

**RE-EXAMINING THE RELATIONSHIP BETWEEN *NE BIS IN IDEM*
AND COMPLEMENTARITY UNDER THE STATUTE
OF THE INTERNATIONAL CRIMINAL COURT**

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1. INTRODUCTION

The last decade of the former century concluded giving rise to a new era of international criminal law. More precisely, in 1998 in Rome, negotiating parties signed a statute founding a new court which would, from then on, try and adjudicate perpetrators of the crimes violating values involving the whole international community – the so called *core crimes*. The reference is to the International Criminal Court in the Hague (hereafter the ICC/Court). This is the first institution to *almost* have a universal jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and aggression¹.

2. MULTIPLE JURISDICTION AND ITS CONSEQUENCES

The enthusiasm which accompanied the signature of the Statute of Rome brought about the discussion of the issues that the supranational

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¹ The courts jurisdiction is limited to the crimes committed on the territory of the state-party by either nationals of any state-party or the third states nationals. However, the Security Council may exercise its power to defer the situation regarding the atrocities committed also on the non-state-party territory, where the jurisdiction would not be allowed according to the Rome Statute. Therefore one might urge to call it a *quasi* universal jurisdiction. See for example: M. A. Pasculli, *Studio sulla giurisdizione universale*, Second Edition, Padova 2013, p. 173 and the doctrine quoted therein.

jurisdiction would need to address. It is indeed the international element of the encompassed crimes and multiplicity of organs willing or able to accuse and conduct trials before judicial bodies of the proper states to lead to the unavoidable conflict of jurisdiction. The international customary law developed three main types of principles to ascertain the jurisdiction in the case of horizontal conflict – the *locus delicti commissi* and the passive or active nationality test². Recent years have shown also an emerging practice of the universality doctrine added to this picture, which seems to play the biggest role with respect to the above mentioned core crimes, as those concerning the values defended by the community as a whole – therefore allowed to be prosecuted by whatever state, regardless of the nationality of perpetrator or place of the commitment of crime. This, somehow controversial doctrine, can be strengthened by the foundation of the ICC itself. It is because of the new mechanism introduced to deal with the Court's jurisdiction – the so-called complementarity. Although the latter does not impose the duty to adopt the principle of universality by the State parties, actually does not even mention it, but to some extent has been thought to act as an incentive for the prosecution of international crimes, as it will be examined below³. Yet, the existence of the ICC completes the whole picture of possible concurrent jurisdictions, albeit at the vertical level.

Furthermore, this whole jurisdictional setting, complicated *per se*, urges to establish also a clear rule which could address the issue of prohibition of the second prosecution for the same offense after an acquittal or conviction sentence by the court which tried the case first. The reference is made to the principle, known in common law systems as a double jeopardy, or in civil law expressed with Latin *ne bis in idem* – not again about the same⁴. Thus, it needs to regulate the vulnerable balance between a fundamental right not to be prosecuted twice for the same acts and the state sovereignty which represents the interest of each state in punishing the crimes and preventing its nationals from being prosecuted outside of their country as well

² A. Cassese, *International Criminal Law*, Oxford 2003, p. 277.

³ B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford 2003, p. 105-128.

⁴ T. Surlan, *Ne bis in Idem in Conjunction with the Principle of Complementarity in the Rome Statute*, „Nauka, bezbednost, policija” 2004, vol. 1, p. 1.

as the effective prosecution of international crimes⁵. Therefore, the foundation of the international, impartial and independent tribunal strives to carve out an effective solution for an individual put in jeopardy of abuses.

3. *NE BIS IN IDEM* AND THE HUMAN RIGHTS PERSPECTIVE

The principle of *ne bis in idem* has been a subject of analysis and research numerous times in all its configurations – at the national, transnational, supranational level – and has been unanimously acknowledged as one of the fundamental human rights, specified in most of written constitutions and international treaties⁶. As an example Article 14 of the International Covenant on Civil and Political Right, Protocol 7 (Article 4) of the European Convention of Human Rights, Article 8 of the Inter American Convention on Human Rights, Article 54 of the Convention implementing Schengen, respectively Articles 9 and 8 of the ICTY and ICTR. Thus, it is beyond any doubt that the recognition of the principle is worldwide and it is enshrined as one of the fundamental human rights of the accused. Notwithstanding, the doctrine provides a quite widespread denial of acknowledgment of the *ne bis in idem* as a principle of international law. The foremost arguments against raise the lack of uniformity within the rule and disparity in approaches between the legal systems⁷. Unclear is what can be inferred from the *ne bis in idem* under different national or international statutes and conventions. What is the *chapeau* of the principle? What does it apply to and what does it cover? Hence, it is quite notable that different scholars coming from different legal systems, in particular from civil and common-law countries, point out different concerns as to the formulation of the principle under the Rome Statute. It is even

⁵ J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, Leiden-Boston 2008, p. 17.

⁶ See for instance: C. Van den Wyngaert, T. Ongen, *Ne bis in idem Principle, Including the Issues of Amnesty*, [in:] A. Cassese, P. Gaeta, J. R.W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A commentary*, Volume I, Oxford 2002, p. 716-717.

⁷ G. Conway, *Ne bis in idem in International Law*, “International Criminal Law Review” 2003, vol. 3, p. 217-218.

followed by the differing nomenclature⁸ – in common-law countries the principle is known as the double jeopardy prohibition or *autrefois acquit*, *autrefois convict*, whereas in civil law tradition it can be generally found under *ne bis in idem* or *non bis in idem*⁹. Moreover, it is commonly associated with the effect of *res iudicata*, which renders the judgment final¹⁰. For instance, in the United States, the 5th Amendment to the Constitution prohibits the prosecutors appeal as violating the *res iudicata*, whereas it is allowed in most of civil law countries¹¹. Nevertheless some authors argue that introduction of the principle to the international courts statutes can be a significant argument in favor of its recognition. For example Cassese states that a customary rule is arguably evolving, at least with regard to international crimes¹². The practice, however, seems not to be confirming the emerging process as, for instance, the Italian Supreme Court (*la Corte di Cassazione*) in one of its latest decisions has, again, denied the existence of a general principle of *ne bis in idem* in international law¹³. Furthermore, as the Human Rights Committee stated the double jeopardy prohibition under the ICCPR can be limited only to the single jurisdiction and is not absolute out of its boundaries¹⁴.

The origins of the principle, historically emerged at the national level, come from the asymmetry between the power of a state and an individu-

⁸ For the scope of this paper, which aims at analyzing the principle under the Rome Statute, the above mentioned wording might be used alternately.

⁹ A. Cassese, P. Gaeta, J. R. W. D. Jones, *op cit.*, p. 710; the notion *non bis in idem* is used for instance by C. van der Wyngaert, G. Stessens, *The international non bis in idem principle: resolving some unanswered questions*, “International and Comparative Law Quarterly” 1999, vol. 48.

¹⁰ See: M. Rogalski, *Prześlanka powagi rzeczy osądzonej w procesie karnym*, Kraków 2005.

¹¹ L. Finlay, *Does the International Criminal Court protect against double jeopardy: an analysis of article 20 of the Rome Statute*, “University of California Davis Journal of International Law and Policy”, Vol. 15, p. 241.

¹² A. Cassese, *op. cit.*, p. 320.

¹³ Cassazione Penale, No. 29664/14, 12 June 2014, summary of the decision available at: <<http://www.marinacastellana.it/blog/wp-content/uploads/2014/08/2966414.pdf>>, [last access on the August 31 2014].

¹⁴ M. N. Morosin, *Double Jeopardy and International Law: Obstacles to Formulating a General Principle*, “Nordic Journal of International Law” 1995, vol. 64, p. 262.

al, and disparity of arms in a hypothetical trial¹⁵. Three rationales for the existence of the principle can be distinguished. The first aims at protection of an individual from facing the trial twice, expressed in Latin by *nemo debet bis vexari pro una et eadem causa* – mostly emphasized in common law countries. The second concentrates on the prohibition for the prosecution of taking action against the same person for the same fact. And the last one relates to the deference of the previous judgment, *res iudicata pro veritate habetur* – which is aimed at keeping the foreseeability and certainty of the judicial system by respecting the seriousness of the judicial process and its judgments¹⁶. Gerard Conway mentions also the “avoidance of the increased possibility that the accused will be found guilty, though he or she is actually innocent”¹⁷. Hence, a general prohibition states that a person must be protected from being tried more than once for the same fact. But, it is exactly here, where the first divergences start. In some occasions the prohibition relates to the conduct – *idem* element – regardless of the normative sight that has been assigned to the conduct. In other words, an individual who was sentenced for a battery, cannot then be tried again for a sexual assault based on the same *actus reus*. Other statutes, instead, relate the *idem* element only to an offense, which is covered by the prohibition, therefore, so to say, a murder can be retried as a manslaughter. Thus, *idem* can be interpreted in a broad and narrow context¹⁸. This distinction has been a subject to the European Court of Human Rights analysis. In the *Zolotukhin ruling*, the Court affirmed the variety of approaches as to the *idem* element, but at the same time highlighted that, in order for the principle to be practical and effective and to provide certain foreseeability and certainty of the rights of individual it must be interpreted broadly, otherwise the role of guarantee enshrined in the ECHR would be undermined¹⁹.

¹⁵ D. Robertson, *A dictionary of human rights*, Europa Publications Limited 1997, p. 61.

¹⁶ C. Van der Wyngaert, G. Stessens, *op. cit.*, p. 780-781; see also A. Sakowicz, *Zasada ne bis in idem w prawie karnym w ujęciu paneuropejskim*, Białystok 2011, p. 32-41.

¹⁷ G. Conway, *Op. Cit.*, p. 222.

¹⁸ See for example: B. Nita, *Zasada ne bis in idem w międzynarodowym obrocie karnym*, “Państwo i Prawo” 2005, vol. 3, p. 33-34.

¹⁹ Sergey Zolotukhin v. Russia, ECHR (Grand Chamber), 10 February 2009, No. 14939/03, para 78.

To complicate the issue one might think, for instance under the Polish law, of a conviction for a continuing offense (series of conducts in realization of the same intent, considered as one crime) when, after the judgment, subsequently some new actions have been revealed²⁰. It is crucial to examine also the final judgments, to what extent arises the *bis* element. In other words, whether, for instance, the plea bargain agreement is covered by the norm or not? Does the *bis* prohibit only another punishment or it bars already a new prosecution? The questions that can be posed are far more than those presented and go far beyond the scope of this paper. Thus, it will be touched upon only a few of them, in particular in relation to the specific role assigned to the principle of *ne bis in idem* under the Rome Statute, as a consequence of the ICC's complementary jurisdiction.

4. COMMON DRAFTING HISTORY OF BOTH PRINCIPLES IN A NUTSHELL

Both the jurisdiction and the *ne bis in idem* issues, indeed, have been quickly revealed as a bone of contention between the states drafting the final version of the Statute. Many of them were reluctant to establish a court which would preempt their own judicial organs from conducting the trials for the crimes committed on its territory or by its nationals – as it happened for instance in the case of the *ad hoc* Tribunals²¹. On the other hand, the states agreed upon an international body which has as a scope bringing an end to impunity of the perpetrators of the most serious crimes in the concern to the international community as a whole, as well as prevention of such crimes²². It subsequently led to the idea of a court which would complement the national jurisdictions in case they were not able or willing to proceed against the accused. This solution had a vital impact on the essence of the double jeopardy.

²⁰ P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz do art. 1-296*. Tom I, 2011, available at www.legalis.pl, [last access on August 31 2014].

²¹ J. T. Holmes, *The Principle of Complementarity*, [in:] R. S. Lee (ed.), *The ICC The Making of the Rome Statute*, Kluwer Law International 1999, p. 41-43.

²² As one can read in the Preamble of the Rome Statute.

The Statute of Rome sets out both complementarity and double jeopardy principle in its second part, governing “Jurisdiction, admissibility and applicable law”, respectively Article 17 and 20. However, as it can be seen in the first works towards the foundation of the ICC from more than half a century ago, the approach was much different. When in 1951 the International Law Commission elaborated its draft, the *ne bis in idem* initially was placed in the chapter entitled “Trial”, while the jurisdictional issues in the articles of the chapter “Competence of the Court” - without even mentioning the term complementarity, which then had never been used²³. The wording *double jeopardy* was introduced for the first time in the revision of the draft from a few years after, replacing the previous *subsequent trial*. Whereas the jurisdiction of the Court – as the draft stated – would depend on an act of conferral by the State party. Those remote attempts were far beyond any realistic conclusion, and were followed by the period of a long stagnation. However, what definitely must be noted, they brought about the first discussions on the states *willing* to confer the jurisdiction to the Court, which to some extent may be considered slightly related to the current terminology used under the Statute, as it will be examined below²⁴. Then, it took almost 40 years to find the silver lining for those advocating for the international criminal tribunal. The works undertaken in the early 90s brought to the critical draft of 1994 which could be seen as the turning point of the ICC history. At the time, the formulation of the *non bis in idem*²⁵ principle was clearly influenced by the Statutes of the *ad hoc* Tribunals. What is notable, it stood still in the part “Trial”, in Article 42, just after the rights of the accused, and included also the provision regarding the prohibition of the double punishment – *ne bis in poena idem*. The jurisdiction was set in the third part, with the same name. But the big step towards the current regulation can be seen in the admissibility criteria, established in the fifth part under Article 35. Even the terminology used in Articles at a glance is much more similar to the one used in the cur-

²³ M. C. Bassiouni, *The Statute of The ICC A Documentary History*, New York 1998, p. 741-748.

²⁴ As observed by J. Stigen, *op. cit.*, p. 36.

²⁵ Kai Ambos underscores the grammar error in the usage of *non* according to the rules of negative command, see K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, Oxford 2013, p. 396.

rent Statute²⁶. Crucial decisions regarding the role of double jeopardy were made a year after. Then, the *ad hoc* Committee on the establishment of the ICC stated in its report that this formulation of *ne bis in idem* “came close to undermining the principle of *complementarity*. The appropriateness of empowering the court to pass judgment on the impartiality or independence of national court was seriously questioned”. Moreover, in the same report appears a statement with respect to the need of replacing all issues of admissibility, including also the one from Article 42 to one part of the Statute²⁷. In 1996, both issues of admissibility and the double jeopardy has been subject to numerous changes basing on different proposals. It is worth being noted that some parts of both articles were literally exchanging and alternating their positions, from one to another²⁸. The Statute of Rome was eventually adopted at the conference in 1998. Although there was a risk of the final clash as at the last session the US tried to gather the opposition to the adoption, alongside Israel and China²⁹. Until the end, the idea of the international court as a last resort was kept, and the principle determining its relationship with the national jurisdictions remained the complementarity. Consequently, the approach stated in the commission report of 1995 remained unchanged. Thus, from the structural point of view there can be no doubt that both principles are intrinsically related and the current setting is a consequence of a long negotiation. At this point, the brief analysis of the complementarity is needed.

5. COMPLEMENTARITY PRINCIPLE

Complementary jurisdiction means that the Court leaves the primacy to the national courts, unless they are unwilling or unable to prosecute those who committed the most serious of crimes. It is opposite provision compared with the respective Articles 8 and 9 of the *ad hoc* Tribunals for

²⁶ M. C. Bassiouni, *The Statute...*, p. 661-668.

²⁷ *Ibidem*, p. 640-642.

²⁸ *Ibidem*, p. 485-487; 544-551.

²⁹ W. Schabas, *Introduction to the International Criminal Court*, Cambridge 2001, p. 18.

the Former Yugoslavia and Rwanda (respectively ICTY and ICTR) which were empowered to the primacy over the national courts. This parallel relation could especially be observed when ICTY demanded Germany to surrender *Dusko Tadic* for the trial, regardless of the investigation opened in Germany³⁰. The motivation for such a different provision lays in the reasons of the establishment of the courts and in the different role they were to play. Both ICTY and ICTR needed the primacy in light of the political situation and ongoing racial conflicts and thus a risk of biased proceedings and unfair trials conducted by national authorities³¹. In the case of Rwanda, the national jurisdiction could be actually defined collapsed. Therefore, immediate and effective jurisdiction was indispensable³². The ICC, on the other hand was founded as a permanent tribunal with unlimited *ratione temporis*³³ to try international crimes. Hence, the complementarity was outlined in the way it respects the priority of the national jurisdiction which generally has the best access to witness and evidence to carry out the trial³⁴. Finally, as it can be inferred from the drafting process, simply an urging need of compromise between the negotiating parties, crucial for the adoption of the Statute, played a chief role in introduction of complementarity. Thus, such a formulation of the admissibility criteria has “assumed a vital role in making the Statute widely acceptable to States³⁵” Cassese highlights the practical ground for such a solution – the court simply would not be able to hear a wide range of cases having a limited num-

³⁰ H-P. Kaul, *The ICC – its relationship to domestic jurisdictions*, [in:] C. Stahn, G. Sluiter (ed.), *The emerging practice of the ICC*, Leiden-Boston 2009, p. 31-32.

³¹ A. Cassese, *op. cit.*, p. 339.

³² P. Wiliński, H. Kuczyńska, *Rzetelny proces karny w orzecznictwie międzynarodowych trybunałów karnych*, [in:] P. Wiliński (ed.) *Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych*, Warszawa 2009, p. 211.

³³ The ICC has jurisdiction over the crimes committed after its entry to force. Moreover, the Court will have jurisdiction with respect to the crime of aggression not before January 1 2017 with possible territorial limitations.

³⁴ The Principle of Complementarity in Practice, Informal Expert Paper in <http://www.iccpi.int/iccdocs/asp_docs/library/organs/otp/complementarity.pdf#search=principle%20of%20complementarity>. [last access on August 31 2014]

³⁵ J. Kleffner, *Complementarity in the Rome Statute and National Jurisdictions*, Oxford 2008, p. 96.

ber of judges and structures³⁶. More specifically, complementarity aims at avoiding impunity of the crimes against *iuris gentium*³⁷. Paradoxically, the State which played the chief role in the development of the principle eventually refused to sign the treaty³⁸.

Having regard to the aforementioned evolutionary passage, the Statute introduces the complementarity in its Preamble as well as in Article 1. Clearly, this repetition suggests the chief importance of the provision itself as the leading instrument for the functioning of the ICC. Nonetheless, both references are only “affirming” the role of the principle for further interpretation of the statutory norms and as such must be read in conjunction or rather as a follow-up provision for the second part of the Statute³⁹. Indeed, it is Article 17 to provide for the issues of admissibility enumerating a negative list of situations in which the Court shall determine the case inadmissible⁴⁰. Following the paragraphs, the ICC is barred from initiating the process:

1. if the jurisdiction (investigation or prosecution) has been executed by the national court and the state is able and willing to prosecute genuinely;
2. if the investigation has not brought to the subsequent prosecution and the decision was not a result of unwillingness or inability;
3. if the person has been tried by another court and the trial by the latter was not conducted impartially and fairly and did not meet the requirement of the due process of law recognized by the international law or, otherwise, for the purpose of shielding the person from the international criminal responsibility (reference to Article 20 (3)⁴¹);
4. if the crime is not of a sufficient gravity.

At first sight, the negative formula used in Article 17 may be intended to enhance the idea of complementarity as the Court evaluates the request

³⁶ A. Cassese, *op. cit.*, p. 351.

³⁷ S. Campanella, *Il ne bis in idem nella giustizia internazionale penale*, Giuffrè 2009, p. 263.

³⁸ J. Kleffner, *op. cit.*, p. 96.

³⁹ *Ibidem*, p. 99-100.

⁴⁰ J. Izydorczyk, P. Wiliński, *Międzynarodowy Trybunał Karny*, Kraków 2006, p. 66

⁴¹ Author's note.

preliminarily taking into account the sovereignty of internal jurisdictions. As the teething jurisprudence has elaborated, in order to decide whether the case can be taken over the two-part admissibility test must be done. It first relates to the national investigation concerning the facts alleged in the case at hand, if there is any investigation being conducted, and then evaluates the gravity threshold⁴².

The first criterion refers to the states' action which bares the ICC from prosecuting if, *a contrario*, the national jurisdiction is *willing* and *able* to genuinely conduct the trial. The practice showed that the first issue was to define whether a "case" of the national ongoing investigations was "covering the same conduct", which requires that the investigations must also have covered the same persons subject to the Court's proceedings⁴³. This is chiefly important with respect to the wording of the *ne bis in idem* principle, which will be examined below. Once it has been done, the Court evaluates *willingness* and *ability* of the national jurisdiction. The meaning of this peculiar terminology used by the drafters of the Statute has been explained also by the Statute itself. Article 17 (2) lays down the interpretative rules for what is included within both criteria. Accordingly, it applies to the case in which the national judicial organ is conducting the trial for the purpose of shielding a person from international criminal responsibility, there is an unjustified delay, the proceeding cannot be said independent or impartial and is inconsistent with the intent of bringing a person to justice. As for the assessment of inability the Court considers whether the State cannot obtain the accused or necessary evidence and testimony, or is otherwise unable to carry out the proceedings, which is due to the total or substantial collapse or unavailability of its national judicial system. The general interpretative way of *unwillingness* and *inability* should be also in line with the standard of due process of law – as the authors of the Infor-

⁴² Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, Prosecutor v. Lubanga, Pre Trial Chamber I, 24 February 2006, ICC 01/04-01/06, para. 29. Available at: <<http://www.icc-cpi.int/iccdocs/doc/doc236260.PDF>> (last access on August 31 2014).

⁴³ Klamberg, *ICL Database and Commentary*, §150, available at http://www.iclklamberg.com/Statute.htm#_ftn301 (last access on August 31 2014).

mal Experts Paper by the Office of the Prosecutor, alongside the scholars highlighted⁴⁴.

This puzzle is completed by the adverb used to describe the investigation or the prosecution that might bar the ICC from stepping in – Article 17 reads that both must be carried out *genuinely*. The wording is a fruit of another long negotiation with several proposals were put forward, but eventually dismissed in favor of the latter. As it was questioned, genuine process refers both to the objective and subjective context of the such. Therefore, the assessment must be done with respect to the way the proceedings are carried out and its outcome, considering the cultural differences between the legal systems. Furthermore, the interpretation must be kept within the criteria set out by Article 17 with respect to unwillingness and inability (as mentioned above) and the human rights standards of the due process⁴⁵. Worth mentioning is a valuable critique written by Kevin John Heller, who argues that this undefined usage of the term “genuine” stays in the opposition to the due process thesis, if compared for instance with the “unwillingness” and “inability” and their interpretative criteria. He proves the contradiction to the due process thesis which would stem from the wrong usage of conjunctions, as well as the lacking provision of case referral based upon the lack of due process. His interpretation underscores the unfortunate terminology used in Article 17 which results, in his opinion, in a need of an amendment of the provision – particularly with respect to the conjunction *and* used in 17(2)(c)⁴⁶.

As it has been often raised in the doctrine, a particular attention must be given to the somehow underestimated second criterion, which refers to the gravity test⁴⁷. In *Prosecutor vs. Lubanga* one reads that the case which does not present sufficient gravity should be declared inadmissible. Although the gravity threshold must be read in conjunction with the care-

⁴⁴ For example: Lattanzi, Monetti, *La Corte Penale Internazionale*, Giuffrè 2006, p.185-186; Informal Experts Paper available at: <http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/complementarity.pdf#search=principle%20of%20complementarity> (last access on August 31 2013).

⁴⁵ J. Stigen, *op. cit.*, p. 216-229.

⁴⁶ K. J. Heller, *The shadow side of complementarity*, “Criminal Law Forum” 2006, vol. 17, p. 19-26.

⁴⁷ See for example: W. Schabas, F. Guariglia, *The Emerging Practice ...*, p. 229-231.

fully selected list of crimes included in the ICC jurisdiction, which means that “the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court”⁴⁸. Furthermore, the assessment must be made both in the literal and contextual manner. The latter means that the gravity threshold is valuated at the moment in which the prosecutor initiates the investigation, as well as subsequently when a case arises from the situation. At last, the Chamber suggested that teleological interpretation of Article 17 (1)(d) read in conjunction with the Preamble (which emphasizes that the Court’s chief role is to put an end to the impunity) gives another key to interpretation and raises the threshold, allowing to prosecute only the most senior leaders suspected for being most responsible for the serious crimes allegedly committed⁴⁹. In most recent decision related to the situation in Sudan, the Chamber reaffirmed the aforementioned criteria, complementing them by the reference to Rule 145(1)(c), which with respect to the determination of sentence, creates a useful guideline which reads as following: “the extent of damage cause, in particular, the harm caused to victims and their families, the nature of unlawful behavior and the means employed to execute the crime”⁵⁰. In the end, the gravity can be assessed if the conduct is systematic (patterns of incidents) or large-scale – the criteria referred to the specific element of war crimes and crimes against humanity – and it must be given due consideration to the social alarm in the international community⁵¹.

Even though the Statute provides for additional interpretative indicators, it is still rather vague and unclear what the drafters meant by intent to bring to justice or total or substantial collapse of national jurisdiction. Moreover, the question remains whether the lack of uniformity and dis-

⁴⁸ Defence application pursuant to Articles 19(4) and (17)(1)(d) of the Rome Statute, Situation in the Republic of Cote D’Ivoire, The Prosecutor v. Charles Ble Goude, para. 17, available at <http://www.icc-cpi.int/iccdocs/doc/doc1840086.pdf>, [last access on August 31 2013]

⁴⁹ *Ibidem*, para. 43-54.

⁵⁰ Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09, 8 February 2010, para. 28-32, available at <http://www.iccklamberg.com/Caselaw/Sudan/Garda/PTCI/243-red.pdf>. [last access on August 31 2013]

⁵¹ Prosecutor v. Lubanga, ICC 01/04-01/06, par. 46.

crepancies between the national systems and the Statute in terms of formulation of international crimes can trigger the complementarity in line with Article 17. As it was mentioned previously, the complementarity is an incentive for the States to improve their legislation in order to “put an end to impunity”, but it does not create an obligation to do so⁵². It can be observed again on the example of *Lubanga* case, who has been accused before the ICC of enlistment of child soldiers (war crime), whereas the national organs in Congo were prosecuting him with respect to crimes against humanity and genocide. Nevertheless the Court, according to the issues of admissibility preempted the national jurisdiction requesting the surrender of Thomas Lubanga, invoking, so to say, an “inactivity” criteria⁵³.

At the end, according to Article 19 it is the Court itself to decide whether the case brought before it is admissible or not. The question arises – how does this provision balance the relation between the Court and the State’s jurisdictions? If the Court has a power to assess whether the ongoing prosecution or investigation is impartial or independent, can such a decision affect the obligation of a collaboration in search of evidences if the Court has decided upon the lack of independence within the State’s judicial organs? But again, the perplexities must remain unanswered, as going far beyond the scope of the paper.

6. *NE BIS IN IDEM* UNDER ARTICLE 20

As mentioned above, the complementarity in the way it developed, weighed upon the ultimate formulation of article which sets out the principle *ne bis in idem*. Article 20 is divided in three paragraphs. First, there is a general condition which reproduces the broad prohibition of being tried by the Court more than once for the same conduct, regardless of the

⁵² P. Benvenuti, *Complementarity of the ICC*, [in:] M. Ellis, R. Goldstone (ed.), *The International Criminal Court: challenges to achieving justice and accountability in the 21st Century*, Idebate Press 2008, p. 63-64.

⁵³ S. A. Williams, W. A. Schabas, *Commentary to Art 17*, [in:] O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Beck-Hart-Nomos 2008, p. 615-616.

legal qualification. It is the less controversial regulation governing the horizontal concurrence within the Court itself and it provides the perpetrator with the broadest guarantee of not being tried twice before the ICC for the same facts. As can be inferred from the wording “except as provided in this Statute” and according to the procedural rules provided by the Statute it, of course, does not prevent an appeal of the decision as well as a revision of the final judgment basing on the new evidences not available during the process or a fundamental defect in the previous processing⁵⁴. Although the first paragraph was initially to be omitted, as considered self-evident, eventually was added as providing clarification without doing any harm⁵⁵. What seems also to be clear, as the Statute uses the wording *conduct*, the same person can be tried again before the Court, for a different crime only on the basis of the different historical facts – which confirms the broad interpretation of the principle is adopted⁵⁶.

The complications arise with respect to the vertical-supranational concurrence, between national jurisdiction and the ICC. The second paragraph is thought to prevent the situation in which another court tries a person for the *crime* under the jurisdiction of the ICC, in case he/she has already been convicted or acquitted by the Court. The third paragraph, envisages the opposite situation – the Court is barred from trying a person for a conduct proscribed by article 6, 7 and 8 in case he/she was tried by another court – unless the process was not intended to shield a person from international criminal responsibility, or, recalling the same criteria set out by Article 17 (3), was not impartial or independent according to the norms of due process recognized by international law and inconsistent with an intent to bring the person to justice.

Article 20 (2) uses the phrase “no person shall be tried before another court for *crime referred to in article 5*” while (3) provides the formula “no person who has been tried for *conduct also proscribed under article 6, 7, or 8*”. There is almost unanimity amongst the scholars that the references to the “crime” and the “conduct” in this case can be respectively interpreted

⁵⁴ C. Van der Van den Wyngaert, T. Ongena, *op. cit.*, p. 721-722.

⁵⁵ J. T. Holmes, *op. cit.*, p. 58.

⁵⁶ I. Tallgren, A. R. Coracini, *Article 20*, [in:] O. Triferrer (ed.), *op. cit.*, p. 682-683.

as a narrow and broad version of the double jeopardy⁵⁷. Therefore, the prevalence of authors note that under the second paragraph the subsequent trial is prohibited only with respect to the four most serious crimes lying under the jurisdiction of the ICC without precluding another trial for different offenses, for example, crime of a multiple murder⁵⁸. On the contrary, the *ne bis in idem* would trigger in the case of a retrial for one of the *core crimes* enumerated by the Statute. The logic given to this provision was, as presented by the Preparatory Commission, not to preclude as subsequent trial for the *ordinary crimes* in the case of acquittal for a *core crime*, only because of the lack of any of international elements – on example the *dolus specialis* in the crime of genocide⁵⁹. However, the consequences of such a distinction may be grave for the fundamental rights of the accused if read in conjunction with the complementarity principle. Accordingly, the ICC steps in, indicts for the *core crime* and conducts a trial over to the final verdict is allowed when the domestic court is, *inter alia*, unable to prosecute. Following the rationale of the Preparatory Committee, and the narrow version of the prohibition adopted, it does not prevent from the situation in which an acquittal by the ICC for an international crime (for instance the international element unproved) would not exclude a responsibility for an ordinary crime within the state's jurisdiction. Until here, all the authors are in complete unanimity – the perpetrator must not go unpunished⁶⁰ and defendants “must not unduly benefit from limited jurisdiction of the ICC”⁶¹. But it seems to be in a clear contradiction with

⁵⁷ See for instance two authors coming from either common law or civil law systems: L. Carter, *The Principle of Complementarity and the International Criminal Court, The Role of Ne bis in idem*, “Santa Clara Journal of International Law” 2010., p. 10; S. Campanella, *op. cit.*, p. 266-267; amongst the English writing scholars M. El Zeidy is against this interpretation, *The Principle of Complementarity: A New Machinery*, “Michigan Journal of International Law” 2002, vol. 23, p. 933-935.

⁵⁸ A. Klip, H. Van der Wilt, *ADIP – Non bis in idem, Report for the Netherlands*, “Revue Internationale de Droit Penal” 2002, vol. 73.

⁵⁹ I. Tallgren, A. R. Coracini, *op. cit.*, p. 686.

⁶⁰ See for instance S. Campanella, *op. cit.*, p. 267; A. Klip, H. Van der Wild, *Op. Cit.*, p. 25; Some authors raise the concern of the possibility of the retrial *in abstracto*, as in contrast with the fundamental right of the accused, in this way: D. Sedman, *Article 20 ICCSt and the Principle of Ne Bis In Idem*, p. 284.

⁶¹ K. Ambos, *op. cit.*, p. 405.

the principle of complementarity, which allows the ICC to take over the process because of the inability of the domestic court to handle the case. In brief, one can imagine a domestic court which is conducting the process in order to judge the most senior perpetrator and convicts him for the crimes against humanity. The Prosecutor, however, evaluates that the court cannot *genuinely* deal with the case and takes it over. The long process ends and does not prove the guilt of the accused which leads to an acquittal. Subsequently, the national court, previously unable to exercise the jurisdiction, without violating the double jeopardy, convicts the same *innocent* person for multiple manslaughter. It might happen because the prove standard can be different from beyond the reasonable doubt or simply because no due process standards were applied – which indeed could have been the reason why the court was previously precluded from judging. Ironically, it seems to be also in line with the preamble of the Statute, which, after all, emphasizes the need to put an end to impunity. Nevertheless, this gap raises an enormous doubt if perceived from the human rights perspective. For the sake of precision, it should be noted that according to the international law, the treaties cannot state any obligation on the third parties, therefore, subsequent trial in a non-state party is always possible⁶².

More attention has been given to the provision under the third paragraph which, in contrast, would apply with respect to the *conduct*, therefore to the historical, not to the normative facts (legal qualification). It means, following the previous example that a person convicted by a national court for a murder cannot be prosecuted for an international crime, based on the same historical facts – a broad version of double jeopardy⁶³. Indeed, in order to strengthen the role of the ICC, the drafters of the Statute set out two subparagraphs containing the exceptions invoking the due process standards, as it was examined above. Both exceptions were subject to a long debate during the drafting works and they differ from the respective

⁶² It is expressed in Latin *pacta tertiis nec nocent nec prosunt* which stands for „treaties do not create either obligations or rights for third states without their consent”, translation available at: <<http://www.oxfordreference.com/view/10.1093/acref/9780192807021.001.0001/acref-9780192807021-e-2239>> [last access August 31 2014].

⁶³ J. Kleffner, *op. cit.*, p. 121, in the same line S. Manacorda, G. Vanacore, *The right not to be tried twice for international crimes: An overview of the ne bis in idem principle withing the ICC and the ICTs Statutes*, p. 6-7.

upward *ne bis in idem* norms in the *ad hoc* Tribunals statute's⁶⁴. At first glance, the Statute repeats the negative formula used in previous paragraphs: “no person who has been tried by another court (...) shall be tried with respect to the same conduct”, whereas both ICTY and ICTR, which had primacy above the national courts, used a positive formulation “a person who has been tried before a national court for act constituting the serious violations of international humanitarian law may be subsequently tried (...)”⁶⁵. This again might be seen as a corollary of the complementarity and a step towards the terminology used in most of international acts, especially in the human rights conventions. In turn, what is undoubtedly the result of adopting the principle in Article 17, the Rome Statute does not allow the retrial if the national court has tried a person for acts characterized as *ordinary crimes*. The wording has been contested as unclear to those national systems which did not recognize the differentiation between ordinary and non-ordinary crimes⁶⁶ and supposedly would grant the ICC and excessive right to of control over the national courts, which would then be contrary to the principle of complementarity⁶⁷. Furthermore, the argument was whether or not the notion of international crime might have any deterrent and retributive effect⁶⁸. Eventually, it was decided that the notion would be omitted, and the ICC should leave the characterization of the crime to the national jurisdictions⁶⁹, which has also, as mentioned above, practical reasons simplifying the prosecution a process of collecting evidences⁷⁰. Moreover, lack of *ordinary crimes* reference can be understood as a confirmation of the broad understanding of the provision under the Statute⁷¹. As most of the commentators state, the charge qualified as an ordinary crime under the national law or lenient penalty imposed thereto, based on

⁶⁴ J. Holmes, *op. cit.*, p. 56-58.

⁶⁵ The latter was also used in the previous draft of the ICC statute, see for instance: Bassiouni, M.C, *op. cit.*, p. 547.

⁶⁶ I. Tallgren, A. R. Coracini, *op. cit.*, p. 688.

⁶⁷ M. C. Bassiouni, *Op. Cit.*, p. 412.

⁶⁸ J. Holmes, *op. cit.*, p. 58.

⁶⁹ Prosecutor vs. Hadzihasanovic, Judgment, Trial Chamber, IT-01-47-T, 15 March 2006, p. 256-257.

⁷⁰ See *supra* note 16.

⁷¹ K. Ambos, *op. cit.*, p. 405.

the same conduct, could instead be revealed as aimed at shielding a person from international responsibility and thus, the *ne bis in idem* would be waived⁷². It seems possible under the second exception to the upward double jeopardy. The question is whether this solution is balanced enough to avoid further interpretative difficulties and can properly solve the issue of a second prosecution after the national decision. As said previously, the exceptions eventually set out in Article 20 (3) are two, and to some extent they resemble the criteria of admissibility in Article 17 (2)(a)(c). This correlation between two principles seem to be strongest and, as suggested by the drafting parties present at the Conference, the wording should be unified to make the criteria more objective and the usage of the compromise achieved on complementarity would ease the further discussion⁷³. Article 20 (3) allows the second trial in the case when the proceedings in another court were (a) for the purpose of shielding the person concerned from criminal responsibility and (b) were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which was inconsistent with an intent to bring the person concerned to justice. Thus the interpretative doubts and issues with respect to *unwillingness* in Article 17 mentioned above can be recalled here. Yet, both articles read together leave a few nuances. It has been questioned why the Statute when referring to the exceptions does not include also the *inability* criteria, which as aforesaid may result from a collapse or unavailability of the national system. Some authors raise that in theory this lack may result in an acquittal due to the deficiency of resources to prosecute complex crime in national proceedings which would bar a subsequent prosecution by the ICC⁷⁴. As a counterargument such a situation may be deemed as falling under the first exception, but again, the question remains, to what extent can each exception be invoked. Worth mentioning is the reference to the norms of due process recognized by international law which is repeated again here,

⁷² For instance: T. Surlan, *op. cit.*

⁷³ J. Holmes, *op. cit.*, 58-59.

⁷⁴ H. Friman, H. Brady, M. Costi, F. Guariglia, C. Stuckenberg, *Charges*, [in:] G. Sluiter and others (eds.) *International Criminal Procedure Principles and Rule*, Oxford 2012, p. 445.

after the Mexican delegation proposal. As it is suggested, these criteria might have been added in order to express the appreciation of the ICC on human rights law and its tribunals⁷⁵. However, it was criticized by some authors pointing that the ICC would in this case judge in a way of the human rights court, which is substantially beyond its competence⁷⁶. Finally, the doubts are even multiplied, when one reads the statement of the Court itself, which invokes the violation of the human rights of accused as lying on the grounds of admissibility, *with the exception of ne bis in idem*⁷⁷.

Article 20 (3), as examined above, refers to the conduct also proscribed under Article 6, 7 and 8. The crime of aggression, referred to under Article 8 *bis* was added in consequence of the amendment adopted during the conference in Kampala⁷⁸. However, if assumed the broad interpretation given to double jeopardy referring to the conduct (which might be emphasized by the term “also”) the amendment can be seen only as keeping the uniformity of the Statute since no other crimes, than those enlisted in Article 5, fall under the jurisdiction of the ICC. Undoubtedly, it must have been done, not to provoke unnecessary discrepancies in the structure of the Statute. What remained unanswered is – why the drafters did not keep the uniformity from the beginning? Originally, the wording of the third paragraph was almost a “copy-paste” of the reference from the downward provision: “conduct constituting a crime referred to in Article 5”⁷⁹. Only at last it has been altered to “conduct also proscribed under Article 6, 7, 8”⁸⁰.

Last remarks must be made with respect to the *bis* element. Under Article 20, the first two paragraphs refer to the trial concluded with a conviction or acquittal sentence. The third paragraph, however, is limited to the wording “who has been tried by another court” and does not mention

⁷⁵ I. Tallgren, A. R. Coracini, *op. cit.*, p. 695.

⁷⁶ C. Van den Wyngaert, T. Ongen, *op. cit.*, p.725. On the contrary, some authors consider the invocation of the human rights standards as a positive factor which lessens the controversy in a solution adopted by the Statute, see for example: P. Milik, *Zasada kompletności jurysdykcji MTK i trybunałów hybrydowych*, Warszawa 2012, p. 198-199.

⁷⁷ *Procesutor v. Katanga and Ngudjolo*, Judgment, No. ICC 01/04-01/07-1497, 28 September 2009, para. 99.

⁷⁸ Article 8 *bis* was added by the amendment in resolution RC/Res.6 of 11 June 2010.

⁷⁹ H. Friman, H. Brady, M. Costi, F. Guariglia, C. Stuckenberg, *op. cit.*, p. 443.

⁸⁰ I. Tallgren, A. R. Coracini, *op. cit.* p. 692.

a conviction or acquittal sentence. The ICC itself attempts to provide an interpretation for such a differentiation in one of its decisions. It alleges that the drafters of the Statute did not exclude the cases of the national decision, before the judgment is concluded, thus, attempting to cover the cases of the prior conclusion as a “catch-all provision”⁸¹. As Triffterer commentary suggests, it should be interpreted in compliance with the complementarity principle, accepting the *bona fide* efforts of the national jurisdiction⁸². The question is arguable whether this provision may effectively solve the problems, for instance in the case of amnesty “which excludes *a priori* the performance of a trial”, making the provision of *bis in idem* inapplicable⁸³. Similarly, in the case of national procedures, where the larger discretion of the prosecutorial decision operates. For instance, in terms of sorting out the charges whether a person has committed a plurality of criminal conducts or there has been a settlement with a public prosecutor. In the former example, where the decision not to prosecute for certain charges is “made at such an early time that the person cannot be said to *have been tried*, the Court would be able to conduct proceedings for those charges, even if the proceedings at the national level overall dealt adequately with the totality of the crimes committed”⁸⁴. The same question arises in the previously mentioned continuing offences, as in the example under the Polish criminal code, or multiple charges and the same facts.

Finally, having in regard the exceptions and loopholes which allow the second process with respect to the same person for the same fact, it appears quite evident that this lack could be undermined by the provision setting forth the deduction of the penalty imposed as an effect of the previous trial. Such a provision is laid down for instance in the statutes of the *ad hoc* Tribunals. However, in contrast with Article 42 regulating *ne bis in idem* in the ILC Draft Code, Article 20 remains silent⁸⁵. Instead, one can find the principle of deduction set out in Article 78 (2), but only as an optional,

⁸¹ Prosecutor v Jean Pierre Bemba Gombo, ICC 01/05-01/08, 14th April 2010, para. 81.

⁸² I. Tallgren, A. R. Coracini, *op. cit.* p. 689.

⁸³ A. Seiber-Forth, *Relevance of the Rome Statute for amnesties*, “Max Planck UNIB” 2003, vol. 7, p. 565.

⁸⁴ B. Elberling, *ICL Database and Commentary*, available at http://www.iclklamberg.com/Statute.htm#_ftn301 (last access August 31 2014).

⁸⁵ M. C. Bassiouni, *op. cit.*, p. 241.

not obligatory, consideration⁸⁶. It is the evident lack that is seen as contradiction to the rights of the accused and *ne bis poena idem* principle.

7. CONCLUSIONS

A few issues noted above are just the tip of the iceberg of possible questions begot from the *ne bis in idem* construction in the Statute of Rome, like the double punishment prohibition, which is intrinsically related with the double jeopardy. However, the aforementioned examples introduce to the questions that the doctrine and scholars have arisen, criticizing a large discretion given to the Court which may lead to contravention, or at least abuse of the *ne bis in idem* principle. Similarly, one may remain perplexed whether vague, and often differing, wording is clear enough to let the ICC adjudicate whether the trial was intent on shielding a person from the international criminal responsibility or the national court was *unable* to try a case. The practice, the case study, and time will show if the ICC may play the role in which it has been assigned. One should wish that, as read in the statement of Hellen Duffy, the double jeopardy prohibition set forth in Article 20 will go further than it may be indicated by human rights law⁸⁷.

SUMMARY

The article touches upon the principle of *ne bis in idem* under the Rome Statute of the International Criminal Court in the Hague as a corollary of the complementary jurisdiction of the Court. The author, basing on the dogmatic analysis, broad doctrine and a „teething” jurisprudence, argues that the current formulation of such principle leaves serious doubts and vagueness as to the possible abuse of the rights of the accused. In the first, introductory part the author underlines the multiplicity of possible

⁸⁶ I. Tallgren, A. R. Coracini, *op. cit.*, p. 697.

⁸⁷ H. Duffy H., *Overview of Constitutional Issues and Recent State Practice*, [in:] C. Krefß and others (eds.), *The Rome Statute and Domestic Legal Orders*, Volume II, Baden Baden 2005, p. 510-511.

concurring jurisdictions in the case of prosecution for the most serious of international crimes. As a consequence, the foundation of the ICC requires a clear and precise rule which would establish a balance between the national jurisdiction and the Court. What more, it requires a rule which would prevent from retrying the same person for the same acts. The second part describes in brief the common historic course and the relationship between both *ne bis in idem* and complementarity. The third part focuses on the principle of complementarity under the current Article 17 and the problems which may result from its formulation, especially in terms of its vague and peculiar wording. In the last part the author analyzes the principle of *ne bis in idem* in its three configurations - horizontal and vertical (downward-upward) - and emphasizes the possible risks for the abuse of the right of the accused. In the author's opinion such loopholes result from the formulation of the principle which aims at keeping uniformity with the principle of complementarity. Furthermore, the author argues that *ne bis in idem* assumed yet a jurisdictional role, however leaves apart the aspects lying in the grounds of its human rights perspective.

