

DOES THE INTERNATIONAL CRIMINAL COURT PROTECT AGAINST
DOUBLE JEOPARDY: AN ANALYSIS OF ARTICLE 20 OF THE ROME
STATUTE

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The rule against double jeopardy has long been considered an important protection for accused persons and an essential element of the right to a fair trial. This article considers whether those appearing before the International Criminal Court are adequately protected by the rule against double jeopardy by examining the scope and application of the double jeopardy protection provided under Article 20 of the Rome Statute. Although Article 20 provides for a basic double jeopardy guarantee; it also contains potentially broad exceptions that may significantly undermine the double jeopardy protection available to accused persons being tried by the International Criminal Court.

INTRODUCTION

The International Criminal Court (ICC) was established by the Rome Statute of the International Criminal Court (Rome Statute) and came into effect on July 1, 2002. The statements welcoming the establishment of the ICC are reflective of the high hopes and idealism that drove the development of the Court. Hans Corell, for example, believed that “[a] page in the history of humankind is being turned.”¹ Kofi Annan, then Secretary-General of the United Nations, declared:

The entry into force of the Rome Statute of the International Criminal Court is an historic occasion. It reaffirms the centrality of the rule of law in international relations. It holds the promise of a world in which the perpetrators of genocide, crimes against humanity and war crimes are prosecuted when individual States

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¹ Hans Corell, Legal Counsel of the United Nations, Transcript of Remarks on the Occasion of the Deposit of the Instruments of Ratification Required for the Entry into Force of the Rome Statute of the International Criminal Court (Apr. 11, 2002), available at <http://www.iccnw.org/documents/CorellTreatyEvent11April02.pdf>.

are unable or unwilling to bring them to justice. And it gives the world a potential deterrent to future atrocities.²

However, the establishment of the ICC has been highly controversial. Much of the opposition has centered on concerns that the ICC undermines state sovereignty, fears that the ICC may be used to pursue politically motivated cases, and concerns about due process protections. One question that has been repeatedly raised in relation to due process is whether the Rome Statute reflects the prohibition against double jeopardy. The following statement by John Rosenthal is illustrative of this concern:

Virtually all the organizations, whether international, governmental, or nongovernmental, that have rallied to the ICC cause go to great pains to stress that the Rome Statute offers all the due process protections of the American Constitution and, more specifically, that it provides protection against double jeopardy. This is simply and obviously not so. Indeed, if the expression 'double jeopardy' is understood in the ordinary sense of American law and, more generally, the common law tradition, then not only does the statute not provide protection against double jeopardy; it also positively sanctions exposing defendants to double jeopardy.³

This paper will examine that claim by considering whether an accused being tried by the ICC is adequately protected by the prohibition against double jeopardy. Part I will consider the rule against double jeopardy from a general perspective, looking at the justifications supporting the principle and its recognition throughout the world. Part II will examine the protection against double jeopardy in the specific context of the Rome Statute, and will analyze the scope and application of the double jeopardy protection in the ICC. Finally, Part III will consider the potential application of these issues in *The Prosecutor v. Mathieu Ngudjolo Chui*,⁴ an ongoing case currently before the ICC in which double jeopardy issues have been raised by the defense.

I. THE RULE AGAINST DOUBLE JEOPARDY

The rule against double jeopardy has a long history and is recognized as

² Press Release, UN Secretary-General, 'There Must Be No Relenting' in Fight Against Impunity, Says Secretary-General as International Criminal Court Rome Statute Comes into Force, U.N. Doc. SG/SM/8293 (July 1, 2002), available at <http://www.un.org/News/Press/docs/2002/sgsm8293.doc.htm>.

³ John Rosenthal, *A Lawless Global Court: How the International Criminal Court Undermines the U.N. System*, 123 POL'Y REV. 29, 33 (2004).

⁴ See *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07 (2007).

a “cardinal principle” that lies “at the foundation of criminal law.”⁵ It is a protection that can be traced back to Roman law, deriving from the principle *nemo debet bis vexari pro una et eadem causa*.⁶ Today, it is viewed as one of the central principles underpinning both the protection of individual human rights and the fair administration of justice.

The core of the rule against double jeopardy is the idea that a person should not be tried more than once for the same offense. In civil law jurisdictions and in the context of international law, the analogous principle of *ne bis in idem*⁷ is applied.

The justifications underpinning this principle are the protection of both the individual who is accused of criminal conduct and the criminal justice system more broadly. In the role of protecting individual rights, Justice Black in *Green v. United States* explained the rationale behind the rule against double jeopardy as follows:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resource and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing sense of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.⁸

Justice Black emphasizes the risk that repeated prosecutions inevitably increase the probability of an innocent person being convicted. A defendant will be in a weaker comparative position in any subsequent re-trial following the disclosure of his defense and evidence at the first trial. There is also the concern that “in many cases an innocent person will not have the stamina or resources effectively to fight a second charge.”⁹

In a broader sense, the principle of double jeopardy reflects the importance of finality in the criminal justice system and protects against inconsistent results. From this perspective, the doctrine plays a role in upholding public confidence in the justice system and respect for judicial proceedings, with the additional practical benefit of conserving judicial resources. The rule against double jeopardy also reinforces the need for investigations and prosecutions to be thorough and diligent, with police and prosecutors knowing that they will not get a second chance to secure a

⁵ Cullen v. The King, [1949] S.C.R. 658, 668 (Can.).

⁶ “No man should be proceeded against twice for the same cause.”

⁷ “Not twice for the same.”

⁸ Green v. United States, 355 U.S. 184, 187-88 (1957).

⁹ MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 4 (1969).

conviction.¹⁰

It is important to recognize, however, that there are competing values and principles that need to be balanced against the justifications informing the protection against double jeopardy. For example, while it is important for a criminal justice system to include safeguards designed to protect innocent people from wrongful conviction, it is also important to ensure that guilty people are convicted and punished. A criminal justice system that manifestly fails in this regard will quickly lose public confidence and respect. To this end, both victims of crime and the wider community, in certain circumstances, may see the rule against double jeopardy as preventing justice from being done. The need to balance these concerns with recognition of the basic justifications outlined above means that few jurisdictions, in practice, apply the rule against double jeopardy as an absolute prohibition. While the general principle is widely recognized and protected, there are also invariably exceptions provided for in each jurisdiction.

The basic rule against double jeopardy is recognized and protected at a domestic level by over fifty national constitutions, including the constitutions of countries as diverse as Germany, Japan, Nigeria, and South Africa.¹¹ It is enshrined in a variety of international and regional instruments, including Article 14(7) of the International Covenant on Civil and Political Rights,¹² Article 4 of the Seventh Additional Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹³ Article 8(4) of the American Convention on Human Rights,¹⁴ Article 19 of the revised Arab Charter on Human Rights,¹⁵ the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa as proclaimed by the African Commission on Human and Peoples' Rights,¹⁶ Article 50 of the Charter of Fundamental Rights of the European Union,¹⁷ and Article 54 of the Schengen Convention.¹⁸ It has also been expressly provided for in the statutes of various international criminal tribunals,

¹⁰ Law Commission (UK), *Double Jeopardy*, Consultation Paper No. 156, ¶4.11 (1999).

¹¹ GRUNDGESETZ [GG] [Constitution] art. 103(3) (F.R.G.); KENPŌ [CONSTITUTION], art. 39 (Japan); CONSTITUTION, Art. 36(9) (1999) (Nigeria); S. AFR. CONST. 1996 art. 35(3)(m).

¹² International Covenant on Civil and Political Rights art. 14(7), G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Mar. 23, 1976).

¹³ Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 4 (Nov. 22, 1984), *amended by* Protocol No. 11, ETS No. 155 (Nov. 1, 1998).

¹⁴ American Convention on Human Rights art. 8(4), July 18, 1978, 1144 U.N.T.S. 123.

¹⁵ Arab Charter on Human Rights art. 19, Aug. 5, 1990.

¹⁶ Resolution on the Right to Fair Trial and Legal Aid in Africa, Nov. 15, 1999, ACHPR/Res. 41(XXVI)99.

¹⁷ Charter of Fundamental Rights of the European Union art. 50, 2000 O.J. (C 364) 1.

¹⁸ Schengen Convention art. 54, 2000 O.J. (L 239) 19.

including the International Criminal Tribunal for the former Yugoslavia,¹⁹ the International Criminal Tribunal for Rwanda,²⁰ and the Special Court for Sierra Leone.²¹

Although there is widespread acceptance of the core principle of *ne bis in idem*, its precise scope and application varies considerably across jurisdictions. For example, different jurisdictions take different approaches to the question of prosecutorial appeals against acquittals, the circumstances in which a final decision may be re-opened and a re-trial allowed, precisely when a decision acquires the status of *res judicata*, and whether double jeopardy protection extends to foreign criminal proceedings.²² The traditional approach to the last question has been that *ne bis in idem* only applies to criminal proceedings within the one jurisdiction. The United Nations Committee for Human Rights confirmed this approach when it decided in *A.P. v. Italy* that a new trial held in a different state did not breach the principle as provided for in Article 14(7) of the ICCPR.²³ These variations have led some to question whether *ne bis in idem* can be considered to have developed and crystallized into a uniform principle of customary international law.

II. *NE BIS IN IDEM* AND THE INTERNATIONAL CRIMINAL COURT

A. *Article 20 of the Rome Statute*

Regardless of whether the principle is considered to have emerged as a uniform rule of customary international law or not, it has been expressly provided for in the Rome Statute.²⁴ Article 20 of the Rome Statute, which is titled “*Ne bis in idem*,” provides that:

¹⁹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/RES/827 (May 25, 1993).

²⁰ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (June 29, 1995).

²¹ Special Court for Sierra Leone, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

²² BEN EMMERSON & ANDREW ASHWORTH, *HUMAN RIGHTS AND CRIMINAL JUSTICE* 303-04 (2001); M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT’L L. 235, 288-89 (1993); Michele M. Morasin, *Double Jeopardy and International Law: Obstacles to Formulating a General Principle*, 64 NORDIC J. INT’L L. 261, 262-63 (1995).

²³ *A. P. v. Italy*, U.N. Comm. for Human Rights, Communication No. 204/1986, U.N. Doc. Supp. No. 40 A/43/40 (July 16, 1986).

²⁴ Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF. 183/9, 2187 U.N.T.S. 90 [hereafter Rome Statute].

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7, or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
 - (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
 - (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.²⁵

In large part, the same considerations underpinning the principle of *ne bis in idem* at the domestic level are applicable in the context of the ICC. The reasons for the inclusion of Article 20 are concerns about fairness to the accused, individual human rights, and the protection of the integrity of the judicial system. At the same time, however, the creation of the ICC introduces an additional jurisdiction in which double jeopardy issues may arise. It also raises further considerations that are specifically relevant to the operation of *ne bis in idem* in the context of criminal justice at the international level. The most important of these is the question of state sovereignty and the relationship between national courts and the ICC, particularly in light of the suspicions often held by national governments towards “foreign” judicial systems beyond their domestic control.

The moral context in which these prosecutions are brought is another factor that will influence any assessment of the operation of *ne bis in idem* within the ICC. The ICC was designed specifically to bring to justice those responsible for “the most serious crimes of concern to the international community as a whole”²⁶ and, as such, has been given jurisdiction with respect to genocide, crimes against humanity, war crimes, and crimes of

²⁵ *Id.* art. 20.

²⁶ *Id.* pmb1.

aggression.²⁷ It is almost, therefore, inevitable that any prosecution undertaken before the ICC will occur in an atmosphere of heightened moral outrage and significant surrounding political tensions. Indeed, the need for the ICC in the first place was “the general perception that the enforcement of international criminal law lacks comprehensiveness, suffering from the historical pattern of impunity.”²⁸

Against this background, there may well be strong arguments for limiting the scope of *ne bis in idem* to ensure that those responsible for crimes of this nature are brought to justice. On the other hand, it can be argued that:

[I]t is precisely at those times when moral outrage is at its highest that the burden on adjudicating bodies is heaviest both to satisfy society’s collective need for condemnation and punishment of war criminals and simultaneously to assiduously protect the rights of those accused of war crimes. In order for a war crimes tribunal to possess legitimacy, it must ensure that rights of the accused are protected by the principles of due process and fundamental fairness.²⁹

The principle enshrined in Article 20 is an attempt to balance these different considerations. However, this attempt has not been free from controversy. Some argue that the ICC “has recognized so many exceptions to the double jeopardy clause that the values the clause allegedly protects are not in fact of a fundamental nature.”³⁰ Considering the scope and application of *ne bis in idem* protection within the framework of the ICC is important to assess whether individuals are, in fact, being protected against double jeopardy, what implications there may be for the long-term achievement of the Court’s stated aim of bringing to justice those responsible for the most serious crimes of international concern, and the extent to which Article 20 provides “the last safeguard in allocating the tasks of national and international criminal justice according to the notion of complementarity.”³¹

²⁷ *Id.* art. 5(1).

²⁸ Immi Tallgren & Astrid Reisinger Coracini, *Article 20: Ne bis in idem*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 670, 697 (Otto Triffterer ed., 2d ed. 2008).

²⁹ Lynne Miriam Baum, *Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court*, 19 WIS. INT’L L. J. 197, 197 (2000).

³⁰ *Id.* at 221-22.

³¹ Tallgren & Coracini, *supra* note 28, at 672.

B. The Relationship with Article 17

When considering the operation of Article 20 of the Rome Statute it is necessary to keep in mind the close relationship between this provision and the principle of complementarity reflected in Article 17. Article 17(1), entitled "Issues of Admissibility," provides:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.³²

Article 17(1)(c) expressly reinforces the application of *ne bis in idem* to a person who has already been tried for conduct which is the subject of the complaint, and the operation of the exceptions to this under Article 20(3).³³ More generally, Article 17 prevents the ICC from asserting jurisdiction where jurisdiction has already been asserted by a national judicial body. The principle of *ne bis in idem* in Article 20 provides a corollary to the principle of complementarity that is set out in Article 17 and which reflects one of the central governing principles underpinning the ICC.

C. Article 20(1)

Of the three situations outlined in Article 20, the most straightforward and comprehensive application of the *ne bis in idem* principle is found in Article 20(1), which bars the ICC from trying a person who has already been convicted or acquitted by the ICC.³⁴ This express prohibition was not

³² Rome Statute art. 17(1).

³³ *Id.* art. 17(1)(c).

³⁴ *Id.* art. 20(1).

included in the 1994 Draft Statute prepared by the International Law Commission, as it was understood to be a self-evident principle. The provision was subsequently included in the interests of clarity after the 1998 Preparatory Committee raised the question.³⁵

The comprehensive nature of the *ne bis in idem* protection under Article 20(1) follows from the reference to the “conduct which formed the basis of crimes,” with the *idem* being defined here by way of a conduct-based test.³⁶ This approach means that the characterization of the offense and its legal elements are irrelevant in determining the application of *ne bis in idem*, and that the prosecution is barred from pursuing a subsequent trial based on the same facts even if it charges the accused with a technically different offense. This conduct-based approach provides strong protection for an accused and is illustrative of a broad application of the *ne bis in idem* principle.

It is also worth noting the express inclusion here of the phrase “except as provided in this Statute,” which makes it clear that the principle of *ne bis in idem* is not intended to prohibit the appeals and revisions that are otherwise provided for under Part VIII of the Rome Statute.³⁷

D. Article 20(2)

When compared to the comprehensive nature of the prohibition under Article 20(1), the protection of *ne bis in idem* is significantly weaker under Article 20(2) of the Rome Statute. Article 20(2) prohibits “another Court” from trying a person who has already been convicted or acquitted by the ICC.³⁸ The limited scope of protection is a result of this prohibition extending only to further trials “for a crime referred to in Article 5.”³⁹ Article 20(2) therefore protects an individual who has been convicted or acquitted by the ICC from being subsequently placed on trial by another court only for the specific offenses for which he has already been convicted or acquitted by the ICC.

This has two immediate implications. The first is that Article 20(2) does not prevent an individual from being charged by another court with an offense other than the four offenses listed under Article 5(1) (namely, genocide, crimes against humanity, war crimes, and the crime of aggression) even where the new charge is based upon the same conduct that formed the basis of the offense already tried before the ICC.⁴⁰ This means, for example,

³⁵ Tallgren & Coracini, *supra* note 28, at 682.

³⁶ Rome Statute art. 20(1).

³⁷ *Id.*

³⁸ The phrase “another court” was intended to primarily refer to national courts but may be construed to encompass other international tribunals. Rome Statute art. 20(2).

³⁹ *Id.*

⁴⁰ *Id.*

that an individual who is acquitted of genocide by the ICC may still be tried by a national court for the murders that formed the basis of the original genocide charge. Secondly, the wording of Article 20(2) suggests that a subsequent trial for a crime referred to under Article 5 is not prohibited where the accused has been convicted or acquitted by the ICC of a *different* Article 5 crime.⁴¹ It may be possible, for example, for an individual who is charged with genocide before the ICC and acquitted to be subsequently tried by a national court (or any other international tribunal) for crimes against humanity.

The use of the words “for a crime referred to in article 5” is a significant limitation on the protection offered under the principle of *ne bis in idem*.⁴² Immi Tallgren and Astrid Coracini observed that during the last session of the Preparatory Committee in 1998 the prohibition was worded so as to extend to subsequent trials “for conduct constituting a crime referred to in article 5,” which would have reflected the more comprehensive *ne bis in idem* protection provided under Article 20(1).⁴³ The committee changed the wording precisely to ensure that a State retained the right to charge a person with, for example, murder despite the fact that the ICC may previously have acquitted that person of a charge of genocide. The double jeopardy implications of this change were recognized; a number of delegations suggested “that the proposed additions would undermine the protection of *ne bis in idem* completely.”⁴⁴

Reynaud N. Daniels suggests that this original wording should have been retained so that Article 20(2) would have maintained a more comprehensive protection against double jeopardy. Daniels suggests that “the negotiating parties believed this limitation of *non bis in idem* was justified because the ICC has no jurisdiction over crimes under national law,”⁴⁵ and concludes that:

Evaluating this article from a human rights perspective, it is apparent that this is [a] manifest limitation of the *non bis in idem* protection. Even if the ICC has no jurisdiction in respect of national crimes, this did not prevent the drafters from prohibiting further prosecution and punishment in respect of the *same conduct*. The drafters’ belief that they could only limit the power of national jurisdiction in relation to the specific crimes

⁴¹ *Id.*

⁴² *Id.*

⁴³ Tallgren & Coracini, *supra* note 28, at 686.

⁴⁴ *Id.*

⁴⁵ Reynaud N. Daniels, *Non Bis in Idem and the International Criminal Court* 25-26 (Beppress Legal Series, Working Paper No. 1365, 2006), available at <http://law.bepress.com/expresso/eps/1365>.

provided for in the Rome Statute does not hold up to scrutiny.⁴⁶

Daniels is correct insofar as he concludes that the Rome Statute could have placed a “conduct-based” limitation on any subsequent prosecution by a national court. Although a domestic statute outlining the jurisdiction of a national court would ordinarily not, as a matter of law, impose *ne bis in idem* protection by unilaterally prohibiting a court in a separate jurisdiction from prosecuting that individual after they had been convicted or acquitted by the original court, such a prohibition is possible under the Rome Statute. The distinction here is that States ratifying the Rome Statute are consenting to be bound by the obligations outlined in the document as a matter of international treaty law. In addition, the fact that the ICC itself only has jurisdiction over a limited, specifically defined number of crimes would in no way prevent a broader prohibition being placed on national courts.

While it is correct to conclude that the drafters were not precluded from imposing a “conduct-based” prohibition on subsequent prosecutions by national courts, they also believed that the limitation of *ne bis in idem* under Article 20(2) was justified because the ICC has no jurisdiction over “ordinary” crimes under national law. The limited nature of ICC jurisdiction does indeed appear to provide a powerful argument in favor of limiting the scope of *ne bis in idem* in the manner provided for under Article 20(2).

In light of the narrow jurisdiction of the ICC, a comprehensive application of *ne bis in idem* to prevent subsequent prosecutions for so-called “ordinary crimes” (such as murder, rape, torture, or kidnapping) would result in a significant lacuna in the power of the international community to effectively ensure that the interests of justice were served. The crimes listed under Article 5 of the Rome Statute, and defined in Articles 6, 7, and 8, all require specific forms of intent to be established as *mens rea* elements of the crime. For example, the physical act of killing somebody is not itself a crime within the jurisdiction of the ICC unless this physical act is also “committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group” (to establish genocide under Article 6); is “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” (to establish the offense of crimes against humanity under Article 7); or is “wilful” in the sense of being intentional or reckless (to establish the offense of war crimes under Article 8).⁴⁷ When prosecuting a criminal offense it is often the *mens rea* element that is the most difficult to prove to the requisite standard. Recognizing this, domestic jurisdictions frequently provide for

⁴⁶ *Id.* at 30 (emphasis in original).

⁴⁷ Under Article 8(2) the wilful killing would also need to be an act committed against a person or property protected under the provisions of the relevant Geneva Convention in order to be defined as a war crime.

alternative verdicts to be available where the *actus reus* of an offense has been proven but the *men rea* has not. This allows, for example, for an accused to be acquitted of a charge of murder when the requisite intention has not been established, but simultaneously convicted on an alternative charge of manslaughter. Such an option is not available to the ICC, which only has jurisdiction over the specific offenses provided for under Article 5.

Imposing a conduct-based *ne bis in idem* prohibition under Article 20(2) would therefore mean that an individual who is tried by the ICC and acquitted of genocide on the basis that the required intent was not proven by the Prosecutor beyond a reasonable doubt⁴⁸ would subsequently be immune from punishment for any individual acts of killing, rape, torture, kidnapping and the like, even if it had been proven to the ICC beyond reasonable doubt that he was responsible for those specific physical acts. This ensures that the right of an accused to *ne bis in idem* protection is upheld to its fullest extent, but it does so at the expense of the victims and the broader international community's interests in seeing some measure of justice served. As a practical matter, this would also significantly enhance the potential risk of commencing a prosecution before the ICC.

In short, the approach adopted by Article 20(2) does impose an important limitation on the *ne bis in idem* protection that is provided to an accused person. There are, however, persuasive arguments in support of this limitation, which is an attempt to balance the rights of the accused with the need to establish a comprehensive framework of criminal accountability in light of the limited jurisdiction granted to the ICC.

In practice, the risk posed to an accused by the restricted *ne bis in idem* protection provided by Article 20(2) is likely to be minimal given the principle of complementarity outlined in Article 17. The ICC is only able to exercise jurisdiction over a matter where national courts are unwilling or unable to investigate or prosecute. Consequently, the risk of subsequent prosecution by a national court is relatively low. This point should not, however, be overstated, particularly given that investigation and prosecution by the ICC could itself potentially alter the political considerations that weigh upon a country's decision to take action in response to alleged crimes of this nature.

E. When Does "Jeopardy" Attach?

Both Articles 20(1) and 20(2) provide for *ne bis in idem* protection only in circumstances where a person has been "convicted or acquitted by the Court."⁴⁹ The question then becomes when a person is considered to be

⁴⁸ As required under Article 66(2) and (3) of the Rome Statute.

⁴⁹ Rome Statute arts. 20(1) – (2).

“convicted or acquitted.” Does “jeopardy” in this sense attach at the initial decision or does it attach when judgment becomes non-appealable?⁵⁰ The decision becomes non-appealable thirty days after notification of the decision or sentence, according to Rule 150(1) of the *Rules of Procedure and Evidence*.

Tallgren and Coracini suggest that while the latter view accords with the application of *ne bis in idem* by regional bodies and with the civil law tradition, the former position is arguably based on the wording of Article 20 and the drafting discussions. In particular, they note that the wording of Article 20(1) excludes the operation of *ne bis in idem* in relation to appeals and revisions under Chapter VIII because it prohibits a person from being subsequently tried before the ICC “except as provided in this Statute.”⁵¹ This wording would be superfluous if “jeopardy” only attached when a judgment becomes “final,” or non-appealable. Tallgren and Coracini note that this interpretation strengthens the *ne bis in idem* protection for an accused.⁵²

One thing that the use of the “conducted or acquitted” requirement does make clear is that “jeopardy” will not attach at the commencement of either an investigation or prosecution. Article 20, then, does not prevent a national court from deciding to investigate or put on trial a person who is already being investigated or prosecuted by the ICC up until the point that the person is “convicted or acquitted.”⁵³ This may well raise numerous separate issues beyond the scope of Article 20 concerning the timing of the various proceedings, the relationship between the national court and the ICC, the principle of complementarity, and admissibility under Article 17.

F. Article 20(3)

Putting the exceptions provided for under Article 20(3) momentarily to one side, the general rule stated in Article 20(3) signifies a return to the comprehensive application of *ne bis in idem* that was provided for in Article 20(1) and is a marked departure from the much weaker protection provided for in Article 20(2).⁵⁴ Whereas Article 20(2) limits *ne bis in idem* protection to trials involving crimes that have been characterized in the same manner, both Articles 20(1) and (3) define the *idem* by way of a conduct-based test. This has the effect of prohibiting subsequent trials based on the same conduct, regardless how the offense is characterized by each jurisdiction. In

⁵⁰ Under Rule 150(2) the Appeals Chamber may extend this time limit “for good cause” upon the application of the party seeking to appeal.

⁵¹ Rome Statute art. 20(1).

⁵² Tallgren & Coracini, *supra* note 28, at 683-84.

⁵³ Rome Statute art. 20.

⁵⁴ *Id.* art. 20(3).

the case of Article 20(3) the general rule provides that no person tried by another court “for conduct also proscribed under article 6, 7, or 8” shall be tried by the ICC “with respect of the same conduct.”⁵⁵

This means, for example, that an individual tried at the national level for murder or sexual assault may not be tried by the ICC for genocide where both charges are based on the same conduct. The main arguments in favor of this approach are that it represents the full extension of the *ne bis in idem* protection, that it respects state sovereignty, and that it best effectuates the intent behind complementarity. Individuals who are not willing to admit to charges of genocide, crimes against humanity, or murder may nevertheless be willing, in some circumstances, to admit to the underlying offenses such as murder or sexual assault. This may have some potential (and not insignificant) benefits, including the avoidance of a lengthy and contested trial (which could result in acquittal), the avoidance of the trauma to victims and witnesses that a trial inevitably involves, and the achievement of closure at an earlier stage.

There are, however, some significant disadvantages to this approach. First, there may be a perception that justice has not been achieved. This perceived failure to achieve a “full measure” of justice may increase the trauma experienced by victims and witnesses, prevent an ultimate sense of closure, and contribute to a continuing environment of denial. A conviction for an “underlying offense” may also trivialize the seriousness of the crimes that have actually been committed and assist in hiding the full extent of the atrocities.⁵⁶

The strict application of *ne bis in idem* in Article 20(3) is, however, significantly qualified by the exceptions provided for under (a) and (b). Those exceptions allow for subsequent proceedings before the International Court of Justice (ICJ) where the proceedings in the other court “were for the purpose of shielding the person concerned from criminal responsibility” or “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, in the circumstances, was inconsistent with an intent to

⁵⁵ It is important to note that the use here of “under article 6, 7, or 8” contrasts with the reference to “a crime referred to in article 5” in Article 20(2). It could be suggested that this different language is significant and indicates the intended exclusion of crimes of aggression from the *ne bis in idem* protection under Article 20(3). The more likely explanation is that this simply reflects the fact that a provision defining the crime of aggression is yet to be adopted in accordance with Article 5(2). This reasoning is confirmed by the Special Working Group on the Crime of Aggression, which has indicated that reference to the crime of aggression will need to be included in Article 20(3) once a definition has been agreed upon and adopted.

⁵⁶ WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 192-93 (2007).

bring the person concerned to justice.”⁵⁷

These exceptions are seen by some as essential to enabling the ICC to fulfill its mandate of ensuring that the most serious crimes of concern to the international community do not go unpunished and to put an end to the impunity that has historically attached to crimes of this nature. In order to achieve this, Article 20(3) effectively gives the ICC a type of supervisory jurisdiction over national courts by requiring national proceedings to meet certain standards with regards to the quality of the criminal justice process. On the other hand, these exceptions have been criticized precisely for giving the ICC supervisory jurisdiction over national courts, since this could undermine state sovereignty.⁵⁸ To consider the exceptions under Article 20(3), it is necessary to consider the scope of these exceptions, who gets to decide whether the criteria for invoking the exceptions has been met, and the practical implications of the balance that has been struck in terms of the operation of the *ne bis in idem* principle.

1. “Shielding” the Accused

The first of these exceptions, under Article 20(3)(a), is designed to deal with the situation of a “sham trial.” This exception prevents a state from exploiting the *ne bis in idem* prohibition by using a “sham trial” to then prevent a trial from being held before the ICC. When viewed in this light, there are persuasive moral and practical arguments supporting the application of this type of exception over a strict application of *ne bis in idem*. A state should not be able to collude with an individual accused of crimes as serious as the Article 5 crimes to shield that person from criminal responsibility. Allowing a “sham trial” in these cases would significantly undermine the purposes underpinning the establishment of the ICC.⁵⁹ In any event, a subsequent prosecution by the ICC does not violate the “spirit” of the *ne bis in idem* prohibition in these circumstances because a “sham trial” does not truly place an individual in jeopardy in the first place.

However, there are also a number of complications that become apparent when considering the practical operation of the exception. Most notably, what criteria indicate that a domestic prosecution was “for the purpose of shielding the person concerned from criminal responsibility” and who gets to make this decision?

The final decision about whether the exception under Article 20(3)(a) is

⁵⁷ Rome Statute arts. 20(3)(a) – (b).

⁵⁸ See, e.g., Gary T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, THE CATO INST., July 16, 1998, available at <http://www.cato.org/pubs/pas/pa-311.html>.

⁵⁹ Rome Statute pmbl.

satisfied will lie with the ICC itself. This issue would first be addressed by the Prosecutor when deciding to initiate an investigation as an issue of admissibility that is expressly required to be considered under Article 53(1)(b). After this initial decision the question would fall to the Court itself as part of the pre-trial or trial process. Any such decision would be highly sensitive and have obvious political implications, since the ICC would be effectively passing judgment on the legitimacy of a national judicial proceeding.

In drafting this exception, the negotiating parties were hoping to formulate an objective standard. Daniels suggests, however, that the reference to “purpose” creates room for a subjective interpretation.⁶⁰ It is difficult to precisely ascertain the types of cases that will, in practice, fall within this exception and where exactly the line will be drawn. Certain factors, however, may suggest intent to shield an accused from further proceedings. A national court may be attempting to shield an individual from future prosecution when, for example, the charges are manifestly disproportionate to the gravity of the alleged conduct, such as when an individual who is charged by the ICC Prosecutor for genocide was previously convicted at the national level, on the basis of the same conduct, for a simple assault. Evidence of a divergence from the normal criminal procedures adopted in a jurisdiction may also be a relevant consideration when determining if a nation is attempting to advantage the accused. The decisive issue will be “whether the decision was made based on the merits of the case or whether political aims to shield the person played a role.”⁶¹

In practice, such an analysis may not be straightforward and this determination will depend on the specific set of circumstances in each individual case. Beyond the simple question of criminal guilt or innocence there are a wide range of legal, political, moral, and cultural factors that will complicate the issue and inevitably impact the conduct of domestic criminal prosecutions in these types of cases. It is difficult, however, to see any form of words that the drafters of the Rome Statute could have adopted to avoid these challenges, and yet still recognize the practical need for an exception to avoid the risk of the *ne bis in idem* protection being abused.

2. The Requirement of Due Process

The second *ne bis in idem* exception under Article 20(3) requires two cumulative conditions to be satisfied. The first is that the previous proceedings “were not conducted independently or impartially in accordance

⁶⁰ Daniels, *supra* note 45, at 28.

⁶¹ JANN K. KLEFFNER & GERBEN KOR, COMPLEMENTARY VIEWS ON COMPLEMENTARITY 126 (2006).

with the norms of due process recognized by international law.”⁶² Tallgren and Coracini suggest that:

Under this exception we might think of a biased court that otherwise seems to act properly: the charge is adequate and the proceedings are efficient. But the members of the court have a preset opinion of the outcome of the trial. Another example would be that of a state official exercising pressure on the court conducting the trial. We might also think of a biased investigative authority.⁶³

In addition, it is necessary to conclude that the previous proceedings “were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”⁶⁴ This introduces a subjective element suggesting a need to demonstrate some type of bad faith over and above the failure to comply with the established standards of due process.

This potentially broad exception gives the ICC a wide margin of discretion and a direct role in passing judgment on the adequacy of national proceedings and national responses to mass atrocities. The reference to “the norms of due process recognized by international law”⁶⁵ widens this discretion still further, with the specific content of such norms not necessarily being definitively settled or clear. Further, the wording seems to refer to “norms of due process” in the broadest possible sense, encompassing future developments and evolving standards.

Bruce Broomhall may well be correct in suggesting:

It must be assumed that the Court will require clear proof before it admits a case against the wishes of a State Party; the evidentiary burden on the Prosecutor can therefore be expected to be significant.⁶⁶

This is, however, a reflection of the political pressures and realities within which the ICC is required to operate, rather than any specific restraint imposed by the terms of Article 20(3)(b). This exception gives the ICC a type of supervisory jurisdiction over national courts. The discretionary nature of the exception dilutes the certainty of any protection extended to an accused under the *ne bis in idem* exception.

Again, this is not to say that such an exception is either unjustified or

⁶² Rome Statute art. 20(3)(b).

⁶³ Tallgren & Coracini, *supra* note 28, at 694.

⁶⁴ Rome Statute art. 20(3)(b).

⁶⁵ *Id.*

⁶⁶ BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 90 (2003).

inappropriate in purpose or form. The ICC was established precisely to ensure effective criminal prosecutions and the enforcement of international justice. Once the international community accepts that it is desirable to establish an international criminal court, it is implicit that there is a minimum standard of criminal justice that is acceptable to the international community, and that national courts must either meet these standards or cede jurisdiction to the international court. It then follows that a *ne bis in idem* exception aimed at the particular issue addressed by Article 20(3)(b) may be necessary to ensure that those minimum standards are upheld. But whatever the desirability of such an exception, it poses a potentially significant limitation on the *ne bis in idem* protection, particularly given that in its current form it provides the ICC with a broad margin of discretion by which to judge national proceedings.

3. The Question of Amnesty

An important practical question to be considered is whether Article 20(3) prohibits a prosecution by the ICC on the basis of *ne bis in idem* where an individual has been granted amnesty from prosecution. The short answer appears to be no. The wording of Article 20(3) requires that a person be “tried by another court” before *ne bis in idem* protection applies. The very purpose of granting an individual amnesty is to prevent that person from being required to face trial, which necessarily then means that they will not meet this criterion. In addition to this, the *travaux préparatoires* of the Rome Statute deliberately excluded the grant of amnesty from forming the basis of a *ne bis in idem* defense.⁶⁷ Given the express wording of Article 20(3) and the clear intent expressed in the *travaux préparatoires*, it is not then necessary, in the context of applying Article 20(3), to examine the underlying question of whether the amnesty granted in any particular case is valid under principles of international law.

What, then, becomes of an individual who has not been granted amnesty but who has been subject to alternative methods of accountability, such as appearing before a domestic investigatory commission like the South African Truth and Reconciliation Commission? Again, the key would seem to be whether the individual can be said to have been “tried by another court.” This threshold will be difficult to meet in most cases, as domestic investigatory commissions are generally established precisely as a mechanism that is intended to operate outside of the regular criminal justice system.

During the drafting of the Rome Statute, there was significant debate

⁶⁷ GEERT-JAN ALEXANDER KNOOPS, SURRENDERING TO INTERNATIONAL CRIMINAL COURTS: CONTEMPORARY PRACTICE AND PROCEDURES 338 (2002).

about the relationship between amnesties and alternative methods of accountability on the one hand, and the protection provided by *ne bis in idem* on the other. One of the reasons for ultimately rejecting the extension of *ne bis in idem* protection in these types of circumstances was the difficulty of drafting a provision that captured the alternative methods of justice seen as “legitimate” by the international community while at the same time allowing the ICC to prosecute individuals granted “unacceptable” amnesties. For example, William Schabas has noted that:

During the drafting of the Statute there was also great debate about the attitude that the Court should take to alternative methods of accountability. The South Africans were most insistent on this point, concerned that approaches like their Truth and Reconciliation Commission, which offer amnesty in return for truth confession, would be dismissed as evidence of a State’s unwillingness to prosecute. While there was widespread sympathy with the South African model, many delegates recalled the disgraceful amnesties accorded by South American dictators to themselves, the most poignant being that of former Chilean president Augusto Pinochet. But drafting a provision that would legitimize the South African experiment yet condemn the Chilean one proved elusive.⁶⁸

This is not to say that amnesties or alternative methods of accountability may not be relevant and potentially taken into account beyond the confines of Article 20(3). Although the Rome Statute does not expressly refer to amnesties, there does appear scope for amnesty to be a relevant consideration when making the decision to initially investigate a matter and when determining admissibility. For example, in determining whether to initiate an investigation under Article 53 of the Rome Statute, the Prosecutor may find these factors relevant when considering whether “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”⁶⁹ Similarly, when considering admissibility under Article 17 these considerations may be relevant in determining whether the case can be characterized as one that “has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned,”⁷⁰ or whether the State was unable or unwilling to genuinely prosecute. They may also be relevant factors when considering, under Article 17(1)(d), whether a case is “of sufficient gravity

⁶⁸ SCHABAS, *supra* note 56, at 68-69.

⁶⁹ Rome Statute art. 53(1)(c).

⁷⁰ *Id.* art. 17(1)(b).

to justify further action by the Court.”⁷¹

The advantage of this approach is that it provides considerable flexibility to the Office of the Prosecutor, allowing each case to be determined upon consideration of its specific set of facts and the particular political, legal, and cultural environment surrounding the case. At the same time, however, this inevitably gives considerable discretion to the ICC in relation to matters of enormous sensitivity and significance. This approach also provides the ICC with the power to override transitional justice decisions that have been made by the State with the most direct connection to the crimes, and that will most directly have to deal with any long-term consequences that result from the actions of the ICC.

4. Pardons and the Enforcement of Sentences

A related question is whether the subsequent failure to enforce a sentence imposed at the national level is a relevant factor to be considered in the application of *ne bis in idem*, so as to prevent subsequent prosecutions before the ICC. A strict application of the *ne bis in idem* prohibition would not allow consideration of subsequent issues of enforcement, with ‘jeopardy’ attaching to the conviction itself. This may, however, conflict with broader notions of justice, since the subsequent failure to enforce a sentence — whether through granting a pardon, commuting a sentence, or granting parole — would be clearly relevant when considering the overall punishment to which an individual has been subjected, and to the broader functioning of the criminal justice system.

At the 1988 March-April Preparatory Committee, Portugal proposed two additional exceptions to be included in Article 20(3) in an attempt to directly address this issue.⁷² The following exceptions were suggested: “(c) the sentence was manifestly disproportionate to the gravity of the crime; (d) there was a manifestly unfounded decision on the suspension of the enforcement of a decision or on a pardon, a parole, or a commutation of sentence.” These provisions were seen as an intrusion on state sovereignty and were highly controversial. They also presented practical difficulties, given the complexities that arise from the differences in sentencing practices among member states. They were not ultimately included in the final draft.

It is, however, incorrect to conclude that the failure to adopt these exceptions means that the ICC will be inevitably barred from intervening in a case where an individual is convicted but then immediately pardoned. If a state fails entirely to enforce a criminal sentence that has been duly imposed by a national court, this may be evidence that the proceedings were not

⁷¹ *Id.* art. 17(1)(d).

⁷² See KNOOPS, *supra* note 67, at 323; Tallgren & Coracini, *supra* note 28, at 697.

actually genuine and that they were, in fact, designed to shield the individual from criminal responsibility. The ICC would then be able to prosecute that individual on the basis of the exception provided for under Article 20(3)(a). In such a case, “criminal proceedings that have commenced in a wholly appropriate manner may turn into a *de facto* sham trial at the stage of enforcement.”⁷³

In this way, while not expressly apparent from the text of the Rome Statute, a member state’s manifest failure to enforce a criminal sentence imposed by a national court may expose the individual concerned to subsequent prosecution by the ICC. This is a further example of the broad nature of the exceptions to the *ne bis in idem* prohibition within the Rome Statute and a further illustration of the considerable discretion that the ICC has in reviewing domestic proceedings.

At the same time, however, it should also be recognized that there are persuasive arguments that support the limitation of the prohibition in these circumstances. The most obvious of these is that a strict application of *ne bis in idem* would allow a state to protect an individual from the jurisdiction of the ICC by convicting that individual – which would bring them under the protection of Article 20 – and then failing entirely to enforce the imposed sentence. Allowing states to shield a person from subsequent prosecution by the ICC would make a mockery of the system of international criminal justice and would undermine the effectiveness of the ICC. Such an example demonstrates the need to strike a balance between the right of the accused to protection from double jeopardy and the interest of the international community in the effective enforcement of criminal justice.

G. Prosecutorial Appeals

One area where there is considerable divergence between states is the grounds on which the prosecution is able to appeal against acquittals in criminal trials, and the extent to which such appeals are seen as being consistent with the *ne bis in idem* protection. Common law jurisdictions have traditionally imposed strict restrictions on appeals against acquittal by the prosecutor, reflecting the view that “[a] verdict of acquittal... could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy....”⁷⁴ This contrasts with the more expansive recognition of prosecutorial appeals in civil law jurisdictions, reflecting a view of *ne bis in idem* as only attaching after a person is finally convicted or acquitted, with ‘finally’ being taken to mean after all available appeals are exhausted

⁷³ Tallgren & Coracini, *supra* note 28, at 697.

⁷⁴ *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)).

(including prosecutorial appeals). In the context of *ne bis in idem*, an expansive right of prosecutorial appeal following acquittal weakens this protection by reducing the finality attached to an initial verdict of acquittal.

The Rome Statute establishes an appeal structure that provides for an expansive right of prosecutorial appeal. Under Article 81, both the Prosecutor and the convicted person may appeal the decision of the Trial Chamber on the grounds of procedural error, error of fact, or error of law. A convicted person may also appeal on the basis of “any other ground that affects the fairness or reliability of the proceedings or decision.”⁷⁵ When considering an appeal, Article 83 provides that the Appeal Chamber has all the powers of the Trial Chamber and may decide, in allowing the appeal, to reverse or amend the decision being appealed or to order a new trial before a different Trial Chamber. While it may be argued that an expansive right of prosecutorial appeal is ultimately justified given the nature of the crimes being dealt with by the ICC and the overarching interest in putting an end to impunity and achieving ‘justice,’ such a right *prima facie* undermines the protection against double jeopardy, at least in the sense that this protection has traditionally been understood in most common law jurisdictions.

H. *Ne bis poena in idem*

A principle closely related to *ne bis in idem* is *ne bis poena in idem*, which is the principle that any punishment already served by an accused should be deducted from any subsequent punishment imposed in relation to offenses based upon the same underlying conduct.⁷⁶ This principle rests on the basic proposition that a person should not be punished twice for the same conduct. Its application may be one way of mitigating, at least to some extent, the consequences of an accused being placed in jeopardy on more than one occasion through the application of exceptions to the principle of *ne bis in idem*.

Given the broad nature of the exceptions to *ne bis in idem* contained within the Rome Statute, it would be desirable to strictly apply *ne bis poena in idem*, which has the additional advantage of being less restrictive to the exercise of state sovereignty than *ne bis in idem*. Article 78(2) of the Rome Statute provides that in imposing a sentence of imprisonment the ICC “may deduct any time otherwise spent in detention in connection with conduct underlying the crime.”⁷⁷ While it might be expected that the ICC will, in practice, routinely take prior punishment into account when sentencing, it

⁷⁵ Rome Statute art. 81(1)(b)(iv).

⁷⁶ Gerard Conway, *Ne Bis in Idem in International Law*, 3 INT’L CRIM. L. REV. 217, 226 (2003).

⁷⁷ Rome Statute art. 78(2).

would have been preferable for this principle to have been enshrined as a mandatory, rather than discretionary, provision. This is particularly true when this discretionary reference is contrasted with the previous sentence, which provides that in imposing a sentence of imprisonment, the ICC “shall deduct the time, if any, previously spent in detention in accordance with an order of the Court.”⁷⁸

III. THE PROSECUTOR V. MATHIEU NGUDJOLO CHUI

A recent example of the issue of *ne bis in idem* before the ICC was in the case of *The Prosecutor v. Mathieu Ngudjolo Chui*.⁷⁹ During his first pre-trial appearance before the Chamber, Ngudjolo Chui claimed to have been previously tried for the same facts in the Democratic Republic of Congo (DRC).⁸⁰ On this basis, he sought a declaration that the charges were inadmissible under Article 17(c) because of the principle of *ne bis in idem*.⁸¹ As one of the only instances in which *ne bis in idem* has been raised before the Pre-Trial Chamber this case presents a case study for the practical application of Article 20 and the protection of *ne bis in idem* under the Rome Statute.

A. *The Factual Background*

Mathieu Ngudjolo Chui is a Congolese national and the alleged former leader of the National Integrationist Front (FNI). He was one of three high ranking leaders of the allied *Front des Nationalistes et Intégrationnistes – Front de Résistance Patriotique d’Ituri* (FNI and FRPI) from early 2003 and became Chief of Staff to the FRPI in that same year. The charges before the ICC relate to Ngudjolo Chui’s role, along with FRPI leader Germain Katana, in planning and organizing an attack by hundreds of FNI and FRPI fighters on the Bogoro village. It is alleged that these FNI/FRPI fighters were ordered to “wipe out” and occupy the village. During the attack approximately 200 civilians were massacred, numerous females in the village reported being raped and assaulted, the village was pillaged, and the survivors were forced to flee.⁸²

⁷⁸ *Id.*

⁷⁹ *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-02/07 (2007).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² ICC, *Combined Factsheet: Situation in the Democratic Republic of the Congo, Germain Katanga and Mathieu Ngudjolo Chui*, at 10 (June 27, 2008), available at http://www2.icc-cpi.int/NR/rdonlyres/ECF1239F-8846-4817-8570-09260D0EE597/277750/Combined_factsheet_on_DRC2_Final_pt_update_2.pdf; ICC, *Newsletter* (No. 19), at 1 (Feb. 2008), available at <http://www2.icc-cpi.int/NR/rdonlyres/6FDDE5D6-A46B-4059-8748->

The attack on Bogoro occurred as part of a larger armed conflict in the Ituri district in 2002 and 2003. The ICC has described the background to the attack:

The crimes alleged in the Application arise from the attack on Bogoro village on 24 February 2003. The attack was perpetrated in the context of an armed conflict between the armed groups of FNI/FRPI on the one side and the *Union des Patriotes Congolais* (“UPC”) and its armed wing, the *Front pour la Libération du Congo* (“FPLC”) on the other, as well as between and amongst other groups. While the former groups predominantly consist of Lendu and Ngiti fighters, the latter group includes in great majority Hema combatants.

After the UPC attacked and took the city of Bunia, capital of the district of Ituri, on 6 August 2002, during which non-Hema civilians were targeted and killed, the Lendu and Ngiti began organizing themselves into armed resistance groups and started to challenge the UPC.

The attack on the village of Bogoro led by Katanga and Ngudjolo Chui was part of a plan by FNI/FRPI, to attack predominantly Hema villages in Ituri in preparation to retake Bunia from the UPC-FPLC. On 6 March 2003, the Lendu and Ngiti alliance managed to drive the UPC-FPLC from Bunia, with the help of the Ugandan armed forces.⁸³

On October 23, 2003, Ngudjolo Chui was apprehended by a MONUC⁸⁴ battalion and was handed over to DRC authorities. He was subsequently tried by the Tribunal de Grande Instance for the murder of a Hema businessman who was a member of another armed political group.⁸⁵ In June 2004, he was acquitted of the murder charge, but was subsequently charged with war crimes and transferred to the Makala Prison.⁸⁶ He escaped from prison before the war crimes trial commenced.⁸⁷ He then founded the *Mouvement Révolutionnaire Congolais* (MRC) and in August 2006, as President of the MRC, he signed a peace deal with the DRC Government.⁸⁸ In December 2006, Ngudjolo Chui was appointed to the rank of Colonel in

751C2F60704D/278444/ICC/NL19200802_En.pdf.

⁸³ ICC, *Combined Factsheet*, *supra* note 82, at 10.

⁸⁴ United Nations Organization Mission in the Democratic Republic of Congo.

⁸⁵ ICC, *Combined Factsheet*, *supra* note 82, at 2.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

the *Forces Armées de la République Démocratique du Congo*.⁸⁹

The DRC ratified the Rome Statute on April 11, 2002, and in March 2004, the Government referred the issue of crimes committed in the DRC (with a special focus on crimes committed in the Ituri region) to the ICC Prosecutor, who then commenced an investigation. A sealed arrest warrant for Ngudjolo Chui was issued by Pre-Trial Chamber I on July 6, 2007.⁹⁰ DRC authorities surrendered Ngudjolo Chui to the ICC on February 7, 2008.⁹¹

B. Proceedings before the International Criminal Court

The warrant of arrest issued by the ICC outlined nine charges against Ngudjolo Chui: three counts of crimes against humanity (murder, inhumane acts, and sexual slavery) and six counts of war crimes (wilful killing, cruel or inhuman treatment, using children to participate actively in hostilities, sexual slavery, intentionally directing attacks against a civilian population, and pillaging).⁹² On March 10, 2008, Pre-Trial Chamber I decided to join the cases of Ngudjolo Chui and Germain Katanga. The hearing to confirm the charges commenced on June 27, 2008. The charges submitted under the Amended Charging Document were four counts of crimes against humanity (murder, inhumane acts, sexual slavery, and rape) and nine counts of war crimes (murder or wilful killing, cruel or inhuman treatment, using children to participate actively in hostilities, sexual slavery, rape, outrages upon personal dignity, intentionally directing attacks against a civilian population, pillaging, and destruction of property).⁹³

At his first appearance before the Court on February 11, 2008, duty counsel read out the following statement by Ngudjolo Chui:

I hereby state that the facts that have been brought against me as a commander of the FNI/FRPI, for these same facts I was arrested on 23 October 2003, and I was tried and judged for these same facts by the tribunal de grande instance of Bunia. The tribunal de grande instance of Bunia acquitted me of these facts. After my acquittal – despite my acquittal I was transferred to the detention facilities in Makala, and it was as a result of

⁸⁹ *Id.*

⁹⁰ Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/07, Warrant of Arrest for Mathieu Ngudjolo Chui (July 6, 2007).

⁹¹ See ICC, *Combined Factsheet*, *supra* note 82; ICC, *Newsletter*, *supra* note 82.

⁹² Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/07, Warrant of Arrest for Mathieu Ngudjolo Chui, at 6-7 (July 6, 2007).

⁹³ Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, at 30-34 (June 26, 2008).

measures taken by my counsel at the Supreme Court of Justice that I was able to be released and that I was reintegrated into the FARDC with the rank of colonel with the following registration number: 507795/K. I do not understand why I am now being arrested again by the International Criminal Court for this same event, the same facts for which I have already been acquitted.⁹⁴

Ngudjolo Chui appears to be invoking Article 20(3) here. On the facts presently available, however, it does not appear that *ne bis in idem* protection will apply in this case. The arrest on October 23, 2003, and subsequent acquittal, were related to the murder of a Hema businessman, while the charges before the ICC concern the attack on Bogoro village. The trial before the ICC is not, therefore, “with respect to the same conduct” that was the subject of the trial before the Tribunal de Grande Instance.

Further, while Ngudjolo Chui was charged with war crimes in the DRC in relation to the attacks launched against the civilian population of Bogoro, he was seemingly never put on trial for these offenses. A magistrate at the Auditorat militaire de garnison de l’Ituri in Bunia confirmed that Ngudjolo Chui escaped before he could be tried, and that while the file had been transferred to the National Prosecutors Office, no prosecution had been conducted.⁹⁵ Under these circumstances, Article 20(3) will not prevent Ngudjolo Chui from being tried by the ICC, as he has not previously been tried by any national court in relation to the attack on Bogoro.

Interestingly, Human Rights Watch has suggested that even if Ngudjolo Chui had stood trial in the DRC for war crimes, the trial may not have complied with international standards.⁹⁶ Anneke Van Woudenberg, a senior research for Human Rights Watch, says that there have been “significant problems with military and civilian proceedings throughout the DRC with significant political interference into the trials.”⁹⁷ Similarly, Federico Borello from the Transitional Justice and Fight Against Impunity Unit at MONUC comments that while satisfactory judgments have been reached in some cases he has monitored in the DRC, others have been total miscarriages of justice.⁹⁸ These comments raise the possibility that Article 20(3)(b) could be applied, even if Ngudjolo Chui had been tried in the DRC in relation to the Bogoro attack, although this would depend upon the

⁹⁴ Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/07, Transcript of Initial Appearance, at 20 (Feb. 11, 2008).

⁹⁵ Katy Glassborow & Marie Delbot, *Ngudjolo Trial Faces Double Jeopardy Claim*, in INSTITUTE FOR WAR AND PEACE REPORTING (Feb. 19, 2008), available at http://www.iwpr.net/?p=acr&s=f&o=342800&apc_state=henh.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

specific circumstances surrounding the domestic prosecution. The evidence suggests, however, that he has not previously been tried for the particular conduct that is the subject of the charges before the ICC. Consequently, there does not seem to be any *ne bis in idem* prohibition preventing Ngudjolo Chui from being tried before the ICC.

This conclusion is reinforced by the fact that the *ne bis in idem* argument does not appear to have been subsequently pursued by the Defense Counsel for Ngudjolo Chui. On September 30, 2008, the Pre-Trial Chamber I confirmed ten of the charges against Ngudjolo Chui and Katanga and committed them to trial.⁹⁹ The Pre-Trial Chamber declined to define the charges of inhuman treatment or outrages upon personal dignity as war crimes, and declined to define the charge of other inhumane acts as crimes against humanity.¹⁰⁰

The fact that this is one of the first examples of this issue being raised before the Pre-Trial Chamber suggests that the real work being done by Article 20 is not being done at the trial stage. The real effect of Article 20, at a practical level, is seen at the stage of the Office of the Prosecutor deciding to initiate an investigation and considering issues of admissibility. Before deciding to commence a prosecution, ICC prosecutors check to ensure that there have been no national proceedings that would render the case inadmissible under Article 17 and consider any double jeopardy issues that may relate to a particular case. Given the limited number of prosecutions that can realistically be pursued and the considerable discretion given to the Office of the Prosecutor in determining the matters that will be investigated, it is more likely that Article 20 issues will arise at this preliminary stage and will influence the initial decision to prosecute.

CONCLUSION

In response to due process concerns raised during the debate surrounding the establishment of the ICC, it was frequently said that the Rome Statute provided comprehensive protections to guarantee a fair trial, including protection against double jeopardy. For example, former U.S. State Department Legal Advisor Monroe Leighton testified before Congress

⁹⁹ The Pre-Trial Chamber unanimously confirmed the charges of murder constituting a crime against humanity; wilful killing as a war crime; using children to participate actively in hostilities as a war crime; intentionally directing attacks against a civilian population constituting a war crime; pillaging constituting a war crime; and destruction of property constituting a war crime. By majority, the Pre-Trial Chamber also confirmed the charges of sexual slavery as a crime against humanity; sexual slavery as a war crime; and destruction of property constituting a war crime.

¹⁰⁰ Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of the Charges, at 209-12 (Sept. 30, 2008).

that “the Treaty of Rome contains the most comprehensive list of due process protections which has so far been promulgated.”¹⁰¹ Certainly, Article 20 provides a basic double jeopardy guarantee. Upon closer analysis, however, Article 20 contains potentially broad exceptions that significantly undermine the *ne bis in idem* prohibition. In particular, the restriction of the prohibition against subsequent prosecution in Article 20(2) to subsequent prosecutions for specific offenses, the potentially wide scope of the exceptions under Article 20(3)(a) and (b), and the expansive right of prosecutorial appeal under Article 81 all limit the protection that is provided against double jeopardy.

This is not, however, to say that such limitations may not be justified. In light of the objectives underpinning the ICC, the nature of the crimes being prosecuted, the limited nature of its jurisdiction, and the complexities of the relationship between the ICC and national jurisdictions, there are strong arguments to be made for each of the exceptions. Further, while there may be legitimate concerns about the broad discretion provided to the ICC in the exercise of these exceptions and the possible implications on state sovereignty, the evidence thus far suggests that the exceptions will not be applied in an expansive way. Rather, the protection against double jeopardy is one of the factors that will be significant in deciding whether to initiate an investigation within the jurisdiction of the ICC. The protection against double jeopardy provided for under Article 20 ultimately cannot be properly assessed as a stand-alone guarantee. It needs, instead, to be situated within the broader framework of the Rome Statute and analyzed within the context of the various interests that need to be balanced if the objectives of the ICC are to be fully met.

¹⁰¹ *The Int’l Criminal Court: Hearing Before the H. Comm. on Int’l Relations*, 106th Cong. 96 (2000) (statement of Monroe Leigh on behalf of the American Bar Association).