Ne bis in idem — Protector of Defendants' Rights or Jurisdictional Pointsman?

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Abstract

In the Rome Statute, and more generally in international criminal law, the principle of ne bis in idem *is not solely concerned with the promotion of the rights of the accused or the* res judicata *authority of a first judgment. It seems to be also — maybe primarily — dedicated to articulating the concurrence between national and international jurisdictions. The present article discusses its different functions, asserting that they differ whether the principle intervenes in an intra- or inter-jurisdictional situation. It also links these functions to the general struggle against impunity governing international criminal law, and concludes by striving to attribute a structural, possibly qualitative role to the principle.*

1. Introduction

The role performed by the *ne bis in idem* principle in criminal justice may be deemed to be primarily concerned with the role of protection in relation to the rights of the accused. However, when assessing its role in the more embryonic system established through the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and operated by the International Criminal Court (ICC), the principle of *ne bis in idem* appears to exert the role of 'pointsman' in the 'concurrence of competences'.[1] Hence,

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1 The phrase '*ne bis in idem*' is preferred here for reasons of Latin semantics. 'Ne' is a volitive negation and implies a positive action, it implies the intention 'to act', a decision, and for this reason is most similar to the imperative tense. The error between 'ne' and 'non' is often made, as in medieval Latin 'non' progressively took over from 'ne' and established itself over the use of 'ne'. See A. Orlandini, *Grammaire fondamentale du Latin*, t. VIII 'Négation et argumentation en latin' (Louvain: Peeters, 2001), at 27. Nevertheless, in this article, we will respect the use by certain authors and in certain legal texts of 'non'.

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when the *ne bis in idem* principle relates to a situation where there are competing competencies in play, its first function is linked to the jurisdictional articulation between such concurrently competent courts, and not primarily to the protection of the accused. This does not imply the disappearance of its protective role: an individual right against double jeopardy is maintained, but the rule also (and mainly) appears as an engine for a more rational allocation of jurisdiction.

In order to fully address this original take on the principle of *ne bis in idem*, this article will first clarify the function and aims of the *ne bis in idem* principle in general terms, and then will address its role in relation to the primacy system of the ICTY and ICTR (collectively ICTs), and finally its use within the framework of the ICC. All this will be done in order to highlight the jurisdictional role that the principle of *ne bis in idem* now plays within international criminal justice.

2. Function and Aims of the *ne bis in idem* Principle in General

When it comes to intra state judicial regulation, the principle of *non* or *ne bis in idem* is recognized as a core protective mechanism in relation to the rights of the individual by the majority of national legal systems[2] — to the point that some consider it as customary law.[3] It is found in the Common Law tradition in the prohibition of double jeopardy and in the principle of *autrefois acquit, autrefois convict*.[4] It also takes the positive shape of *res judicata pro veritate habetur* — known in French as *autorité de chose jugée* and in German as *erledigungsprinzip* (principle of finality) and *Anrechnungprinzip* (principle of taking into account). At the international level, this protection is notably found in the International Covenant on Civil and Political Right (ICCPR),[5] in Protocol 7 to the European Convention for the Protection of Human Rights

2 As can be seen from numerous national reports in 'Les compétences criminelles concurrentes nationales et internationales, et le principe *ne bis in idem*', 73 *Revue Internationale de droit pénal* (2002) 773–1145. See also Ch. Van den Wyngaert (ed.), *Criminal Procedure Systems in the European Community* (London: Butterworth, 1993), at 408; Ch. Van den Wyngaert and T. Ongena, 'Ne bis in idem Principle, including the issue of Amnesty', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court* (Oxford: OUP, 2002) 705–729, at 706; I. Tallgren, 'Article 20: *Ne bis in idem*', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Court – Observers' notes, Article by Article* (Baden-Baden: Nomos, 2008) 669–700, at 673.

3 See e.g. A. Cassese, *International Criminal Law* (Oxford: OUP, 2003), at 319.

4 M.L. Friedland, *Double Jeopardy* (Oxford: Clarendon, 1969).

5 Art. 14(7) International Covenant on Civil and Political Rights, adopted by the GA Res. 2200 A (XXI), 16 December 1966, entered into force on 23 March 1976.

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and Fundamental Freedoms[6] and in the American Convention of Human Rights.[7]

Under different definitions and titles, these national and international texts seem to unanimously consider the principle as a safeguard offered to the accused. They focus indeed on the principle guaranteeing an individual's freedom[8] within national territorial limits: it protects the accused from potential abuse of process, avoiding the possibility of the individual being put 'in jeopardy' by being subjected to successive prosecutions by national jurisdictions in relation to the same behaviour or crime.[9] It also ensures respect for the authority of a national court's decision and protects legal security by holding that a court's decision is final. But here exactly is the issue at hand: the so-called 'unanimous' protection remains intra-jurisdictional. Most states prevent their judicial branch from acting several times *in idem*, but they by no means establish recognition of foreign decisions *in idem*. There would appear to be no general or transversal rule: it may be the case that states may decide to recognize foreign decisions based on certain conditions, and hence may conclude bilateral agreements in this regard, but no general system of protection appears to exist as such.[10] National sovereignty, or more simply territoriality, prevails over the rights of the individual.[11]

In other words, a prohibition of double jeopardy can be observed within most states' boundaries, recognized by several international treaties. Yet, when different national systems are involved *in idem*, the principle becomes one of an inter-jurisdictional nature, of which no clear system is yet established. Two recent exceptions that may help clarify such challenges: in the European Union and before international criminal tribunals and courts, a transnational *ne bis in idem* has been established. It can be conceived as a deep strengthening of the legal security purpose, sustained by the intra-jurisdictional principle,

6 Art. 4, Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms amended according to the provisions of Protocol No. 11, adopted in Strasbourg on 22 November 1984, entered into force on 1 November 1988.

7 Art. 8(4), American Convention on Human Rights, adopted in San José on 22 November 1969, entered into force on 18 July 1978. The principle appears in Ch. 2, dedicated to civil and political rights.

8 See e.g. Inter American Commission on Human Rights (C-33) *Loayza Tamayo c. Peru*, 17 September 1997, § 66: '*Este principio busca proteger los derechos de los individuos*' (only available in Spanish). More generally, see e.g. S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: OUP, 2005), at 384.

9 About the *rationales* of the principle, see e.g. Ch. Van den Wyngaert and G. Stessens, 'The International non bis in idem Principle: Resolving Some of the Unanswered Questions', 48 *International and Comparative Law Quarterly* (1999) 779–804, at 781–785.

10 See e.g. Van den Wyngaert and Ongena, *supra* note 2, at 708, or Tallgren, *supra* note 2, at 674.

11 The United States dual sovereignty doctrine seems to constitute the most striking example of this territorial limitation. Considered as an exception to the prohibition of double jeopardy, it allows for successive prosecutions of the same offence by different bodies, permitting i.e. a second trial on the basis of violation of the United States Constitution, after a state trial has been concluded. See e.g. D.E. Lopez, 'Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent non bis in idem', 33 *Vanderbilt Journal of Transnational Law* (2000) 1263–1303, at 1271–1272.

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but the rationale for its application is more accurately based upon structuring the European or international criminal inter-jurisdictional systems. In both cases, an extra-territorial system of *ne bis in idem* is under construction. The purpose of this article is to examine the latter exception, which has not been subject to the same level of assessment compared to the system in the European Union.[12] However, it is clear that the hypothesis nevertheless applies to both situations: as announced in the introduction, the assertion is that when the principle goes beyond an exclusive application in a single domestic setting and hence involves additional jurisdictional interests, first of all it helps to articulate the relationships between concurrently competent jurisdictions. In other words, a jurisdictional or structural role is then added to the principle's protective function, somewhat superseding the traditional function.

In the European Union, both roles seem fairly well integrated since the Charter has established the right for the accused 'not to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted *within the Union* in accordance with the law'.[13] A supranational system of *ne bis in idem* had been previously founded by the Convention implementing the Schengen Agreement, which related more to legal cooperation between states than to an individual right. Within this system there were several limits to the protection an individual was to be afforded, somewhat easing the attempt to limit a state's judicial sovereignty.[14] As (increasingly) applied, the principle assists in reinforcing the mutual recognition of judicial decisions rendered in Member States, as explained for example by the Commission in its 'Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings'.[15]

Before the ICTs and the ICC, the principle's nature as one of protecting fundamental rights looks more equivocal. The Statutes proclaim the rule of *ne bis*

12 See for a summarized presentation, e.g. M. Bohlander, 'Ne bis in idem', in C. Bassiouni (ed.), *International Criminal Law, Vol. III: International Enforcement* (Leiden: Nijhoff, 2008) 541–560; or D. Sarmiento, 'El principio ne bis in idem en la jurisprudentia del TJCE', in L. Arroyo-Sapatero and A. Nieto-Martin (eds), *El principio de ne bis in idem en el derecho penal europeo e international* (Cuenca: Ed. de la Universidad de Castilla - La Mancha, 2007) 37–64; L. Colomer Hernandez, 'Conflictos de jurisdicciòn, non bis in idem en litispendentia international en la Uniòn Europea', *ibid.*, 65–94; e.g. in the CJEU, see *Hüseyin Gözütok and Klaus Brügge*, C-187/01 et C-385/01, 11 February 2003.

13 Art. 50 of the Charter of Fundamental Rights of the European Union, signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000 (emphasis added).

14 Arts 54 to 58 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 19 June 1990.

15 COM (2005) 696, not published in the *Official Journal of the European Union*, available on www.europa.eu. On mutual recognition, see e.g. G. Vernimmen-Van Tiggelen and L. Surano, 'Quel futur pour la reconnaissance mutuelle en matière pénale? Analyse transversale', in G. Vernimmen-Tiggelen, L. Surano and A. Weyembergh (eds), *L'avenir de la reconnaissance mutuelle en matière pénale dans l'Union européenne* (Bruxelles: IEE/ULB, 2009) 549–581, at 576.

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in idem[16] but as will be observed in the following sections, its structural role prevails over its function of individual protection when the implied jurisdictions are different. In other words, when the principle applies to an intra-jurisdictional context (e.g. when the ICC wants to open a case already judged by itself), its protective nature appears clearly. But when the competent jurisdictions emanate from different systems (in particular, in the case of relations between national and international jurisdictions), this protection loses its prevalence: the principle appears to be first dedicated to organizing the inter-jurisdictional concurrence. In this sense, Shany clearly suggests that the principle of *ne bis in idem* regulates the relationship between national and international jurisdictions.[17] Nevertheless, other scholars address the tension between the different *rationales* of the principle, attributing varied characteristics to the *ne bis in idem* principle in international criminal law without ever explicitly clarifying its structural role.[18]

In order to clarify the original systematization of the *ne bis in idem* principle set up in international criminal law, and to describe the non-traditional functions it could exercise within this inter-jurisdictional context, we will first observe the practice of the ICTR and ICTY, before delving into the system applied at the ICC.

3. The Function of the *ne bis in idem* Principle within the Primacy Regime of the ICTY and the ICTR

The ICTY and ICTR can be considered as precursors to the International Criminal Court, and in this sense, they present a clear point of reflection concerning the internationalization of the *ne bis in idem* principle, and its role within the international criminal law system.

In the preparatory debates concerning the Statute of the Tribunal for the former Yugoslavia, it appears that the reasons why the principle was indeed

16 Art. 10 ICTYSt.; Art. 9 ICTRSt.; Art. 20 ICCSt.

17 See Y. Shany, *Regulating Jurisdictional Relations Between National and International Courts* (Oxford: OUP, 2007) in general, but e.g. at 20 and in detail at 159–163.

18 Kittichaisaree places it amongst the rights of the accused but underlines its link to admissibility issues, see K. Kittichaisaree, *International Criminal Law* (Oxford: OUP, 2001), at 288; Zappalà does not deal with it in his exhaustive monograph about human rights in international criminal proceedings, see S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: OUP, 2003); Cassese qualifies it as an obstacle to the exercise of national power, see Cassese, *supra* note 3; Conway opines that it plays a role in the mandate of international criminal law, see G. Conway, 'Ne bis in idem in International Law', 3 *International Criminal Law Review* (2003) 217–244, at 223; Tallgren affirms that the principle 'occupies a central but controversial role in the ICC Statute', see Tallgren, *supra* note 2, at 672; according to her, it is the 'last safeguard in allocating the tasks of national and international criminal justice' but has a paradoxical effect from the point of view of the individual, in allowing the case to be rejudged where the first proceedings failed the requirement of good faith; at the end of this contribution, we will comment on the teleological role she also attributes to the principle, considering that it participates in the general struggle against impunity that the ICC Statute upholds.

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included in the text of the Statute were more structural than linked to the rights of the accused. In response to the United Nations (UN) Security Council's call to the Secretary-General to prepare a Statute for an ad hoc Tribunal,[19] France inserted the principle of *ne bis in idem* under Article IX, in their proposal put forward to support the preparation, under the title of 'Article IX. *Non bis in idem*; concurrence of jurisdiction.'[20] France provided that the principle 'must be combined with the principle of giving priority to the international decision'.[21] The primacy of the international court was declared but no mechanism had been envisaged to put that idea into practice — save for the principle of *ne bis in idem*. The latter is the only principle mentioned in order to manage this inter-jurisdictional concurrence. By contrast, when the French proposal deals with the rights of the accused, the rule of *ne bis is idem* is not mentioned.[22] While it is not explicitly provided for, it appears ostensibly to be primarily aimed at the distribution of competences (more than at safeguarding the rights of the accused). In the proposal addressed by Russia to the Secretary-General, the principle is situated within a similar context as that of the French in so much as it is established in Article 16 as a single 'pointsman' between the international tribunal and the national jurisdictions, and does not appear in Article 17, dedicated to defence.[23]

In his final Report, the Secretary-General commented that in creating such an international tribunal 'it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts … . Indeed national courts should be encouraged to exercise their jurisdiction'.[24] The concurrence of competences that might flow from this postulate would nevertheless have to be accompanied by the primacy of an international court. This would therefore exclude, by virtue of the *ne bis in idem* principle, any prosecution that might follow a decision of the international tribunal. In the Secretary-General's proposal which has been affirmed by the Security Council unanimously[25] and became formalized within the final ICTY Statute, the principle of *ne bis in idem* is recognized immediately after the primacy of the international court is proclaimed (Articles 9 and 10 of the Statute). Formally, it is therefore not framed in the context of defendants' rights, which can be found it Article 2, and hence is utilized as a rule concretizing the primacy of the ICTY. We can observe that with regard to the defence and rights of defendants, Article 14(7) of the ICCPR is directly inserted into the Statute — except for its

19 SC Res. 808, 22 February 1993. Cf. W.A. Schabas, *The UN International Criminal Tribunals, the former Yugoslavia, Rwanda and Sierra-Leone* (Cambridge: CUP, 2006), at 13 *et seq.*

20 *Letter from the Permanent Representative of France to the United Nations addressed to the Secretary-General*, UN Doc. S/25266, 10 February 1993, § 58.

21 *Ibid.*, § 133.

22 *Ibid.*, §§ 115–120.

23 *Letter from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General*, UN Doc. S/25537, 6 April 1993, at 7.

24 *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808*, UN Doc. S/25704, 3 May 1993, § 64.

25 SC Res. 827, 25 May 1993.

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ne bis in idem provision:[26] according to the 1966 treaty, the latter only operates within the state's boundaries. Before the ICTY, therefore, the rule finds a broader application and hence has a different function.

In 1994, barely a few months after the ICTY was created, dramatic events then taking place in Rwanda spurred the UN Security Council to put in place another ad hoc international criminal tribunal. The text of Articles 8 and 9 of the ICTR Statute are similar to Articles 9 and 10 of the ICTY Statute. According to Article 8 ICTR Statute, jurisdictional concurrence applies between the ICTR and the national courts but the ICTR has primacy for taking judicial action. Here again, the principle of *ne bis in idem* is formulated in relation to the international court's primacy.

The structure and *travaux préparatoires* of the two Statutes support the position that the principle's primary aim is to participate in the allocation of jurisdiction. Moreover, the principle only protects the individual to a limited degree: the guarantee not to be tried twice *in idem* is not absolute unless the first judgment was handed-down by the international tribunal concerned (ICTR or ICTY). In certain conditions, when a national court has already given a decision, a new action may be instituted: the first judgment does not preclude the authority to do so if the first procedure was lacking in certain qualities (e.g. independence, impartiality, a genuine intention to bring the accused to justice). This imperfect protection against double jeopardy reveals the deep link between the rule of *ne bis in idem* and the way in which the relations between national and international courts are conceived:[27] should the individual protection be weakened, the rule first gives concrete expression to the primacy of the ICTs.

In the jurisprudence of the ICTs, the principle of *ne bis in idem* only occupies an ancillary position, with the exception of a fundamental decision in the *Tadić* case.[28] This decision gave the ICTY the opportunity to define the parameters of the rule *ne bis in idem* (which we do not specify in this article focused as it is on the general aims of the rule). In most cases, before the tribunals, the legal procedures that were simultaneously engaged at the national and international level were identified before a definitive judgment was adopted and before the principle of *ne bis in idem* was thereby engaged. During the first years of activity of the ICTs, these jurisdictional conflicts were often defined by deferral requests from the ICT to internal courts.[29] Later the trend would

26 In keeping with the desire as expressed by France in its report: see *Letter from the Permanent Representative of France to the United Nations addressed to the Secretary-General*, *supra* note 20, at § 117.

27 Shany explains that regulatory modes and rules always depend on the way these relations are conceived. See Shany, *supra* note 17, at e.g. 125.

28 Decision on the Defence motion on jurisdiction, *Tadić* (IT-94-1-T), Trial Chamber, 10 August 1995; Decision the the Defence motion for interlocutory appeal on jurisdiction, *Tadić* (IT-94-1-T), Appeals Chamber, 2 October 1995 ; Decision on the defence motion on the principle of non bis in idem, *Tadić* (IT-94-1-T), Trial Chamber, 14 November 1995.

29 By virtue of ICTR RPE, Rule 10; to ICTY RPE, Rule 10 also. See e.g. the *Tadić* case: Dusko Tadić was arrested in Munich where his prosecution had commenced before becoming the subject of the first deferral request by ICTY. The relatively insignificant character of the accused

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be for the cases to be preferably deferred by the ICT to the competent national court.[30] The tribunals were consequently not asked in their jurisprudence to clarify the role of the principle of *ne bis in idem* in supporting their primacy. A reading of the statutes nonetheless allows us to note their silence about the principle of *ne bis in idem* as a right of the accused.

The ICTs' experience regarding the principle of *ne bis in idem* seems to present two main interests for our 'systemic' inter-jurisdictional approach. On the one hand, it shows the politically delicate nature of the rule. That an international tribunal decides to re-judge *in idem* implies indeed a value judgment on national proceedings: this explains why in respect of deferral the *ne bis* grounds of sham trials (and failure of genuine prosecution) have never been used (the neutral Rule 9(iii) being more generally invoked). In the same sense, this foreshadows the insertion of the principle within the 'objective' question of admissibility in the ICC Statute: the negotiators wanted to make the most objective and least politically damaging assessment of the national procedures possible. On the other hand, we can observe that the principle of complementarity of the International Criminal Court takes roots in the ICTs' primacy. We must admit that the primacy of the ICTs is linked to their ad hoc nature, to the individual circumstances of the particular situation — be it the collapse of the judicial apparatus in Rwanda or the dissensions of the Courts in the former Yugoslavia. If these states had been considered as able or willing to act, the ICTs would probably not have been needed nor created; in other words, the ICTs replace failing national jurisdictions. From this concept we can clearly derive the core idea of complementarity: in the general system of the ICC, the priority is attributed to national jurisdictions because their deficiency is not presumed as was the case in the former Yugoslavia and Rwanda. If this deficiency is asserted, the ICC can step in and deem the case admissible. In other words, the international goal is to make sure that a jurisdiction can act in the case, in both situations of primacy and complementarity. In the former Yugoslavia and in Rwanda, the priority has been attributed to the international tribunal; in the ICC system, the priority is given to the states in deference to their sovereignty. Accordingly, the observations made in relation to the ICTR and ITCY concerning the rule of *ne bis in idem* should also apply to the ICC.

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allows us to assume that 10 years later, the ICTY would not use its primacy in order to secure the submission of the German Courts. If the Prosecutor requested deferral, it was because in this precarious time for the Tribunal, it was searching 'desperately' to pursue a case. See Schabas, *supra* note 19, at 126.

30 By virtue of ICTR RPE, Rule 11*bis*; ICTY RPE, rule 11*bis*. See e.g. Decision on the Prosecutor's request for the referral of Wenceslas Munyeshyaka's indictment to France, *Munyeshyaka* (ICTR-2005-87-1), Trial Chamber, 20 November 2007.

4. The Function of the *ne bis in idem* Principle within the Framework of the ICC Statute

Before the ICTY, ICTR and the ICC, the principle of *ne bis in idem* is firstly, dedicated to articulating the jurisdictional concurrence between the national and international levels. In its internationalized application, it helps give a semblance of structure to international criminal law. In other words, we assert that in its inter-jurisdictional sense, it plays a role of 'pointsman' between concurrently competent jurisdictions. It intervenes in the architecture of the international criminal system more than promotes the rights of the accused.

In continuation of its structural role at the ad hoc tribunals one can observe that the principle is included in Part II of the Rome Statute (dedicated to 'Jurisdiction, admissibility and applicable law') and not in the Part III (which describes the 'General Principles of Criminal Law') nor in Part VI (which governs 'the Trial') where the rights of the accused are enumerated.[31] More substantially, we will observe below that *contra* to the International Law Commission (ILC) draft: (i) the negotiators of the Rome Statute did attribute a structural role to the principle of *ne bis in idem*; (ii) as a result, the rule appears to be deeply implicated in the complementarity mechanism, participating in the regulation of inter-jurisdictional relations; and (iii) notwithstanding the relative neglect of its traditional protective function, the principle remains linked to the rights of the accused: explicitly in its intra-jurisdictional application, and more surprisingly through the general *telos* of the Rome Statute and fair trial requirements.

A. Different Roles Envisaged for the Principle in the Travaux Préparatoires *to the Rome Statute*

The efforts towards establishing a permanent International Criminal Court were punctuated by political reluctance and complex legal argument.[32] Without proceeding to an exhaustive presentation of this long history, we will focus on the relevant issues concerning the principle *ne bis in idem*. In this light, this section will examine firstly the way it has been considered by the ILC and secondly the subsequent negotiations in the immediate lead up to adoption of the Rome Statute.

While working in the 1980s on the definition of 'the most serious crimes', the ILC first dealt with the question of an international criminal court through the draft Code of Offenses against the Peace and Security of Mankind, as part of its mission to achieve 'progressive development of international law and its codification'.[33] The draft codes that emerged in 1986 and 1987 did not include

31 Art. 67 ICCSt.

32 For a detailed historic survey, see e.g. C. Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (Ardsley: Transnational Publishers, 1998).

33 Art. 1 of the Statute of the International Law Commission, joined to GA Res. 174 II, 21 November 1947, by virtue of which the ILC was created.

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the principle of *ne bis in idem* in the judicial guarantees that were to be accorded to the accused. However, in 1987 an article appeared that explicitly mentioned the principle:

> Article 7. *Non bis in idem* [new article]
> 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 a State.[34]

According to the Special Rapporteur appointed by the ICC to work on the draft code, the provisions of Article 7 were only intended to apply when there was a situation of national courts being concurrently competent to deal with a matter and not in the case where an international criminal court was created. The Special Rapporteur was of the opinion that the existence of an international court would deny the principle of *ne bis in idem* of any meaningful effect: by definition, decisions of national courts could not block a procedure from taking place at the international level because the latter is intrinsically superior to national courts.[35] This gives rise to a strictly hierarchical vision of national and international courts, and does not express any concern for the individual being twice put in 'judicial jeopardy'. In this way, the primacy of international courts would sweep aside the application of the principle. Certain members of the ILC were nonetheless of the opinion 'that the problem of the *non bis in idem* rule would arise … also in the case where an international court of criminal jurisdiction was established covering totally or in part the scope of the code'.[36] In 1988, an amended version of the above provisions were consequently adopted. The article envisaged both situations; it related 'to the application of the rule at the international level, either as a result of the existence of an international criminal court or as a result of the involvement of the courts of several legal systems'.[37]

One cannot argue that the article had, as its primary aim, the management of relations between courts that were concurrently competent. Indeed, that was neither the project for the draft Code of Offences, nor was it the aim of the mandate that was officially given to the ILC at the time. Without confirming our hypothesis of a structural *ne bis in idem*, Article 7 of the draft Code nonetheless reveals that the respect for this principle is put in danger by the creation of a new jurisdictional level: various courts being made competent *in idem*, the accused becomes exposed to multiple prosecutions. The principle is therefore at the heart of difficulties posed by the internationalization of criminal law.

In December 1992, the UN General Assembly finally ordered the ILC to undertake a project for the establishment of an international criminal court.[38]

34 *Report of the Commission to the General Assembly on the work of its 39th session*, UN Doc. A/42/10, 4 May to 17 July 1987, at 6.
35 *Ibid.*, at 3.
36 *Ibid.*, at § 38.
37 *Report of the Commission to the General Assembly on the work of its 40th session*, UN Doc. A/43/10, 9 May to 29 July 1988, at 69.
38 GA Res. 47/33, 25 November 1992.

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In the draft Statute that the Commission elaborated upon in 1993, was Article 45, entitled 'Double Jeopardy (*non bis in idem*)',[39] which is very similar to the provisions that were suggested during the planning stages of the draft Code of Offences. It is the only provision in the draft Statute that governs the admissibility of cases before the international court, in other words that provides for the conditions of international action when the national jurisdictions are also competent in the case.[40]

By contrast, in 1994, the draft Statute for an international criminal court that was officially adopted by the ILC contained an Article 35 relating to the admissibility of matters before the international court, distinct from Article 42 that was solely focused on *ne bis in idem*.[41] In its commentary on this, the ILC declared that 'a greater degree of protection against double jeopardy is required under the statute and article 42 gives effect to this view'.[42] In other words, Article 35 governs the concurrence of competences that can occur while the principle of *ne bis in idem* is devoted to the protection of the accused. The principle found itself included in the draft Statute without being linked to the interactions between different courts to decide *in idem*. This stage of negotiations does not confirm the thesis of this article as yet: the principle of *ne bis in idem* appearing to be principally in place as a means of protection for the individual. The ILC accorded a role of protection for the individual to the principle of *ne bis in idem* in its discussions and draft statute. But once the final stages towards the creation of the ICC were underway, there appears to have been a change in emphasis, a pivot away from individual protection as such towards a more structural role allocating competences between competing jurisdictions.

By creating an Ad hoc Committee[43] and then a Preparatory Commission (PrepCom)[44] to work on the project to create an international criminal court, the UN General Assembly gave concrete expression to the efforts put in place by the ILC. As for the principle of *ne bis in idem*, it is interesting to note that in 1997, the PrepCom indicated that 'various rights to be afforded to persons investigated or indicted by the court are contained in articles 26, 28, 29, 30 and 41 …'.[45] In other words, when listing out the rights of the accused, the Commission made no reference to Article 42, it appears to have 'forgotten' the principle of *ne bis in idem*.

39 *Report of the Commission to the General Assembly on the work of its 45th session*, UN Doc. A/48/10, 3 May to 23 July 1993, at 120.

40 J. Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions* (Leiden/Boston: Nijhoff, 2008), at 56.

41 *Report of the Commission to the General Assembly on the work of its 46th session*, UN Doc. A/49/10, 2 May to 22 July 1993, at 52 (Art. 35) and 57 (Art. 42).

42 *Ibid.*, at 57.

43 Created in 1995 by virtue of GA Res. 49/53, 9 December 1994.

44 Created in 1996 by virtue of GA Res. 50/46, 10 December 1995; created in 1997 and 1998 by virtue of GA Res. 51/207, 17 December 1996.

45 *Decision taken by the Preparatory Committee at its session from 4 to 15 August 1997*, UN Doc. A/AC.249/1997/L.8/Rev.1, 14 August 1997, at 33, fn. 44.

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In 1998 in Zutphen (The Netherlands), the structure of the draft Statute for the international criminal court was considered by the PrepCom: the different working groups gathered together in order to make their proposals in a coherent form. In the so-called 'Zutphen Document' that emerged, the principle of *ne bis in ide*m is displaced and moved away from the area concerned with the rights of the defendant. Contained in the new Article 13, it immediately follows the provisions on the admissibility of cases (Articles 11 and 12). All these provisions are contained in Part 2 entitled 'Jurisdiction, admissibility and applicable law'. According to the terms of the document, these are 'substantive issues'[46] because they are linked to the controversial relationship between the international and national courts. The principle of *ne bis in idem* or 'article 13[42] was moved to this part because of its relationship to jurisdiction and admissibility'.[47]

One cannot detect any substantial change to the principle of *ne bis in idem*: the text as proposed by the ILC was not modified. Yet, it seems that the links between the principle and the concurrence of competent courts overcame its function of protecting the individual. The rights of the accused were established in another part of the restructured draft Statute, in the new Article 60 in particular. This structural reasoning was maintained until the Rome conference and then, in the Statute of the International Criminal Court.

B. A Principle at the Heart of the Complementarity Mechanism

According to the Rome Statute, the International Criminal Court acts in complementarity to national courts.[48] Very briefly, one could say that it is only called to intervene in cases where there has been a failure or a lack of will on the part of the national courts to prosecute through the internal process. Hence as previously mentioned, one finds, in a generalized and institutionalized form, a system that recognizes the circumstantial primacy of the ICTs. The international authority does exercise a judicial power in the exclusive circumstances of a failure in law or a lack of will to pursue prosecutions at the national level. This original institutional system constitutes a delicate balance between, on the one hand, the desire to prevent serious crimes going unpunished and on the other hand, the desire to preserve the sovereignty and independence of the criminal justice system of individual states.[49]

46 *Report of the inter-sessional meeting from 19 to 30 January 1998 in Zutphen, the Netherlands*, UN Doc. A/AC.249/1998/L.13, 4 February 1998, § 9.

47 *Ibid.*, at 47.

48 Preambular paragraph 10 and Art. 1 ICCSt.

49 For a detailed study of complementarity, see Stigen, *supra* note 40, or J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: OUP, 2008), at 58–95 in particular. For a more theoretical and conceptual analysis, see F. Megret, 'L'articulation entre tribunaux pénaux internationaux et juridictions nationales dans la répression des crimes des droits international: centralité et ambiguïtés dans l'ordre juridique international' (PhD thesis on file at University of Geneva, Switzerland).

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Complementarity is not defined as such in the Statute — rather, its meaning is expressed within Article 17 governing the conditions in which the ICC can exercise its jurisdiction. It deals with the admissibility of a case before the Court when a state has already acted or does not want to act *in idem*. By virtue of the principle of complementarity, the Court cannot intervene in a case where the state has already acted or is acting, except if this national action resulted from the unwillingness or inability of the state to genuinely investigate or prosecute.[50]

Article 17(1)(c) includes the principle of *ne bis in idem* among the conditions of inadmissibility and refers to Article 20(3) in this matter, hence we can see that the principle is well implicated in the concretization of the complementarity principle. More precisely, Article 17 itself deals with investigations or prosecutions that a state would have undertaken *in idem*, before the intervention of the ICC;[51] it refers to Article 20(3) for the cases where the accused has already been tried. Conceptually, an application of the principle of *ne bis in idem* to enquiries and proceedings (and not only to judgments) might be envisaged: the jeopardy of being twice the object of investigations or prosecutions could be prohibited. This is not the option kept open by the drafters of the Statute as Articles 17 and 20(3) are not merged.

The drafters of the Statute did not always conceive this distinction between the two provisions as clearly. In the final report of the PrepCom, a relative confusion seems to reign between the respective reach of both articles. As regards the future Article 17, a proposal of reformulation is worded as follows: 'The Court has no jurisdiction where the case in question *is being investigated or prosecuted, or has been prosecuted*, by a State which has jurisdiction over it'.[52] *A contrario*, a few pages further along, it is suggested that the future Article 20 could be expressed as follows: 'The Court has no jurisdiction where the case in question *is being investigated or prosecuted, or has been prosecuted*, by a State which has jurisdiction over it'.[53] Very clearly, the realms of application of these two sentences were tangled or even mirrored each other. However, this kind of inconsistency is quite common in the *travaux préparatoires* and may ultimately be of little significance. Moreover, scholars are unanimous as regards the domain covered by each article:[54] the principle of *ne bis in idem* only applies to situations where a first 'judgment' *stricto sensu* has been rendered.

50 Art. 17(1) ICCSt.

51 For the exceptional conditions in which an investigation or prosecution would not be considered to bar an action before the ICC, see Art. 17(2) and (3) ICCSt. For the distinction between Arts 17 and 20, see M.M. El Zeidy, 'The Principle of Complementarity, a New Machinery to Implement International crIminal Law', 23 *Michigan Journal of International Law* (2002) 869–975, at 931.

52 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/2 /Add.1, 14 April 1998, at 42 (emphasis added).

53 *Ibid.*, at 46 (emphasis added).

54 See S. Williams and W.A. Schabas, 'Issues of Admissibility: Article 17', in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Court – Observers' notes, Article by Article* (Baden-Baden: Nomos, 2008) 605–625; or Tallgren, *supra* note 2, at 689.

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One might wonder why the two provisions were not unified. Three main factors might explain why. First, as we saw, the principle of *ne bis in idem* was focused on the rights of the accused and was so distinguished by the ILC from the general mechanism of admissibility — the Rome Statute could simply keep track of its successive historical stratum. Secondly, the distinction allows Article 20 to provide for the different scenarios of *bis in idem.* It permits the application of the principle of *ne bis in idem* to situations where the ICC itself has rendered the first judgment, while these situations would not be covered by the complementarity expressed by Article 17. Article 20(1) is indeed dedicated to the intra-jurisdictional interaction (where the Court wants to 'rejudge' after its own decision) and the situation where another court wants to act after a decision has been rendered by the ICC. Thirdly, on a more conceptual level, but in the same sense, one could argue that the promulgation of the principle of *ne bis in idem* in a peculiar article displays the will not to overshadow the protection afforded to the accused. The fact that the principle has a use regarding the admissibility mechanism does not imply that it loses its other rationales. It still protects the individual, even if this does not appear as its primary function. One could note that the protection provided to the accused is far from perfect: in many cases, a second procedure is possible — the principle as enunciated in Article 20 only recognizes an absolute *res judicata* effect to the ICC judgments vis-à-vis the ICC itself.[55] In other words, the principle has an absolute effect in its sole intra-jurisdictional application. This appears to confirm our hypothesis: the structural function of *ne bis in idem* emerges with its internationalization. In any case, the rule's double *rationale* could justify the distinction kept between Articles 17 and 20: Article 20 participates in inter-jurisdictional regulation but also contains a right for the accused. Trial Chamber II in *Katanga and Ngudjolo Chui* indirectly recognized this:

> This belated inclusion of the *ne bis in idem* principle in article 17(1)(c) as a basis for challenging admissibility is … explained *essentially* by the need to protect the rights of the accused, in contrast to subparagraphs (a), (b) and (d) of the same article, the purpose of which is to safeguard the sovereign rights of States and to ensure that cases brought before the Court are of sufficient gravity.[56]

Thus, the commentary expressed here by Trial Chamber II states that it did not envisage the inclusion of the principle of *ne bis in idem* in the article that deals with admissibility, essentially because its other aim is to protect the individual; the principle was later added to the article. In other words, Article 20(3) contributes to complementarity, offering an interpretative grid for judgment rendered at the national level, but Article 20 also provides for the application of *ne bis in idem* to actions where a judgment

55 Art. 20(1) ICCSt.

56 Reasons for the oral decision on the Motion challenging the admissibility of the Case, *Katanga and Ngudjolo Chui* (ICC-01/04-01/07), Trial Chamber II, 16 June 2009, § 48 (emphasis added).

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has already been rendered by the Court and, at that point, protects the accused.

The distinction implies that investigations or prosecutions that have not led to a judgment because they are ongoing or they were deliberately interrupted or suspended, do not bring the principle of *ne bis in idem* into operation.[57] This is a traditional view of the principle: it can apply only to a case that has already been adjudicated upon in the strict sense — a procedure that has been fully completed. The principle is not about a preventative action when the accused finds themselves 'in jeopardy' a number of times, since the principle restricts its application to situations where the first proceedings have been completed. In inter-jurisdictional interactions, it only protects the accused from strictly defined jeopardy.

In practical terms, this means that a decision of a public prosecutor not to pursue (for example, a *classement sans suite* in Belgium)[58] can block an action being taken before the ICC, on the basis of Article 17(1)(b), and not on the basis of the principle of *ne bis in idem.*[59] Precision is required in defining the provision that governs the decision of a tribunal to put an end to legal action, on the basis, for instance, that there is insufficient proof (in Belgium, a *non-lieu* that was declared by the *chambre du conseil*).[60] This appears to be derived from the definition of Article 17(1), paragraph (a) and (b) dedicated to *investigations* and *prosecutions*; it would then enter into the aim of Article 17(1)(c), which refers to Article 20(3) and would block, if the decision was taken properly and in good faith, any further action in court. Nevertheless, Trial Chamber III decided in the *Bemba* Case that Article 17(1)(c) could not apply to *non-lieu* because the latter was not a final decision on the merits.[61] The strict application of *ne bis in idem* to this kind of final decision makes *non-lieu* an unknown engine in the Statute's terms.

57 A.M. La Rosa, *Juridictions pénales internationales - la procédure et la preuve* (Paris: PUF, 2003), at 134.

58 See e.g. H. Bosly, D. Vandermeersch and M.-A. Beernaert, *Droit de la procédure pénale* (Brugge: La Charte, 2008), at 189.

59 In this sense, see also the commentary of the *PrepCom* in 1996 : 'This paragraph [about the *ne bis in idem* principle], it was noted, should apply *only to res judicata and not to proceedings discontinued for technical reasons*', *Report of the Preparatory Committee on the Establishment of an International Criminal Court,* vol. 1, UN Doc. A/51/22, § 170 (emphasis added).

60 Bosly, Vandermeersch and Beernaert, *supra* note 58, at 918–928. The term '*non-lieu*' can have different meanings, depending of the uses of it in different national legal systems. Here, it means that the decision to put an end to legal proceedings is made by a court and not by the prosecution.

61 Decision on the admissibility and abuse of process challenges, *Bemba Gombo* (ICC-01/05-01/08), Trial Chamber III, 24 June 2010, § 248. Appeals Chamber did not propose another reading of the Statute: judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility of Process Challenges', *Bemba Gombo* (ICC-01/05-01/08), Appeals Chamber, 19 October 2010, §§ 65–75.

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C. A New Relationship between the Principle and the Rights of the Accused?

We have now defined the position and scope attributed to the principle of *ne bis in idem* in the Rome Statute. In this last section, we will complete the assessment of its position before the ICC by putting forward two original links between the rule and the rights of the accused.

First, as it supports its jurisdictional system and is part of the Rome Statute, one can interpret the principle in the light of the Statute's object and purpose.[62] In other words, we can describe the principle as participating in the general aims of the ICC, that is, in the struggle against impunity. According to the Preamble of the Rome Statute, states indeed decided to create the Court

> [a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished …
> [d]etermined to *put an end to impunity* for the perpetrators of these crimes and thus to contribute to the prevention of such crimes …[63]

Consequently, we could suggest that the only matter that is recognized as activating the *ne bis in idem* principle is the correct exercise of the *ius punendi* of the international community.[64] In other words, a first judgment that is handed down *in idem* blocks other actions if the accused has been sufficiently punished.[65] This explains that, for the principle to apply, it is necessary not only that an initial judgment is handed down but that a sentence is also imposed. New procedures *in idem* will indeed be allowed, in spite of the principle, if the first initial procedure was deficient in a number of respects — amongst which is the situation where a too lenient sentence has been imposed. In other words, the imposition of mild sentences seems to be conceived as a sign of too much clemency being afforded to the accused.[66] Non-enforcement of a judgment does not explicitly constitute an exception to the principle of *ne bis in idem* but could be considered as a deficiency of the first trial. This tallies with the objective of 'fighting against impunity' pursued by the Rome Statute. It cannot be argued that this promotes the rights of the accused: the link between protecting the latter from jeopardy and the principle of *ne bis in idem* appears significantly weakened in this scenario.

Article 20(3) seems to establish a second original link between the principle of *ne bis in idem* and the rights of the accused. This one appears to act more positively in favour of the latter. Within the exception to the principle in

62 Art. 31-1 Vienna Convention on the Law of Treaties, 23 May 1969.

63 Preambular paragraphs 4 and 5 ICCSt. (emphasis added).

64 Tallgren, *supra* note 2, at 672.

65 See A. Nieto Martin, 'Introduccion : El principio de ne bis in idem en el derecho penal europeo en internacional', in L. Arroyo Zapatero and A. Nieto Martin (eds), *El principio de ne bis in idem en el derecho penal europeo en internacional* (Cuenca: Ed. de la Universidad de Castilla-La Mancha, 2007) 9–15, at 15.

66 A situation that was envisaged by the ILC; see *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, vol. 1, A/51/22, GAOR, 51st sess., Suppl. no 22, § 173.

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Article 20(3)(b), it is stated that a case previously judged could be deemed admissible by the ICC if the first procedure lacked impartiality and independence, did not respect 'the norms of due process' and did not display a desire to judge the accused. These three criteria appear to be cumulative. As regards the guarantee of due process, it should be noted that the ICC is not an international court of human rights: in theory, it is not competent to evaluate the way in which states apply human rights, and therefore it cannot oblige states to respect human rights.[67] Yet the possibility does remain for the Court to perform such a function, albeit giving the Court a significant new dimension.[68] Keeping the aims of the Statute in mind (i.e. the fight against impunity), it seems that only a very wide interpretation of Article 20(3), as opposed to its punitive *ratio legis*, would allow for an exception with regard to every failure to respect the standards of fair process.[69] In other words, a (globally fair) judgment at the national level that is sufficiently severe should *a priori* block every action that might be taken before the Court, even if it lacked some of the guarantees of due process. If it is necessary that the first procedures were brought in good faith and were impartial, an attack on the rights of the accused will not theoretically suffice to deny the decision of the Court of the authority that its decision is final. Today, the respect of guarantees of due process does not constitute an explicit, positive obligation — rather, it is grounds for reinforcing the case for admissibility before the ICC.[70] Nevertheless, if the Court decides to turn its jurisprudence in this direction, this demand could become an independent and sufficient criterion for admissibility. A failure to respect the guarantees of due process could imply admissibility before the ICC: because those rights of the accused would not have been respected, the ICC could re-evaluate the case. One can imagine that, in the future, the principle of *ne bis in idem* might take on a qualitative characteristic, requiring a strict respect of the norms of due process to recognize an authority, blocking the first trial *in idem*. This would reinforce the hypothesis according to which, the principle participates in articulating a system of inter-jurisdictional criminal justice.

5. Conclusion

As we observed, the principle of *ne bis in idem* exercises different functions in international criminal law. It can be summarized as having two primary objectives. On the one hand, to protect the accused from being twice put in jeopardy, the traditional aim of the principle. It is largely recognized as being a

67 R.E. Fife, 'The International Criminal Court - Whence it Came, Where it Goes', 69 *Nordic Journal of International Law* (2000) 63–86, at 66–67.

68 Van den Wyngaert and Ongena, *supra* note 2, at 725; T. Vander Beken, G. Vermeulen and T. Ongena, 'Concurrent National and International Criminal Jurisdiction and the Principle of "ne bis in idem" ', 73 *Revue Internationale de droit pénal* (2002) 811–848, at 841.

69 Kleffner, *supra* note 49, ft. 365.

70 K.J. Heller, 'The Shadow Side of Complementarity: the Effect of Article 17 of the Rome Statute on National Due Process', 17 *Criminal Law Forum* (2005) 255–280, at 257.

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right confined to providing protection for an individual from multiple prosecutions within one jurisdiction. On the other hand, the rule participates in upholding the structure of emergent international criminal law. As in the European Union, this articulating function appears to come about through the internationalization of the rule: it is needed and used in extra-territorial situations, where the protective goal of the rule can be relatively neglected. The issue will unlikely be referred to the ICTs involved in deferrals and other actions to finish their task, but perhaps the ICC will explicitly confirm this structural nature of the principle in its jurisprudence.

Within this jurisdictional function, the principle of *ne bis in idem* serves the aims of the Rome Statute in helping to fight against impunity. The ICC could also recognize a qualitative role for the rule, through an extension of its reach to cover human rights to a fair trial. If the Court takes on the demanding task to require general respect of the norms of due process, one could argue that the principle of *ne bis in idem* would be reconciled with its historical function, of protecting the rights of the accused. The rule would then have come full-circle.

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