COMPLEMENTARITY AND COMPLETED TRIALS: REFORMING THE *NE BIS IN IDEM* CLAUSE OF ARTICLE 20(3) OF THE ROME STATUTE

Abstract

Article 20(3) of the Rome Statute provides that a person who has been tried by a national court for a crime over which the ICC has jurisdiction may be retried before the ICC for the same conduct, if it is established that the proceedings at the national level '[W]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court'; or 'were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice'. This paper is concerned with the question whether article 20(3) of the Rome Statute is broad enough to allow the ICC to retry all persons who have already been tried in domestic courts of States Parties where such retrial is commanded by the interests of justice.

Keywords: *Complementarity, Rome Statute, Ne bis in idem, double jeopardy, International Criminal Court*

1. Introduction

On 17 July 1998, representatives of 148 States convened in Rome, Italy, and voted to adopt the Rome Statute of the International Criminal Court (hereafter referred to as the Rome Statute).[1] Because of its mandate and its enforcement powers, the International Criminal Court (ICC) has been hailed as a major advance on the road towards individual accountability for the perpetration of the most heinous violations of human rights (hereafter referred to as international crimes) and thus as a major contribution to the prevention of such horrible crimes.[2]

However, with its limited resources in terms of human and financial means, the ICC will not be able to deal with all perpetrators of the crimes that come under its jurisdiction wherever such crimes are committed throughout the world.[3] For this reason, in order to end impunity in the commission of international crimes, there will always be a need for combined efforts by the ICC and national courts.[4] This reality is recognised by the Rome Statute which, in the Preamble and article 1, provides that the jurisdiction of the ICC is 'complementary' to national courts and that, therefore, States Parties retain the primary responsibility for the repression of international crimes. In legal literature, this is generally referred to as the 'principle of complementarity' or the 'complementarity regime of the Rome Statute'.[5]

* **By Evode KAYITANA, LLB (NUR), LLM (Unisa), LLD (NWU, Potchefstroom).** The author is a lecturer in the School of Law, University of Rwanda. E-mail: ekayitana@yahoo.fr

[1] S.H. Farbstein, 'The Effectiveness of the Exercise of Jurisdiction by the International Criminal Court: the Issue of Complementarity' (2001), available at http://www.ecmi.de/publications/detail/12-the-effectiveness-of-the-exercise-of-jurisdiction-by-the-international-criminal-court-the-issue-of-complementarity-184/ (last visited 17 January 2014), 7.

[2] A. Cassese, 'From Nuremberg to Rome: International Military Tribunals to the International Criminal Court' in A. Cassese, P. Gaeta and J.R. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol I (2002), 18.

[3] *Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Dissenting opinion of Judge ad hoc Van den Wyngaert 2002 ICJ 3 (14 February 2002) para 37.

[4] *Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Dissenting opinion of Judge ad hoc Van den Wyngaert 2002 ICJ 3 (14 February 2002) para 37.

[5] The complementarity regime of the Rome Statute means that the ICC was not intended to replace national courts; it will rather act alongside national courts which are primarily entrusted with the task of prosecuting international crimes (E. Kourula, 'Universal Jurisdiction for Core International Crimes' in M. Bergsmo and L. Yan, (eds), *State Sovereignty and International Criminal Law* (2012), 132). It is a "reserve court" which acts only when States are "unable or unwilling" to prosecute (J. Wouters, 'The Obligation to Prosecute International Law Crimes' (date

Complementarity, however, is subject to a serious problem. Since international crimes are often committed by State agents as part of State policy, governments often try to ensure that their own officials engaged in such actions are not held accountable.[6] Even where trials are conducted, the accused persons are often acquitted through what is generally referred to as 'sham' trials.[7] In order to counteract this problem, the Rome Statute provides that a person who has been tried by a national court for a crime over which the ICC has jurisdiction may be retried before the ICC for the same conduct, if it is established that the proceedings at the national level:[8] [W]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or […] were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

The two situations above relate to instances where, at the time of trial, 'proceedings' are not conducted with a genuine intent of punishing the person accused of an international crime. Article 20(3) of the Rome Statute provides that in these situations, in order to put an end to the culture of impunity for gross violations of human rights, the ICC may disregard the sham proceedings conducted at the national level and retry the persons concerned. This clearly is an important provision in the Rome Statute.

The present article argues, however, that the situations in which the ICC is allowed to intervene and correct sham trials in terms of article 20(3) are too limited. The argument is that there are more situations in which the ICC should be allowed to intervene and retry a person who has already been tried at the national level because, like in the two situations currently provided for in article 20(3), the interests of justice also require a retrial. These situations are the situation where the 'proceedings' in the national courts were genuinely conducted and an appropriate sentence was imposed but the person concerned was later released from prison after serving only an insignificant part of his sentence. Another is the situation where, subsequent to the accused's acquittal, new and compelling evidence is brought to light which clearly points to his guilt.

The first section of this paper will discuss the provision of article 20(3) of the Rome Statute which sets out the situations in which the ICC may retry a case that has already been tried in a national court. The

uknown), available at http://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf (last visited 2 May 2013), 3.

[6] D. Akande and S. Shah, 'Immunities of State Officials, International Crimes and Foreign Domestic Courts', 21 *European Journal of International Law* (2011), 815, 816. See also A. Cassese, *International Criminal Law*, 2nd ed. (2008), 307: "[T]oday, more so than in the past, it is state officials, and in particular senior officials, that commit international crimes. Most of the time they do not perpetrate crimes directly. They order, plan, instigate, organize, aid and abet, or culpably tolerate or acquiesce or willingly or negligently fail to prevent or punish international crimes". See also W. Schabas, *An Introduction to the International Criminal Court* 4th ed. (2011), 1: "Prosecution for war crimes, however, was only conducted by national courts, and these were and remain ineffective when those responsible for the crimes are still in power and their victims remain subjugated. Historically, the prosecution of war crimes was generally restricted to the vanquished or to isolated cases of rogue combatants in the victor's army. National justice systems have often proven themselves to be incapable of being balanced and impartial in such cases".

[7] L.E. Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem', 8 *Santa Clara Journal of International Law* (2010), 165, 194 and L. Finlay, 'Does the International Criminal Court protect against double jeopardy: An analysis of article 20 of the Rome Statute', 15 *U.C. Davis Journal of International Law & Policy* (2009), 221, 235.

[8] Art 20(3) Rome Statute.

article will then go on to suggest other situations in which a retrial by the ICC is needed and conclude that article 20(3) should be broadened to cover those situations too.

2. Complementarity and *Ne bis in idem*: Article 20(3) of the Rome Statute

The complementarity regime of the Rome Statute is also intertwined with the *ne bis in idem* rule which is found in many domestic laws.[9] The Rome Statute recognises that when a person has already been tried by a national court, he may not be tried for a second time for the same crime before the ICC.[10] However, in order to ensure that national trials are not be used as a means to shield perpetrators of international crimes from being tried by the ICC,[11] the Rome Statute provides that a person who has been tried by a national court for a crime under the jurisdiction of the ICC may be retried by the Court with respect to the same conduct, if it is established that the proceedings at the national level:[12] [W]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or […] were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice. As stated above,[13] these two situations relate to 'sham'[14] proceedings. Here, the domestic courts deliberately conducted fake trials to circumvent the ends of justice.[15] These two situations are examined in more details hereunder.

2.1. The proceedings were undertaken for the purpose of shielding the person concerned from criminal responsibility

Situations where a foreign trial can be characterised as having been conducted with a purpose of 'shielding' the accused from criminal responsibility are many and various. They include fraudulent acquittals[16] or, in case of conviction, situations where the accused was convicted but no sentence was imposed,[17] where the sentence was imposed but not served[18] and where a derisory sentence was imposed.[19]

2.1.1. The accused was fraudulently acquitted

When State officials or their allies are implicated in the commission of international crimes, fraudulent proceedings may be conducted for the purpose of clearing the persons involved of the accusations against them in order to allow them to continue a normal civil or political life free from blames and complaints. Article 20(3) (a) plays an important role here by preventing a State from using a sham trial to prevent the concerned persons from being held accountable before the ICC.[20] It ensures that State does not collude with an individual accused of international crimes to shield that person from criminal responsibility.

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[9] H. Khen, 'Internationalizing Non Bis in Idem: Towards a unified concept of double jeopardy in the application of universal jurisdiction over international core crimes' (date Unknown), available at http://www.alma-ihl.org/opeds/hillyme-nonbisinidem (last visited 25 September 2013).

[10] M Zeidy 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' 23 *Michigan Journal of International Law* (2002), 869, 930-931.

[11] X. Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?', 88 *International Review of the Red Cross* (2006), 375, 384.

[12] Art 20(3) Rome Statute.

[13] See 1 (Introduction) above.

[14] Zeidy, *supra* note 10, 931.

[15] M.A. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court', 167 *Military Law Review* (2001), 20, 59 and Zeidy, *supra* note 10, 931.

[16] See 1 hereunder.

[17] See 2 hereunder.

[18] See 3 hereunder.

[19] See 4 hereunder.

[20] Finlay, *supra* note 7, 235.

It is impossible to draw up an exhaustive list of all situations that may reflect a State's intention to shield a person from criminal responsibility in this way.[21] This is a question which must be answered in view of the prevailing facts of each case.[22] An example of these situations would be when the State conducts ineffective and 'non-genuine' investigations in order for the accused to be acquitted in court.[23] Other cases would include instances where evidence emerges that the acquittals were secured as a result of intimidation or influence on the judges. Such acquittals may lead the ICC to consider the proceedings as having been conducted with the purpose of shielding the accused from criminal responsibility and make an order for a retrial.

2.1.2. The accused was convicted but no sentence was imposed

Another situation where a domestic trial would be seen as having been conducted for the purpose of shielding the person from criminal responsibility is where the accused was tried and convicted but no sentence was imposed. On this issue, Bernard[24] points out that in order for a judgment of a national court to block the case from being admissible before the ICC, the accused must have been 'sufficiently punished'. In other words, he says, for the *ne bis in idem* principle to apply: 'it is necessary not only that an initial judgment is handed down but that a sentence is also imposed'.[25]

This interpretation of the *ne bis in idem* clause of the Rome Statute is the most consistent with the underlying purpose of the Rome Statute, i.e., to end impunity for international crimes.[26] Without the possibility for the ICC to intervene where a person has been convicted but no sentence was imposed, purposes of deterrence and prevention of future international crimes cannot be achieved.

2.1.3. The sentence was imposed but not served

Another situation where a domestic trial should be seen as having been conducted with the intention of shielding the accused person from criminal accountability is where that person was sentenced but, owing to a State's policy, the sentence was not executed. Although no specific mention is made in the Rome Statute to the effect that the ICC would retry such cases, it appears that a situation of this kind would clearly fall under article 20(3)(a) of the Rome Statute. If States were allowed to try and convict but fail to execute the sentences imposed by their courts, it can never be said that the purpose of the trial was to bring the perpetrator to justice. Such a situation would also undermine the very purpose of the Rome Statute: ending impunity for the perpetrators of international crimes.[27]

2.1.4. Only a derisory sentence was imposed

The last situation where a trial can be characterised as having been conducted for the purpose of shielding the person concerned from criminal responsibility is where, under external pressure, a State

[21] M. Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (2008), 175. See also Finlay, *supra* note 7, 236: "It is difficult to precisely ascertain the types of cases that will, in practice, fall within this exception and where exactly the line will be drawn".
[22] Finlay, *supra* note 7, 236.
[23] Zeidy, *supra* note 21, 175.
[24] D. Bernard, 'Ne bis in idem-protector of defendants' rights or jurisdictional pointsman?', 9 *Journal of International Criminal Justice* (2011), 1, 16.
[25] *Ibid*, 16.
[26] Para 5 Preamble to the Rome Statute.
[27] Bernard, *supra* note 24, 16: "Non-enforcement of a judgment does not explicitly constitute an exception to the principle of *ne bis in idem* but could be considered as a deficiency of the first trial. This tallies with the objective of 'fighting against impunity' pursued by the Rome Statute".

conducts a trial in order to prevent the extradition of the said person to a foreign or international tribunal, but the court sentences that person to a derisory sentence.[28] A typical example of such cases is the so-called '*Leipzig* trials'. These were a series of war crimes trials held by the German Supreme Court (*Reichsgericht*) in Leipzig following the end of World War I as part of the penalties imposed on the German government under the Treaty of Versailles.[29] Initially, the Allies wanted to prosecute German war criminals before their military tribunals,[30] but the Germans refused to extradite any German citizens to Allied governments, suggesting instead that they would try them before a German court.[31] This proposal was accepted by the Allied leaders, and in May 1920, they handed the German government a list of 45 persons to be tried.[32] As not all these people could be traced, however, only twelve individuals were brought to trial.[33] The trials were held before the *Reichsgericht* in Leipzig from 23 May to 16 July 1921.[34] Six persons were acquitted while six others were convicted of war crimes.[35]

The sentences that were imposed were as follows:

i. Sergeant Karl Heynen, convicted of mistreating British prisoners of war. He was sentenced to a prison term of ten months.[36]
ii. Captain Emil Müller, convicted of mistreating prisoners of war. He was sentenced to six months in prison.[37]
iii. Private Robert Neumann, convicted of mistreating prisoners of war. He was sentenced to six months in prison.[38]
iv. First Lieutenants Ludwig Dithmar and John Boldt, convicted of war crimes on the high seas. The accused were two officers of the submarine SM U-86 that had sunk the hospital ship *Llandovery Castle* and then attacked and killed survivors in lifeboats.[39] They were sentenced each to four years in prison.[40]

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[28] See also Bernard, *supra* note 24, 16 where the author discusses this issue in the context of the Rome Statute: "New procedures *in idem* will indeed be allowed, in spite of the principle, if the first initial procedure was deficient in a number of respects - amongst which is the situation where a too lenient sentence has been imposed. In other words, the imposition of mild sentences seems to be conceived as a sign of too much clemency being afforded to the accused".

[29] Zeidy, *supra* note 10, 872.

[30] A. Kramer, 'The First Wave of International War Crimes Trials: Istanbul and Leipzig', 14 *European Rev* (2006), 441, 442; Zeidy, *supra* note 10, 872; C. Mullins, *The Leipzig Trials: an Account of the War Criminals' Trials and a Study of German Mentality* (1921), 8.

[31] Zeidy, *supra* note 10, 872; Schabas, *supra* note 6, 4 and Mullins, *supra* note 30, 8-9.

[32] Mullins, *supra* note 30, 9. The initial list contained 895 suspected war criminals to be tried by the Allied governments. This proposal was rejected by the German government, arguing that it (the German government) was not very stable and that honouring this demand would lead to its overthrow. Zeidy, *supra* note 10, 872.

[33] Mullins, *supra* note 30, 191.

[34] *Ibid*, 23.

[35] W.H. Parks, 'Command Responsibility for War Crimes', 62 *Military Law Review* (1973), 1, 13.

[36] Anonymous 'German War Trials: Judgment in the Case of Karl Heynen', 16 *American Journal of International Law* (1922), 674, 674.

[37] Anonymous 'German War Trials: Judgment in the Case of Emil Muller', 16 *American Journal of International Law* (1922), 684, 685.

[38] Anonymous 'German War Trials: Judgment in the Case of Robert Neumann', 16 *American Journal of International Law* (1922), 696, 696.

[39] Llandovery Castle was a Canadian hospital ship. It was sunk by a German submarine, U-86, on 27 June, 1918. A total of two hundred and fifty-eight persons were on board the ship. Three life boats survived the sinking of the vessel, however, and proceeded to rescue survivors from the water. The U-boat (U-86) then started firing at and sinking the life boats to kill all witnesses and cover up what had happened. Ultimately, only twenty four people survived the attack on the lifeboats. For a full account of this incident see M. Leroux, 'The sinking of the Canadian Hospital Ship' (2010), available at http://www.canadiangreatwarproject.com/writing/llandoveryCastle.asp (last visited 15 September 2013).

[40] Anonymous, 'German War Trials: Judgment in Case of Lieutenants Dithmar and Boldt', 16 *American Journal of International Law* (1922), 708, 709.

v. Major Benno Crusius, convicted of ordering the execution of prisoners of war. He was sentenced to two years confinement.[41]

Outside Germany, the *Leipzig* trials were perceived, and rightly so, as a mockery of justice because of the too lenient sentences that the court imposed *vis-à-vis* the gravity of the crimes involved.[42] In particular, if one considers the sentences imposed on those who were found guilty of murder (First Lieutenants Ludwig Dithmar and John Boldt and Major Benno Crusius), one must arrive at the conclusion that the trials were conducted for the sole purpose of preventing the accused persons from being extradited to the Allied governments as envisioned earlier in the Treaty of Versailles, where they could have been sentenced to long terms of imprisonment. Germany's intention of shielding the war criminals from accountability becomes even clearer if one takes note of the fact that First Lieutenants Ludwig Dithmar and John Boldt spent only four months in prison (out of four years) as German authorities later announced that they had 'escaped' from prison.[43] In cases similar to the *Leipzig* trials, there clearly is an interest for the ICC to step in and retry the perpetrators.

2.2. The Proceedings were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice

Sham proceedings that fall under this category are those which relate to the situation where the domestic proceedings were conducted, not necessarily with a purpose of 'shielding' the person concerned from criminal liability, but in another manner which is inconsistent with intent to punish. The difference between the two situations consists in that in the first situation there is 'a plan conceived in order to shield the accused', while in the other situation are included other possible circumstances where a proceeding was not conducted with an intent to 'punish' but without necessarily there being a 'subjective' purpose to shield.[44] In practical terms, however, the two situations do not differ much because they both result in the impunity of the perpetrator.[45] A situation of this kind can best be illustrated by reference to the post-genocide *Gacaca* trials in Rwanda. After the 1994 genocide in Rwanda, the new Rwandan government struggled to bring the perpetrators of the genocide to justice but failed. By 30 November 1999, five years after the genocide, only 2,406 persons had been tried for genocide out of the 121,500 in detention.[46] Among those awaiting trial, an estimated 40,000 prisoners were still without files, let alone having appeared before a judge.[47] It quickly became very clear that, considering also the fact that thousands of other suspects were still at large, it could take more than 100 years to complete the trials.[48] The country thus needed a more expeditious means of delivering justice.

[41] Parks, *supra* note 35, **13.**
[42] *Ibid***, 14 and** Mullins, *supra* note 30, 17 and 208. See also Schabas, *supra* note 6, 4: "those found guilty were sentenced to modest terms of imprisonment, often nothing more than time already served in custody prior to conviction. The trials looked rather more like disciplinary proceedings of the German army than any international reckoning".
[43] Leroux, *supra* note 39.
[44] D. Spinellis, 'Global report the *ne bis in idem* principle in "global" instruments', 73 *Revue Internationale de Droit Pénale* 1149, 1160.
[45] *Ibid*, 1160.
[46] UN 'Report of the Special Representative of the Commission on Human Rights on the situation of human rights in Rwanda' UN Doc A/55/269 (4 August 2000) para 144.
[47] *Ibid*, para 146.
[48] S. Rupucci, and C. Walker, (eds), Countries at the Crossroads: A Survey of Democratic Governance (2005), 500.

In response, Rwanda implemented the *Gacaca* system, a Rwandan traditional form of dispute resolution.[49] The pillars of this system were confessions accompanied by a request for pardon in exchange for lenient sentences. It was hoped that this system would help to speed up the trials.[50] The *Gacaca* courts were launched on 18 June 2002 and closed *on 18 June 2012 after* trying more than 1.2 million cases,[51] among which 25-30% resulted in acquittals.[52]

The law establishing the *Gacaca* courts[53] divided the perpetrators of the genocide according to their responsibility into three categories:[54]

1st Category:

1° The person whose criminal acts or criminal participation place among planners, organisers, incitators, supervisors and ringleaders of the genocide or crimes against humanity, together with his or her accomplices;

2° The person who, at that time, was in the organs of leadership, at the national level, at the level of Prefecture, Sub-prefecture, Commune, in political parties, army, gendarmerie, communal police, religious denominations or in militia, has committed these offences or encouraged other people to commit them, together with his or her accomplices;

2nd Category:

1° The person whose criminal acts or criminal participation place among killers or who committed acts of serious attacks against others, causing death, together with his or her accomplices;

2° The person who injured or committed other acts of serious attacks with the intention to kill them, but who did not attain his or her objective, together with his or her accomplices;

3° The person who committed or aided to commit offences against persons, without the intention to kill them, together with his or her accomplices.

3rd Category:

The person who only committed offences against property.

The criminals who fell in the first category were excluded from the jurisdiction of the *Gacaca* courts and could be prosecuted only before the ordinary courts.[55] *Gacaca* courts were thus able to try cases of category 2 (which also included acts of murder) and category 3 crimes (crimes against property). In case of category 2 crimes, Gacaca courts could issue sentences ranging from 6 months imprisonment

[49] Named for the *Kinyarwanda* word for "grass", gacaca was a traditional form of communal justice, whereby community elders would resolve disputes by devising compensatory solutions aimed at restoring harmony between the parties. S.E. Powers, 'Rwanda's Gacaca Courts: Implications for International Criminal Law and Transitional Justice' (2011), available at http://www.asil.org/insights110623.cfm (last visited 19 March 2013).

[50] *Ibid*.

[51] Human Rights Watch, 'Country Summary: Rwanda' (World Report January 2012), available at http://www.hrw.org/sites/default/files/related_material/rwanda_2012.pdf (last visited 12 January 2013), 2.

[52] Government of Rwanda, 'Fact File-Gacaca–The People's Court' (date unknown), available at http://www.gov.rw/FACT-FILE-Gacaca-the-people-s-court (last visited 19 March 2013).

[53] This law was amended several times. The latest version of it was the Organic Law n° 16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged With Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between 1 October 1990 and 31 December 1994 (Official Gazette n° special of 19/06/2004)

[54] Art 51 Organic Law n° 16/2004.

[55] Art 2(2) Organic Law n° 16/2004.

and 'community work'[56] to 30 years' imprisonment.[57] Those falling under the 3rd category could only be ordered to pay civil damages for what they have damaged.[58]

Gacaca has been credited with the swift delivery of results that could not possibly have been achieved by the ordinary courts.[59] On the other hand, however, *Gacaca* has been criticised for lacking a deterrent effect for future would-be perpetrators of international crimes. This stemmed from the inherent contradiction of using a 'conciliatory process for a retributive purpose'.[60] In the context of international criminal law, deterrence emphasizes the need to demonstrate to would-be perpetrators that genocide and other serious violations of human rights will always be 'punished'. This is the deterrent effect of punishment. People have complained, however, that *Gacaca* lacked such deterrent effect because the sentences handed to the perpetrators did not reflect the gravity of the crimes they had committed and confessed to.[61] In particular, some people perceived the 'community service' as insufficient punishment, given the gravity of the crimes committed during the genocide, such as murder.[62]

Of course, it cannot be said that the trials were conducted with the 'purpose of shielding the person' from responsibility because the Government that put in place the *Gacaca* courts in Rwanda is the same government which stopped the genocide after defeating the *génocidaires*' regime in 1994.[63] This is the reason why the *Gacaca* cases cannot be put in the same category as the *Leipzig* trials. While the former

[56] Art 73(2) Organic Law n° 16/2004: "Defendants falling within the second category referred to in part 3° of article 51 of this organic law, who :
3° confess, plead guilty, repent and apologise before the Gacaca Court of the Cell, draws up a list of perpetrators, incur a prison sentence ranging from one (1) to three (3) years, but out of the pronounced prison sentence, they serve half of the sentence in custody and the rest is commuted into community services on probation".

[57] The long sentence of imprisonment (up to 30 years' imprisonment) was applicable where the accused refused to plead guilty and apply for pardon and for those accused whose confessions were rejected and were subsequently convicted of a crime of genocide. Art 73(1): "Defendants falling within the second category referred to in points 1° and 2° of article 51 of this organic law, who:
1° refused to confess, plead guilty, repent and apologise, or whose confessions, guilty plea, repentance and apologies have been rejected, incur a prison sentence ranging from twenty five (25) to thirty (30) years of imprisonment".

[58] Art 75 Organic Law n° 16/2004.

[59] Powers, *supra* note 49 and P. Clark, 'The Limits and Pitfalls of the International Criminal Court in Africa' (2011), available at http://www.e-ir.info/2011/04/28/the-limits-and-pitfalls-of-the-international-criminal-court-in-africa/ (last visited 12 September 2013): "[t]he experience of Rwanda's gacaca community courts highlights the importance of delivering justice at the local level. Since their creation in 2001, the gacaca jurisdictions – despite sustained criticism by international human rights groups – have prosecuted 400,000 suspected perpetrators of the 1994 genocide and contributed substantially to community truth-telling and social cohesion. Nearly every Rwandan adult has been involved in the trials, including providing eyewitness accounts of genocide crimes. Village-level processes like gacaca attempt what the ICC and national courts can never do, namely delivering accountability for everyday citizens who participate in violence. For many Rwandan genocide survivors, the most important perpetrators are not the government officials who planned and incited mass murder, but rather the neighbour or family member who wielded the machete in 1994. Violence committed by community-level actors – which is increasingly common in diffuse forms of modern conflict – requires these new forms of community-level accountability".

[60] Powers, *supra* note 49.

[61] A.M. De Brouwer and S. Ka Hon Chu, 'As end of gacaca nears, looking to more attention to post-genocide trauma from sexual violence' (2012), available at http://www.intlawgrrls.com/2012/04/as-end-of-gacaca-nears-looking-toward.html (last visited 19 March 2013).

[62] Clark, *supra* note 59.

[63] T. Hauschildt, 'Gacaca Courts and Restorative Justice in Rwanda' (2012), available at http://www.e-ir.info/2012/07/15/gacaca-courts-and-restorative-justice-in-rwanda/ (last visited 16 September 2013): "The Rwandan Patriotic Army (RPA), the military arm of the Rwanda Patriotic Front (RPF) which consisted of Tutsis living in Ugandan exile, defeated the Rwandan Government Forces and ended the genocide".

were conducted with an intent to shield the accused persons from criminal accountability (i.e., to avoid the extradition of the accused persons to an international criminal tribunal as envisaged earlier in the Treaty of Versailles), the *Gacaca* trials were not.

But, can it also be said that a person who committed murder during the 1994 genocide and was subsequently sentenced to 3.5 years' imprisonment (plus 3.5 years of community service) was tried with'intent to bring the person to justice'?[64] The answer falls to be 'no'! The answer must be sought in the social-political and economic situation that was prevailing in Rwanda when the Government of the country decided to launch these courts. After the genocide, Rwanda did not have enough judges and prosecutors to conduct and finish the trials of the *génocidaires* within a reasonable time.[65] As stated above, before the *Gacaca* courts were introduced, it had been anticipated that the genocide trials would take around 150 years to complete.[66] The primary purpose of the *Gacaca* process was thus the expedition of the trials by conducting them at grass-roots level (involving around 160,000 'lay judges')[67] and by offering incentives to the accused persons to confess and plead guilty in order to facilitate the collection of evidence.[68] This has helped the country to conduct complete genocide trials in ten years instead of 150 years as initially anticipated.

Another consideration behind the *Gacaca* policy is that the administration and maintenance of the prisons placed enormous financial constraints on the government. By 30 November 1999, around 121,500 persons were in detention.[69] The costs for maintaining these prisoners were unbearable for a country like Rwanda.[70] The *Gacaca* rate of convictions was around 70%[71] of the 1.200.000 persons brought to trial.[72] This means that around 800.000 persons were convicted of genocide. The Rwandan government could simply not keep all these persons in prison. Although the Government never publicly mentioned this argument, it is obvious that *Gacaca*, with its sentences of community work (outside prison) and its reduced imprisonment sentences (up to only 3 months in prison) was meant to be a solution to this problem.

Given the above considerations, it seems clear that the purpose of *Gacaca* justice was not to punish the perpetrators of the genocide. Arguably, the *Gacaca* trials can be tolerated because the 'first category' perpetrators of the genocide were prosecuted by ordinary courts and were sentenced to heavy sentences, including the death penalty,[73] before it was abolished in 2007.[74] It may happen, however, that in future,

[64] In terms of art 73(1) (3º) of Organic Law n° 16/2004, *Gacaca* courts were allowed to impose a sentence of 3.5 years imprisonment and 3.5 years of community service in murder cases.
[65] Out of the 785 judges that Rwanda had before the genocide, only 20 were still active after the genocide. Some had been killed during the genocide but the majority were in exile or were in prison on charges of genocide. Hauschildt *supra* note 63.
[66] Hauschildt, *supra* note 63. Some say the trials could even take more than 200 years. Powers, *supra* note 50.
[67] AllAfrica, 'Rwandan Gacaca Genocide Courts Considered a Success' (2012), available at http://allafrica.com/stories/201206190550.html (last visited 25 Sept 2013).
[68] Under article 54(3) (20) of Organic Law n° 16/2004, for a guilty plea to be accepted that accused had also to "reveal the co-authors, accomplices and any other information useful to the exercise of the public action".
[69] UN, *supra* note 46, para 144.
[70] Hauschildt, *supra* note 63.
[71] Government of Rwanda *supra* note 52.
[72] Human Rights Watch, *supra* note 51, 2.
[73] In 1998, 22 people found guilty of genocide were sentenced to death and executed. See W.D. Rubinstein, *Genocide* (2004), 292.
[74]Amnesty International, 'Rwanda abolishes death penalty' (2007), available at http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802 (last visited 20 March 2013).

another country ravaged by an internal conflict, such as Sudan,[75] will attempt to resort to a process similar to *Gacaca*. It is also possible that sentences imposed in that process would be much more lenient than those imposed by the *Gacaca* courts. For instance, the sentence of 3.5 years imprisonment may be reduced to 3 months imprisonment, and 3.5 years of community service may be reduced to 3 months of community service. Such proceedings would not be regarded as having been conducted with an intent to bring the person concerned to justice and, in particular if they were to be applied to the 'first category'[76] offenders (which was not the case in Rwanda), the ICC would legitimately step in and order that some of the cases (the most responsible) be retried before it.[77]

The other exceptions to the *ne bis in idem* rule which should be introduced into the Rome Statute will now be discussed next.

3. Proposed Reforms to the *Ne bis in idem* Provision Of Article 20(3): Situations not Currently Contemplated in the Rome Statute

Situations that are discussed under this heading relate to two circumstances which do not fall under any of the two situations currently contemplated in the Rome Statute. First there may be a situation where the 'proceedings' were genuinely conducted with intent of bringing the person concerned to justice and an appropriate sentence was imposed but the person was later released from prison after serving only an insignificant part of his sentence. Secondly, there may be a case where subsequent to the accused's acquittal new and compelling evidence is brought to light which clearly points to his guilt. In these two cases, given the nature and gravity of the crimes defined in the Rome Statute, and given the need of ending impunity and ensuring deterrence for those crimes, interests of justice demand that a second trial be opened before the ICC if such trial is not possible under the laws of the territorial State or if such State is unwilling or otherwise unable to conduct it. These two situations are discussed hereunder.

3.1. The sentence was imposed but only an insignificant part of it was served

A situation where the accused was properly tried and sentenced to an appropriate punishment but then shortly released may materialise where, for example, the accused has been convicted and sentenced but then released from prison through executive measures such as presidential pardon,[78] or parole.[79]

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[75] It is now alleged that war crimes and crimes against humanity have been committed in Darfur, Sudan, and it is on the basis of these allegations that in 2009 the ICC issued an international arrest warrant against President Omar Bashir. *The Prosecutor v Omar Hassan Ahmad Al Bashir Second Decision on the Prosecution's Application for a Warrant of Arrest* ICC-02/05-01/09-94 (12 July 2010).

[76] It is meant here the "most responsible" such as high-ranking government officials who plan and execute genocides, crimes against humanity and war crimes.

[77] See also Carter, *supra* note 7, 195) where he says that "an extreme disparity between the sentence and the gravity of the […] crime of which the accused is convicted" may cause the proceedings to be viewed as "a sham trial".

[78] Under section 84(2)(j) of the South African Constitution (1996), for example, the President of the Republic has the power to pardon offenders and remit any sentence imposed by a court. In Rwanda, the President has similar powers by virtue of article 236 of the *Code of Criminal Procedure* (*Law Nº 30/2013 of 24/5/2013 Relating to the Code of Criminal Procedure*, Official Gazette nº 27 of 08 July 2013) which provides that: "The power to grant collective or individual pardon shall be exercised by the President of the Republic at his/her sole discretion and in public interests. Presidential pardon shall remit in whole or in part penalties imposed or commute them to less severe form of penalties".

[79] Parole is a mechanism that allows for the conditional release of offenders from a prison into the community prior to the expiration of their entire sentences of imprisonment, as imposed by a court of law. In South Africa, parole is allowed by section 73(4) of the Correctional Services Act 111 of 1998 which provides that: "In accordance with the provisions of this Chapter a prisoner maybe placed under correctional supervision or on day parole or on parole before the expiration of his or her term of imprisonment". In Rwanda, the power to grant

Presidential pardon and parole may be abused and used to 'shield' convicted criminals from accountability.[80] This problem is far from being hypothetical. Schabas[81] gives the example of the case of an American soldier, Lt William Calley, who, in the early 1970s, was convicted of war crimes for an atrocious massacre in My Lai village, Vietnam, in which around 500 civilians were savagely massacred by American soldiers under his command, and was duly sentenced to a term of life imprisonment but was then granted a pardon by President Richard Nixon after only a brief term of detention had been served.[82] Another example may be the one of Schabir Shaik, a former business advisor to South African President Jacob Zuma, who had been sentenced to an effective 15 years' imprisonment for corruption and fraud on 8 June 2005 but was released on medical parole after serving two years and four months, allegedly suffering from life-threatening ('final phase') severe hypertension.[83] Some believe that the medical reasons advanced to release Mr Schabir Shaik from prison were mere pretence.[84] They argue that Shaik was never 'terminally ill' and that he was released only because of his personal and business ties with President Zuma.[85] The lesson that must be learnt from Lt William Calley and Schabir Shaik's cases is that trials are not enough to ensure that criminals are held accountable and that potential offenders are deterred from engaging in similar conducts in future. There must also be a legal framework that ensures that sentences are effectively executed.[86]

With respect to international crimes, the potential for abusing executive powers by releasing criminals from prison is even higher because international crimes are often committed by political leaders or on their behalf in pursuance of State policy.[87] A State that is under pressure from the international

parole is entrusted to the Minister of Justice by article 245(1) of the *Code of Criminal Procedure* (*Law Nº 30/2013 of 24/5/2013 Relating to the Code of Criminal Procedure*, Official Gazette nº 27 of 08 July 2013) which reads as follows: "A person who is sentenced to one or several imprisonment penalties or placed under the Government's custody may be granted release on parole on the following conditions: 1° if he/she sufficiently demonstrates good behaviour and gives serious pledges of social rehabilitation; 2° if he/she suffers from serious and incurable disease approved by a medical committee composed of at least three (3) recognized doctors; 3° if he/she has already served his/her penalty for a period of time provided for under Article 246 of this Law depending on the offences of which he/she was convicted".

[80] G.S. Sisk, 'Suspending the Pardon Power during the Twilight of a Presidential Term', 67 *Missouri. Law Review* (2002)**,** 1, 19 and D.F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale Law Journal* (1991), 2539, 2606.

[81] Schabas, *supra* note 6, 204.

[82] On 16 March 1968, US soldiers led by Lt William Calley entered the Vietnamese village of My Lai on a search and destroy mission during the Vietnam War. Under Lt Calley's orders, the soldiers massacred around 500 civilians, including women and children. Many of the victims were raped, tortured, and/or mutilated. Lt Calley himself shot down and killed large groups of civilians with a machine gun. J. Rosenberg, 'My Lai Massacre The Massacre Conducted by U.S. Soldiers in My Lai During the Vietnam War' (2013), available at http://history1900s.about.com/od/1960s/qt/mylaimassacre.htm (last visited 20 September 2013).

[83] C. Bateman, 'Tighter medical parole - no more 'Shaik, rattle and roll", *South African Medical Journal* (2012), 210, 212.

[84] See for example, S. Hlongwane, 'New medical parole board, new rules â?? Correctional Services moves to avoid another Shaik 'brouhaha'' (2012), available at http://www.dailymaverick.co.za/article/2012-02-24-new-medical-parole-board-new-rules-correctional-services-moves-to-avoid-another-shaik-brouhaha/ (last visited 13 September 2013), and Bateman, *supra* note 83, 212.

[85] Hlongwane *supra* note 84.

[86] See also Finlay, *supra* note 7, 240: "A strict application of the *ne bis in idem* prohibition would not allow consideration of subsequent issues of enforcement, with 'jeopardy' attaching to the conviction itself. This may, however, conflict with broader notions of justice, since the subsequent failure to enforce a sentence - whether through granting a pardon, commutating a sentence, or granting parole - would be clearly relevant when considering the overall punishment to which an individual has been subjected, and to the broader functioning of the criminal justice system".

[87] J. Foakes, 'Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts' (2011), available at

community[88] or from the ICC may institute a proceeding against the persons suspected of international crimes, convict them and send them to prison. However, as long as the government on behalf of which the crimes were committed is still in power, the convicted persons will stand a great chance to be released from prison very soon earlier than the interests of justice would otherwise require. In cases such as this there is need for an international forum where these criminals should be retried and appropriately punished.

The Rome Statute does not address this important question. The two admissibility thresholds in regard to the retrial of a case before the ICC concern only 'proceedings'[89] which were conducted for 'the purpose of shielding the person concerned from criminal responsibility'[90] or were otherwise 'conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice'.[91] These two provisions do not thus address the issue of a person who has been tried by an independent court and sentenced to an appropriately long term sentence but is later released from prison when, for example, a new government comes to power. If such a situation were to happen, it appears that the ICC would be barred from hearing such case for the purposes of ensuring that the person concerned is appropriately punished.[92] In the light of this fact, the admissibility threshold under article 20(3) of the Rome Statute should be extended to cover cases where the 'proceedings' were conducted genuinely and a person was convicted and sentenced to a fitting sentence but only an infirm portion of the sentence was served.

It is not possible to provide precise criteria to determine when the period a person has passed in prison should be seen as an 'insignificant part' of his sentence. But, it is submitted, a period that is less than the half of the sentence imposed by the court ought to be regarded as insignificant. Although international law does not prescribe to States the minimum length of imprisonment that States must

http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf (last visited 13 September 2013), 2.

[88] Such as Senegal in regard to the trial of former Chadian dictator Hissène Habré**.** See *Belgium v Senegal Questions Relating to the Obligation to Prosecute or Extradite* Judgement 2012 ICJ 422 (20 July 2012).

[89] Art 20(3) Rome Statute.

[90] Art 20(3) (a) Rome Statute.

[91] Art 20(3) (b) Rome Statute.

[92] Schabas *supra* note 6, 204: "In a case where an individual is properly tried and convicted, but is subsequently pardoned, the Court would seem to be permanently barred from intervening". See also RD Evans 'Amnesties, Pardons and Complementarity: Does the International Criminal Court Have the Tools to End Impunity?' http://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2005/amnestiespardonscomplementarity.pdf (last accessed 12 October 2013): "it would appear that the ICC would be prevented from retrying a person if they were pardoned after a genuine trial and conviction" (at 6). For a contrary view see Finlay, *supra* note 7, 240-241: "It is, however, incorrect to conclude that the failure to adopt these exceptions means that the ICC will be inevitably barred from intervening in a case where an individual is convicted but then immediately pardoned. If a state fails entirely to enforce a criminal sentence that has been duly imposed by a national court, this may be evidence that the proceedings were not actually genuine and that they were, in fact, designed to shield the individual from criminal responsibility. The ICC would then be able to prosecute that individual on the basis of the exception provided for under Article 20(3) (a). In such a case, "criminal proceedings that have commenced in a wholly appropriate manner may turn into a *de facto* sham trial at the stage of enforcement. In this way, while not expressly apparent from the text of the Rome Statute, a member state's manifest failure to enforce a criminal sentence imposed by a national court may expose the individual concerned to subsequent prosecution by the ICC. This is a further example of the broad nature of the exceptions to the *ne bis in idem* prohibition within the Rome Statute and a further illustration of the considerable discretion that the ICC has in reviewing domestic proceedings".

impose to persons guilt of international crimes,[93] it would be a mistake to say that international law is indifferent to the degree of severity of the penalties imposed and, as a matter of logic, served.

The obligation to impose appropriate sentences is specifically reflected, for example, in article V of the Genocide Convention which requires member States to enact legislation providing 'effective penalties for persons guilty of genocide', and article 4 of the Torture Convention which requires States parties to make acts of torture 'punishable by appropriate penalties which take into account their grave nature'. Although these conventions do not prescribe specific terms of imprisonment, their intent is obviously that persons convicted of genocide and torture get sentences that reflect the gravity of the offences.[94] By analogy, the granting of pardon and the subsequent release of a person from prison before he has served a substantial part of the sentence (supposing that the sentence was itself appropriately long) would clearly deviate from a State's obligation under international law, and a second trial before the ICC would be a proper remedy. In the view of the present author, half of the sentence imposed should be an appropriate threshold.

Before passing to the next point, it is worth noting that in case of a second trial and conviction by the ICC, fairness would require that the sentence served at the domestic level be reduced from the sentence imposed by the ICC. This requirement of fairness is often expressed in the maxim *ne bis poena in idem*,[95] which provides that sentences already served by an accused for the same offence should be discounted in the imposition of any subsequent sentence relating to that offence.[96]

3.2. New and compelling evidence is brought to light after the completion of the original proceedings which points to the guilt of an acquitted defendant

The second situation where a retrial by the ICC of a person already tried for an international crime at a domestic level is needed and justified is where subsequent to that person's acquittal, new and compelling evidence is brought to light which undoubtedly points to his guilt. The instances in which a situation of this kind may arise are many and various. Firstly, with the advances in recent years in scientific evidence, particularly DNA testing, it is now possible to obtain new and persuasive evidence which was not available at the time a person was tried and acquitted. Secondly, the person concerned may himself, subsequent to his acquittal, confess that he in fact committed the crime with which he was charged. Thirdly, any other type of evidence, a witness for example, may emerge after the person concerned has been acquitted and clearly point to the guilty of that person. Despite the sound justifications for the rule against double jeopardy, a second trial would be justified.[97] From the accused

[93] Orentlicher, *supra* note 80, 2604: "Even when international law establishes a duty to prosecute particular offenses, it generally leaves the determination of penalties to the discretion of national governments". See also D.F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' in N. Kritz, *Transitional Justice*: *How Emerging Democracies Reckon with Former Regimes, Volume I: General Considerations* (1995), 411.

[94] Orentlicher, *supra* note 80, 2605.

[95] G. Conway, 'Ne Bis in Idem in International Law' 3 *International Criminal Law Review* (2003), 217, 226. In the legal literature, this principle is invariably referred to as the "accounting principle", the principle of "set-off", the principle of "deduction", or the principle of "taking into account". W.B. Bockel, *The Ne Bis in Idem Principle in EU Law: A Conceptual and Jurisprudential Analysis*, PHD-thesis, Leiden University (2009) 35. For a similar provision see art 9(3) of the Statute of the ICTR which provides that: "In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served". The same article appears as art 9(3) in the Statute of the ICTY.

[96] Conway, *supra* note 95, 241; Bockel, *supra* note 85, 35 and Finlay, *supra* note 7, 242.

[97] Also see M. Kirby, 'Carroll, double jeopardy and international human rights law' (2003), available at http://www.michaelkirby.com.au/images/stories/speeches/2000s/vol52/2003/1880-

person's rights perspective, the *ne bis in idem* fulfils three functions. First, the principle protects the accused against 'abusive' and 'ill-intentioned' prosecutions.[98] Secondly, the rule protects the accused against the anxiety and stress arising from multiple prosecutions.[99] Finally, recognising that the accused cannot have enough resources to fight an endless legal battle (the trial), the rule protects the accused against a potential wrongful conviction.[100]

It is submitted that a further exception to the *ne bis in idem* rule of the Rome Statute that allows a second prosecution before the ICC where new and compelling evidence is discovered may be accommodated in a way that does also care for the above functions of the rule. This can be achieved by limiting the exceptions to only two situations where new evidence is most compelling and unequivocal. These are where the new evidence consists in scientific evidence, such as DNA testing, or confession from the accused person himself. In these two situations, the risks that ICC prosecutors could abuse their power by instituting malicious prosecutions against a specific person (or specific persons) as well as the risk of a wrong conviction are seriously minimised because of the quality of the evidence required. Scientific evidence is not easily manipulated and a confession cannot be easily fabricated. The anxiety and stress of a second trial are also minimised because of the accuracy of these types of evidence. In any event, it must also be kept in mind that the rights of the accused must be weighed against the rights of the victims to see justice being done and the international community's interest in deterrence of future crimes.[101]

From the perspective of the sovereignty of the territorial State, the proposed exception would also take care of the primacy of such State in initiating and conducting trials of persons accused of international crimes (complementarity) by limiting itself to situations where a second trial is not possible under the laws of that State, or where the State is unable to conduct such a trial or is unwilling to conduct it. A situation where a second trial is not possible under the laws of the concerned state may be due to the fact that the protection against double jeopardy afforded to a person accused of a crime in that country is absolute to the extent that even if, after a final acquittal, the person in question confesses to the police

DOUBLE_JEOPARDY_CLJ,_AUGUST_2003.doc (last visited 7 March 2015), 29: "An important reason, propounded for supporting a qualification or exception to the double jeopardy rule is the availability, in recent times, of DNA and other scientific evidence that may help to prove conclusively the guilt or innocence of an accused. […] This is a new ingredient. It was not available for the resolution of earlier disputes about guilt. A rational legal system, so it is said, will be adjusted to permit the new ingredient to be taken into account whether the jury verdict was guilty or not guilty".

[98] D.S. Rudstein, 'Retrying the acquitted in England Part II: The exception to the rule against double jeopardy for 'tainted acquittals'', 9 *San Diego International Law Journal* (2008), 217, at 255 and Bernard, *supra* note 24, 3.

[99] Rudstein, *supra* note 98, 246-249. See also Law Commision (New Zealand), 'Acquittal following perversion of the course of justice" *(*2001), available at http://www.lawcom.govt.nz/sites/default/files/publications/2001/03/Publication_77_166_R70.pdf (last visited 24 September 2013), 5.

[100] *Green v United States* 355 US 188 (1957). See also D. Scheffer, 'Non bis in idem and the Rome Statute of the International Criminal Court' (2006), available at http://law.bepress.com/cgi/viewcontent.cgi?article=6282&context=expresso (last visited 12 September 2013), 3: "Its rationale lies principally in the need to protect individuals, with their limited access to resources, from being harassed through repeated prosecutions by the powerful state, with its access to extensive resources. It prevents the state from attempts to retry facts underlying an acquittal thereby limiting erroneous convictions which could flow from the fact that defendants do not have the resources and energy to fight against repeated and vexatious prosecutions".

[101]Finlay, *supra* note 7, 224: "[w]hile it is important for a criminal justice system to include safeguards designed to protect innocent people from wrongful conviction, it is also important to ensure that guilty people are convicted and punished. A criminal justice system that manifestly fails in this regard will quickly lose public confidence and respect. To this end, both victims of crime and the wider community, in certain circumstances, may see the rule against double jeopardy as preventing justice from being done".

that he committed the crime for which he was acquitted, a second trial is not possible.[102] The situation where the State is unable would include, for example, situations where owing to conflicts the justice system is not able to properly investigate and try the person(s) accused concerned. Finally, the situation where the State is unwilling would cover situations where the State judicial machinery is perfectly functional but because of political influences the accused persons are not investigated and prosecuted. These three situations would fit into the logic of the complementarity regime of the Rome Statute: States Parties have primacy in conducting investigations and trials but, if they are unable or unwilling to conduct such investigations and trials, the ICC is allowed to step in to ensure that impunity for perpetrators of gross violations of human rights does not occur.

4. Conclusion

This paper has been concerned with the question whether article 20(3) of the Rome Statute is sufficiently broad to allow the ICC, in accordance with its complementarity regime, to retrial persons who have already been tried in domestic courts of States Parties if a retrial of such persons is commanded by the interests of justice. Under article 201(3) of the Rome Statute, the ICC is allowed to conduct a second trial only when the 'proceedings' at the national level were conducted for the purpose of 'shielding the person concerned from criminal responsibility' or were otherwise conducted in a manner which, in the circumstances, was 'inconsistent with an intent to bring the person concerned to justice'. To sum up, both two above situations relate to instances where, at the time of trial, 'proceedings' are not conducted with a genuine intent of punishing the person accused of an international crime. It was argued that this is a too restrictive approach to international crimes whose perpetrators are prosecuted at the national level. It was argued that article 20(3) of the Rome Statute should be amended to also empower the ICC to intervene and retry a person who has already been tried at the national level when, although the 'proceedings' in the national courts were genuinely conducted and an appropriate sentence was imposed: (1) the person concerned was later released from prison after serving only an insignificant part of his sentence; or, (2) subsequent to the accused's acquittal, new and compelling evidence is brought to light which clearly points to his guilt. It was argued that a retrial in these two situations is also needed in order to ensure that impunity for the most serious crimes is ended. In order to ensure that the jurisdictional primacy of States Parties is not unduly violated, it was suggested that the proposed exceptions should be restricted to situations where: (1) a second trial is not possible under the laws of the concerned State; or (2) the concerned State is not willing, or (3) unable to retry the concerned person. Finally, it was suggested that in case of prior conviction and sentence, the sentence served at the country level, if any, should be deducted from the sentence to be imposed by the ICC. A deduction of the sentence already served at the domestic level would strike a fair balance between, on the one hand, the requirements of fairness to the accused and, on the other hand, the broader interests of the victims, the society and the international community at large.

[102] For example, it is said that the protection against double jeopardy enshrined in section 35(3) (m) of the South African Constitution (1996) is absolute. For instance, if A was previously acquitted on a charge of murder in respect of Y's death, he cannot be retried for the same offence if the prosecution finds fresh and compelling evidence that was not available or that was not known at the time of the first trial. A.M. Sorgdrager, *Law of Criminal Procedure and Evidence Casebook*, 2nd ed. (1997), 137.