Santa Clara University School of Law

Santa Clara Journal of International Law

Volume 8 | Issue 1 Article 8

1-1-2010

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# I. Introduction

Complementarity is a principle which represents the idea that states, rather than the International Criminal Court (ICC), will have priority in proceeding with cases within their jurisdiction. As Roy S. Lee has written:

> This principle means that the Court will complement, but not supersede, national jurisdiction. National courts will continue to have priority in investigating and prosecuting crimes committed within their jurisdictions, but the International Criminal Court will act when national courts are 'unable or unwilling' to perform their tasks.[1]

In his thoughtful paper, Professor Newton expresses a concern that the implementation of complementarity may not honor the underlying premise of state prerogatives in pursuing national prosecutions. He would like to see a deferral to the good faith reasonableness of domestic jurisdictions.[2] He expresses a concern with "whether the ICC will trample on the sovereign prerogatives of states or will coexist . . ."[3] and expresses a need for "a cooperative and healthy synergy."[4] Professor Newton is concerned that the legal restraints within the ICC statute are insufficiently or inadequately defined to preserve the deference to state prosecutions.[5]

One of the concerns expressed in Professor Newton's paper is whether a state will have the prerogative of deciding which crimes to charge without running the risk that the ICC will minimize the state's choice by prosecuting the same acts under the ICC statute. The primary question is what happens if a state chooses to prosecute for an "ordinary" crime, such as murder or rape, rather than for an "international" crime, such as genocide, crimes against humanity, or war crimes. Suppose, for example, that a state is prosecuting or has prosecuted an accused for multiple murders for a particular incident that also arguably was part of a widespread or systematic attack against a civilian population. Is the case inadmissible in the ICC or could there be a prosecution in the ICC for crimes

1. Roy S. Lee, *Introduction*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 27 (Roy S. Lee ed., Kluwer Law International 2d ed. 2002) (1999). Mr. Lee is the Director of the Codification Division in the Office of Legal Affairs of the United Nations and also the Secretary of the International Law Commission and of the Sixth Committee of the General Assembly. He was the Secretary of the Preparatory Committee on the Establishment of an International Criminal Court.
2. Michael A. Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT'L L. 115, 120 (2010).
3. *Id.* at 121.
4. *Id.* at 123.
5. *Id.* at 144.

against humanity of murder? Assuming that jurisdictional requirements are met, the issue becomes one of admissibility of the matter and, in the case of completed cases, also an issue of *ne bis in idem*, or double jeopardy. A case is not admissible in the ICC if a state with primary jurisdiction is willing and able to proceed with the investigation and prosecution or if the accused was already tried for the conduct and a further prosecution is now barred under the *ne bis in idem* provision.[6] There are exceptions, however, to the willing and able provision and to the *ne bis in idem* bar if the state prosecution is a "sham" trial, shielding the accused from responsibility, or was an improper proceeding, lacking in independence or impartiality and inconsistent with bringing the accused to justice.[7]

While the issue of "ordinary" crimes occurs with both the "willing and able" standard and the *ne bis in idem* standard, the focus of this paper will be on the situation in which a state has already prosecuted an accused for a crime, resulting in a conviction, an acquittal, or another final determination of the case. The prior adjudication triggers the principle of *ne bis in idem*, or double jeopardy. I will develop the point that the design of the *ne bis in idem* principle in the ICC statute is highly protective of state prosecutions and is expressly different from the statutes for the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) that permit greater control by the international tribunal than exists with the ICC. The definitions chosen for *ne bis in idem* in the ICC statute foster the priority of States in initially prosecuting crimes, give states great leeway to prosecute after an ICC prosecution, and greatly limit the ability of the ICC to prosecute after a state adjudication of the facts. Although the application of the *ne bis in idem* provision is not settled since the ICC has yet to interpret it, a broad interpretation of *ne bis in idem* that favors state prosecutions over ICC prosecutions would be more consistent with the language of the statute and the underlying principle of complementarity. This is not to say that the extensive deference to state prosecutions is necessarily the best balance between national and international prosecutions. The deferential approach will potentially preempt ICC jurisdiction in cases in which one might argue that an international prosecution based on more serious crimes would result in greater justice. Significantly for the accused, the state-protective approach of the ICC statute may result in multiple prosecutions for the same conduct. While these

6. Rome Statute of the International Criminal Court art. 17(1)(a) & (c), July 17, 1998, 2178 U.N.T.S. 90, 37 I.L.M. 999 (entered into force July 1, 2002)[hereinafter Rome Statute].
7. *See id.* art. 17(2).

concerns are not inconsequential and deserve consideration from a policy and drafting perspective, this paper focuses on the interpretation that, from a legal analysis, follows from the ICC statute as it was in fact drafted As presently constituted, the ICC *ne bis in idem* provisions are protective, rather than preemptive, of state prerogatives.

The general principle of *ne bis in idem* and a detailed analysis of the ICC provisions are laid out in the following sections. Section II provides an overview of the basic terminology and concepts used with *ne bis in idem*, including the difference between a narrow definition that uses "crime" or "elements" and a broad definition that uses "conduct," "acts," or "facts." Section III describes the statutory provisions of the ICC statute and analyzes the meaning of the terms "crime" and "conduct" in the statute. The meaning is considered in light of the drafting history, the language differences in each paragraph of the *ne bis in idem* provision, the distinction between the provisions in the ICC statute and the statutes of the ICTY and the ICTR, and a comparison with the interpretation of *ne bis in idem* language with regard to the European arrest warrant. The conclusion is that the most accurate interpretation of the ICC statutory provisions would provide for a broad *ne bis in idem* prohibition when a national prosecution is followed by a potential ICC prosecution, blocking a subsequent ICC prosecution based on the same conduct. Section IV then explores whether the exceptions to *ne bis in idem* would have the effect of narrowing the *ne bis in idem* protection. Here, too, the conclusion is reached that, barring evasive, deceptive practices, it is unlikely that the exceptions would change the result that most national prosecutions would bar subsequent ICC prosecutions for the same conduct. As a conclusion, Section V is a summary of the major points why state prosecutions are given deference under the ICC *ne bis in idem* provisions and also a brief commentary on other unresolved issues related to *ne bis in idem*.

## II. The Concept of *Ne Bis in Idem*

*Ne bis in idem* is a concept based on fairness to the accused and a desire for finality in criminal cases.[8] The language of the U.S. Constitution states "[n]o

8. Jennifer E. Costa, *Double Jeopardy and Non Bis In Idem: Principles of Fairness*, 4 U.C. DAVIS J. INT'L L. & POL'Y 181, 184-85 (1998); Jose Luis de la Cuesta, *Concurrent National and International Criminal Jurisdiction and the Principle "Ne Bis in Idem" General Report*, 73 INT'L REV. PENAL L. 707, 710 (2002) (identifying rationales of "justice, legal certainty, respect for previous judicial decision, and rule of law..."); Dax Eric Lopez, *Not Twice For the Same: How the Dual Sovereignty Doctrine is Used to Circumvent* Non

person [shall] be subject for the same offense to be twice put in jeopardy of life or limb . . . ."[9] Article 14 (7) of the International Covenant on Civil and Political Rights (ICCPR) similarly provides: No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.[10] While the terminology differs, including " *ne bis in idem*," "double jeopardy," and "not to be tried or punished twice," and the definition may be broad or narrow, the basic principle is the same regardless of the nomenclature. The principle applies to both multiple prosecutions and to multiple punishments for the same offense. The concept is worldwide—all or almost all nations have a *ne bis in idem* provision as do each of the international criminal tribunals.

What differs, however, is the definition and interpretation of *ne bis in idem* among States and international bodies. The terminology used is significant because it connotes different conceptual meanings. There is a basic difference between basing *ne bis in idem* on the legal characterization of the crime and basing it on the underlying factual conduct or actions.[11] While "same offense" can refer either to the legal characterization or to the underlying conduct, other terms have more constant meanings. The same "crime" or "elements" generally refers to the legal characterization and is interpreted much more narrowly than the same "act," "facts," or "conduct," which refer to the underlying actions.

Bis In Idem, 33 VAND. J. TRANSNAT'L L. 1263, 1271-72 (2000).

9. U.S. CONST. amend. V.

10. International Covenant on Civil and Political Rights art. 14(7), G.A. Res. 2200A (XXI), ¶ 21, U.N. GAOR Supp. No. 16, ¶ 52, U.N. Doc. A/6316 (Dec. 16, 1966).

11. In addition to the U.S. law discussed in the text, other national and regional bodies have similarly interpreted *ne bis in idem* differently, depending upon whether the focus was on the legal characterization only or on the underlying acts or conduct. *See* Sylvie Cimamonti, *European Arrest Warrant in Practice and* Ne Bis In Idem, *in* THE EUROPEAN ARREST WARRANT IN PRACTICE (Nico Keijzer & Elies Van Sliedregt eds., Cambridge University Press 2009) (detailing cases interpreting "same acts" in the context of the European arrest warrant as a broader interpretation than the legal characterization); 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 673 (Otto Triffterer ed., C.H. Beck Hart Nomos 2nd ed. 2008) [hereinafter Tallgren & Coracini] (commenting that, in general, *ne bis in idem* is defined by the facts or conduct in civil law countries and by the legal characterization of the charge or offense in common law systems); Christine Van Den Wyngaert & Tom Ongena, Ne Bis in Idem *Principle, Including the Issue of Amnesty*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 714, 715 (Antonio Cassese et al. eds., Oxford University Press 2002) [hereinafter Van Den Wyngaert & Ongena, *in* Cassese Commentary] (discussing the approaches in selected European countries and the European Court of Human Rights).

For example, the current interpretation under the U.S. Constitution is narrow and uses the language of "same elements" to define the same offence. In reestablishing the test as based on same elements, the U.S. Supreme Court rejected the use of a "same conduct" test. The "same elements" test, also called the "Blockburger test," is decidedly narrower than what is referred to as the "same conduct" test.[12] The "same elements" test looks at "whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution."[13] In contrast, the "same conduct" test provides that "'if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted,' a second prosecution may not be had."[14] The difference can be quite significant in application. As a case in point, applying the "same conduct" test, the U.S. Supreme Court found that a prosecution for reckless manslaughter was barred by double jeopardy when the accused had already pled guilty to driving while intoxicated and other traffic offenses based on the same incident and involving the same conduct.[15] Under the "same elements" test, however, the subsequent prosecution for reckless manslaughter would not have been barred because an element of each crime is different from the other. Manslaughter requires a death which driving while intoxicated does not and driving while intoxicated requires intoxication which is not an element of reckless manslaughter. The "same elements" test is far narrower in that it provides less double jeopardy protection than the "same conduct" test. As explained below, the ICC statute uses both the term "crimes," which is comparable to "elements," and the term "conduct."

Another basic premise of *ne bis in idem* is that, in general, it applies only within a sovereign jurisdiction. For instance, within the United States, double jeopardy does not bar a prosecution for the same crime by two different states or by a state and the federal government.[16] An example is the prosecution of Terry Nichols, an

12. United States v. Dixon, 509 U.S. 688, 696 (1993).
13. *Id.* at 700-702. An example from *Dixon* is the count of assault with intent to kill, which was not barred by double jeopardy under the Blockburger test by a prior finding that the accused had violated a protective order that prohibited molesting, assaulting, threatening, or physically abusing the victim. Under Blockburger, the element of "intent to kill" was not an element of the contempt charge regarding the protective order and the element of "knowledge of the protective order" as not an element assault with intent to kill.
14. *Id.* at 697 (quoting Grady v. Corbin, 495 U.S. 508 (1990)).
15. *Grady v. Corbin*, 495 U.S. at 523 (1990), overruled by United States v. Dixon, 509 U.S. 688 (1993).
16. Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*,

accomplice of Timothy McVeigh in the Oklahoma City bombings of 1995. Nichols was prosecuted in federal court and also in state court in Oklahoma.[17] Similarly, multiple prosecutions by different national jurisdictions are not barred as a matter of customary international law.[18] The United Nations Human Rights Committee has similarly interpreted Article 14 (7) of the ICCPR to apply only within a specific jurisdiction.[19] With the advent of international criminal courts, however, there now are *ne bis in idem* provisions that restrict both the international courts and national courts in conducting subsequent prosecutions. *Ne bis in idem* restrictions can occur both horizontally and vertically.[20] The horizontal level occurs within a court system or between comparable sovereigns, such as between states. For example, the ICC cannot try an accused a second time for the same conduct for which the accused has already been tried before the ICC. It is the vertical levels that are critical to the discussion here. The vertical *ne bis in idem* effect includes both "downward" and "upward" restrictions.[21] The "downward" *ne bis in idem* governs when a state may not prosecute an accused after the ICC has already prosecuted on those acts. The "upward" *ne bis in idem* restricts the ICC from prosecuting after a previous state prosecution. It is the "upward" *ne bis in idem* that is the most pertinent to the question posed here of whether a state prosecution for an ordinary crime bars a subsequent ICC prosecution.

There are also limitations on multiple prosecutions by different sovereign

86 WASH. U. L.R. 769, 788 (2009). Although author notes that the U.S. Justice Department, as a policy matter (the Petite policy), does not ordinarily prosecute after the accused was tried in a state court for the same criminal activity. *Id.* at 851.

17. *See* Rick Bragg, *The Bombing Verdict: The Reaction; Among Families of Victims, Anger and Acceptance Mix*, N.Y. TIMES, Dec. 24, 1997 at A1, available at 1997 WLNR 4865508; Tim Talley, *Jury Deadlock Spares Nichols – Impasse forces Judge to Impose Sentence*, CHI. TRIB., Jun. 12, 2004 at 6, available at 2004 WLNR 19871503 (Nichols was convicted in federal court on charges of conspiracy to use a weapon of mass destruction and eight counts of involuntary manslaughter charges, and subsequently convicted in state court of 161 state murder counts).
18. *See* Colangelo, *supra* note 16, at 812-15; Dionysios Spinellis, *Global Report: The* Ne Bis in Idem *Principle in "Global" Instruments*, 73 INT'L REV. PENAL L. 1149, 1150 (2002).
19. Colangelo, *supra* note 16, at 808-809; Spinellis, *supra* note 18 at 1152.
20. *See* Van Den Wyngaert & Ongena, *in* Cassese Commentary, *supra* note 11, at 707; de la Cuesta, *supra* note 8, at 708 (describing horizontal transnational concurrence of jurisdiction between States, vertical concurrence between national and international jurisdictions, and horizontal concurrence between international jurisdictions); Spinellis, *supra* note 18, at 1151-53 (discussing horizontal *ne bis in idem* between States) and at 1153-61 (discussing vertical *ne bis in idem* between international criminal tribunals and states).
21. *See* Van Den Wyngaert & Ongena, *in* Cassese Commentary, *supra* note 11, at 722; Spinellis, *supra* note 18, at 1158-61 (discussing both "upward" and "downward" *ne bis in idem*).

jurisdictions established by treaty or domestic laws. An example is typical extradition treaties[22] that mandate or permit a refusal based on a previous or ongoing adjudication in the requested state. This occurs with the rules governing extradition with regard to the European arrest warrant.[23] A refusal to extradite is mandatory or discretionary in some circumstances of multiple prosecutions. The terminology of "crimes" and "elements" or "acts" and "conduct" is as important in this area as it is with the bar on multiple prosecutions and punishments within a jurisdiction.

The distinction between "elements" or "crime" and "conduct," "acts," or "facts" is also apparent in U.S. cases dealing with extradition treaties. While the issue is not one of constitutional double jeopardy, a *ne bis in idem* or double jeopardy concept is common in the treaties. The language in a typical extradition treaty bars extradition if the accused has already been convicted or acquitted either for the "same offense" in some treaties, or for the "same acts" or for the "same facts" in other treaties.[24] Professor Bassiouni notes that the term "same facts" is a broader

22. Colangelo, *supra* note 16, at 812-15 (positing that the requirement to refuse extradition if the case is already adjudicated in the requested State does not represent the state of international law, but rather is a type of exception to the general rule that *ne bis in idem* does not bar prosecutions by multiple sovereigns); *see also* ALBIN ESER, OTTO LAGODNY, & CHRISTOPHER L. BLAKESLEY (eds.), THE INDIVIDUAL AS SUBJECT OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS: A COMPARATIVE STUDY (Nomos Verlagsgesellschaft 2002) (noting for various countries that there is no international *ne bis in idem* bar to prosecutions by multiple sovereigns, but that treaties or domestic legislation may limit concurrent jurisdiction based on prior adjudication) at 166-67, 178 (Finland—some prohibitions on domestic prosecution and extradition if foreign judgment); at 239, 267 (Germany—referring to requirements of the 1990 Convention Implementing the Schengen Agreement (CISA)); at 333-38 (Italy—discussing treaty obligations regarding *ne bis in idem*); at 469, 479-80, 499 (The Netherlands—discussing Dutch domestic law prohibiting subsequent prosecution after foreign judgment and similar treaty obligations); at 535-36, 610 (United States—discussing highly narrow domestic definition of double jeopardy and no bar in general to prosecutions by multiple sovereigns; also commenting on limited application of treaty provisions); at 739 (commenting that Finland and The Netherlands, but not Germany and the United States, have domestic law recognizing a transnational ne bis in idem principle; without domestic law, the issue is governed by treaties).
23. *See* discussion *infra* notes 81-91 and accompanying text.
24. *See, e.g.,* Treaty on Extradition, U.S.-Italy, art. 4, Oct. 13, 1983, 35 U.S.T 3023, 1590 U.N.T.S. 161(entered into force 24 Sept. 1984); *id.* art. VI ("[E]xtradition shall not be granted when the person sought has been convicted, acquitted or pardoned, or has served the sentence imposed, by the Requested Party for the same acts for which extradition is requested."). *See also* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 757 (Oxford University Press 2007) (Note, though, that even this "typical" treaty language can differ due to translation issues. Professor Bassiouni points out that the term "same acts" in the English version was "same facts" in the Italian version of this treaty).

term than "same offense" in extradition treaties."[25] As Professor Bassiouni comments, "[t]he concept of same facts includes same evidence and material propositions of fact,"[26] which is broader than the term "same acts"[27] and far broader than the "same elements" test as expressed in the Blockburger-type test.[28] While there is a range of interpretations for terms, such as "same conduct" and "same offense," the latter is usually narrower than the former.[29] Professor Bassiouni notes that "same conduct" can be interpreted as "(a) identical acts; or (b) a series of acts related to each other by the scheme or intent of the actor; or (c) multiple acts committed at more than one place and at different times, but related by the actor's criminal design." "Same offense" can be interpreted as "(a) identical charge; or (b) lesser included offense; or (c) related offenses, but not included.[30] In these definitions, the range of interpretations for "same offense" focuses more on the legal characterization while the interpretations of "same conduct" focus more broadly focus on the underlying factual incident.

Two U.S. cases provide some insight into the meaning of the terms. In the course of deciding whether an indictment in the United States barred an extradition to Italy under an extradition treaty, the Second Circuit Court of Appeals recognized that a "same acts" test is broader than a "same elements" or Blockburger test.[31] The court ultimately granted the extradition on the grounds that, even under the "same acts" test, a charge in Italy for fraudulent bankruptcy which involved an Italian bank was a different act from a charge in the United

25. BASSIOUNI, *supra* note 24, at 750-51 (also explaining that part of the difference comes from the fact that prosecutors in civil law systems must prosecute for all possible crimes on the facts while prosecutors in common law systems have more discretion in selecting the crimes; consequently, it is more consistent with the civil law system to bar subsequent prosecutions based on the underlying facts while, in the common law system, the focus is on the crimes); *see also* Christopher L. *Blakesley, Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond—Human Rights Clauses Compared to Traditional Derivative Protections such as Double Criminality*, 91 J. CRIM. L & CRIM. 1, 49 (2000) (commenting on the difference between the broad concept of "same facts" and the narrow concept of " same crimes"); de la Cuesta, *supra* note 8, at 721 (noting that most legal systems look to the historical events and not the legal characterization for ne bis in idem).
26. BASSIOUNI, *supra* note 24, at 751.
27. *Id.*
28. *Id.* at 750-51.
29. *Id.* at 752.
30. *Id.*
31. Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980); *see also* Elcock v. United States, 80 F. Supp. 2d 70, 79-80 (E.D.N.Y. 2000) (although applying the narrow Blockburger test, the court recognized that "same acts" is broader than "same offense" and broader than the Blockburger "same elements" test).

States for a related offense regarding a U.S. bank. The Italian prosecutor had also submitted that he would not use facts from the events in the United States in the Italian prosecution.[32] In another case, a federal district court had to determine the meaning of the French word "faits" because the treaty under which the accused had been extradited to the United States barred "the use of faits relied upon at the Luxembourg trial for prosecution of defendants in the United States."[33] The court noted that the typical civil law concept of *ne bis in idem* included "related acts and the use of evidence supporting such similar acts" rather than "offense" or "conduct."[34] The court found that "faits" meant "'material propositions of fact' or 'operative facts' or 'ultimate facts'—that is to say factual elements required to make out a prima facie case."[35] On this basis, the court found that a U.S. prosecution for money laundering was relying on the same facts as a previous Luxembourg conviction on money laundering. Both involved money laundering of proceeds of drug trafficking. On the other hand, a U.S. charge of conspiring to distribute and to possess with intent to distribute cocaine was viewed as based on different facts.[36]

The extradition cases, as well as in the U.S. interpretation of the Fifth Amendment's double jeopardy clause, are examples of how the concept of *ne bis in idem* can be broad or narrow and of how significant the choice of terms can be. The terms "conduct," "acts," or "facts" is broader than "elements" or "crimes." The ICC statute, discussed in the next section, uses these conceptual distinctions to create a *ne bis in idem* structure that favors state prosecutions.

## III. *Ne Bis in Idem* in the ICC Statute

### *A. The statute*

The *ne bis in idem* provision of the ICC statute involves both the definitional issue of "crimes/elements" and "acts/conduct" and the limitations on prosecutions by multiple jurisdictions. Ne bis in idem comes up in two critical places in the ICC statute: 1) Article 20 which sets forth the principle of a *ne bis in idem* bar and 2) Article 17, which states *ne bis in idem* under article 20 is a reason to find a case

32. Lopez, *supra* note 8, at 1286-87.
33. United States v. Jurado-Rodriguez, 907 F. Supp. 568, 577 (E.D.N.Y 1995); *see also* Lopez, *supra* note 8, at 1287-89.
34. *Jurado-Rodriguez*, 907 F. Supp. at 578.
35. *Id.* (quoting Sindona v. Grant, 619 F.2d at 169).
36. *Id.* at 580-581.

inadmissible.[37]

Articles 17 and 20 are both part of the section of the statute on "jurisdiction, admissibility and applicable law." As such, they are limitations on the Court's ability to consider a case. The admissibility provisions are designed to limit the ICC and foster state prosecutions. While *ne bis in idem* is a limitation based on fairness to the accused and finality of proceedings, it is also logical to place it within the admissibility limitations because *ne bis in idem* imposes a limitation on prosecutions.

It makes sense to turn first to Article 20 because it sets forth the principle of *ne bis in idem* that is then incorporated into reasons for inadmissibility under Article 17. Article 20 provides limitations on cases before the ICC and on cases before national courts. The limitations on cases before the ICC include prior adjudications within the ICC and prior adjudications by national courts (or possibly by another international or regional court.)

Article 20 provides:

> 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. (emphasis added)

It is important to note the difference in terminology in the paragraphs of Article 20. The significance of using "crime" in paragraph 2 compared with the use of "conduct" in paragraphs 1 and 3 has important consequences for complementarity

37. Rome Statute of the International Criminal Court art. 17-20 (July 17, 1998). It is a *ne bis in idem* rule specifically for offenses that arise under article 70, which are offenses against the administration of justice of the Court, such as giving false testimony, improperly influencing testimony, or improperly affecting the work of Court employees.

and is discussed in the next section.

Article 17 incorporates *ne bis in idem* into its reasons for making a case inadmissible. It states:

> ". . .the Court shall determine that a case is inadmissible where:. . .
>
> (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. . ."

It is also worth noting another overlap between Articles 17 and 20. Article 17 declares a case inadmissible if:

> 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. . .

"Unwillingness" is defined, inter alia, in Article 17 (2) as proceedings "for the purposes of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5" or proceedings that are or were "not conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice." The provisions regarding shielding a person from responsibility and concerning the lack of independence or impartiality and lacking an intent to bring the person to justice are almost identical to the language of the two exceptions to *ne bis in idem* in Article 20. This is not without purpose and logic. According to commentators, the exceptions from Article 17 were incorporated into Article 20 because they had already achieved a consensus on those points.[38] Moreover, there is logic in having the same exceptions to a denial of ICC jurisdiction. While there is a difference because *ne bis in idem* concerns only completed proceedings while the "unwilling" standard covers investigations and prosecutions, the reason for the ICC to assume the case despite a state investigation, prosecution, or completed proceedings is logically the same—

38. Bruce Broomhall, *The International Criminal Court: A Checklist for National Implementation*, *in* ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION 146 (Ass'n Internationale de Droit Pénal ed., 1999); John T. Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS 58 (Roy S. Lee ed., Kluwer Law International 2nd ed. 2002) (1999) [hereinafter Holmes, *in* Lee Commentary]; *see also* Tallgren & Coracini, *supra* note 11, at 689 (Exceptions to Article 20 were intended to be the same as "unwilling," although at different points in a process. The "unwilling and unable" provision is designed for investigations and ongoing prosecutions while *ne bis in idem* is dealing with a completed criminal process. Nevertheless, it is important that the wording is identical between Article 20 and Article 17).

when the state process is not functioning properly.

### *B. The meaning of "conduct" and "crime"*

#### 1. The construct and language of the statute

The statute uses the broad definition of *ne bis in idem* for multiple prosecutions within the ICC and for a successive prosecution in the ICC after a national prosecution. The ICC cannot try an accused "with respect to conduct which formed the basis of crimes" that have already been tried by the Court. Similarly, an accused cannot be tried in the ICC if the person was tried by another court "for conduct also proscribed under article 6, 7, or 8. . .with respect to the same conduct" unless one of two exceptions is met. As outlined above, the exceptions deal with sham trials. The basic idea, then, is that a successive prosecution in the ICC is barred if the conduct has been the subject of a prosecution either in the ICC itself or in a national jurisdiction. For instance, if the accused is tried in the ICC for genocide for a particular incident in which people were killed, the accused cannot subsequently be tried in the ICC for a crime against humanity of murder for the same incident.[39] More importantly, the use of the word "conduct" should mean that, if an accused is tried in a national jurisdiction for murder based on a particular incident, the accused cannot subsequently be tried in the ICC for genocide, war crimes, or crimes against humanity based on the same killing.

Although the application of the second scenario in which there is a prior state prosecution could conceivably be interpreted only to bar ICC prosecutions if the state prosecution is for genocide, war crimes, or crimes against humanity, such a limited interpretation of "same conduct" would be less sound than a broader interpretation. The language within the statute, the general underlying goal of complementarity, the contrast with the ICTY and ICTR statutes, and the similarity to language in other contexts all point towards a broader interpretation.

As a starting point, the language within the statutory provision reflects a distinction between "conduct" and "crime." This distinction would be comparable to the distinction between "same conduct" and "same elements" in the U.S. double jeopardy example mentioned earlier. Major commentators on the evolution of article 20 state that "conduct" should be interpreted to preclude subsequent prosecutions for a crime involving the same conduct, even if definitions of the two

39. Tallgren & Coracini, *supra* note 11, at 683.

crimes each contain a different element.[40] It is also important to note that the word "conduct," rather than "crime" or "elements," is used in both paragraph 1, which governs subsequent prosecutions within the ICC, and paragraph 3, which governs ICC prosecutions subsequent to a state prosecution. There seems to be general agreement among commentators that the word "conduct" in paragraph 1 means that a prosecution for one of the crimes within the jurisdiction of the ICC precludes a subsequent prosecution on the basis of the same conduct for a different crime within the jurisdiction of the ICC.[41] For example, under the first paragraph, if the accused is tried for genocide for a particular incident, the ICC cannot subsequently try the accused for war crimes or crimes against humanity based on the same incident.[42]

There is somewhat less certainty with regard to the meaning of "conduct also proscribed under article 6, 7, or 8... with respect to the same conduct" in paragraph 3. This is the provision that governs "upward" *ne bis in idem*, which bars a subsequent prosecution in the ICC after a State prosecution. The language in early drafts did not prohibit a subsequent trial in the ICC if "the acts in question were characterized by [the national court] as an ordinary crime and not as a crime which is within the jurisdiction of the Court. . ."[43] The language of an "ordinary

40. WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 205 (T.M.C. Asser Press 2006) (several states oppose the more stringent ne bis in idem approach because they find their ordinary criminal law a sufficient basis for prosecuting war crimes and wish to preserve their freedom to do so, which demonstrates that the ne bis in idem principle prohibits repeated prosecution regardless of what law is applied first); *see also* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 192-93 (Cambridge University Press 3rd ed. 2007) (noting that article 20 (3) likely prohibits subsequent ICC prosecutions even if prior state prosecution was for an ordinary crime); Tallgren & Coracini, *supra* note 11, at 683 (defining idem as "same historical facts" provides a broad ne bis in idem protection and prohibits a subsequent, different characterization of the same facts).

41. John T. Holmes, *Complementarity: National vs. The ICC*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 672 (Antonio Cassese et al. eds., Oxford University Press 2002) [hereinafter Holmes, *in* Cassese Commentary]; Holmes, *in* Lee Commentary, *supra* note 38, at 59; Tallgren & Coracini, *supra* note 11, at 683 (stating that "[t]he wording of paragraph 1, defining idem by the same historical facts, leaves room for a broad interpretation of the protection. According to it, a trial for a subsequent, different qualification, based on the same historical facts would be prohibited"); Van Den Wyngaert & Ongena, *in* Cassese Commentary, *supra* note 11, at 722 (pointing out that "Article 20 (1) refers to 'conduct,' indicating that it adopts the broad interpretation of the idem"); Spinellis, *supra* note 18, at 1158 (noting that "conduct may not be prosecuted even under a different legal assessment or characterization").

42. Tallgren & Coracini, *supra* note 11, at 683.

43. M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT 168-71 (Transnational Publishers Inc., vol. 2 2005).

crime," however, was taken out of the final version. Professor Schabas has pointed out that, if the intent was to bar the ICC from a subsequent trial only if the state crime was specifically genocide , war crimes, or crimes against humanity , then one would have expected the language to read "for a crime referred to in Article 5'" as is written in paragraph 2.[44] Instead, the language is far broader by using the language "with respect to the same conduct." Professor Tallgren and others concur that the term "conduct also proscribed" is meant as a broad interpretation.[45] Professor Tallgren posits that the characterization of the crime is not determinative; instead it is whether the conduct, such as "murder of several persons," was the subject of a criminal prosecution under national law.[46] In that case, Professor Tallgren and other commentators indicate that the ICC is barred from prosecuting for the conduct underlying the murder, even if the crime in the ICC would be genocide rather than murder.[47]

On the other hand, the language of "ordinary crimes" was apparently stricken primarily due to concerns about vagueness rather than expressions of concern about the concept.[48] This was not the universal reason, however, as at least two states objected to the possibility of an ICC prosecution after a state prosecution for "ordinary crimes" on the basis that the subsequent prosecution violated *ne bis in idem*.[49] Nevertheless, one commentator builds on the idea that the reasons for

44. SCHABAS, *supra* note 40, at 193.
45. Tallgren & Coracini, *supra* note 11, at 692; *see also* Colangelo, *supra* note 16, at 58 (emphasizing the distinction between "crime" and "acts" or "conduct"); Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86, 96 (2003) (use of "conduct" in Article 20(3) indicates proscription of subsequent ICC prosecution for conduct characterized as "ordinary crime"); Julio Bacio Terracino, *National Implementation of ICC Crimes*, 5 J. INT'L CRIM. JUST. 421, 437-38 (2007) (detailing the drafting history of Article 20(3) and its implication that ordinary crimes would bar a subsequent ICC prosecution).
46. Tallgren & Coracini, *supra* note 11, at 692.
47. *Id.*; *see also* Kleffner, *supra* note 45, at 96; Spinellis, *supra* note 18, at 1159 (broad reach of "bottom-up" decisions).
48. Van Den Wyngaert & Ongena, *in* Cassese Commentary, *supra* note 11, at 725. *But see* Michele N. Morosin, *Double Jeopardy and International Law: Obstacles to Formulating a General Principle*, 64 NORDIC J. INT'L L. 261, 266 (1995) (stating that at least the Netherlands and Costa Rica took an even stronger view of precluding a subsequent ICC prosecution after a state prosecution—they objected to the language "ordinary" crime in the International Law Commission Draft because they were of the view that any subsequent prosecution by the ICC would violate *ne bis in idem*).
49. Doudou Thiam, Special Rapporteur, Twelfth Report on the Draft Code of Crimes Against the Peace and Security of Mankind, A/CN.4/460 and Corr.1, *in* II EXTRACT FROM THE YEARBOOK OF THE INTERNATIONAL LAW COMMISSION ¶¶ 93-94 (U.N. New York and Geneva eds. 1994) (Costa Rica and The Netherlands).

deleting "ordinary crimes" are unclear to suggest that the language "conduct also proscribed under article 6, 7, or 8" could equate to genocide, war crimes, and crimes against humanity as that is the "conduct" defined by those articles.[50] Under this view, the ICC would not be barred by paragraph 3 from prosecuting an accused if the state prosecution was for murder rather than the more serious crimes covered by the ICC statute.

Despite some uncertainty, it seems likely that the language of "conduct also proscribed under article 6, 7, or 8" is a broad statement of *ne bis in idem* rather than a narrow one. The drafters chose the word "conduct" in both paragraphs 1 and 3 in contrast to the word "crime" in paragraph 2. If, as the commentators generally agree, the word "conduct" in paragraph (1) is intended as a broad version of *ne bis in idem*, one would expect that the word "conduct" in paragraph (3) would carry the same meaning. This would seem especially true because the drafters used a different word, "crime," in paragraph 2 and, thus, presumably knew the difference between the meaning of the two words in *ne bis in idem* jurisprudence. While the inclusion of conduct also proscribed under article 6, 7, or 8 in paragraph 3 could be viewed as limiting the meaning of "conduct" in a way that is different from the unconditional term "conduct" in paragraph 1, it seems more likely that the drafters would have used the word "crime" in paragraph 3 if they had meant for that provision to be limited to the specific crimes of genocide, crimes against humanity, and war crimes.[51] Moreover, as Professor Schabas points out, even an "ordinary" murder is quite serious, usually carrying the most severe penalty in the jurisdiction.[52] If the state prosecution is shielding the accused from accountability, there is an exception to take care of that. Article 20 (3) (a) provides that *ne bis in idem* does not apply if the proceedings in the other court "[w]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court." Thus, if an accused was prosecuted for assault when the facts demonstrate a murder that could be also characterized as a crime against humanity, presumably the ICC would not be barred by Article 20 because the prosecution for such a minor crime of assault would likely be found to be shielding the person from criminal responsibility.[53]

50. MOHAMED M. EL ZEIDY, THE PRINCIPLES OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE 288-90 (2008).
51. *See id.* at 286-87 (posing the argument that the inclusion of "proscribed under article 6, 7, or 8" could mean that only those specific crimes are covered).
52. SCHABAS, *supra* note 40, at 192.
53. Tallgren & Coracini, *supra* note 11, at 694 (indicating that it is difficult to know exactly

The language of "conduct" is also likely to be interpreted broadly under principles of statutory construction and lenity. The underlying principle of complementarity infuses the ICC statute. Both the Preamble and Article 1 state that the ICC "shall be complementary to national criminal jurisdictions."[54] Commentary on the importance and prominence of complementarity as a cornerstone of the adoption of the ICC statute is legion.[55] If the statutory language is unclear, under general principles of statutory construction, the Court would interpret the provisions in light of the underlying purposes of the statute.[56] Additionally, under the general criminal law principle of lenity, an ambiguous statute will be interpreted favorably to the accused.[57] With either of these principles of construction, the term "conduct" is likely to be construed broadly to prohibit a subsequent prosecution in the ICC after a state prosecution, at least for a significant crime.

The broad interpretation of the word "conduct" is also reinforced by the drafter's use of the word "crime" in paragraph 2. Paragraph 2 addresses the "downward" *ne bis in idem*, which prohibits a state prosecution after a prosecution in the ICC. The provision bars subsequent prosecutions "for a crime referred to in article 5." There is general agreement among commentators that States are only prohibited from subsequent prosecutions for the specific crimes of genocide, crimes against humanity, or war crimes [or aggression[58]] that constitute a "crime

what type of cases would fall under this exception, but that possibly a prosecution for assault where the acts could be genocide would mean the process is a sham).

54. Rome Statute, *supra* note 6, prmbl. (which states that "emphasizing the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions ..."). *Id.* at art. 1 (stating that an International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. ...").
55. *See, e.g.,* Holmes, *in* Cassese Commentary, *supra* note 41, at 672; Tallgren & Coracini, *supra* note 11, at 611; Van Den Wyngaert & Ongena, *in* Cassese Commentary, *supra* note 11, at 81-82; Broomhall, *supra* note 38, at 143; Kleffner, *supra* note 45, at 94; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/C.1/SR.11 (June 15 – July 17, 1998).
56. Kleffner, *supra* note 45, at 93.
57. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 50 (LexisNexis 4th ed. 2006); United States v. Bass, 404 U.S. 336, 347 (1971); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 156-57 (Oxford 2003). *See also* Rome Statute art. 22 (2) (which specifically sets forth the principle: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.").
58. Rome Statute, *supra* note 6, art. 5. "Crimes referred to in article 5" would also include the crime of aggression but, since there is yet to be an adopted definition of aggression, for all

referred to in article 5."[59] This means that, even if there is a prosecution in the ICC for one of the three specific crimes, a state may subsequently prosecute the accused on the same facts for different crimes, such as murder or rape, under national law.[60] According to Professor Tallgren, the language in paragraph 2 was changed from barring a subsequent state prosecution for "conduct constituting a crime under article 5" to the current language barring prosecution only for a "crime under article 5."[61] She indicates that the concern was to allow subsequent state prosecutions for ordinary crimes, such as murder, especially if there was an acquittal in the ICC or new evidence was discovered.[62] As such, the drafters carefully protected the right of states to try individuals for crimes within their jurisdictional capacity. The ability of states to try the accused for crimes within their jurisdiction is in accord with general interpretations of dual sovereignty.[63] *Ne bis in idem* ordinarily only bars a subsequent prosecution within one jurisdiction.[64] While multiple prosecutions, even in separate jurisdictions, raise important concerns about fairness to the accused and are part of the rationale behind some of the treaty and national law restrictions on subsequent prosecutions, it is beyond the scope of the present article to delve into this issue.[65] The important point about this

practical purposes at this time, the crimes that are involved here are genocide, crimes against humanity, and war crimes.

59. SCHABAS, *supra* note 40, at 193; Tallgren & Coracini, *supra* note 11, at 686-87; Van Den Wyngaert & Ongena, *in* Cassese Commentary, *supra* note 11, at 723-24 (giving example that if accused tried in ICC for a war crime of murder, state can still try the accused for the ordinary crime of murder in a national court); Spinellis, *supra* note 18, at 1158. A jurisdictional theory supports the limited downward ne bis in idem effect. Under this theory, because the ICC's jurisdiction is limited to only the listed serious crimes, an ICC adjudication cannot affect the jurisdiction of national courts that are based on a much wider range of crimes. *See* Van Den Wyngaert & Ongena, *in* Cassese Commentary, *supra* note 11, at 717-18 (commenting that downward NBII is narrower because the effect of an ICC prosecution can only be with regards to the crimes within the jurisdiction of the ICC; the broader jurisdiction of states over other crimes would not be affected under a jurisdictional approach to NBII); Spinellis, *supra* note 18, at 1158 (noting that where the ICC's jurisdiction is limited to certain crimes, then ne bis in idem should not preclude prosecutions for crimes that were not within the jurisdiction of the ICC, even if based on the same facts).
60. Tallgren & Coracini, *supra* note 11, at 686-87; SCHABAS, *supra* note 40, at 193; de la Cuesta, *supra* note 8, at 732.
61. Tallgren & Coracini, *supra* note 11, at 686.
62. *Id.*
63. See discussion supra notes 16-19 and accompanying text.
64. EL ZEIDY, *supra* note 50, at 284; Tallgren & Coracini, *supra* note 11, at 671; Van Den Wyngaert & Ongena, *in* Cassese Commentary, *supra* note 11, at 721-22.
65. *See, e.g.*, de la Cuesta, *supra* note 8, at 732 (commenting that a subsequent state prosecution after an ICC prosecution on the same conduct is unfair to the accused and suggesting that,

background and context is that the word "crime" carries a different meaning than the word "conduct" in *ne bis in idem* parlance. The word and concept choice of the drafters, as confirmed by the commentary on the provision, is very strong support that the word "conduct" in paragraph 3 is intended to have a broader meaning than the word "crime" in paragraph 2.

Although the ICC has yet to address directly the issue of *ne bis in idem*, Professor Newton points out that the case of Thomas Lubanga Dyilo, which is presently being prosecuted in the ICC, is a case in which the Democratic Republic of the Congo (DRC) had previously initiated proceedings against Lubanga.[66] After the DRC self-referred the situation to the ICC, a Congolese court issued arrest warrants and authorized preventive detention for genocide, crimes against humanity, murder, illegal detention, and torture.[67] Because the Congolese proceedings had not been pursued and Lubanga had not been tried by the State court, there was no *ne bis in idem* issue of preclusion. The Pre-Trial Chamber of the ICC did address, however, the issue of admissibility based on whether a state investigation or prosecution was underway in the course of deciding on the issuance of an arrest warrant.[68] They viewed the conduct underlying the charges in the DRC as different from the conduct underlying the charges in the ICC. Moreover, as Professor Newton points out, the DRC was self-referring the case to the ICC, which may obviate the need for an assessment of the similarity of the potential prosecution.[69] In any event, the issue was not one of *ne bis in idem*, which

at a minimum, the principle of deduction should have been included). *See also XVIIth International Congress of Penal Law*, *in* RESOLUTIONS OF THE CONGRESSES OF THE INTERNATIONAL ASSOCIATION OF PENAL LAW (J.L De La Cuesta ed. 1926-2004) (Electronic Review of the International Association of Penal Law 2007) (resolving, inter alia, that downwards *ne bis in idem* from an international court to a national court should be determined "on the basis of substantially the same facts, thus barring domestic prosecution if the conduct of the accused qualifies both as an ordinary crime and...a serious violation of international humanitarian law...").

66. Newton, *supra* note 2, at 155.
67. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-8-Corr 17-03-2006, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into Record of the Case Against Mr. Thomas Lubanga Dyilo, PTC, ¶ 33 ( Feb. 24, 2006) [hereinafter *Lubanga*] (the Court describes two arrest warrants issued in 2005, one for genocide and crimes against humanity and a second one for murder, illegal detention, and torture; the self-referral letter dates to 2004 (¶ 22); and the issuance of the ICC arrest warrant was in 2006); SCHABAS, *supra* note 40, at 182 (describing the DRC arrest warrant).
68. *Lubanga*, *supra* note 67, at ¶¶ 30-40.
69. Newton, *supra* note 2, at 155; *see also* Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-1213, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute) ( June 16,

would have operated as an absolute preclusion if the "conduct" underlying the charges was the same and there had been a final judgment in the case.

Under the circumstances of the Lubanga case, however, even if *ne bis in idem* had been the issue, it is unlikely that the conduct would have been viewed as the same since the recruitment of child soldiers is different conduct from the crimes charged in the DRC. Of the crimes charged in the DRC arrest warrants, there would have been the most likely overlap with crimes against humanity and illegal detention.[70] The Court, however, states that there is no reference in the DRC arrest warrants to recruiting and using child soldiers.[71] Thus, it appears that neither the crimes against humanity nor the illegal detention charges were based on child soldiers. The difference between the crimes charged in the DRC and the child soldier charges in the ICC would be similar to the situation discussed supra in Section II in which "same facts" did not preclude a prosecution for conspiracy to distribute drugs after a prosecution for money laundering the proceeds.[72] In both instances, although there may be one or more general incidents, the actions involve different crimes.

While the Lubanga case did not involve a *ne bis in idem* claim, an actual *ne bis in idem* claim was preliminarily raised in the case of Mathieu Ngudjolo Chui,[73] also from the DRC. Ngudjolo was acquitted in 2004 of a charge of murder of an individual in Bunia in the DRC.[74] At his initial appearance in 2008 before the ICC,

2009)[hereinafter Katanga Admissibility Decision]. Katanga had challenged the admissibility of the case on the basis that an investigation had been initiated in the DRC on attacks on villages, including Bogoro which is at issue in Katanga's case. *Id.* at ¶¶ 22, 70. In its decision rejecting Katanga's admissibility challenge, the Trial Chamber found that the DRC did not want to pursue the case in its national courts and, therefore, was "unwilling" to proceed under the ICC standard. *Id.* at ¶¶ 77-78, 90-95.

70. Katanga Admissibility Decision, *supra* note 69. It is unclear from the Court's description exactly what acts were alleged in the DRC for the crimes charged. It is likely, however, that the underlying acts for the charge of genocide involved killing members of a group. It also would appear that the charges of murder and torture would not have overlapped with the acts of recruiting and using child soldiers as crimes against humanity. Similarly, it is entirely clear what acts were the basis of the illegal detention charges. The Court, however, finds no overlap with the charges in the ICC of child soldier crimes against humanity.
71. *Lubanga*, *supra* note 67, at ¶¶ 38-39.
72. *See* Jurado-Rodriguez, *supra* notes 33-36 and accompanying text.
73. Katanga Admissibility Decision, *supra* note 69.
74. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-262, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant Arrest for Mathieu Ngudjolo Chui, ¶ 18 ( July 6, 2007) [hereinafter Ngudjolo Warrant Decision]; Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-T-33, Initial Appearance, 18 (Feb. 11, 2008) [hereinafter Ngudjolo Initial Appearance].

Ngudjolo claimed that he had previously been tried, and acquitted, for the same conduct on the basis of which he was now charged in the ICC.[75] In its earlier decision issuing the arrest warrant for Ngudjolo, the Pre-Trial Chamber had found that the charge on which he was acquitted in the DRC was based on different conduct than the conduct underlying the charges at the ICC, which involves attacks on the village of Bogoro.[76] However, when the issue was raised at the initial appearance of the accused, the Pre-Trial Chamber gave the defense the option to file a written motion challenging admissibility based on *ne bis in idem*.[77] It does not appear that the defense followed up on this motion.[78] It is unclear exactly what the overlap might have been between the adjudicated case in the DRC and the charges before the ICC and, consequently, this case does little to shed light on the interpretation of the *ne bis in idem* provisions of the ICC statute.[79]

### 2. The *ne bis in idem* provisions of the ICTY and ICTR statutes

Although neither the Lubanga nor the Ngudjolo case required much analysis of

75. Ngudjolo Initial Appearance, *supra* note 74, at 20.
76. *Id.* at 22.
77. *Id.* at 17.
78. *Id.* (at the initial appearance, the defense indicated that they would file a written motion the next day). The defense then filed a request to postpone in the filing of the motion on inadmissibility as they needed time to obtain the documents from the DRC. Situation en Republique Democratique du Congo Affaire, Le Procureur c/Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-279, Requête en vue d'obtenir la prorogations des délais permettant à la Défense de déposer l'ensemble du dossier pouvant justifier l'exception d'irrecevabilité de la procédure ( Feb. 12, 2008); *see also* Katy Glassborow & Marie Delbot, *Ngudjolo Trial Faces Double Jeopardy Claim*, *in* INSTITUTE FOR WAR AND PEACE REPORTING, Feb. 19, 2008, http://www.iwpr.net/?p=acr&s=f&o=342800&apc_state=henh. There does not appear to be anything further in the public record regarding the *ne bis in idem* claim. Lorraine Finlay, *Does The International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute*, 15 U.C. DAVIS J. INT'L L. & POL'Y 221, 246-47 (2009).
79. The issue raised by the defense at the initial appearance also included a claim that there was an investigation and an arrest warrant issued in the DRC for other charges that might have overlapped with the conduct at issue before the ICC. Ngudjolo Initial Appearance, *supra* note 74, at 18. As with the Lubanga case, this is not a ne bis in idem issue, but one of admissibility based on the issue of "willingness" to prosecute. See discussion, supra notes 66-69 and accompanying text. The admissibility issue, too, does not appear to have been followed up by Ngudjolo's defense. Ngudjolo's co-accused, Germain Katanga did pursue a challenge to admissibility based on an earlier DRC had initiation of an investigation involving attacks on villages, but the Trial Chamber found that the DRC met the "unwilling" standard and the case was admissible. *See* Katanga Admissibility Decision, *supra* note 69. For an excellent discussion of admissibility issues, *see* Linda M. Keller, *The Practice of the International Criminal Court: Comments on "Complementarity in Crisis,"* 8 SANTA CLARA J. INT'L L. 199 (2010).

*ne bis in idem*, when the ICC does face the issue, the Court is likely to consider the interpretation of the *ne bis in idem* provisions of the ICTY and ICTR statutes. The practice of the ICTY and ICTR on *ne bis in idem* is a helpful reference in further identifying the importance of the ICC statute's use of the term "conduct" rather than "crime," as well as in understanding the significance the ICC's rejection of the term "ordinary" crime. The ICTY and the ICTR have not dealt directly with the issue of upward or downward *ne bis in idem*.[80] Nevertheless, they have had to interpret the terminology used for *ne bis in idem* in the context of the transfer of cases and in the context of cumulative convictions and punishments. The *ne bis in idem* provision of the ICTY and ICTR statutes[81] provides:

"2. A person who has been tried by a national court for acts constituting serious violations

80. The issue of upward ne bis in idem was raised in Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of Non-Bis-In-Idem, ¶¶ 10-12 ( Nov. 14, 1995), but because there had been no decision on the merits in Germany, there was no *ne bis in idem* issue. Similarly, in Prosecutor v. Ntuyahaga, Case No. ICTR-98-40-T, Decision on the prosecutor's Motion to Withdraw the Indictment, Trial Chamber ( Mar. 8, 1999), there was no downward ne bis in idem issue because there was no final adjudication in the ICTR. Regarding the Ntuyahaga case, *see* Spinellis, *supra* note 18 at 1155 n.19 (noting that because indictment withdrawn rather than an acquittal, national prosecutions in Rwanda or Belgium not barred); Tallgren & Coracini, *supra* note 11, at 679; Van Den Wyngaert & Ongena, *in* Cassese Commentary, *supra* note 11, at 720-21.

81. Statute of the International Criminal Tribunal for the former Yugoslavia art. 10, S. C. Res. 827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 art. 9, S.C. Res. 955 (Nov. 8, 1994) [hereinafter ICTR Statute]. The full provisions of these statutes provide:

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

> of international humanitarian law may be subsequently tried by the International Tribunal only if:
>
> (a) the act for which he or she was tried was characterized as an ordinary crime; or
>
> (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted." (emphasis added)

Unlike the provision of the ICC statute, the ICTY and ICTR statutes have a narrow interpretation of upward *ne bis in idem*. By using the terminology "ordinary crime," the statute would allow the ad hoc tribunal to prosecute a case even after an adjudication by a national court if the national prosecution was for an "ordinary" crime.[82] This means that, if a national court prosecuted for murder or rape, the ICTY or ICTR would not be barred by *ne bis in idem* from adjudicating a case based on the same conduct for genocide, crimes against humanity, or war crimes.[83]

The underlying distinction for *ne bis in idem* purposes between "ordinary" crimes and the "international" crimes covered by the statutes of the ad hoc tribunals was also part of the reasoning in rejecting a motion to transfer a case to a national jurisdiction that did not have a provision for the more serious crime of genocide. In the case of Prosecutor v. Bagaragaza,[84] the Appeals Chamber of the ICTR affirmed the referral bench's decision to refuse to transfer Bagaragaza's case to Norway when Norway would have prosecuted him only for murder and not for genocide. While the transfer provision itself did not specify whether or not the national jurisdiction had to be able to prosecute for a specific crime covered in the ICTR statute, the Court found that the legal characterization of the crime was

82. Van Den Wyngaert & Ongena, *in* Cassese Commentary, *supra* note 11, at 719.
83. On the other hand, an ICTR Trial Chamber in the early days of the Court indicated that a national court prosecution for one serious crime covered by the statute, such as war crimes, would preclude a prosecution in the ICTR for other crimes (genocide and crimes against humanity) covered by the ICTR statute. *See* Van Den Wyngaert & Ongena, *in* Cassese Commentary, *supra* note 11, at 719 (noting that the issue was alluded to in the prosecution requests for deferral by a national jurisdiction in the Bagosora and Musema cases) (citing Prosecutor v. Bagosora, Case No. ICTR-96-7-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal tribunal for Rwanda (May 17,1996); Prosecutor v. Musema, Case No. ICTR-96-5-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral on the Competence of the International Criminal Tribunal for Rwanda in the Matter of Alfred Musema (Mar. 12, 1996)).
84. Prosecutor v. Bagaragaza, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11bis Appeal (Aug. 30, 2006).

significant in its determination. The Court found support for the weight placed on the legal characterization of the crime in the *ne bis in idem* provision that clearly differentiates between an "ordinary" crime and a crime covered by the ICTR statute.

The decisions of the ad hoc tribunals are largely relevant to the interpretation of the ICC provisions to emphasize the significance of the deletion of the term "ordinary crimes" from the ICC statute. The ICC language, which bars an ICC prosecution when the accused has been tried for the same "conduct" in a state court, is far broader than the specific language of the ad hoc statutes, which is clearly designed to allow an international prosecution when the state prosecution was for an "ordinary crime." The language of the ICC statute does not use a legal characterization of the crime as in the ICTY and ICTR statutes. As mentioned earlier, the significance of this distinction is further clarified by the change in language in the ICC drafting from the initial use of the terminology of "ordinary crime" to the subsequent use of "same conduct." Moreover, the difference between the underlying primacy principle of the ad hoc tribunals and the complementarity principle of the ICC is reflected in the *ne bis in idem* principles. The ad hoc tribunals were designed to preempt national prosecutions under a primacy principle, giving the international courts control over where the accused were prosecuted. In contrast, the complementarity principle underlying the ICC's existence is expressly designed to give great control to states to proceed with prosecutions that would then preempt the jurisdiction of the ICC. Thus, the difference in language and underlying concept renders the statutes of the ad hoc tribunals and interpretations relevant to the interpretation of the ICC's *ne bis in idem* provision by further explaining the distinctions in terms.

Similarly, the ICTY and ICTR interpretation of when cumulative convictions are barred is primarily useful again in distinguishing the terminology of "elements" and "conduct." The jurisprudence on cumulative convictions is less directly relevant in that it concerns convictions within one system rather than multiple systems, but nevertheless, the cases involve an issue of *ne bis in idem* and its terminology. For purposes of interpreting the ICC statute on multiple jurisdictions, the importance is the use of the term "same elements" in the ICTY and ICTR cases in contrast to the term "same conduct" in the ICC statute. In the context of cumulative convictions, the ICTY and ICTR have adopted the "same elements" or Blockburger test that is the current test, described supra, under the U.S.

Constitution.[85] The "same elements" test is a narrow one, only barring multiple convictions if all the elements of one crime are contained within the elements of the other. If each crime has a different element from the other, *ne bis in idem* does not bar a multiple conviction. Using this test, the ICTY and ICTR have found cumulative convictions based on the same conduct are permissible for genocide and crimes against humanity;[86] war crimes and crimes against humanity;[87] and even for different counts of crimes against humanity.[88] The narrow interpretation is based on adopting the language and test of "same elements," which is essentially comparable to the use of the term "same crime." In contrast, the term "same conduct" is generally viewed as broader than the term "same elements" or "same crime." Recall the jurisprudence discussed earlier of the U.S. Supreme Court in which the Court rejected the "same conduct" test and opted for only the narrower "same elements" test. Consequently, once again, the use of the term "same conduct" in the ICC statute conveys an intention for a broader coverage of *ne bis in idem* than if the term had been "same elements" or "same crime."

### 3. The analogy of the European arrest warrant

A closer analogy for the ICC statute may be the provisions governing extradition under the European arrest warrant. These provisions were created by agreement, similar to the statutory provisions of the ICC. While the restrictions were not necessarily mandated by the *ne bis in idem* laws of individual states, various provisions, such as the 1990 Convention Implementing the Schengen Agreement (CISA)[89] and the 2002 Framework Decision on the European Arrest

85. *See* Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgement, ¶ 412 ( Feb. 20, 2001).
86. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶¶ 468-70 (Sept. 2, 1998) (genocide, complicity in genocide, and crimes against humanity/extermination).
87. Prosecutor v. Kupreskic, Case No. IT-95-16, Appeal Judgement, ¶¶ 386-88 ( Oct. 23, 2001) (murder as a violation of the laws or customs of war and cruel treatment as a violation of the laws or customs of war cumulatively charged with murder and inhumane acts as crimes against humanity ); Prosecutor v. Kunarac, Kovac, & Vukovic, Case No IT-96-23 & IT-96-23/1-A, Appeal Judgement, ¶¶ 176-78 (June 12, 2002) (convictions for the same conduct under art. 3 violations of the laws or customs of war and art. 5 crimes against humanity are permissible).
88. Prosecutor v. Naletilic & Martinoviv, Case No. IT-98-34-A, Judgement, ¶¶ 583-91 (May 3, 2006) (torture under art. 5(f) and persecution under art. 5(h); *Kunarac, Kovac, & Vukovic, supra* note 87, at ¶¶ 179-85 (torture under Art. 5(f) and rape under Art. 5(g)).
89. Schengen Agreement on the Gradual Abolition of Checks at their Common Borders and the Convention Applying the Agreement, Belg.-Fr.-F.R.G.-Lux.-Neth, June 14, 1985, 30 I.L.M. 84.

Warrant (FD-EAW),[90] define how *ne bis in idem* operates in this context.[91] The provisions require or allow a refusal to extradite in certain circumstances. More important to the analysis here is the use of the term "same acts" and the interpretation of that term.[92] Both CISA and EAW-FD use the terminology.[93] In addition to the similarity between the term "same acts" and "same conduct" in the ICC statute, there is also a similarity between the underlying purpose of "mutual trust and recognition" of different criminal justice systems within the European Union[94] and the principle of complementarity between the ICC and member states.

The key to applying the European arrest warrant terminology is not the legal

90. Council Framework Decision 2002/584/JHA, on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002, O.J. (L 246) (EU).
91. *See* ESER, LAGODNY, & BLAKESLY, *supra* note 22, at 96 (a list of European treaties that concern international *ne bis in idem*).
92. *See* Cimamonti, *supra* note 11, at 123-24. *See also* de la Cuesta, *supra* note 8, at 719 (quoting Article 54 with the terminology of "same acts"). Translation poses problems in many situations, including exactly what terminology is used and what it means. Note that some commentators use an English translation for the CISA provision that has the term as "same offences" rather than "same acts." *See* ESER, LAGODNY, & BLAKESLEY, *supra* note 22, at 98 (quoting art. 54 of CISA with "same offences"); *id.* at 117 (referring to translation and conceptual differences in what is meant by a "judgment); Christine van den Wyngaert & Guy Stessens, *The International Non Bis In Idem Principle: Resolving Some of the Unanswered Questions*, 48 INT'L & COMP. L. Q. 779, 790 (1999) (pointing out a disparity in that the English version uses "same offences" while the French, Dutch, and German versions use "same facts"). Regardless, however, whether the translation is "same offences" or "same acts," the interpretation of the term by the European Court of Justice, discussed in the text, uses a broad definition.
93. De la Cuesta, *supra* note 8, at 719, provides the following translations:
Article 54 of the CISA provides:

> 'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.' (emphasis added). Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1) provides in article 3, headed 'Grounds for mandatory non-execution of the European arrest warrant':
>
> 'The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:
>
> ...
>
> (2) if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State; . . . (emphasis added).

94. Cimamonti, *supra* note 11, at 118.

characterization of the crimes, but rather "if the material facts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter."[95] This is the same concept as considering whether the offenses involve the "same conduct" and is a broader concept than looking only to the "crime" itself. Examples from European Court of Justice cases, interpreting art. 54 of CISA, illustrate the broad application of "same acts." In one case, the acts of exporting and importing the same narcotic drugs were considered the "same acts" in each of the two states involved, even though the quantity or persons involved may have been different.[96] Similarly, importing goods in one state and selling them in another were viewed as the "same acts."[97] On the other hand, receiving and handling the proceeds of drug trafficking in one state was considered a different act from money laundering the proceeds in a second state.[98] The latter example is a close call on whether the "same acts" are involved, but what is important is that the Court was not focusing solely on the legal characterization of the crimes and, in fact, emphasized that the critical question was the "identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected."[99]

### 4. Summary of analysis of terminology

The language of the ICC statute, contrasted with the ICTY and ICTR provisions and analogized to the European arrest warrant language, suggest that the terminology of "same conduct" should be interpreted more broadly than merely the legal characterization of the crimes. Both the language of the *ne bis in idem* provision on "same conduct" and the broader *ne bis in idem* effect given to state prosecutions in "upward" *ne bis in idem* situations suggest that state sovereignty and the principle of complementarity are particularly furthered by the *ne bis in*

95. *Id.* at 124.
96. *Id.*
97. *Id.* at 13 (But note that there are several decisions from states that appear to be using more of a legal characterization standard—criticized in the Cimamonti article as inconsistent with the "same acts" interpretation by the ECJ).
98. *Id.* at 124 (referring to Norma Kraaijenbrink Case No. C-367/05, Judgment of the Court, ¶ 36 (July 18, 2007) available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0367:EN:NOT. The interpretation of *ne bis in idem* by national courts also apparently varies. *See* Cimamonti, *supra* note 11, at 125-27.
99. *Id.* ¶ 36.

*idem* regime in the ICC statute. As Professor Newton points out, the language of *ne bis in idem* and the issue of admissibility in the ICC statute are open to interpretation.[100] However, given the general understanding of "same conduct" in contrast to "same crime," and given the views of major commentators on the meaning of the *ne bis in idem* provision, it seems that the more sound interpretation of the *ne bis in idem* provision is a broad one that would preclude ICC prosecutions after state prosecutions for the same underlying facts, regardless of the legal characterization in the state prosecution. Moreover, the provision is written to provide greater *ne bis in idem* protection in the "upward" effect than in the "downward" effect. Subsequent ICC prosecutions involving the "same conduct" as the previous state prosecutions are barred whereas subsequent state prosecutions are only barred if they involve the "same crime" as the previous ICC prosecution. The deletion of the term "ordinary crimes," which appears in the ICTY and ICTR statutes also should carry some weight in interpreting "same conduct." Even if the purpose in deleting the terminology of "ordinary crimes" was due to its vagueness, the ultimate choice of terms, in light of analogous situations, should inform the interpretation of "same conduct." Moreover, a strong analogy is the meaning given to the terminology of "same acts" in the European arrest warrant and extradition cases where the ECJ has distinguished the term from a narrower concept of a legal characterization.

Thus, the basic *ne bis in idem* prohibition would bar the ICC from a prosecution subsequent to a national prosecution for the same underlying conduct. The only exceptions would be, as provided in articles 17 and 20, if the State proceeding is a sham trial designed to shield the accused from responsibility or the proceeding is otherwise lacking in independence or impartiality and is inconsistent with bringing the accused to justice.

## IV. Exceptions to *Ne Bis in Idem*: Shielding an Accused from Responsibility or Failing to Conduct an Independent or Impartial Proceeding

The issue raised by the exceptions to the *ne bis in idem* bar (and also the exception to inadmissibility if there is an ongoing prosecution) is whether the exceptions will be interpreted to permit an ICC prosecution after a state prosecution for a lesser crime. An exception to the application of *ne bis in idem*

100. Newton, *supra* note 2, at 147.

exists, in particular, if the proceedings "were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court." In this case, the state prosecution is a "sham" trial and does not warrant the deference of *ne bis in idem*. The ICC will be able to prosecute in such an instance, despite the prior adjudication. The *ne bis in idem* provision expressly provides for an exception in that eventuality. The question is whether this provision will be used to override state prerogative in prosecuting crimes under national law other than as genocide, crimes against humanity, or war crimes. While it is legitimate to raise the concern, the intent neither of the provision nor common examples of sham trials would lead to the conclusion that a bona fide prosecution for "ordinary" crimes would be shielding the accused from responsibility.

If the intent of the *ne bis in idem* provision is to give states the primary decision-making authority on the nature of the charges, it would be inconsistent to turn around and make an exception for how the states have characterized the crime. Some commentators have suggested that using the sham trial provision to override legitimate prosecutions of serious national crimes, such as murder, would be counter to the intent of the overall *ne bis in idem* approach that safeguards the right of national jurisdictions to have priority in trying the cases.[101] Moreover, given the way in which the *ne bis in idem* provision is constructed, differentiating between "crime" for downward *ne bis in idem* and "conduct" for upward *ne bis in idem*, it would negate that difference if the exception applied every time that a state prosecuted for an "ordinary" crime. If that result had been desired, the drafters would have been more likely to use the term "crime" or "ordinary crime" in the upward *ne bis in idem* provision, especially with the precedent of the ICTY and ICTR statutes so well known at the time. On the other hand, if the national prosecution was for a minor crime, such as assault, in a context in which the conduct could be charged as genocide, then the sham trial exception should apply. The line between state prerogative in charging and charging that indicates an attempt to shield the accused from responsibility may not be clear-cut. However, what can guide the Court is the balance that was struck by the states parties between favoring state prosecutions and yet providing for an international safeguard against impunity.

101. EL ZEIDY, *supra* note 50, at 171; Tallgren & Coracini, *supra* note 11, at 687-88. *See also* Kleffner, *supra* note 45, at 95-96. *See generally* Terracino, *supra* note 45, at 437-38 (state prosecutions for ordinary crimes would bar an ICC prosecution on the same conduct; reason for removing "ordinary" crime language was due to concerns related to state prerogatives in prosecuting decisions).

The few examples of "sham" trials in commentary on the ICC statute similarly support the interpretation that prosecution for a serious, but "ordinary" crime would not constitute a sham trial. John T. Holmes[102] has written that "the underlying premise of the complementarity regime was to ensure that the Court did not interfere with national investigations or prosecutions except in the most obvious cases."[103] He gives the example of a sham trial where a state appoints a special investigator with political connections to the accused rather than using the regular court processes in the state.[104] He also suggests that transferring a case to a secret tribunal might constitute a sham trial.[105] Thus, it would seem that simply prosecuting for an "ordinary" crime would not be in the same category as the examples of improperly manipulating the system.[106]

Another commentator, Mohamed M. El Zeidy, notes that "shielding the person from criminal responsibility" actually would include the other categories of "unwillingness," such as an unjustified delay or conducting a proceeding that is not independent or impartial with an intent that the accused is not brought to justice.[107] He suggests that examples specifically of shielding might include high levels of acquittals or very light sentences for serious crimes, such as occurred in the Leipzig trials after World War I.[108] Thus, an extreme disparity between the sentence and the gravity of the national crime of which the accused is convicted would potentially be viewed as a sham trial. Once again, this does not mean that, in every case in which an accused is charged with an "ordinary" crime, there would be a finding of shielding the accused from responsibility. Instead, the situation would have to be more clearly disparate with justice under a legitimate system. El Zeidy gives further examples from the European Court of Human Rights and the Inter-American Court of Human Rights that involve inadequate investigation or altering evidence that evinces a design to cover-up or shield those responsible.[109] In one case, for example, the investigation of the disappearance of the victim was conducted by the armed forces and it was the armed forces who were accused of

102. Mr. Holmes was a member and acting head of the Canadian delegation to the ICC preparatory committee.
103. Holmes, *in* Cassese Commentary, *supra* note 41, at 675
104. *Id.*
105. *Id.*
106. *See also* Terracino, *supra* note 45, at 431-33 (rejecting idea that prosecution for ordinary crimes would make a state unwilling or unable to prosecute without more).
107. EL ZEIDY, *supra* note 50, at 170.
108. *Id.* at 172 (including examples of an accused given 6 or 10 months for ill-treatment of prisoners of war; hundreds who were acquitted).
109. *Id.* at 175-80.

complicity in the illegal disappearances.[110] This example, too, demonstrates the significant and extreme facts that constituted a form of shielding the accused from responsibility. The examples from the human rights courts, the Leipzig trials, and a politically-motivated or irregular process are all indicators of a lack of a bona fide effort to bring an accused to justice. This is qualitatively different from a prosecution for a national crime, such as murder, in lieu of an international crime. A prosecution based on a legitimate investigation, a fair process, and a just sentence is unlikely to be viewed as a sham proceeding in comparison to the examples given above.

## V. Conclusion

This paper began by posing a situation in which a state has prosecuted an accused for an "ordinary" crime of murder or rape and by asking the question whether the ICC could subsequently try the accused for genocide, war crimes, or crimes against humanity based on the same underlying conduct. While there is no definitive answer from the ICC as yet, the better answer to the question is "no." The ICC cannot try an accused when the accused has already been tried, whether convicted or acquitted, for the "same conduct," whatever the legal characterization is of the crime. The only exceptions would be if there is a sham trial, meaning that the purpose was to shield the accused from responsibility or the proceedings were otherwise lacking in independence or impartiality in a manner that was inconsistent with bringing the accused to justice. As suggested in this paper and from various commentators, there could be a finding of a sham trial if the state trial was for a very minor crime, such as assault, as that could evince a purpose of shielding the accused when the underlying acts were homicide.

The reasons for answering the question "no" on upward *ne bis in idem* are based on the language of the statute, the commonly accepted understanding of the terms "conduct" and "crime," the absence of an exception for "ordinary" crimes, and the analogy to the European arrest warrant cases. In cases based on *ne bis in idem*, and in cases based on extradition treaties, it is generally understood that "conduct" is a broader term than "crime" or "elements." As such, it means that the legal characterization of the crime itself is not significant. Instead, it is the historical facts or conduct that is the basis of deciding if the accused has already been subject to prosecution. The decision to use the term "same conduct" in prohibiting a

110. *Id.* at 178-79 (discussing Velasquez Rodriguex v. Honduras, Judgment of 29/07/1988, Inter-Am Ct. H.R. (ser. C) No. 4 (1988), ¶¶ 181-82 (July 7, 1966).

subsequent ICC prosecution leads to the conclusion that the drafters intended to bar an ICC prosecution after a state prosecution, even if the state prosecution was for an "ordinary" or national crime. This broad interpretation of the upward *ne bis in idem* provision is different from the provision in the ICTY and ICTR statutes, which specifically exempt "ordinary" crimes from the reach of upward *ne bis in idem*. The fact that the ICC drafters deleted the language exempting "ordinary crimes" supports the interpretation that the drafters intended a broad reach with the term "same conduct." The analogy of the European arrest warrant cases and national practice in using the term "conduct" further supports the conclusion that a state prosecution for an ordinary crime precludes a subsequent ICC prosecution based on the same underlying conduct. Given this likely interpretation, Professor Newton's concern that the states will not be given control over what crimes to prosecute is unlikely to ever pose a problem in the context of conduct first tried in a national proceeding. In fact, the opposite concern could be articulated that the ICC has too limited a jurisdiction over the cases and should be able to try crimes that are treated as lesser crimes in national prosecutions.

As a final note, while the focus of this paper has been on the upward *ne bis in idem* issue in response to Professor Newton's paper, it is also worth pointing out that there are issues of fairness to the accused in facing multiple prosecutions that should be the subject of continued study and consideration. The upward *ne bis in idem* will block a subsequent prosecution, but the downward *ne bis in idem* provision would not bar a subsequent state prosecution on a crime other than genocide, war crimes, and crimes against humanity for the same underlying conduct. While the limited downward *ne bis in idem* perhaps furthers the goal of fostering state options in prosecution, it fails to answer a fundamental question of fairness that arises if, for instance, an accused is convicted (or acquitted) in an ICC prosecution and then faces a state prosecution for murder based on the same acts. As indicated in Section III (B) (1) supra, this concern was raised by two states during the drafting process. Although prosecutions by multiple sovereigns may not be prohibited under international law, there is a considerable amount of respect for and deference to other national prosecutions in practice as evidenced by the provisions in bilateral and multilateral extradition treaty provisions. As the ICC statute currently stands, fairness to the accused in facing multiple prosecutions after an ICC prosecution is left in the discretion of the state prosecuting authorities. This possibility of multiple prosecutions could be somewhat alleviated by amending the statute to require a deduction of sentence, or to otherwise take the prior sentence into account, in levying a new sentence based on the same

conduct.[111] It will benefit the accused, the states, and the international community to continue to evaluate the delicate balance of the principle of complementarity with the application of the upward and downward *ne bis in idem* provisions in practice and to amend the statute as needed to achieve a fair administration of justice to the accused, the victims, and society.

111. A concern with a lack of a deduction principle in the ICC statutory scheme has been raised by a number of commentators. *See* van den Wyngaert & Stessens, *supra* note 92, at 793; de la Cuesta, *supra* note 8, at 732 (noting unfairness to accused from possibility of multiple prosecutions and suggesting that the "principle of deduction" would be beneficial). Note, too, that the ICTY and ICTR statutes do contain a deduction provision, which is required in the situation in which the ICTY or ICTR prosecute after a state prosecution. Recall that the ICTY and ICTR statutes allow for the tribunal to prosecute if the state prosecution has been only for an "ordinary" crime. This is the opposite of the situation that is likely to arise with the ICC, where there are fewer limits on a state prosecution that follows an ICC prosecution. Nevertheless, the concept of deduction as a principle of fairness to the accused in facing multiple prosecutions and punishments is the same. The principle of deduction in the ICTY statute states:

> "In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served."

ICTY Statute, *supra* note 81, art.10(3).