is actually intertwined into at least two mechanisms: a) in regard to obligations burdened upon states in a treaty context; and b) on the binding power of a rule

[2] The doctrine of 'double jeopardy' can be found within the Fifth Amendment of the United States of America [**"US"**] Constitution, which states that "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb…"

[3] Translation is provided within 'Appendix B: Legal Maxims' in Garner (2009).

outside of treaty context, (Conway, 2003, p. 229) *vis-à-vis* customary international law and general principles of international law. The latter approach has actually created a debate among scholars whom deny this existing principle as neither a part of custom nor a general principle (Brownlie, 1998, pp. 52–54), [4] despite already being regulated in many national legal systems.

Reflection of *ne bis in idem* is also embodied in many international instruments, *i*.e. the Geneva Conventions III[5] and IV[6] in the context of humanitarian law, human rights conventions such as the ICCPR[7] and ECHR, [8] also in the statutes of international criminal tribunals, [9] including the Rome Statute of the ICC.[10]

The principle of *ne bis in idem* is now acknowledged as an internationally recognized human rights (Tallgren & Reisinger, 2008, p. 904). This is evident as seen from Article 14(7) of ICCPR, Article 8(4) of ACHR and Article 4(1) of Protocol 7 to the 1950 ECHR. As also confirmed by Justice Steward in *Crist v. Bretz,* where he mentioned about few factors that relates *ne bis in idem* with human rights in international context (U.S Supreme Court, 1978, pp. 30-31). The reasoning behind this recognition is that the principle gives the State an obligation to ensure its citizen free from double prosecutions and indefinite adjudication (Tallgren & Reisinger, 2008, p. 903).

There are two distinctions for the application of *ne bis in idem* that coat the issue of admissibility. *Firstly*, an *in concreto* application. This form of operation refers to the identity of a conduct, applying a fact-based approach. *Secondly*, *in abstracto* application, which focuses on the legal similarity of the conduct, allowing a retrial if pressed with different charges.[11] Regardless, the ICTY and ICTR Statutes have all establish that the principle shall apply both ways in conjunction of between the international and national courts.

C. *Ne Bis In Idem* According to Article 20 of the Rome Statute

The rule of *ne bis in idem* had raised several issues in the preparatory work of the Rome Statute, and therefore was omitted from the draft (Tallgren & Reisinger, 2008, p. 911; *Mathieu Ngudjolo Chui*, ICC, 2009, para. 48). Despite some suggestions made by delegations for the ICC to follow the footsteps of the ICTY (Report, ICC, 1995, para. 49), the idea was rejected due to the different nature between the two courts. The contrast distinction is shown from the ICC as a *last*

[4] See also Chorzów Factory Case (Interpretation of Judgments Nos. 7 and 8), PCIJ, 1927, p. 27 (as cited in B. Cheng, 1993, p. 336).

[5] Article 86 of the 1949 Geneva Convention III on Treatment of Prisoners of War provides that "No prisoner of war may be punished more than once for the same act, or on the same charge."

[6] Article 117(3) of the 1949 Geneva Convention IV on Protection of Civilian Persons in Time of War states that "No internee may be punished more than once for the same act, or on the same count."

[7] Article 14(7) of the 1966 International Covenant on Civil and Political Rights provides that "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

[8] See in ECHR, Article 4.

[9] See in ICTY Statute, Article 10; ICTR Statute, Article 9; SCSL Statute, Article 9.

[10] Rome Statute, Article 20 provides for *ne bis in idem* to apply both to prior proceedings by the ICC itself (Article 20(1) to (2)) and, somewhat more qualifiedly, to proceedings before national courts related to the same conduct (Article 20(3)).

[11] The case of *Paul Touvier* in France, on 22 November 1992, may be used as a reference where the Court of Appeal of Paris held that the accused could be tried for crimes against humanity, although he had previously been tried and sentenced to death in absentia for maintaining contacts with a foreign power or its agents for the purpose of assisting its undertakings against France.

resort court,[12] meaning that national jurisdiction still has priority in adjudicating cases before the ICC does (Tallgren & Reisinger, 2008, pp. 687-688; El-Zeidy, 2008, p. 171; Carter, 2010, p. 194), unlike its predecessor *ad hoc* international criminal tribunals that possessed primacy over the jurisdiction of national courts.[13] The drafters also concerned on the placement of the principle in the statute on whether it shall be included as general principle of criminal law or included as procedural matter or even jurisdictional problem of the Court itself (Tallgren & Reisinger, 2008, p. 912). Nevertheless, the principle was finally included under the premise of Jurisdiction, Admissibility and Applicable Law in the Zutphen Draft (Tallgren & Reisinger, 2008, p. 912).

The final product of this drafting process is embodied within the current Article 20 of the Rome Statute. As seen from its wordings, the first paragraph ensures that prosecution against the same person over the same case will not be held. Unfortunately, the Rome Statute gives no clear indication of whether a conviction or acquittal rendered by the first instance is regarded as a final decision or whether only a non-appealable judgment can establish *res judicata* (Tallgren & Reisinger, 2008, p. 914).

On the second paragraph, the Rome Statute directs the provision onto adjudication by another court of a case that has been acquitted by the ICC. The scope of 'another court' here refers to state parties to the Rome Statute (Tallgren & Reisinger, 2008, p. 916), which implements the theory of vertical relation to national jurisdiction, as explained by Judge Wyngaert and Ongena, that is divided into 'downward' and 'upward' restrictions, where it suppresses the possibility for the ICC to retry after state prosecution *vice versa* (Wyngaert & Ongena, 2002, p. 722).

Lastly, the third paragraph connotes that *ne bis in idem* applies differently in comparison to national courts –less strict, in a sense– due to a daunting decision made by the drafters in allowing cases from another court to be retried again by the ICC.[14] According to Article 20(3), an exception to the principle of *ne bis in idem* can apply when the national proceedings were conducted "for the purpose of shielding the person concerned from criminal liability" within the jurisdiction of ICC, or "otherwise were not conducted independently or impartially… [and] was inconsistent with an intent to bring the person concerned to justice".

'Shielding', as regulated in Article 17(2)(a), allows the Court to adjudicate a case that have been previously prosecuted in domestic proceedings, ergo waiving the principle of *ne bis in idem* by virtue of Article 20(3)(a) if the proceedings were meant to shield a person with the intention not to bring the Defendant to justice. On the other hand, the second limb of Article 20(3) is an alternative provision focuses on judges' failure in adjudicating cases. This article requires two elements to be fulfilled. *Firstly*, the question on whether the presiding judge in the national court was not independent or was not impartial, and *secondly*, on whether the proceedings were conducted inconsistently with the intent to bring justice.

[12] See Rome Statute, Preamble and Article 1.

[13] See ICTY Statute, Art. 9; ICTR Statute, Art. 8; SCSL Statute, Art. 8; STL Statute; Art. 5.

[14] The issue of complementarity upon the ICC and domestic authority in adjudicating international crimes in accordance to Article 5 of the Rome Statute is analysed comprehensively in Kleffner, J. K. (2008). Complementarity in the Rome Statute and National Criminal Jurisdictions. New York, NY: Oxford University Press.

D. <u>Potential Violation of Defendant's Rights Caused by the Exclusionary Clause</u>

The exclusion of *ne bis in idem* provides not only justice to the victims, but also results to a suffering felt by Defendants. As mentioned above, this principle was created to value the basic rights and respects the finality of a judgment. The relation between justice and the victims, as noted by the ICTY in *Nikolić* (ICTY, para. 86), is that "punishment must therefore reflect both the calls for justice from the persons who have –directly or indirectly– been victims of the crimes". Justice always leans towards the victim. While in fact, violation of Defendants' basic rights in court would only shift their position as *the* victim of the law itself.

In respect to the finality and conclusiveness of judgments, as seen in *Rola* Co. *v.* C*ommonwealth*, where it mentions that judgment of judicial tribunals is final and conclusive as opposed to administrative tribunals (High Court of Australia, 1944, p. 213). For an accused being acquitted from case removes the constant threat and anxiety. However, being in adjudication again would raise the concern again and it would constitute as a punishment for the defendant even though he is found innocent (Conway, 2003, p. 223). There is no certainty given to Defendants in court, where it should have been given through the *ne bis in idem* principle.

Moreover, repeated prosecutions will inevitably increase the probability of an innocent person being convicted (*Green v. United States*, U.S Supreme Court, 1957, pp. 30-31). Consequently, Defendants will be in weaker comparative position in any subsequent retrial following the disclosure of their defence and evidence at the first trial. This creates an unbalance scale, as there have been established weaknesses from each party. There is also concern that "in many cases an innocent person will not have the power or resources that is effective to fight a second charge" (Friedland, 1969, p. 3-5).

Thus, from Defendants' perspective, *ne bis in idem* should provide security in line with the purpose of the principle itself, that is to give protection from multiple prosecution (Friedland, 1969, p. 4). The exclusion itself act as boomerang, meaning that accused can be tried for over and over again without any guarantee of justice and fairness.

Both of the concerns are closely related to the right to fair trial. Fair trial has been considered as one of the fundamental human rights that aimed to ensure proper administration of justice (OHCHR, 2014, para. 9). The Rome Statute itself, under Article 67 who reflects from Article 14 of ICCPR, has set the minimum standard of human rights for criminals in court. Even though it is not explicitly stated, Defendants' rights to fair trial is impugned by the exclusionary clause. Being in trial for the exact same crime for the second time would clearly questions the legal certainty of law.

The high risk of second adjudication does not only potentially harm the accused, but also the public trust towards the Court. The principle reflects the importance of finality under criminal justice system and to protect the alleged perpetrator from inconsistent result. From this understanding, it proved that the principle holds a significant role in upholding public trust towards the justice system and to respect the judicial proceedings. This will also lead to the benefit of conserving judicial resources (Finlay, 2009, p. 223).

According to some scholars (Cuesta & Eser, 2001, p. 710; van Den Wyngaert & Stessens, 1999, p. 781; Friedland, 1969, pp. 3-5; Tallgren & Reisinger, 2008,

p. 903), a case that has been concluded shall not be reopened (*factum praeritum*) and that decision of a criminal court shall not prevail by other criminal court (*res iudicata pro veritate habetur*). The rationale is that in the first trial, all efforts should be given (Friedland, 1969, p. 4). Therefore, it will minimize the possibility of having second or more adjudication. Again, this will affect to ensure Defendants' rights while at the same time upholding the criminal justice system.

E. A New Concept of Fairness by the Rome Statute

Despite entailing many hurdles, the exclusion of *ne bis in idem* still exists to date within Article 20(3) of the Rome Statute. The concept of fairness to the accused is left to a vague corner, allowing the Court to levy multiple prosecutions if deemed to be needed. Besides, the impression of violating the nature of *ne bis in idem* can actually be alleviated through evaluating the balance it brings to justice. To this current moment, there exist two possible arguments to dodge the prolonged disagreements, those are on the issue of complementarity principle and on the elements of Article 20(3) itself.

a. Complementarity

The complementary nature of the ICC is often seen as a problem when applying exclusion to *ne bis in idem*. As stated by Roy S. Lee [15] during the preparatory work, the Court will be complementing, does not supersede national jurisdiction and can only perform when the State is 'unable or unwilling' to do so (2002). This concept of complementarity was made to ensure the Court to not interfere with national prosecutions, except for cases that falls within the ICC's jurisdiction (Holmes, 2002, p. 675). That being said, the Court comes second in adjudication (Conway, 2003, p. 352), and exemption to *ne bis in idem* is only applied to the matter of 'unwillingness' of States.[16] What concerns many is on how States have its prerogatives in performing legal actions when it comes hand-in-hand with the ICC's jurisdiction through Article 20(3). Since *ne bis in idem* is included under the premise of Jurisdiction, Admissibility and Applicable Law in the Zutphen Draft (Tallgren & Reisinger, 2008, p. 912), this first issue will also reflect to Article 17 on admissibility.

To answer briefly, the issue regarding complementarity would relate back to the concept of treaty obligation. The ICC was established through the consent of state parties, consequently, any ratification or accession will also mean accepting the Rome Statute wholly. States must have been well aware on the conditions that Article 20(3) demands. Furthermore, it is also important to look into the reason why *ne bis in idem* requires a comprehensive assessment prior adjudication by means of admissibility.

Since the wordings of Article 17(1)(c)[17] correlates to Article 20(3), it is understood that the ICC is, simply put, barred to process cases in respect of 'same conduct'. Without any explicit means of interpretation, the Court uses "same person, same case" test.[18] While 'same person' is

[15] Roy S. Lee served as secretary during the process of establishing the ICC in the Preparatory Committee.

[16] See Rome Statute, where the wordings of Article 17(2) on unwillingness is reflected in the conditions set out within Article 20(3)(a) and (b).

[17] Article 17(1)(c) serves inasmuch as a safeguard to preserve judicial integrity on domestic level (Schabas & El Zeidy, 2008, p. 786)

[18] This test was firstly used in the case of *Lubanga* (ICC, para. 24) by the ICC on the issue of admissibility that was submitted by the Defence Counsel due to adjudication that has been conducted by Democratic Republic of the Congo against Mr. Lubanga

self-explanatory, the Chambers in *Laurent Gbagbo* (ICC, para. 10), *Thomas Lubanga Dyilo* (ICC, para. 31) and *Ahmad Harun and Ali Kushayb* (ICC, para. 14) have consistently concluded that 'same case' shall means specific incidents where crimes that falls within ICC's jurisdiction have been committed by identified suspects. Thus, the approach here is that if the conduct or incident is the same, therefore *ne bis in idem* applied. It is to be noted that specific incidents provided in arrest warrant do not represent a manifestation of criminality (*Gaddafi*, ICC, 2014, paras. 82-83).

In any case *ne bis in idem* does apply, the exclusionary clause will be evaluated to dismiss this principle. Although precedence of Article 20(3) is still lacking, any assessment of this article shall be determined alongside with the issue of admissibility and determined in a case-per-case basis (*Gadaffi*, ICC, 2014; *Mathieu Ngudjolo Chui*, ICC, 2009) in the context of complementarity.

It is to be reminded that the ICC was designed specifically to prosecute those responsible for 'the most serious crimes to the international community as a whole'.[19] The underlying concept of ICC's complementarity solely lies upon the *ratione materiae* relating to Article 5 of the Rome Statute, that are Genocide, Crimes Against Humanity, War Crimes, and Aggression. Article 20(3) by no means establish any *primacy* to ICC's jurisdiction, especially since the exclusionary clause can only be invoked if other courts (including national court) have processed the accused, yet deficiency is found within it and hampers justice to be served.

b. The Elements in Article 20(3)

Here, the exclusionary clause itself have raises perception of outweighing the idea of *protecting Defendants rights*. In spite of the optimism set out about *ne bis in idem* throughout the statute, the exclusionary clause still exists to date – somewhat shows ICC's disbelief on national courts due to the tendency of protecting its own nationals (Cryer, 2006, p. 985). A new set of rules have then been introduced to qualify if a dismissal is deemed to be necessary, shown within Article 20(3) as well as Article 17(2) in relation to unwillingness.

i. Shielding

In the commentary of the Rome Statute, the phrase '*shielding*' is said to be one amongst the more difficult term to define (Tallgren & Reisinger, 2008, p. 926), it even received strong criticism for being too subjective to be defined. In the context of sub-paragraph (a) carried out by State, a trial can be regarded as 'shielding' if there is any intentional deficiency found throughout its adjudication, leading to a negative result of that trial (El-Zeidy, 2008, p. 175). The term negative does not necessarily refer to the verdict or the judgement substantially. Instead, it uses a process-oriented approach to determine whether justice has been achieved, despite the term 'justice' ought to be understood as prosecuting a person by arresting him and trying him in court (Fry, 2012, pp. 48-50). In this sense, the less accurate and thorough the proceedings are, the higher indication the intent of shielding a person from criminal responsibility would be (El-Zeidy, 2008, p. 175). Another indication that could meet the first limb of Article 20(3) is from imposing disproportionate charges. Example to this is if in a case where an atrocity amounting to a serious crime, say genocide, but is charged disproportionately only as an ordinary crime, such as an assault (Tallgren &

[19] See Rome Statute, Preamble

Reisinger, 2008, p. 926). Therefore, the ICC will have the power to render a national court's decision for a dismissal if the condition mentioned above is met.

As been perfectly laid out by Cryer, a broader goal of international criminal law aims for "prosecutions [to] engender a sense of justice having been done, or 'closure' for victims" (Cryer, 2011, p. 30). The notion of shielding is a legitimate concern to be raised, since improper proceedings would only hamper a *bona fide* prosecution, and to some certain extent results to impunity. That being said, the first element of shielding is a necessary input to the Court to manifest its objects and purpose of bringing justice over international crimes.

ii. Independence, Impartiality, and Inconsistency in Bringing Justice

For justice to be really blind, judges are required to have certain characteristics, regardless their judiciary level. Judicial independence, for example, is an essential trait that judges should have as administrator of justice. The ICC has its own interpretation of this terminology, where the Rome Statute strictly limits ICC judges in partaking into activities that would interfere or to affect their independence. [20] From its ordinary meaning, 'independent' is defined as someone who is not subject to a control of another (Garner, 2009, p. 838). Meanwhile the element of 'impartiality' is a judicial characteristic of disinterest towards parties and their causes (*Brdjanin*, ICTY, para. 13). If a verdict is based on a partial consideration, it would only create unjust and defeat the purpose of a court. Although a judge shall always be seen with the presumption of correctness (Wilkinson, 1989, p. 788), impartiality could be easily be invalidated from the existence of a bias or prejudice. For an example, the ECtHR has a set of tests in determining the existence of bias[21] that could be used in this regard: The subjective approach regarding the personal behaviour of a judge over a case; or the objective approach that rely on certain facts that could determine bias indeed exist.

The lack of independency or impartiality is to be read cumulatively (Tallgren & Reisinger, 2008, p. 927) with the rest of the element that determines on whether there is an intent in failing the objective to bring justice. This final clause requires a distinction to be made between a mere mistake in adjudication or such mistake is intended. This would require the previously mentioned elements of Article 20(3)(b) to be objectively analysed and evaluated with the concept of due process per required. Similarly, with the explanation provided above about 'shielding', the purpose of the Court is to end impunity.[22]

Though it may seem controversial to examine a judge's independence and impartiality, Article 20(3) does not automatically render a national court's practice relating to due process to be inevitable, since the scrutiny still needs to meet and adhere with the standards of the Rome Statute. That being said, if the Prosecutor finds the necessity to contest *ne bis in idem* on the basis of Article 20(3)(b), the importance of *res judicata* should be overlooked, especially when international crimes are committed, in order to maintain

[20] Rome Statute, Article 40

[21] The test is consistently used in the ECtHR proceedings, as seen in *Piersack v. Belgium*, para. 30; *De Cubber v. Belgium*, para. 24; *Hauschildt v. Denmark*, para. 46; *Bulut v. Austria*, para. 31; *Castillo Algar v. Spain*, para. 43; and *Incal v. Turkey*, para. 65.

[22] See Rome Statute, Preamble.

the objectives of the ICC in creating a just process of law.

F. Conclusion

This article began by establishing the concept of *ne bis in idem* in the scope of ICC according to Article 20 of the Rome Statute. While purposed to protect Defendants from being subjected to multiple prosecutions, the ICC is also allowed to exempt the final judgement of national courts, which consequently fails the whole understanding of *ne bis in idem*. The only exception to this principle can only be invoked if there was a defect or 'unwillingness' from the State that adjudicated the case beforehand.

The ICC is yet to perform, or at least give a definitive answer on how the objectives to the exclusionary clause could outweigh the whole understanding of *ne bis in idem* from the Defendant's perspective. With no cases to refer to, the Authors concluded that the object and purpose of the ICC and also the Rome Statute shall always be used as the main reference to respond the underlying problem regarding the vivid balance as introduced in the beginning.

Indeed, the current practice of *ne bis in idem* still contains loopholes. The issue covering any potential harm to Defendants' rights or the broad concept of fairness that the ICC implements should still be a subject of a further research. This leaves the ICC a task to provide a delicate balance to benefit the accused, the States, and the international community from the implementation of Article 20(3) of the Rome Statute in the future.

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