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International Criminal Law Research Paper: RN Daniels

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***Non bis In Idem* and the Rome Statute of the International Criminal Court**

Introduction

It has been said that the principle against twice punishing an individual for the same crime is as old as the common law itself.¹ The roots of the principle can be traced back to Roman law and ancient biblical law. It has long been part of English common law and first received constitutional recognition in the form of the Fifth Amendment of the United States Constitution. Indeed it has been recognized at national level, in some form or other, across the globe.

¹ J Hunter “Development of the Rule against Double Jeopardy” Journal of Legal History (1984) 3-4

The principle has been recognized at a national level among almost all common law countries, either by incorporation into their constitutions or by incorporation into statutory law.² The *non bis in idem* principle has found a home in at least fifty constitutions³ including countries such as Canada,⁴ New Zealand,⁵ South Africa⁶ and India.⁷ There are vastly different approaches however, with some systems prohibiting successive prosecutions for the same conduct after an acquittal or conviction and others permitting further trials where there are newly discovered facts or where there has been a fundamental defect in the earlier trial. Others permit repeated prosecutions but prohibit double punishment.

The double jeopardy principle, as it is known in the United States, is intimately related to *non bis in idem* (from the Latin maxim *nemo bis vexari pro una et eadem causa* meaning ‘a man shall not be twice vexed or tried for the same cause’). Although conceptually similar, the primary difference between double jeopardy and *non bis in idem* is that double jeopardy operates only within a single legal system while the identity of the prosecuting power is not relevant to the application of *non*

² KC Pillai *Double Jeopardy Protection : A Comparative Overview* (Mittal Publications) 1988, 1

³ M.C. Bassiouni “Human Rights in Criminal Justice: Identifying International Protections in National Constitutions” (1993) 3 *Duke J. Comp. & Int’l L.* 247, 289

⁴ Section 11(h) of the Canadian Charter of Rights and Freedoms provides that any person charged with an offence “has the right, if finally acquitted of the offence, not to be tried for it again and, if found guilty and punished for the offence, not to be tried or punished for it again”

⁵ Section 26(2) of the New Zealand Bill of Rights provides that “No one who has been finally acquitted of, or pardoned for, an offence shall be tried or punished for it again”

⁶ Section 35(3)(m) of the South African Constitution provides that every person has the right to a fair trial which includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted”

⁷ Article 20(2) of the Indian Constitution provides that no person shall be prosecuted and punished for the same offence more than once.

bis in idem.⁸ *Non bis in idem* relates to numerous issues including; the recharging of an accused with the same or another offence, the framing of an indictment, the sentencing of an accused on multiple convictions (double punishment), new trials, appeals, revision, the relationship between courts and between states.⁹

The principle of *non bis in idem* plays a fundamentally important role within the criminal justice system. Its rationale lies principally in the need to protect individuals, with their limited access to resources, from being harassed through repeated prosecutions by the powerful state, with its access to extensive resources.¹⁰ It prevents the state from attempts to retry facts underlying an acquittal¹¹ thereby limiting erroneous convictions which could flow from the fact that defendants do not have the resources and energy to fight against repeated and vexatious prosecutions. *Non bis in idem* protects individuals against multiple punishments for the same offence, so-called double counting, in the absence of authorization by the legislature. The common law articulation of the principle, which may be traced to Sir William Blackstone, conceived of double jeopardy in relation to procedural and substantive blameworthiness, i.e. the need to avoid multiple punishment of a single act of blameworthy and criminal conduct.¹²

⁸ D. Lopez "Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent *Non bis in Idem*" *Vanderbilt J Transnat'l L.* 1263 2000, 1272

⁹ I Tallgren "Ne bis in Idem" in O. Triffterer (Ed) *Commentary on the Rome Statute of the International Criminal Court*, 1999 (Publisher Baden-Baden : Nomos Verlagsgesellschaft)420

¹⁰ *Green v United States* 355 US 184 at 187-88; see further D Lopez note 8 at 1263

¹¹ *Brown v Ohio* 432 US 161

¹² G. Thomas III *Double Jeopardy: The History and the Law* (New York Univ. Press) 1998, 5

In addition, *non bis in idem* operates to bring criminal proceedings to finality, and is therefore of benefit to the defendant as well as to society. Furthermore, it operates to uphold the integrity of the administration of justice by limiting conflicting judicial rulings. However, it must be tempered by the need to bring criminals to justice and to punish them.

Non bis in idem operates at three levels; firstly, it operates in relation to multiple prosecutions within a state (internal application). Secondly, it operates between different sovereigns (first-tier international application). Thirdly, it operates with respect to relations between states and international tribunals (second-tier international application). At an international level, the nature of transnational crimes and the applicable jurisdictional principles¹³ could leave defendants at risk of prosecution for international crimes by a number of sovereigns, as well international criminal tribunals.

This paper will analyze the formulation of the principle in the Rome Statute of the International Criminal Court¹⁴ (hereafter “the Rome Statute”) and speculate on the level of protection it will afford to defendants indicted for international crimes. The first part of the paper will look at the national application of *non bis in idem*, particularly looking at the United States. The second part gives a brief overview of

¹³ A state may assert jurisdiction over: (1) all criminal acts that occur within its territory and over all person responsible for such conduct, regardless of their nationality (the territoriality principle) (2) aliens who commit acts abroad that are considered prejudicial to the safety of the state or its security (3) their own nationals who commit crimes abroad (4) those persons who commit offences abroad which harm the nationals of the state (passive personality) (5) the exercise of universal jurisdiction in respect of crimes under customary international law (such as war crimes, crimes against humanity, genocide and torture) see J. Dugard *International Law A South African Perspective* (Juta) 2000, 133-142

¹⁴ 2187 UNTS 3, entered into force on July 1, 2002

the principle in its international context. The third part looks, very cursorily, at the events in East Timor and Cambodia, to better understand the context for the certain provisions in the text of the Rome Statute. The fourth section looks specifically at the text of the Rome Statute.

Part I: Double Jeopardy and the Fifth Amendment

The United States Constitution Fifth Amendment famously declares “...nor shall any person be subject for the same offence to be twice out in jeopardy of life or limb...” At first glance this appears simple and straight forward. It appears to protect individuals against being placed at risk of further punishment, through further criminal proceedings in relation to the same offence, following an acquittal or conviction. However, this apparent simplicity is deceiving. To begin with the courts must determine when they are dealing with the *same offence* for the purposes of the Fifth Amendment. The Supreme Court has been anything but consistent in its development of a proper theory.

In *Diaz v United States*¹⁵ the Supreme Court stated: “The homicide charged against the accused in the Court of First Instance and the assault and battery for which he was tried before the justices of the peace, although identical in some of their elements, were distinct offenses in both law and fact...the justice of the peace, although possessed of jurisdiction to try the accused or assault and battery, was

¹⁵ *Diaz v United States* 223 US 442, 448-49 (1912)

without jurisdiction to try him for homicide...It follows that the plea of former jeopardy disclosed no obstacle to the prosecution for homicide”

In *Diaz* therefore *same offence* meant the same offence. However, this was followed by *Blockburger v United States*.¹⁶ The defendant had been charged and convicted of two offences, *viz.* selling drugs without the original packaging and selling drugs without a written order, both violations of Harrison Narcotic Act. The Supreme Court considered the proposition that the separate indictments violated the protection against double jeopardy and held that the defendant could be indicted with two offences because each required proof of an additional element not required by the other. Under *Blockburger* a greater offense is generally treated as the same offense as each of its lesser included offenses. The *Blockburger* test has often been critiqued by commentators because, when rigidly applied, it leads to inequitable and absurd results.¹⁷ Applying *Blockburger*, attempted murder must be treated as being the same offence as premeditated murder. Although the *Blockburger* test was not formulated by reference to successive prosecutions, it was subsequently applied in those circumstances.¹⁸

In *Brown v Ohio*¹⁹ the defendant had been charged and convicted, in the county where he was apprehended, of joyriding. Subsequently, in a different county, he was indicted for autotheft. The Supreme Court accepted that joyriding was a lesser

¹⁶ *Blockburger v United States* 284 US 299 (1932)

¹⁷ A. Amar “Double Jeopardy Law Made Simple” 106 Yale L.J. 1807 (1996-1997); M Zeidy “Doctrine of Double Jeopardy in International Criminal and Human Rights Law” Mediterranean J. of Hum Rts. (2002) 183.

¹⁸ Note 12, 52

¹⁹ *Brown v Ohio* 432 US 161 (1977)

included offence because auto theft required proof of joyriding (as well as proof that the accused intended to permanently deprive the owner of possession of the vehicle). Accordingly, the auto theft indictment was impermissible.

*Grady v Corbin*²⁰ marked a shift from *Blockburger*. The accused had been convicted of driving while intoxicated and failing to keep to his lane, a traffic violation. When it later came to light that the victim of the accident, caused by the defendant's traffic violation, had died from his injuries, the defendant was charged and convicted of manslaughter, reckless homicide and drunken driving. On appeal, the Supreme Court articulated the test as follows: a second prosecution may not be held "if, to establish an essential element of an offense charged in that [second] prosecution, the government will prove conduct that constitutes an offence of which the defendant has already been prosecuted".²¹ Accordingly, Court found that the accused should not be placed in further jeopardy for manslaughter, reckless homicide or drunken driving.

In *United States v Dixon*²² the Supreme Court returned to the *Blockburger* test. Here, two defendants had been convicted of contempt of court for violating courts orders, which barred them from committing offences on their release from custody. They were then prosecuted for the same conduct to which the court orders related. The Supreme Court ruled that, because two of the offences contained the exact same

²⁰ *Grady v Corbin* 495 US 508 (1990)

²¹ *Id* at 510

²² *United States v Dixon* 509 US 688 (1993)

elements as the contempt charge, these charges could not survive the double jeopardy prohibition.

The brief sample of the Supreme Court jurisprudence demonstrates an inconsistent conception of the double jeopardy protection, at times the approach is broader and other times more limited than is warranted. Although the double jeopardy clause in the Fifth Amendment limits the government to one bite at the cherry, very little else is clear. The Court should be faithful to the constitutional text. The double jeopardy clause was clearly intended to relate only to *same* offences. This is consistent with the historical development of the double jeopardy protection.²³ By enquiring into the elements of the offenses and by trying to establish whether the proof of one offence necessarily required proof of another, the Court has run into massive interpretive problems. Lenient treatment of auto theft and manslaughter does not serve the interests of justice. There is no sound legal argument or policy justification why prior convictions for lesser-included offenses should bar subsequent prosecutions for the greater offense. As the Court discovered, double jeopardy pertinently raises the question of appropriate levels of deference to the Legislature (in regard to its role in creating offences) but easy solutions are elusive.

In respect of multiple prosecutions, the rules of the game are somewhat clearer. The general rule is that acquittals, whether by a jury or court, based on the insufficiency of the evidence presented, are not capable of being appealed by the

²³ Note 17 at 1816, quoting Sir W Blackstone “It is to be observed that the pleas of *atrefois acquit* and *atrefois convict*...must be upon a prosecution for the same identical act and crime”

state.²⁴ Whether acquittal verdicts result from error is immaterial, the defendant must not be put in jeopardy twice for the same offence.²⁵ A second prosecution of the same offence is however permissible when a convicted defendant has successfully set aside his conviction on grounds other than the insufficiency of the evidence.²⁶ On the assumption that there is a “continuing jeopardy” until final judgment, mistrials justified by “manifest necessity” may be followed by a second trial²⁷ even if the mistrial resulted from an innocent procedural error by the prosecutor.²⁸ However, mistrials caused by the defendant or granted at the defendant’s request do not prohibit a retrial.²⁹

The double jeopardy protection is limited by the dual sovereignty doctrine. The doctrine, set out in *United States v Lanza*³⁰ establishes that the double jeopardy clause does not bar prosecutions for the same offense at state and federal level. The Court stated “ “we have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory...It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each”.³¹ The Supreme Court has also confirmed that, because states are equally sovereign, a defendant convicted under the laws of one state may be indicted under the laws of

²⁴ *United States v Scott* 437 US 82 (1978)

²⁵ *United States v Martin Linen Supply Co* 430 US 564, 571 (1977)

²⁶ *Ball v United States* 163 US 662 (1896)

²⁷ *Arizona v Washington* 434 US 497

²⁸ *Illinois v Somerville* 410 US 458 (1973)

²⁹ *Oregon v Kennedy* 456 US 667 (1982)

³⁰ *United States v Lanza* 260 US 377

³¹ *Id* at 382

another state for the same offence.³² Furthermore, the dual sovereignty approach also operates in respect of sequential foreign and federal prosecutions.³³ Although the so-called “sham exception”³⁴ limits further prosecutions by different sovereigns if the second prosecution is a cover for a prosecution by the first sovereign, who failed at its first attempt, this is a limited and narrow exception.

Under English common law, there is an absolute bar against indicting a defendant for the same offence twice if the accused has been acquitted or convicted. This absolute prohibition is now subject to a statutory exception, in the form of the Criminal Procedure and Investigations Act (1996), where acquittals are tainted by interference with or intimidation of jurors and witnesses.³⁵ *Artefois acquit/convict* applies only when the offences in the first and second prosecutions are identical in fact and law. Unlike the dual sovereignty approach of the United States, there is a long line of authority which indicates that the English courts will not try defendants who have already been tried by foreign courts with competent jurisdiction for the same offences.³⁶ English common law provides that, subject to a few limited exceptions, the prosecution has no right of appeal.³⁷ In 1998 the United Kingdom passed the Human Rights Act which incorporates the [European] Convention for the Protection of Human Rights and Fundamental Freedoms³⁸ (the European Convention). It remains to be seen how the common law defenses of *atrefois acquit*

³² *Heath v Alabama* 474 US 82 (1985)

³³ *United States v Rashed* 83 F Supp 2d 96 (DC 1999)

³⁴ *Bartkus v Illinois* 359 US 121 (1959)

³⁵ Law Commission of England and Wales: Double Jeopardy Paper No 156 (2001), par 2.15

³⁶ Note 8 *supra* at 1296

³⁷ Note 35 *supra*

³⁸ 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953

and *atrefois convict* will be influenced by Additional Protocol 7 to the European Convention³⁹ when it ratifies the Protocol.⁴⁰

Part II: *Non bis In Idem* in the International Context

Although commentators argue that the internal application of *non bis in idem* has achieved the status of customary international law, all agree that its application as between different sovereigns, or as between nations and international courts, is less entrenched or developed.⁴¹ Apart from extradition law⁴² most commentators agree that the international application of *non bis in idem* cannot be considered customary international law nor can it be considered a general principle of international law.

At an international level, the application of *non bis in idem* is hindered by several factors, principally the fact that: (a) recognition of foreign criminal judgments is a limitation of sovereignty⁴³ (b) there are wide disparities in respect of its implementation at national level⁴⁴ (c) recognition of foreign criminal judgments, or

³⁹ (ETS 117), *entered into force* Nov. 1, 1988. Note that the UK has not yet ratified Additional Protocol 7. (<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=117&CM=7&DF=5/3/2006&CL=ENG>)

⁴⁰ The UK has not ratified Additional Protocol 7 but may yet do so, see note 35, par 1.9 (<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=117&CM=7&DF=5/3/2006&CL=ENG>),

⁴¹ A Cassese *International Criminal Law* 2003 (Oxford Univ. Press) 319

⁴² Most extradition treaties contain some form of *non bis in idem* principles, however the scope of such provisions are limited. The treaties often provide that *non bis in idem* may be used as a ground to refuse extradition because of an earlier prosecution in the courts of the requested state. It is seldom for a treaty to permit refusal of extradition on the grounds of a prior prosecution in the requesting state. It is even more unusual for a treaty to permit refusal on the basis that there has been a previous prosecution in a third state. See G Conway "Ne bis in Idem in International Law" 3 Int'l Crim L. Rev 217 2003 at 233

⁴³ See note 13 *supra*

⁴⁴ Conway, note 42 *supra*, sets out the biggest areas of variance: the common law tradition generally applies the principle in abstract (by reference to the offence committed) while the civil law tradition prefers a concrete application (by reference to the factual conduct that forms the basis of the offence); the common law approach is conceived in territorial, rather than national, terms. Furthermore, the common law tradition

judgments of international courts, require a high degree of faith in the administration of justice by the other jurisdictions.⁴⁵ Below, the relevant aspects of the International Covenant on Civil and Political Rights⁴⁶ (hereafter “the ICCPR”) the European Convention and the Convention on Schengen⁴⁷ (hereafter “the Schengen Convention”) are briefly discussed.

Non Bis In Idem in Multilateral Treaties

Article 14(7) of the ICCPR 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”

In 1984 the United Nations Human Rights Committee (hereafter “the HRC”) published its views on article 14(7) of the ICCPR. The HRC noted in General Comment 13 that states have expressed differing views on the resumption of criminal cases and some have felt it necessary to make reservations in that respect. The HRC noted that most states distinguish between the resumption of a trial in exceptional circumstances and the prohibition of a re-trial under the principle of double jeopardy.

At the outset it should be noted that article 14(7) refers to final conviction and final acquittal. Thus double jeopardy does not enter into the picture until final

is to prohibit appeals by prosecutors against acquittals or light sentences whereas the civil tradition generally contains no such bar and the state may appeal acquittals due to errors of law or errors of fact.

⁴⁵ Note 41, 318

⁴⁶ ICCPR 999 U.N.T.S. 171, entered into force Mar 23, 1976

⁴⁷ See http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_239/l_23920000922en00010473.pdf (last visited 3 May 2006)

judgment is delivered. The textual formulation therefore permits a second prosecution or trial pending a final judgment under the law or penal procedure of the state concerned. By specifically referring to the laws and penal procedures of each country, the formulation of article 14(7) lends itself to a narrow application in that it does not prevent prosecutions for the same offence by different sovereigns, a dual sovereignty approach. This was affirmed by the HRC in *AP v Italy*.⁴⁸ AP had been convicted of conspiring to illegally exchange currency in Switzerland. He was sentenced to two years imprisonment, after which he was expelled from the country. Italy indicted him for the same offence and asked France to extradite him so that he could stand trial in Italy. France refused but Italy convicted him *in absentia*. AP referred an individual complaint to the HRC alleging that Italy sought to violate his right against double jeopardy. The HRC ruled that the complaint was inadmissible because article 14(7) prohibited double jeopardy only in regard to adjudication within a given state.

In *Jijon v Ecuador*⁴⁹ the HRC was again asked to consider article 14(7). In this case, the complainant submitted that his right, not to be subjected to double jeopardy, was violated by Ecuador. He had been convicted of participating in a bank robbery and served a one year prison sentence. Upon his release he was charged for the unlawful possession of firearms during the bank robbery. However, the Ecuadorian Superior Court had dismissed the charges. Jijon argued that his right not to be subjected to double jeopardy had been violated. The HRC held that there was no

⁴⁸ *AP v Italy* Communication 204/1986 (16 July 1986)

⁴⁹ *Jijon v Ecuador* Communication No. 277/1998: Ecuador 08/04/92

violation declaring that “while the second indictment concerned a specific element of the same matter examined in the initial trial, Mr Teran was not tried or convicted a second time, since the Superior Court had quashed the indictment, thus vindicating the principle of *ne bis in idem*”.

The European Convention makes no express reference to *non bis in idem* but article 4(1) of Additional Protocol 7 to the European Convention declares that “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.” However, article 4(2) makes specific provision to re-open a case in accordance with national laws if there are new or newly discovered facts or if there has been serious defect in the previous proceedings, which could have affected the outcome of the case. Article 4(2) is also flexible enough to accommodate different domestic approaches. The sub-article provides that the principle does not in any way limit the right of convicted persons to re-open of the case in circumstances permitted under national law.

In *Oliveira v Switzerland*,⁵⁰ the European Court of Human Rights (hereafter “the ECHR”) considered article 4 of Additional Protocol 7 and took a narrower view than it previously had in *Gradinger v Austria*.⁵¹ Oliveira had been driving on a snow

⁵⁰ *Oliveira v Switzerland* 25711/94 [1998] ECHR 68

⁵¹ *Gradinger v Austria* 15963/90 [1995] ECHR 36. Gradinger had been convicted of causing death by negligent driving. During the proceedings, the court had determined that his alcohol limit did not exceed the prescribed limit. After the convictions, new evidence came to light and he was given a fine for driving

covered road and was unable to control her vehicle because she had not adjusted her speed. The vehicle veered into another car and caused injuries to the occupant of that vehicle. The police magistrate fined her for violating the Road Traffic Act, by failing to drive safely and control her vehicle. She was subsequently fined by the district court for negligently causing physical injury to the occupant of the other vehicle. The ECHR held that article 4 did not prohibit people from being tried twice for the different offences arising from the same set of facts.

Apart from extradition treaties, there have been few attempts to establish the international application of the *non bis in idem* principle (i.e. preventing state Y from conducting further prosecutions following a prosecution for the same offence by state X). Early attempts to do so in Europe failed.⁵² These were followed by the Schengen Convention which has been more successful, with at least ten member states.⁵³

Article 54 of the Schengen Convention provides 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.” However, article 55 builds in several exceptions which contracting states may adopt in relation to article

with excess alcohol in his blood system. The ECHR noted that the offences were different but found that article 4 had been violated because both charges were based on the same conduct.

⁵² See: European Convention on the International Validity of Criminal Judgments (ETS No. 070, *entered into force* July 26, 1974) and the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 073, *entered into force* March 30, 1978) have been ratified by very few states.

⁵³ C Van den Wyngaert & G Stessens “The International *Non Bis in Idem* Principle: Resolving Some of the Unanswered Questions” 48 Int’l Comp. L. Q. 779 1999, 787

54. The first exception relates to instances where the acts to which the foreign judgment relates occurred in whole or in part on its own territory. The second exception relates to instances where the acts, to which the foreign judgment relates, constitute an offence against the national security or other equally important interests of that contracting party.

International Criminal Tribunals

The London Charter of 1945 established the legal basis for the punishment of Nazi war criminals, however the nuts and bolts for the trials of the major war criminals were provided by article 11 of the Constitution of the International Military Tribunal (hereafter the IMT⁵⁴). Article 11 provided that “Any person convicted by the Tribunal may be charged before a national, military or occupation court...with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the IMT for participation in the criminal activities of such group or organization.” Clearly this was an extremely weak formulation of the *non bis in idem* principle.⁵⁴ Although the IMT⁵⁵ occasionally made statements to articulate their respect for the principle of *non bis in idem* there was in fact little real concern for the principle.⁵⁶

⁵⁴ Note 24, 226

⁵⁵ The Tribunal stated “We conceive the only purpose of this Tribunal is to bring to trial war criminals that have not already been tried” Trial of War Criminals before the Nuremburg Military Tribunals under Control Council Law No. 10, Vol. VI at 1213 (1952) in O. Triffterer, note 9 *supra* at 424

⁵⁶ *Id*

The International Criminal Tribunal for Rwanda (hereafter “the ICTR”) established by Security Council Resolution 955 (1994) incorporated the *non bis in idem* principle in article 9,⁵⁷ as did article 10 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (hereafter “the ICTY”) established by Security Council resolution 827 (1993).⁵⁸ In the *Tadic* case, the defense claimed a violation of *non bis in idem* because proceedings on the same indictment had already commenced against him in Germany.⁵⁹ The Trial Chamber dismissed the claim on the grounds that “the accused has not yet been the subject of a judgment on the merits of any of the charges for which he has been indicted”⁶⁰ However the ICTY did hold that Germany, which had deferred the case to the ICTY, could not again prosecute Tadic for the same facts after the disposition of his case at the ICTY.⁶¹

⁵⁷ Article 9 provides that (1) No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda (2) A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if (a) The act for which he or she was tried was characterized as an ordinary crime; or (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted (3) In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

⁵⁸ Article 10 provides that “(1) No person shall be tried by a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal. (2) Any person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal if: (a) the act for which he or she was tried was characterized as an ordinary crime, or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted. (3) In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

⁵⁹ Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of *Non bis in Idem*, 14 Nov 1995 at reg. pg 7118, cited in O Triffterter note 9 *supra* at 424

⁶⁰ *Id*

⁶¹ Decision on Defense Motion on the Principle of *ne bis in idem* (14 Nov. 1995) par 13

As mentioned earlier, *non bis in idem* is relevant also when defendants face multiple convictions which may arise from their indictment for several crimes with overlapping elements. War crimes, crimes against humanity and genocide, for example, contain overlapping elements. In these instances, it is important for the prosecutor to avoid a multiplicity of charges relating to the same conduct. However, in the absence of guidelines as to which crimes deserve the priority, this is not an easy task.⁶² Although the ICTY rejected the notion of ranking international crimes, the ICTR has been more receptive to the idea.⁶³ However, neither the ICTY nor the ICTR has expressly provided for the ranking of international crimes in their constitutive documents.

Although the jurisprudence of the ICTR and the ICTY has not been uniform, both *ad hoc* tribunals took the approach that cumulative charges phrased in the alternative are permissible if the same conduct contravenes more than one criminal provision. The tribunals took the view that potential unfairness to the accused should be addressed at the sentencing stage. This was explained by the Appeal Chamber in *Celebici*: “Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not permissible to determine to a certainty which of the charges brought against the accused will be proven. The Trial Chamber is better poised, after the parties’ presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition,

⁶² A. Bogdan “Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda” 3 *Melb. J. Int’l L.* 1 2002, 5

⁶³ *Id* at 15, comparing the approach in *Akayesu* and *Kupresic*

cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.”⁶⁴

Though cumulative charges may be permissible if they are phrased in the alternative, whether cumulative convictions are justifiable is another matter. In *Akayesu* the Trial Chamber took the view that multiple convictions for the same conduct is not permissible when one offence is the lesser included offence of the other or when one offence charges the accused as an accomplice and the other charges the accused as the principal offender. In the *Celebici* case, the Appeal Chamber stated that multiple convictions based on the same set of proven facts has on occasion “been upheld, with potential issues of unfairness to the accused being addressed at the sentencing phase”.⁶⁵

The jurisprudence of the ICTY and the ICTR both demonstrate an inclination to adopt the same elements test espoused by *Blockburger*.⁶⁶ As Bogdan points out, this may adversely impact on defendants’ rights. Defendants face the possibility of being convicted on multiple charges for the same conduct and then run the risk of being twice punished for the same conduct. Even if sentences for cumulative convictions run concurrently there are other potential inequities for the defendant. Firstly, there are inevitable stigmas that attach to cumulative convictions. Secondly, cumulative convictions may adversely affect the possibility of early release. Finally, defendants will be adversely affected by habitual offender laws if they are subsequently

⁶⁴ *Celebici* Case No IT-96-21-A (20 February 2001) [400] cited by Bogdan note 60 *supra* at 21

⁶⁵ *Celebici* Case IT-96-21-A (20 February 2001) [405]

⁶⁶ *Kupreskic* Case No IT-95-16-T (14 January 2000) [718]; *Akayesu* Case No. ICTR-96-4-T (2 September 1998) [468]; *Celebici* Case IT-96-21-A (20 February 2001) [412]

convicted in different jurisdictions.⁶⁷ For these reasons, the proposition that multiple convictions should only be permissible if the offences are “genuinely distinct” (to be determined by the nature of the conduct and not the elements of the offence) is persuasive.

The ICTY and the ICTR was based on the principle that the *ad hoc* tribunals would exercise concurrent jurisdiction, although the *ad hoc* tribunals were be granted primacy of jurisdiction. These tribunals had wide powers to intervene at any stage of national proceedings and request the state to defer the matter to the tribunal.

Understanding the provisions of the International Criminal Court (ICC) must be grounded in the reasons for its establishment. It is therefore necessary to briefly explore the inadequacies of domestic courts in the fight against international crime. This will be accomplished by reference to East Timor and Cambodia.

Part III: East Timor and Cambodia

During 1975, the Indonesian army invaded the Portuguese colony of East Timor. Between 1975 and 1999, approximately 200 000 East Timorese were murdered in order to subjugate them to Indonesian rule.⁶⁸ On 30 August 1999 the East Timorese overwhelmingly voted overwhelmingly for independence under UN supervised elections, as opposed to merely being granted autonomy from Indonesia. Following

⁶⁷ Note 62, 24

⁶⁸ T. Gray “To Keep You is No Gain, to Kill You is No Loss—Securing Justice Through the International Criminal Court” 20 *Ariz. J. Int’l & Comp. L.* 645 (2003), 659

the announcement of the results during September 1999, Indonesian army-backed militias began a campaign of murder, arson, and forced expulsions.⁶⁹ During January 2000, the UN called for the establishment of an international human rights tribunal to prosecute the heinous misdeeds committed during 1999. The Indonesian state persuaded the UN to allow it to establish its own tribunal to prosecute these crimes. In January 2002, Indonesia established its first human right court. At the same time, East Timor created its own UN-backed tribunal.

As at January 2002 the East Timor tribunal, despite the frequent refusal of Indonesia to extradite suspects, had convicted ten militiamen for crimes against humanity. By March 2003, the East Timor tribunal had indicted nearly 150 individuals on charges of genocide and crimes against humanity.⁷⁰

By contrast, the Indonesian tribunal has demonstrated a marked lack of will and capacity to prosecute individuals for their crimes. This is evident from the small number of indictments and convictions as well as the trifling sentences handed down. The Indonesian tribunal only convicted two defendants by December 2002 and it sentenced one to three years imprisonment⁷¹ and the other to ten years⁷². The sentences pale in comparison to the heinous nature of the crimes. Furthermore, the

⁶⁹ <http://www.hrw.org/background/asia/timor/etimor-back0829.htm>

⁷⁰ Note 68, 675

⁷¹ A former Indonesian governor, A. Soares, was sentenced to three years imprisonment for committing crimes against humanity. See note 67 *supra* at 672

⁷² A deputy commander of two militia groups, E. Gutierrez, was found guilty of murder as a crime against humanity and assault as a crime against humanity. He was sentenced to ten years imprisonment.

effectiveness and legitimacy of the Indonesian tribunal is severely dented by instances of witness intimidation, corruption and political pressure.⁷³

Between 1975 and 1979 between 1.7 and 2 million Cambodians perished in horrific circumstances at the hands of the Khmer Rouge.⁷⁴ Although the Khmer Rouge lost power in 1979, as at 2003 there had still not been any prosecutions for the brutal murders that occurred during its reign of terror.⁷⁵ Discussions between Cambodia and the UN began during 1997 with a view to establishing a mechanism to prosecute those responsible for the crimes committed under the Khmer Rouge. The Cambodian government insisted on a domestic tribunal, despite UN disapproval, but nevertheless sought UN assistance. Following disagreements over the independence of the proposed tribunal and the status of previous amnesties a hybrid court was agreed upon during June 2003.⁷⁶ However, many of the criminals who could have been prosecuted have passed away.

The East Timor and Cambodian situations demonstrate the enormous difficulties of using domestic tribunals to swiftly bring international criminals to justice. On one hand, it is necessary not to unnecessarily limit national sovereignty. On the other hand, the prosecution venue must be guided by the need to: (a) conduct effective prosecutions (b) hold trials that meet standards of due process (c) guarantee security of witnesses (d) ensure that the public has access to the proceedings (e) ensure that the proceedings create a culture for human rights and rule of law (f) ensure that

⁷³ Note 68 *supra*, at 669-670

⁷⁴ Note 68 *supra*, at 658-9

⁷⁵ Note 68 *supra*, at 680

⁷⁶ Note 68 *supra* at 683

criminals are not selectively prosecuted and (g) ensure that prosecutorial proceedings are conducted and finalized without undue delay.

Part IV: The Rome Statute of the International Criminal Court

At the end of the Second World War, the seeds for an international criminal court began to germinate. These plans, stalled by the Cold War, resurfaced in 1993-4 with the establishment of the *ad hoc* tribunals. The evident inadequacy of domestic courts to deal with international crimes, coupled with the enormous financial burden of *ad hoc* tribunals, led to an increasing awareness that a permanent international court was necessary.

In July 1998, 120 nations signed the Rome Statute ushering in a new era for international criminal law.⁷⁷ By August 2003, there were 139 signatories and 91 parties to the Statute.⁷⁸ The Rome Statute created the first permanent international criminal tribunal with jurisdiction over genocide, crimes against humanity, war crimes and crimes against aggression. Unlike the *ad hoc* tribunals, the ICC was specifically not granted primacy of jurisdiction.⁷⁹

Although the *non bis in idem* provisions are set out in article 20, this must be read together with the complementary provision in article 17. This article precludes the ICC from hearing a matter if it is being investigated or prosecuted by a state, unless

⁷⁷ Note 68 *supra*, 646

⁷⁸ Note 68 *supra*, 647

⁷⁹ M. Zeidy "The Principle of Complementarity: A New Machinery to Implement International Criminal Law" 23 Mich. J. Int'l L. 869 2001-2002, 890;

the state is unwilling or unable to genuinely prosecute.⁸⁰ In addition, the article provides that the ICC may not hear cases where the person concerned has already been tried for the conduct in question by the state. This places a difficult standard of proof on the ICC prosecutor. If the ICC displays deference to national sensitivities, it will be relatively easy for states to deny the ICC jurisdiction by subjecting them to sham investigation.⁸¹

Before we turn to the provisions of article 20, it is necessary to mention that the Rome Statute prevents double punishment for the same conduct by requiring the ICC to deduct any time previously spent in detention under an order of the ICC. In addition, the ICC is required to deduct any time otherwise spent in detention in connection with the conduct underlying the offence.⁸² Article 20 contains three subparagraphs. Each of these will be considered separately.

Article 20(1) reads: “Except as provided for in this Statute, no person shall be tried before the Court with *respect to conduct which formed the basis of crimes* for which the person has been convicted or acquitted by the Court” (Emphasis added). This sub-article protects against repeated prosecutions by the ICC. The phrase “except as provided for in the statute” was necessary to accommodate further prosecutions that could result from appeals and reviews under article 81, read with

⁸⁰ Although the concept of inability was uncontroversial the concept of willingness to prosecute was contentious because certain states felt that this might lead to violations of constitutional protections against double jeopardy. S Williams in O. Triffterer *op cit* .note 9, 388

⁸¹ G Robertson QC *Crimes Against Humanity* 1999 (Penguin Publishers), 350

⁸² Article 78 of the Rome Statute

article 83(2).⁸³ Article 20(1) refers to the *conduct* which formed the basis of the crimes and is therefore a broad formulation of the *non bis in idem* protection. The scope of the protection depends on whether the same facts or conduct has previously been prosecuted by the ICC. Accordingly, the characterization of the offence and the legal elements of the offence are irrelevant to the application of the *non bis in idem* principle in the sub-article. The reference to convictions and acquittals clarifies that the article does not prevent further prosecutions by the ICC when there has been an amendment, withdrawal or non confirmation of charges.⁸⁴

Article 20(2) provides that: “No person shall be tried *by another court for a crime referred to in article 5* for which that person has already been *convicted or acquitted by the Court*” (Emphasis added). This sub-article prevents state parties from prosecuting persons for crimes referred to in article 5 (for instance, genocide, war crimes and crimes against humanity) if they have been convicted or acquitted of those crimes by the ICC. However, some elements of the article 5 offences constitute independent crimes under national law (for instance, murder is an element of genocide). Accordingly, individuals may be prosecuted for crimes under national law even though they may have been prosecuted for the same conduct by the ICC. The article therefore only protects defendants when states criminalize conduct within the jurisdiction of the ICC. The negotiating parties believed this limitation of *non bis in*

⁸³ Article 81 of the Rome Statute permits both the prosecutor and the defendant to appeal or review the conviction, acquittal or sentence on any of the following grounds (a) procedural error (b) error of fact or (c) error of law. Defendants are also permitted to appeal on any other grounds which affected the fairness or reliability of the proceedings or decision. Article 83(2) (b) permits the appeal chamber to order a new trial following a successful appeal or review.

⁸⁴ Note 9, 427

idem was justified because the ICC has no jurisdiction over crimes under national law.⁸⁵

It is submitted that national courts should have been expressly prohibited from prosecuting and punishing defendants again for the *same conduct* after their earlier conviction or acquittal by the ICC. The absence of such a clause does not lie in the legal inability to include such a clause. In *Tadic*, for instance, the IMT indicated that the prosecution in Germany should not proceed in respect of the same acts that were the subject of the prosecution by the IMT. It merely reflects that states were not ready to limit their sovereignty in such a manner as to guarantee the full protection of *non bis in idem*. Of course, it is hard to defend the human rights of international criminals. However, human rights are universal and must also protect the marginalized and most reviled in society.

Article 20(3) provides that: “No person who has been tried by another court for *conduct also proscribed* under article 6, 7 or 8 shall be tried by the Court with respect to the *same conduct* unless the proceedings in the other court:

- (a) Were for the *purpose of shielding the person* concerned from criminal responsibility for *crimes within the jurisdiction of the Court*; or
- (b) Otherwise were *not conducted independently or impartially* in accordance with *norms of due process recognized by international law* and were

⁸⁵ Note 9, 428

conducted in a manner which, in the circumstances, was *inconsistent with an intent to bring the person concerned to justice*” (Emphasis added)

Article 20(3) is without doubt the most contentious of the provisions in the Rome Statute. It first sets out the general rule, to exclude further prosecutions by the ICC in respect of conduct already prosecuted by national courts. The use of the word “conduct” makes it clear that the article operates regardless of how the crimes were characterized under national law. Then the article creates two exceptions to the general rule: (a) where the national proceedings were a sham and (b) where the process was not independent, impartial or otherwise not in accordance with international standards of due process. In these exceptional circumstances, conduct that has already prosecuted at national level may be reprosecuted by the ICC. Because the exceptions creates supervisory jurisdiction over national courts by the ICC, it was vigorously opposed by some states during the negotiations.⁸⁶

It is unclear whether the first exception, where the national proceedings were for the “purpose of shielding the person from criminal responsibility” for international crimes, will be objectively or subjectively determined. The intention of the negotiating parties was to find a formulation that prescribed an objective test.⁸⁷ Tallgren claims that good faith decisions by national prosecuting authorities to abandon proceedings, due to the insufficiency of the evidence or because the prosecution does not serve the interests of justice, would be sufficient to bar a second

⁸⁶ Note 9 *supra* 429

⁸⁷ Note 9 *supra* 429

prosecution by the ICC. However, it is submitted that reference to word “purpose” in sub-clause 20(3) (a) creates scope for a subjective interpretation of the article.

Implementation of the second exception, *viz.* where national proceedings were not conducted independently, impartially or in accordance with international due process norms, is likely to be prove challenging for the ICC. It creates a margin of discretion for the ICC to evaluate national proceedings against the still unclear international standards of due process.⁸⁸ As Tallgren points out, international law has “so far, if not expressly recognized, at least quietly tolerated all kinds of extraordinary and biased courts martial and extrajudicial solutions to large scale international crimes.”⁸⁹ It is suggested that the international standards of due process encompass, at least: the right to be presumed innocent, an open and public trial, an independent and impartial court; the right of defendants not to be compelled to testify against themselves.⁹⁰

It should be noted that article 20 does not protect against multiple criminal prosecutions by different contracting parties. This is yet another indication of the limited protection afforded by the *non bis in idem* formulation in the Rome Statute.

It should also be noted that while article 20 does not preclude the ICC from exercising jurisdiction over the conduct of persons who have been granted amnesty

⁸⁸ The Rome Statute itself contains provisions relating to fair trials. Article 14 of the ICCPR sets out fairly detailed international standards of due process, but there are a number of reservations to the article and there are still widely divergent national approaches to it. In General Comment 13, par 2, the Human Rights Committee noted “In general, the reports of States fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Laws and practices dealing with these vary widely from State to State.” See YS Kim *The International Criminal Court* (Wisdom House Publishers) 2003, 293

⁸⁹ Note 9, 432

⁹⁰ Note 81, 113-116

via truth commissions and amnesty tribunals⁹¹ article 53 permits the prosecutor to abandon an investigation if it would not serve the interest of justice.

Part V: Conclusion

Given that the drafters of the Rome Statute looked to the Statutes of the ICTR and ICTY for guidance as to an appropriate formulation of *non bis in idem*, the significant textual similitude is unsurprising. Somewhat predictably, the negotiating parties were unable to reach consensus on whether the common law or civil law model of *non bis in idem* would be more appropriate, which led to the adoption of a *sui generis* model that borrows from both systems.⁹² In any event, neither the common law model nor the civil law models are ideal.

It is both natural and inevitable that *non bis in idem* will vary in its scope and application in the domestic and international environment.⁹³ By contrast with the national context, international criminals may be able to harness national resources for their defense.⁹⁴

The adoption of the conduct based test in article 20(1) of the Rome Statute, as opposed to the same-elements test, must be welcomed. This is consistent with the rationale of the *non bis in idem* principle and affords necessary protection for

⁹¹ M. Arsanjani “Jurisdiction and Trigger Mechanisms of the ICC” in *Reflections on the International Criminal Court* (TMC Asser Press) 1999 by Hebel, Lammers & Shukking (Eds), 73

⁹² G.A. Knoops *Surrendering to the International Criminal Courts: Contemporary Practice* (Transnational Publishers) 2002, 317

⁹³ J. Costa “Double Jeopardy and Non Bis In Idem: Principle of Fairness” 4 U.C. Davis J Int’l L. & Pol’y 181 1998, 195

⁹⁴ *Id* at 195-196

defendants. There is no reason why the ICC prosecutor should be afforded a second bite at the cherry.

As previously mentioned, article 20(2) of the Rome Statute grants states the power to prosecute defendants for national crimes outside of ICC jurisdiction. Evaluating this article from a human rights perspective, it is apparent that this is a manifest limitation of the *non bis in idem* protection. Even if the ICC has no jurisdiction in respect of national crimes, this did not prevent the drafters from prohibiting further prosecutions and punishment in respect of the *same conduct*. The drafters' belief that they could only limit the power of national jurisdiction in relation to the specific crimes provided for in the Rome Statute⁹⁵ does not hold up to scrutiny.

It is submitted that article 20(3) of the Rome Statute contains a legitimate limitation of state sovereignty in the two exceptions that have been created. Firstly, the limitations on sovereignty are narrow in scope. Secondly, national legal systems cannot be wholly trusted to genuinely prosecute international criminals. Grave international crimes, such as genocide, often go hand in hand with insecure or illegitimate domestic legal systems. Even after their fall from grace, international criminals may be able to bring enormous pressure to bear on domestic actors thereby decreasing the prospects of an impartial hearing. As Judge Cassese stated in *Tadic*: “It would be a travesty of law and betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human

⁹⁵ R. Lee (Ed) *International Criminal Court: The Making of the Rome Statute 1999* (Boston: Kluwer Law International), 58

rights.”⁹⁶ The enormous obstacles to securing justice, for international crimes, through national mechanisms are understood by the East Timorese and Cambodians.

In sum, although the *non bis in idem* provisions may have been framed by necessary political compromise, certain provisions do unreasonably diminish the protection of defendants against vexatious repeat prosecutions by state parties. Defendants may prove their innocence at the ICC and yet face subsequent prosecution at national level for the same conduct. In addition, it may be legitimately be argued that the Rome Statute might have done more to advance recognition of foreign criminal judgments between the contracting parties.

⁹⁶ Cited in J Paust *et al International Criminal Law: Cases and Materials* 2nd Ed, 2000 (Durham, N.C: Carolina Academic Press) 163