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NE BIS IN IDEM AND THE INTERNATIONAL CRIMINAL TRIBUNALS

The Rome Statute of the International Criminal Court (ICC),[1] and the Statutes of the three *ad hoc* tribunals, for the former Yugoslavia,[2] for Rwanda[3] and for Sierra Leone,[4] all contain similar *ne bis in idem* provisions. Those in the Statutes of the *ad hoc* tribunals are identical, although they differ from the ICC provisions in a number of respects. Article 20 of the Rome Statute states:

Ne bis in idem

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 before 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 articles 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.

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[1] Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, art. 20.

[2] Statute of the International Criminal Tribunal for the Former Yugoslavia , UN Doc. S/RES/827 (1993), annex, art. 10.

[3] Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), annex, art. 9.

[4] Statute of the Special Court for Sierra Leone, art. 9.

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The comparable provision in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) reads:

Non bis in idem

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.

The provisions in the Statute of the International Criminal Tribunal for Rwanda (ICTR) and the Statute of the Special Court for Sierra Leone are broadly similar.

In the context of the ICC, *ne bis in idem* can be seen as an aspect of the general issue of the complementarity of the jurisdiction of the ICC to the jurisdiction of national courts. In contrast with the *ad hoc* tribunals, whose jurisdiction is concurrent with and has primacy over the jurisdiction of national courts,[5] the jurisdiction of the ICC is said to be secondary, or complementary, to national jurisdiction.[6] The wording of article 20 of the Rome Statute, on *ne bis in idem*, closely reflects the wording of article 17 on admissibility. This complemen-

[5] Statute of the ICTY, *supra* note 2, art. 9; Statute of the ICTR, *supra* note 3, art. 8; Statute of the Special Court for Sierra Leone, *supra* note 4, art. 8.

[6] See articles 13 and 17 of the Rome Statute, *supra* note 1. See also, Bart S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383 (1998); John T. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS (Roy S. Lee, ed., 1999); *Prosecutor* v. *Kanyabashi* (Case no. ICTR-96-15-T), Decision of the Trial Chamber, 18 June 1997, para. 32: "It is true that the Tribunal has primacy over domestic criminal courts and may at any stage request national courts to defer to the competence of the Tribunal pursuant to article 8 of the Statute of the Tribunal … The Tribunal's primacy over national courts is also reflected in the principle of *non bis in idem* as laid down in Article 9 of the Statute and in Article 28 of the Statute

tarity was seen as a necessary limitation on the ICC's powers in order to induce states to accept the limitations on their sovereignty that flow from ratification of the Rome Statute.[7] The ICC is permitted to exercise jurisdiction where national authorities have investigated a case and decided not to prosecute where the decision not to prosecute resulted from an inability or unwillingness of the state concerned to pursue prosecution.[8]

A large body of literature has emerged on the general topic of the ICC and on the question of complementarity, in particular.[9] The

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which established that States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber. The primacy thereby entrenched for the Tribunal, however, is exclusively derived from the fact that the Tribunal is established under Chapter VII of the UN Charter, which in turn enables the Tribunal to issue directly binding international legal orders and requests to States irrespective of their consent'' (rejecting an argument that the Tribunal ought to defer to the principle, often found in civil law jurisdictions and reflecting the civil law conception of criminal jurisdiction as relating to nationality (rather than territoriality), of *jus de non evocando*, *i.e.*, that nationals have a right to be tried by a court in their own national jurisdiction). While the Statutes of the ICTY and ICTR, *supra* notes 2 and 3, respectively, are annexes to Security Council resolutions pursuant to Chapter VII of the United Nations Charter, the Rome Statute, *supra* note 1, is a multilateral treaty and the Statute of the Special Court for Sierra Leone, *supra* note 4, is a treaty between an international organisation (the United Nations) and a state (Sierra Leone). The Special Court for Sierra Leone will enjoy primacy over the national courts of Sierra Leone (art. 8(2) of its Statute), although peacekeepers who commit transgressions while on duty in Sierra Leone will be subject to the jurisdiction of the sending state, unless the latter is unwilling or unable to carry out an investigation or prosecution in which case the Special Court may exercise jurisdiction if authorised by the security council to do so (art. 1(2) & (3) of the Statute).

[7] UN Doc. A/51/22 (1996), paras. 153–178.

[8] Rome Statute, *supra* note 1, art. 17(1). See, generally, Roy S. Lee, *ibid.*, pp. 47–51.

[9] See, *e.g.*, Roy S. Lee, *ibid.*; Hays Butler, *A Selective and Annotated Bibliography of the International Criminal Court*, 10 Criminal Law Forum 121 (1999); John T. Holmes, *supra* note 6; Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court (Human Rights Watch, 1998); Rome Statute of the International Criminal Court: A Challenge to Impunity (Mauro Politi & Giuseppe Nesi, eds., 2001); William A. Schabas, An Introduction to the International Criminal Court (2nd ed., 2004). On the *ad hoc* international criminal tribunals, see, *e.g.*, M.C. Bassiouni & P. Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia (1996); V. Morris & M.P. Scharf, The International Criminal Tribunal for Rwanda (1998).

specific issue of *ne bis in idem* has not attracted the same degree of attention,[10] partially because there is little or no case law on the topic from any of the international tribunals. This article focuses on some aspects of *ne bis in idem* that do not seem to have been exhaustively treated in the literature: the issue of prosecution appeals; cumulative convictions and the *Delalic* case before the ICTY[11]; and character evidence in international tribunals. The first and last of these issues reflect to some extent the clash of legal cultures, between common and civil law systems, that may arise as the work of the international criminal tribunals progresses and that was apparent in the negotiations on the formulation of the Rome Statute.[12]

Prior to discussion of the three specific issues identified above, the *ne bis in idem* provisions of the Rome Statute and those in the Statutes of the *ad hoc* tribunals are first compared and contrasted. As Kittichaisaree observes, a notable feature of the Rome Statute is that article 20 appears in Part 2, on jurisdiction, admissibility, and applicable law, rather than Part 3, on general principles of criminal law (in which, *inter alia*, grounds for excluding criminal responsibility are set out in Article 31).[13] However, this is not necessarily because *ne bis in idem* is not a "general principle of criminal law" in the broad sense of a general principle used in article 38(c) of the Statute of the International Court of Justice. As Kittichaisaree notes, the placing of the *ne bis in idem* provisions in the Statute reflects the fact that *ne bis in idem* is so closely related in the scheme of the Statute to admissibility; it is a procedural bar to the ICC's jurisdiction (rather than a ground for excluding responsibility).[14]

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[10] For an overview of the inclusion of *ne bis in idem* in the specific context of the ICC, see C. Van Den Wyngaert & T. Ongena, *Ne Bis in Idem Principle, including the Issue of Amnesty*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (A. Cassese, P. Gaeta & John R.W.D. Jones, eds., 2002). See also, A.-M. La Rosa, *A Tremendous Challenge for the International Criminal Tribunals: Reconciling the Requirements of International Humanitarian Law with Those of Fair Trial*, 321 INT'L REV. RED CROSS 635, 637–642 (1997).

[11] *Prosecutor* v. *Delalic et al.*, (Case no. IT-96-21), Judgment, 20 February 2001, paras. 401–426. The case is also referred to as *Celebici*, because of the name of the location involved, but is referred to in this article by the name of the first of the accused, Delalic.

[12] See, generally, CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY (P. Fennell, B. Swart, N. Jörg & C. Harding, eds., 1995); EUROPEAN CRIMINAL PROCEDURES (M. Delmas-Marty & J.R. Spencer, eds., 2002). On the Rome Statute negotiations, see, *e.g.*, John T. Holmes, *supra* note 6.

[13] K. KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 291 (2001).

[14] *Ibid.*

I. BACKGROUND TO THE PRINCIPLE OF *NE BIS IN IDEM*

The principle that a person should not be prosecuted more than once for the same criminal conduct, reflected in the maxim *ne bis in idem* and also referred to as the rule against double jeopardy,[15] is found among legal systems throughout the world.[16] It is the criminal law version of a broader principle, aimed at protecting the finality of judgments, and reflected in the doctrine *res judicata*.[17] Although differing views can be found among writers and publicists, a substantial body of opinion has held to the view that the principle of *ne bis in idem* has not been recognised as a rule of custom, although there is somewhat more support for the rule as a general principle of international law.[18]

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[15] The phrase is derived from the Roman law maxim *nemo bis vexari pro una et eadam causa* (a person shall not be twice vexed or tried for the same cause). The term "double jeopardy" is derived from the wording of the Fifth Amendment to the Constitution of the United States of America, which states, *inter alia*, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb".

[16] See, *e.g.*, M.C. Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 247 (1993), who surveys approximately fifty national constitutions containing the principle.

[17] Article 38(1) (b) and (c) of the Statute of the International Court of Justice (regarding international custom and the general principles of law recognised by civilised nations respectively). *Res judicata* in its application to civil matters appears to have long been accepted as a general principle of international law. See the *Chorzów Factory Case* (*Interpretation*), (1927) PCIJ Ser. A 9, at p. 27 (Judge Anzilotti), and *Société Commerciale de Belgique Case*, (1939) PCIJ Ser. A/B 78, at p. 175 (both cited in BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 336–337 (1993)); R. Theofanis, *The Doctrine of* Res Judicata *in International Criminal Law*, 3 INT'L. CRIM. L. REV., 195 (2003).

[18] In the context of extradition law, *ne bis in idem* is more generally accepted as a rule of public international law, particularly as between the requested and requesting state where a prior prosecution and/or sentence has been imposed in the former (as opposed to where a prior prosecution took place in a third state). See D. Oehler, *ibid.*, p. 617, citing *Symposium on Extradition and National Reports in Preparation of X International Penal Congress of Rome 1969*, 39 REV. INT'LE DROIT PÉNAL 375 (1968). See also, M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 459 (1974); S.D. BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 171 (1966); M.L. FRIEDLAND, DOUBLE JEOPARDY 391–392 (1969). For a contrary view in relation to third states, *i.e.*, the view that *ne bis in idem* is not a rule of international law apart from treaty provisions where the prior trial has occurred in a third state, see, *e.g.*, the decision of the German Federal Constitutional Court in BverfGE 75, 1 2 BvM 2/86 (English translation available at: < http;//www.ucl.ac.uk/laws/global_law/cases/german/constitutional/ constitutional_1.html >).

Morosin, for example, reflecting the main thrust of opinion, suggests that despite being frequently found in national laws (which suggests the rule may be a general principle of international law), the disparities of approach to *ne bis in idem* present a serious obstacle to its formulation in international law; however a contrary view is also arguable.[19]

A central issue in the jurisprudence and literature on double jeopardy is whether the principle operates to prevent further prosecution on the same facts as formed the basis of an existing conviction or acquittal facts (*i.e.*, an *in concreto* application, relating to the identity of the conduct) or if only further prosecution for the same *offence* or legal head of liability is prohibited (*i.e.*, an *in abstracto* application, relating to the legal identity of the offences).[20] The latter limits the scope of the principle in that the same set of facts could

[19] See M.N. Morosin, *Double Jeopardy and International Law: Obstacles to Formulating a General Principle*, 64 NORDIC J. INT'L L. 261 (1995). Similarly, see, *e.g.*, D. Oehler, *The European System*, in 2 INTERNATIONAL CRIMINAL LAW PROCEDURAL AND ENFORCEMENT MECHANISMS 617–618 (M.C. Bassiouni, ed., 1999); THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 54 (2001). In favour of a contrary conclusion, it may be argued that the elements common to different approaches (*e.g.*, as between common and civil law systems) can be identified to form the content of a potential international principle: see G. Conway, Ne Bis in Idem *in International Law*, 3 INT'L CRIM. L. REV. 217 (2003). The Schengen Accord (article 54 of the Schengen Implementation Convention of 14 June 1990, 30 INT'L LEGAL MATERIALS 184 (1991)) and the European Convention on Double Jeopardy (Cm. 438 (1987)) are two multilateral conventions that apply the principle on an *erga omes* or inter-state level. For recent European Union developments, see M. Fletcher, *Some Developments to the* ne bis in idem *Principle in the European Union: Criminal Proceedings Against Hüseyn Gözütok and Klaus Brügge*, 66 MODERN LAW REVIEW 769 (2003); N. Thwaites, *Mutual Trust in Criminal Matters: the ECJ gives a first interpretation of a provision of the Convention implementing the Schengen Agreement. Judgement of 11 February 2003 in Joined Cases C-187/01 and C-385/01*, Hüseyin Gözütok and Klaus Brügge, 4(3) GERMAN LAW JOURNAL (March 2003). More generally, see also, K. Ambos, *The International Criminal Court and the Traditional Principles of International Cooperation in Criminal Matters*, 9 FINNISH Y.B. INT'L L. 413, 420 (2000); M. El Zeidy, *The Doctrine of Double Jeopardy in International Criminal and Human Rights Law*. 6 MEDITERRANEAN J. HUMAN RIGHTS 182 (2002).

[20] As noted in the dissenting opinion of Judge Repik in the European Court of Human Rights decision in *Oliveira* v. *Switzerland*, [1999] 28 EHRR 289. See also, *e.g.*, *Touvier*, (1992) 100 ILR 337, especially at p. 348, where *ne bis in idem* was applied *in abstracto* to permit subsequent recharging on the same facts for a different offence where the sentence imposed upon the prior conviction (*in absentia*) was not served and the conviction was later pardoned; the Court noted, however, that *ne bis in idem* would bar a prosecution on the same facts where the previous prosecution resulted in an *acquittal*.

ground a further prosecution so long as the subsequent prosecution charges the accused with a different offence. The Anglo-Saxon tradition has been to apply the *ne bis in idem* principle *in abstracto*, whereas many continental or civil law countries reflect the principle *in concreto*.[21] The practical difference between the two views could be lessened by the adoption of a *ne bis poena in idem* rule applied *in concreto* where *ne bis in idem* as such is not accepted.

Ne bis poena in idem is a related or corollary principle to that of *ne bis in idem*[22] and is to the effect that sentencing and penalties already served or paid by an accused for the same offence or set of facts should be discounted when a subsequent penalty is imposed that relates to the same offence or facts. *Ne bis poena in idem* imposes less of a restriction on a state's sovereignty than a full *ne bis in idem* rule and could, consequently, less controversially be invoked to take into account foreign decisions; acceptance of the principle could mitigate the harshness of a refusal to recognise *ne bis in idem* as such.[23]

II. STATUTES OF THE *AD HOC* TRIBUNALS AND THE ROME STATUTE COMPARED

The formulation of *ne bis in idem* in the Statutes of the *ad hoc* tribunals (and that of the Special Court for Sierra Leone) differs in a number or respects from that of the International Criminal Court.

The Statutes of the ICTY, the ICTR and the Special Court for Sierra Leone all make express provision for *ne bis poena in idem* (articles 10(3), 9(3) and 9(3), respectively), whereas article 20 of the

[21] See, *e.g.*, Oehler, *supra* note 18, pp. 616–617.

[22] The phrase derives from the Latin maxim *nemo debet bis puniri pro uno delicto*. In German terminology, the general rule of *ne bis in idem* is referred to by the term *Erledigungsprinzip* (principle of exhaustion of proceedings) and *ne bis poena in idem* by the term *Anrechnungsprinzip* (principle of taking into account). On German terminology, see *Commission Communication*: *Mutual Recognition of Final Decisions in Criminal Matters*, Brussels, 26 July 2000, Commission Document (2000) 495 final, at sec. 6.2.

[23] C. Van Den Wyngaert & G. Stessens, *The International* Ne Bis In Idem *Principle: Resolving Some of the Unanswered Questions*, 48 INT'L COMP. L.Q. 779, 793 (1999). In *Boehringer* v. *Commission*, [1972] ECR 1281, *ne bis poena in idem* was argued for in the alternative to an acceptance by the Court of a full *ne bis in idem* principle (at p. 1284) (although the Court did not rule on the matter). See also, I. CAMERON, THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION 88–89 (1994).

Rome Statute does not. However, it has been pointed out that a *ne bis poena in idem* provision is effectively contained in article 78(2) (concerning the determination of the sentence) of the Rome Statute, which states, *inter alia*, that "[t]he Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime".[24]

A second feature distinguishing the approach in the Rome Statute and from the Statutes of the *ad hoc* tribunals is the inclusion in the latter of the concept of "ordinary crimes": the international tribunals are prohibited from retrying someone if the accused has already been tried for acts constituting serious violations of international humanitarian law except where the act for which he or she was tried was characterised in the national court as an ordinary crime (or where the national trial was essentially a show trial).[25] The Rome Statute eventually omitted the first exception, confining itself to the "show trial exception", because of disagreement at the negotiations as to the compatibility of the "ordinary crimes" rule with the underlying *ne bis in idem* protection.[26] It seems that arguments made in favour of including the exception because the characterisation of a crime as an international one had a particular deterrent or retributive effect (greater than that associated with a conviction for ordinary crimes) were rejected.[27] The conclusion was drawn that it did not make sense to both provide for *ne bis in idem* protection and allow the ICC to retry the same conduct for international crimes, *i.e.*, it was concluded that the ICC should be bound to an *in concreto* application of *ne bis in idem*.[28] However, it might be argued that the same logic should be applied to bind national courts to an *in concreto* application of the principle; a national court is only prohibited from retrying an accused for the same *crimes* as an accused has already been tried

[24] Christoph J.M. Safferling, Towards an International Criminal Procedure 331 (2001).

[25] The "show trial exception" in the Statutes of the *ad hoc* tribunals provides that the Tribunals may retry an accused where the "national proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted" (art 10(2)(b) of the ICTY Statute and art. 9(2)(b) of the ICTR Statute, *supra* notes 2 and 3, respectively).

[26] Rome Statute, *supra* note 1, art. 20. See John T. Holmes, *supra* note 6, pp. 57–58. See also the discussion of the differing wording in this regard of the Statute of the ICC and of the Statutes of the *ad hoc* tribunals in C. Van den Wyngaert & T. Ongena, *supra* note 10, p. 725.

[27] *Ibid.*, p. 58.

[28] *Ibid.*

for by the ICC (or in other words, a national court may retry for the same acts, but for a different offence or set of offences than those over which the ICC has jurisdiction).

Under article 20, therefore, the ICC is prohibited from retrying an individual in an *in concreto* sense of *ne bis in idem* (once the acts forming the basis of an ICC trial have already been tried before a national criminal court, the ICC may not exercise jurisdiction, unless the exceptions in article 17 apply). In contrast, the formulation in the Statutes of the *ad hoc* tribunals applies *ne bis in idem* in its *in concreto* form to any attempted subsequent national prosecution for acts over which the tribunals have jurisdiction and have already carried out a trial (articles 10(1) and 9(1) of the ICTY and ICTR Statutes, respectively, and Article 9(1) of the Statute of the Special Court of Sierre Leone)).

Finally, Rule 168 of the Rules of Procedure and Evidence of the ICC[29] provides for an *in concreto* application of *ne bis in idem* with respect to the offences set out in article 70 of the Rome Statute relating to the administration of justice (*i.e.*, in contempt and committal matters).

The appeal provisions of all four Statutes permit appeals by the prosecution, although once again the wording in the ICC Statute is somewhat different than that of the *ad hoc* tribunals. The Rome Statute, in article 81(l)(a), permits the prosecutor to appeal on the basis of a procedural error, an error of fact, or an error of law. The convicted person, under article 81(l)(b), may appeal on the same grounds, as well as on any other ground that affects the fairness or reliability of the proceedings. In addition, a convicted person or the prosecutor may appeal on the ground of a disproportionate sentence (article 81(2)(a)). The Statutes of the *ad hoc* tribunals provide for an appeal by either party on the ground of an error of law invalidating the decision or an error of fact occasioning a miscarriage of justice.[30] The Appeals Chambers of the *ad hoc* tribunals may affirm, reverse, or revise the decisions of the Trial Chambers; the Appeals Chamber of the ICC, under article 83(2), may additionally order a retrial. These provisions are at odds with the dominant common law tradition, which has excluded the possibility of prosecutorial appeal, confining review of criminal trials to matters of law and jurisdiction.

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[29] Rules of Procedure and Evidence, ICC-ASP/1/3, p. 10.

[30] Statute of the ICTY, *supra* note 2, art. 25; Statute of the ICTR, *supra* note 3, art. 24; Statute of the Special Court for Sierra Leone, *supra* note 4, art. 20. Both parties may also appeal a judgment of the Special Court for Sierra Leone on the ground of procedural error.

The review provision of the Rome Statute (article 84) permits a convicted person to seek a revision of the final judgment where, in certain circumstances,[31] new evidence becomes available; where decisive evidence at the trial is discovered to have been forged or falsified by a party other than the applicant; or where one or more of the judges has committed an act of misconduct or serious breach of duty.[32] This provision is available to the convicted person only, and not to the prosecutor, under the ICC Statute. The Statutes of the *ad hoc* tribunals allow both the convicted person and the prosecutor to seek a revision of a Trial Chamber judgment.[33] The Rome Statute permits the Appeals Chamber, in proceedings for revision (or *cassation*, to use the French term), to reconvene the original Trial Chamber, reconvene a new Trial Chamber, or retain jurisdiction over the matter.[34] The Statutes of the Yugoslavia and Rwanda tribunals

[31] A revision may be ordered where the evidence is sufficiently important that had it been proved at trial it would have likely resulted in a different verdict (Rome Statute, *supra* note 1, art. 84(l)(a)(ii)).

[32] In contrast, in English law, for example, the pleas of *autrefois acquit* and *autrefois convict* lie to prevent a new trial where new evidence emerges. Glanville Williams (see GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 163–164 (2nd ed., 1983)) gives an example whereby someone who has been acquitted of murder and who writes a newspaper article (subsequent to the acquittal) admitting the murder could not be retried for murder (despite the emergence of compelling new evidence). However, the person could be tried with a separate offence, such as perjury (for having lied in court during the prior trial), during which the prosecution would not be estopped or prevented from asserting that the accused had committed the offence of murder in order to establish guilt of perjury (English criminal law, therefore, does not contain any doctrine of issue estoppel: see, *e.g.*, the House of Lords decision in *R.* v. *Humphrys*, [1977] AC 1). As Lord Hutton LJ pointed out in *R.* v. *Z.*, [2000] 3 WLR 117, at 130, there exists some tension between the *Humphrys* rule that English criminal law knew no doctrine of issue estoppel and the ruling of the Judicial Committee of the Privy Council in *Sambasivam* v. *Public Prosecutor*, *Federation of Malaya*, [1950] AC 458, that the prosecution was prohibited from adducing similar fact evidence in a second trial that tended to show that the accused was guilty of an offence of which he had already been acquitted. The United Kingdom government is now planning to reform the law in the area of double jeopardy in England and Wales so as to permit a second trial where reliable and compelling new evidence emerges, following on from a recommendation of the Law Commission of England and Wales: REPORT ON DOUBLE JEOPARDY AND PROSECUTION APPEALS (2001), Recommendation 3, p. 127. See also, HOME OFFICE, CRIMINAL JUSTICE WHITE PAPER (2002), at 4.63–4.66.

[33] Statute of the ICTY, *supra* note 2, art. 26; Statute of the ICTR, *supra* note 3, art. 25; Statute of the Special Court for Sierra Leone, *supra* note 4, art. 21.

[34] Rome Statute, *supra* note 1, art. 84(2).

state simply that the appeals chambers may have submitted to them applications for review of trial chamber judgments.[35] The rule for the Special Court for Sierra Leone is similar to that of the ICC, except that it does not allow the Appeals Chamber to reconvene a new Trial Chamber (at least for the time being, there is only one Trial Chamber).[36] A request for revision by the Prosecutor of the Yugoslavia and Rwanda tribunals must be brought within one year of final judgment, under the Rules of Procedure and Evidence,[37] but the Special Court for Sierra Leone imposes no such distinction upon the Prosecutor, and allows revision at any time,[38] as does the Rome Statute (on which, see further below).

With respect to *revision*, therefore, the ICC Statute favours the accused more than regimes of the *ad hoc* tribunals, in that under the Rome Statute, the accused does not have to face the potential prospect of a revised trial at the initiation of the prosecutor.

In summary, the ICC provisions are both more comprehensive and deferential to national jurisdiction than those of the *ad hoc* tribunals. They illustrate some of the difficulty in reconciling national sovereignty with the internationalisation of criminal law and provide for a somewhat more restrictive application of *ne bis in idem*. Nonetheless, they show the enduring importance of the principle in an international law context.

III. OVERVIEW OF MAIN TRIBUNAL CASE LAW

Relatively little case law from the *ad hoc* tribunals addresses the operation of the *ne bis in idem* provisions in their Statutes. The issue of *ne bis in idem* was raised before the ICTY in *Tadic*,[39] but the defence arguments were dismissed by the Trial Chamber. The defence sought to argue that *ne bis in idem* operated to prevent the Tribunal from exercising jurisdiction on the basis that an indictment had been

[35] Statute of the ICTY, *supra* note 2, art. 26; Statute of the ICTR, *supra* note 3, art. 25.

[36] Statute of the Special Court for Sierra Leone, *supra* note 4, art. 21.

[37] Rules of Procedure and Evidence, IT/32, Rule 119; Rules of Procedure and Evidence [of the ICTR], ITR/3/Rev.l, Rule 120.

[38] Rules of Procedure and Evidence [of the Special Court for Sierra Leone], Rule 120.

[39] *Prosecutor* v. *Tadic* (Case no. IT-94-1-T), Decision, 14 November 1995, paras. 10–11, and 24.

served on Tadic in Germany. However, the German trial had not begun, so the Trial Chamber held that no violation of *ne bis in idem* occurred. An additional question related to *ne bis in idem* was also discussed in *Tadic* and illustrates the close connection between admissibility and *ne bis in idem* under the Statutes. The defence (at p. 31) sought to link deferral under article 9 and the *ne bis in idem* provisions of article 10(2) of the Statute of the ICTY. Tadic argued that the statute permitted deferral under article 9 only under the circumstances described in article 10(2), as reflected in Rule 9(i) and (ii) of the Rules of Procedure and Evidence, and referred to statements by four of the permanent representatives to the Security Council in support (the effect would be to limit the power of the tribunal to assert primacy of jurisdiction over a national court to the circumstances set out in article 10(2) and Rule 9(i) and (ii), where the national proceedings characterise the impugned act as an ordinary crime and where there is a lack of impartiality or independence in the proceedings or they are designed to shield the accused from international criminal responsibility; the text of article 9 simply states that at any stage in the procedure, the Tribunal may formally request national courts to defer to the competence of the Tribunal in accordance with the Statute and Rules of Procedure and Evidence). The Trial Chamber did not address the argument as it had disposed of the application on other grounds. In this regard, Brown observes:

> The statutory language contains no wording that would signal that the primacy of the Tribunal should be restricted to certain situations – such as those enumerated under Article 10(2). If the Security Council formally intended that deferral be limited to certain situations, it presumably would have written provisions to this effect into the Statute. Moreover, the judges of the Tribunal are bound by its Statute, not by Security Council members' post-decisional political statements. Indeed any other rule would compromise the Tribunal's judicial independence. While the Judges of the Tribunal have accepted certain Security Council statements about the Statute as authoritative interpretations, they must also consider the text of the articles in question and the purpose they serve (footnotes omitted).[40]

The case of *Bagasora*,[41] at the ICTR, illustrates the *in concreto* application of *ne bis in idem* where a prior national prosecution has taken place. The Trial Chamber held that it was not permissible for the prosecution to put on trial a person before the Tribunal for

[40] Bart S. Brown, *supra* note 6, at p. 406 (references omitted).

[41] *Prosecutor* v. *Bagasora* (Case no. ICTR-96-7-D), Decision, 17 May 1996.

genocide or crimes against humanity after that person had been already tried for the same conduct under Belgian jurisdiction.[42]

An associated issue more frequently raised and addressed is that of cumulative convictions, on which the case of *Delalic* et al.[43] is one of the leading authorities. A number of more recent decisions also deal with the issue. Although not addressed in the Statutes of the international tribunals, the question of cumulative convictions is one covered by the underlying principle of *ne bis in idem*[44] in that the accused may be subject to multiple punishments for the same offence (the punishments being adjudged simultaneously, rather than consecutively). In *Aleksovski*, the Appeals Chamber of the ICTY observed, in determining a revised sentence and having noted that double jeopardy protection was relevant to all stages of the prosecution process, that account should be taken of the increased anxiety and stress to the accused as a result of having to face a second sentencing and also for having undergone a second detention following release.[45]

IV. PROSECUTION APPEALS

As discussed above, article 81 of the Rome Statute, and articles 25, 24 and 20 of the Statutes of the Yugoslavia, Rwanda and Sierra Leone tribunals, respectively, permit the possibility of a retrial following an appeal by the prosecution. Such appeals have generally been prohibited in common law systems. Some United States authority describes a prohibition on such appeals as the most fundamental principle of protection against double jeopardy.[46] Although it

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[42] *Ibid*., para. 13 (discussed in K. Kittichaisaree, *supra* note 13, p. 289); *Prosecutor* v. *Musema*, (Case no. ICTR-96-5-D), Decision, 12 March 1996, para, 12; *Prosecutor* v. *SARL Radio Télévision Libre des Milles Collines* (Case no, ICTR-96-6-D). Decision, 12 March 1996, para. 11.

[43] *Supra* note 11.

[44] See, *e.g*., the observation in *Pearce* v. *The Queen*, (1998) 72 ALJR 1416, 156 ALR 684, at p. 1428, 686: "Further, 'double jeopardy' is an expression that is employed in several different stages of the criminal justice process: prosecution, conviction and punishment." See also, *Prosecutor* v. *Aleksovski* (Case no. IT-95-14/1-A), Judgment, 24 March 2000, n. 363; *Prosecutor* v. *Naletilic and Martinovic* (Case no. IT-98-34-T), Judgment, 31 March 2003, para. 743.

[45] *Ibid*., para. 190.

[46] M.N. Morosin, *supra* note 18, at p. 268, quoting the United States Supreme Court decision in *United States* v. *Martin Linen Supply Co*., 430 US (1977) 564, 571, quoting *United States* v. *Ball*, 163 US (1896) 662, 671.

appears that practice in the United States has not always been consistent with this view,[47] the common law has generally treated such an appeal as going against double jeopardy protection.[48] The prohibition on appeals follows on from the role of juries in the Anglo-American legal tradition. Juries provide a determination of the facts by the peers of the accused, a group of people taken to be representative of society.[49] The rationale behind the jury system, that a representative group from society provides the best chance of a fair and humane decision, would be undermined by the possibility that the jury verdict could be overturned by an appellate court consisting only of professional judges.[50] In contrast, civil law systems view a trial as complete only when the possibility of further appeal has been exhausted.[51]

[47] For a discussion of United States law and practice, and that of a number of other countries, see: *Report to the Attorney General on Double Jeopardy and Government Appeals of Acquittals*, *Truth in Criminal Justice Report No.6*, *Office of Legal Policy*, 22 J.L. Reform 833 (1989) (cited in R.B. Philips, *The International Criminal Court Statute: Jurisdiction and Admissibility*, 10 Crim. L. Forum 61 (1999), p. 83, n. 72); See also, The Law Commission (England & Wales) Consultation Paper No. 156, Double Jeopardy: A Consultation Paper (2001), Appendix B; The Law Commission (England & Wales), Report on Double Jeopardy and Prosecution Appeals (2001).

[48] Some delegations to the Preparatory Committee on the Rome Statute held the view that preclusion of a prosecution appeal was a general principle of criminal law: UN Doc. A/51/22, pp. 86–87, cited in D. MacSweeney, *International Standards of Fairness*, *Criminal Procedure and the International Criminal Court*, 68 Rev. Int'le Droit Pénal 233, 287, n. 204 (1997).

[49] The reality of jury practice may cast doubt on this underlying idea. In the United States, for example, the study of the ethnic and other characteristic features of jurors in an effort to predict how a particular group might tend to favour or disfavour a particular accused would suggest that the concept of a selection of twelve men and women as guaranteeing an evaluation of the facts that would be representative of the views of society at large may be misconceived (a differently constituted jury, also putatively representative of society, might have reached a different result). However, perhaps no greater degree of objectivity would be achieved through judicial determinations of both law and fact in criminal trials. See also, generally, *e.g.*, M. Hill & D. Winkler, *Juries: How Do They Work? Do We Want Them?*, 11 Crm. L. Forum 397 (2000).

[50] Christoph J.M. Safferling, *supra* note 24, pp. 334–335.

[51] *Ibid.*, p. 332; M. Chivario, *Private parties: The rights of the defendant and victim*, in M. Delmas-Marty & J.R. Spencer, *supra* note 12, pp. 573–574; D. MacSweeney, *supra* note 48, p. 288.

It seems clear that, in principle, the possibility of prosecution appeals does pose problems given the underlying rationale of *ne bis in idem* protection as providing protection against the anxiety of repeated prosecution, by a governmental apparatus with relatively greater resources than the accused, and the associated increased risk of an erroneous conviction.[52] Despite the fact that the prosecutor in an international criminal tribunal is not part of a government apparatus in the way a national prosecutor might be perceived to be, the potential for the abuse of the right to appeal exists in a way, it is submitted, comparable to a national prosecution. For example, it may be that national governments would be willing to cooperate in the zealous pursuit of a prosecution appeal because their political interests coincide with such an appeal. Moreover, a prosecutor determined to "go after" a particular accused may, for example, under the Rome Statute, seek the cooperation of States and intergovernmental organisations in carrying out its investigations.[53] It is submitted, therefore, that if the common law rationale for the exclusion of prosecution appeals has force and cogency in a national legal setting, it may also in an international context, notwithstanding differences between the two legal régimes.

How allowance of such appeals may impact upon this protection would depend on how extensive the right to appeal was made, *e.g.*, as regards time limits. The time limit provided for in the Rules of

[52] For a contrary view, see L. Kittichaisaree, *supra* note 13, p. 290, who proposes that the common law rationale for the exclusion of prosecution appeals – that the government should not be allowed to abuse its power to prosecute accused persons by re-prosecuting them until they are finally convicted – is absent in the context of prosecutions before international tribunals, where the prosecution prosecutes on behalf of the international community and, like the defence, must rely on the cooperation of external entities without support by a government apparatus with abundant resources. Kittichaisaree proposes that the prosecution and the accused before an international tribunal "enjoy equality of arms in fact and in law" (citing *Prosecutor* v. *Tadic* (Case no. IT-94-1-A), Declaration of Judge Nieto-Navia, 15 July 1999, paras. 4–5). For general discussion of the rationale underlying *ne bis in idem* in an international context, see. G. Conway, *supra* note 19, pp. 222–224; C. Van Den Wyngaert & T. Ongena, *supra* note 10, pp. 707–710.

[53] See article 54 of the Statute on the powers and duties of the prosecutor.

Procedure and Evidence of the ICC[54] within which an appeal may be brought is thirty days, which may be extended for "good cause" (Rule 150).[55] This is a relatively short time period and, therefore, more consistent with *ne bis in idem* concerns. It is a theoretical possibility that the prosecution could seek repeated appeals, although this would be unlikely to arise in practice, unless, very unusually, two successive trials, were, for different reasons, seriously defective.

MacSweeney proposed that different thresholds be adopted by the ICC for prosecution appeals on law and on fact, in that appeal or review of legal issues is more compatible with the common law tradition than are prosecutorial appeals on grounds of fact.[56] Along similar lines, Morosin proposed that an interlocutory review system would overcome the divergence between the common and civil law approaches to the matter;[57] however, the allowance of prosecution appeals was retained in the final draft of the Statute. The alternative approach suggested by MacSweeney of differentiating between errors of law and fact may give rise to a number of difficulties.

First, as a matter of treaty interpretation, it may be difficult to justify differing standards with respect to errors of law and fact now that no such distinction is drawn in the final draft of the Statute

[54] Report of the Preparatory Commission for the International Criminal Court, PCNICC/2000/l/Add. 1.

[55] The equivalent period under the Rules of Procedure and Evidence of the ICTY (Rule 108) and the ICTR (Rule 108), is thirty days (i.e. both provide for the same period as does the Rome Statute). The Rules of Procedure and Evidence of the Special Court for Sierra Leone, which were originally modelled on those of the Rwanda Tribunal, have been amended to set a time limit of only fourteen days (Rule 108(A)), and only seven days in the case of an appeal dismissing an objection based on lack of jurisdiction (Rule 108(B)).

[56] D. MacSweeney, *supra* note 48, p. 284 *et seq*. In the common law tradition, a judicial review of a lower court's decision may be pursued by the prosecution as a form of collateral attack on the decision. Judicial review proceedings are concerned essentially with the procedural and jurisdictional validity of a decision, rather than its merits. Once granted, an action in judicial review will not generally render a matter *res judicata* (see, *e.g*., H.W.R. WADE & C.F. FORSYTH, ADMINISTRATIVE LAW 718 (7th ed., 1994) and the Irish cases of *The People* (*Attorney General*) v. *O'Brien*, [1963] IR 92; *The State* (*Tynan*) v. *Keane*, [1968] IR 348, especially Walsh J. at p. 355).

[57] Morosin, *supra* note 19.

(MacSweeney, writing before the final draft was agreed upon in Rome, proposed the distinction be inserted into the final draft).[58] Secondly, the experience of administrative law in common law countries suggests that distinguishing between mistakes of law and fact can be very difficult in some cases. The following excerpt from de Smith, Jowell and Woolf illustrates the problem:

> Perplexing problems may, however, arise in analysing the nature of the process by which a tribunal determines whether a factual situation falls within or without the limits of a category or standard prescribed by a statute or other legal instrument: every finding by a tribunal postulates a process of abstraction and inference, which may be conditioned solely by the adjudicator's practical experience and knowledge of affairs, or partly or wholly by his knowledge of legal principle. He hears evidence and, by satisfying himself as to its reliability, finds what were the true facts; it may then be necessary for him to draw a series of inferences from these primary findings in order to determine what were the material facts on which he has to base his decision; in order to draw certain of these inferences correctly he may need to apply his knowledge of legal rules. At what point does an inference drawn from facts become an inference of law? Is the application of a statutory norm to the material facts always to be classified as the determination of a question of law?[59]

The mixed question of fact and law whereby a court or tribunal must determine how to characterise the facts in light of the relevant legal rule has, as the above quote highlights, given rise to the most difficulty in the context of administrative law. In the context of the ICC, for example, a determination by a Trial Chamber that a national court had failed to give both sides an equal hearing in adopting a favourable attitude to the defence and, therefore, that the national trial did not operate as a bar to the jurisdiction of the ICC (because the national trial fell within the ''show-trial exception'' of article 20(3)), could be attacked as both an error of law and an error of fact: an error of law could be said to lie in the characterisation of the national court's approach as having resulted in a tainting of the national proceedings so as to give the ICC jurisdiction (a misapplication of the categorisation in article 20(3)); an error of fact may be said to lie in that the Trial Chamber simply overestimated the effect, as a matter of evidence, of any tendency by the national court to be

[58] See also, Part III, General Principles of Criminal Law, article 32 of the Rome Statute, which refers to both mistakes of law and of fact, in comparable terms, as grounds for excluding criminal responsibility (only where they negate the mental element required by a crime).

[59] S.A. De Smith, Lord Woolf & J. Jowell, De Smith's Judicial Review of Administrative Action 297 (5th ed., 1995).

favourable to the accused or otherwise partisan or tendentious in its approach.

Rather than applying such a potentially difficult and tortuous distinction between errors of fact and law to narrow the potential scope of prosecutorial appeal, the Appeals Chamber of the ICC could simply adopt a strict standard of review of errors of both fact and law. Guidance on the issue may be found in article 4(2) of Protocol No. 7 to the European Convention on Human Rights, which provides that a reopening of a case is only possible if the procedural error amounts to "a fundamental defect in the previous proceedings".[60] A judicial elaboration or interpretation of the appeal provisions of the Rome Statute is in any case inevitable, as the court will have to develop some test that will distinguish errors that merely result in amendment or revision of a decision and errors that merit the ordering of a retrial.[61]

Similarly, the process of revision should be strictly applied to prevent it becoming a second chance at an appeal or trial. As MacSweeney points out, this may be inevitable given the restrictive wording of article 84(i)(a)(ii), in that new evidence grounding the revision must likely have resulted in a different verdict.[62] No time limit is set out in the Rules of Procedure and Evidence of the Court for the initiation of revision proceedings.[63] This provision might be thought inconsistent with the underlying rationale of *ne bis in idem* as affording protection against the anxiety of repeated prosecution. However, three factors operate as a counterpoint to this consideration. First, many national systems (especially in the civil law tradition) do not treat the possibility of reopening a case if decisive new evidence emerges as prohibited by double jeopardy protection. Secondly, the requirement that new evidence be decisive will likely, in

[60] "The provisions of the previous paragraph [concerning double jeopardy in general] shall not prevent the reopening of the case in accordance with the law and penal procedure of the state concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case" (ETS No. 117). See *Oliveira* v. *Switzerland*, *supra* note 20. The restrictive approach to appeals proposed here, it is submitted, would also make sense in the context of possible repeated prosecution appeals, *i.e.*, where a retrial is itself appealed against by the prosecution, which would clearly expose an accused to the sort of repeated and sustained prosecution that double jeopardy protection seeks to prevent.

[61] See articles 83 and 84 of the Rome Statute, *supra* note 1.

[62] D. MacSweeney, *supra* note 48, p. 288.

[63] See Chapter 8, Sec. IV, Rules 159–161.

practical terms, make rare the instances where a case is reopened. Thirdly, there is the countervailing interest of society in ensuring that a person guilty of a crime will not go unpunished simply because of the unavailability of evidence at the time of the original trial, especially in the context of the gravity of the crimes involved.

As of yet, little case law[64] has emerged from the *ad hoc* tribunals directly concerning a prosecutorial right of appeal or revisions (to date, appeals have generally concerned interlocutory matters only), which may indicate that, in practical terms, risk of a whittling away of double jeopardy protection in this context is not likely.

V. CUMULATIVE SENTENCING AND *NE BIS IN IDEM*

The issue of cumulative convictions and sentences has arisen in a number of cases before the ICTY. As noted above, *Delalic*[65] seems to have become established as the leading authority, although the issue is also addressed in other cases, and there has been disagreement among the judges of the Tribunals as to the best approach. The scenario presents similar issues, albeit to a lesser degree, to those posed by *ne bis in idem*. Although the accused will not in such a case be exposed to the ordeal and anxiety of repeated prosecution, the idea that someone should only have to serve punishment and render a debt to society once for a given offence may be threatened by the use of cumulative convictions where the same conduct entails committing

[64] A recent example is *Prosecutor* v. *Jelisic* (Case no. IT-95-10), Judgment, 5 July 2001, where the Appeals Chamber allowed a prosecution appeal concerning denial of an opportunity to be heard, the standard to be applied pursuant to Rule 98*bis*(B) of the Rules of Procedure and Evidence, and intent to commit genocide (but not in relation to the prosecution's argument concerning *dolus specialis*). However, the Chamber (Judges Shahabudeen and Wald dissenting) concluded that, in the circumstances of the case, it was not appropriate to order that the case be remitted for further proceedings and declined to reverse the acquittal. A request for review by the accused in *Tadic*, based on arguments that one of the defence counsel acted against the interests of the accused, was refused (for failing the meet the criteria in Rule 119 of the Rules of Procedure and Evidence that the new fact grounding the application for review must not have been known by the moving party at the time of the original proceedings and that the lack of discovery of the new fact must not have been through lack of diligence on the part of the moving party): *Prosecutor* v. *Tadic* (Case no. IT-94-1-R), Decision on Motion for Review, 30 July 2002. See also, *Prosecutor* v. *Barayagwiza* (Case no. ICTR 97-19-AR72), Decision on Prosecutor's Request for Review or Reconsideration, 31 March 2000, para. 41; *Prosecutor* v. *Delic* (Case no. IT-96-21-R-R119), Decision on Motion for Review, 25 April 2002, p. 7.

[65] *Prosecutor* v. *Delalic* et al., *supra* note 11.

more than one offence, *e.g.*, assault, assault causing grievous bodily harm, murder, and genocide. By using different legal characterisations, the same conduct could be repeatedly punished.

In his dissenting opinion in *Kayishema*, Judge Khan of the ICTR noted the trend in favour of one or the other of two approaches in relation to cumulation of convictions:

> The jurisprudence from national courts and the views of legal commentators on the issue of concurrence is mixed. Some argue that it is wrong to *convict* for two or more crimes that suffer from concurrence while others argue that an accused can be convicted for all the established crimes but, in order to avoid prejudice, *punished* for the established crimes concurrently (generally by imposing the sentence for the gravest crime).[66]

A similar divergence of opinion is to be found in the jurisprudence of the *ad hoc* international tribunals.

5.1. *Case Law Prior to* Delalic

In *Tadic*, the Trial Chamber ruled that questions of cumulation should be addressed once the accused has been found guilty, *i.e.*, at the sentencing stage:

> What can, however, be said with certainty is that penalty can not be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend on the technicalities of pleading.[67]

A number of other decisions support this approach, including *Ntagerura*,[68] *Akayesu*,[69] *Krnojelac*,[70] and an earlier decision in *Delalic*.[71] Having cited these authorities, Judge Khan in his dissenting opinion in *Kayishema* concluded that, notwithstanding divergent opinions in national systems and among writers, the jurisprudence of the inter-

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[66] *Prosecutor* v. *Kayishema & Ruzindana* (Case no. ICTR-95-1-T), Separate and Dissenting Opinion of Judge Kahn, 21 May 1999, para. 11.

[67] *Prosecutor* v. *Tadic*, *supra* note 39, p. 6.

[68] *Prosecutor* v. *Ntagerura* (Case No. ICTR 96-1-A), Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, 28 November 1997, para. 26.

[69] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, paras. 464–465.

[70] *Prosecutor* v. *Krnojelac* (Case No. IT-97-25), Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 10.

[71] *Prosecutor* v. *Delalic* et al. (Case No. IT-96-21-AR), Decision, 6 December 1996, para. IV.

national criminal tribunals 'has been consistent in its approach from the very first case at the ICTY *[Tadic]*''.[72]

In contrast, the majority of the Appeals Chamber of the ICTR, in *Kayishema*, concluded that ''[cumulative conviction] would be improper as it would amount to convicting the accused person twice for the same offence. This the Trial Chamber deems to be highly prejudicial and untenable in law in the circumstances of this case.''[73] Similarly, in *Kupreskic*, the Trial Chamber held that an individual cannot be convicted of both murder as a crime against humanity and murder as a war crime, because murder as a war crime does not require proof of elements that murder as a crime against humanity requires.[74]

In summary, it seems earlier case law from the Tribunals favoured the prosecution in allowing cumulative conviction, but later decisions indicate a trend opposed to cumulation.

5.2. *The Decision in* Delalic

In *Delalic*, the Appeals Chamber reviewed some of the Court's earlier jurisprudence and observed that cumulative sentencing had been permitted, with considerations of unfairness to the accused being addressed at the sentencing stage.[75] The Chamber then went on to review a number of national and other authorities before settling on a rule to be applied by the Tribunal. The decision is interesting in itself as an example of how the Tribunal may drawn upon the laws of national systems in determining the law to be applied by the Tribunal. The Appeals Chamber first briefly addressed the issue of cumulative charging, noting that the practice should be allowed as it is not always possible for the prosecution to determine with certainty which of the possible charges will be proven and that the Trial Chamber is best placed to determine which of the possible charges should be retained.[76]

The Chamber noted that three approaches to the issue of cumulative convictions and sentences were to be found in national laws: first, to address issues of unfairness at the sentencing stage (*e.g.*, Germany); secondly, to confine cumulative sentencing to the most

[72] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 65, para. 12.

[73] *Ibid.*, paras. 648–649.

[74] *Prosecutor* v. *Kupreskic et al.* (Case no. IT-95-16-T), Judgment, 14 January 2000, paras. 682–701.

[75] *Prosecutor* v. *Delalic* et al., *supra* note 11, para. 405.

[76] *Ibid.*, para. 400.

severe of crimes (*e.g.*, Zambia); and, thirdly, to require proof of different statutory elements for cumulative convictions and sentencing to be imposed (*e.g.*, the United States of America, under the so-called *Blockburger* test).[77] The Chamber noted that another instructive approach was that of the United States Military Tribunal established pursuant to Allied Control Council Law No. 10 following the end of World War II to prosecute persons charged with crimes against peace, war crimes, and crimes against humanity. In the case of the latter crimes, which are the type of crime over which the current international criminal tribunals have jurisdiction, the United States Military Tribunal permitted cumulative convictions in the context of the severity and gravity of the crimes perpetrated.[78]

Having reviewed these authorities, the Appeals Chamber simply concluded that "reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions" lead to the conclusion that the approach preferred in United States law should be adopted by the Tribunal.[79] Where the *Blockburger* test was not met, the Chamber held that only the more specific charge should be preferred against the accused.[80] The Chamber did not enter into any detailed argument as to why this particular conclusion was merited over and above alternative resolu-

[77] *Ibid.*, paras. 407–409 and references therein. In *United States* v. *Blockburger*, 284 US 299 (1932), the United States Supreme Court held that multiple convictions can be imposed under different statutory provisions if each statutory provision requires proof of a fact which the other does not. The *Blockburger* test was confirmed in *Rutledge* v. *United States*, 517 US 292 (1996).

[78] The Appeals Chamber cited *Altstötter et al.* (*The Justice Trial*), 4 L.R.T.W.C. 75–76, where numerous defendants were found guilty of war crimes, as well as crimes against humanity based on exactly the same facts. In addition, the Appeals Chamber (at para. 643) cited the "Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)", UN Doc. S/25274, which concluded that a war crime could also be a crime against humanity, since the fundamental rules of human rights law are identical to the rules of the law of armed conflict.

[79] See *supra* note 76.

[80] Applying this test to the facts of the case, the Appeals Chamber upheld the convictions of the accused for a number of offences under article 2 of the Statute, and dismissed the convictions entered under article 3 (violations of the laws and customs of war, contained in common article 3 of the Geneva Conventions – murders, cruel treatment, and torture), which did not contain any element requiring proof of a fact not required by the offences under article 2 (grave breaches of the fourth Geneva Convention – wilful killings, wilfully causing great suffering or serious injury to body or health, torture, and inhuman treatment) (see paras. 1410–1426).

tions of the issue. It did not, for example, address the argument that the severity of the crimes operated as a counterweight to any question of unfairness to the accused and the latter could be addressed at the sentencing stage (the position in German law, the case law of the United States Military Tribunal established after World War II, prior case law of the ICTY itself, and the law in England and Wales). It could be argued that the device of cumulative charging and conviction does have a symbolic quality of reinforcing how reprehensible and grave were the offences of the accused, by enumerating more fully the criminality of the accused, and that that is consistent with the special international character of such crimes. As noted above, questions of unfairness could be addressed at the sentencing stage, by imposing concurrent sentences or by adopting a principle of totality in sentencing similar to that found in some national laws.[81] Moreover, considerations of unfairness to the accused are much less in the context of cumulative convictions than is generally the case with *ne bis in idem* in that there is no issue of repeated and prolonged prosecution. Apart from being open to criticism for the thinness of its reasoning, therefore (in so far as the Court simply asserted its conclusion to be the better one), the Court's conclusion on the issue in *Delalic* may not have been the most preferable one open to it.

[81] In England and Wales, for example, the principle of totality requires a court to consider the total sentence in relation to the entire circumstances of the offending and to the sentences normally imposed for other comparable crimes, rather than passing a sentence calculated by a simple arithmetical approach. The principle is provided for in statute, for example, in the Criminal Justice Act 1991, s. 28(2). See ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 226–231 (3rd ed., 2000); *Pearce*, *supra* note 44, at p. 1424, 692. The amended Rules of Procedure and Evidence of the ICTY provide that the Trial Chamber "shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused" (Rule 87(C)) (as noted in *Prosecutor* v. *Krstic* (Case no. IT-98-33), Judgment, 2 August 2001, para. 656). The ICTY has emphasised the importance of totality as a guide to sentencing: see, *e.g.*, *Prosecutor* v. *Delalic et al.* (Case no. IT-96-21), Decision, 9 October 2001, para. 43: "The Trial Chamber considers that the present case is best resolved by way of a single and global sentence in the case of each accused, thereby reflecting, in each case, the total criminality and culpability of the accused." See also *Prosecutor* v. *Vasiljevic* (Case no. IT-98-32), judgment, 29 November 2002, where the accused was convicted cumulatively and was sentenced to reflect the totality of his conduct and to avoid double punishment for the same act (the Trial Chamber referring to articles 23(1) and 24(1) of the Statute and Rules 101 (A) and 87(C)) (see Part XIV of the judgment)). The totality principle is also expressed in Rule 145(l)(a) of the Rules of Procedure and Evidence of the ICC.

The conclusion argued for here may be further supported by one of the decisions in the *Tadic* case, where the Trial Chamber held that there was no difference between crimes against humanity and war crimes in terms of the gravity or seriousness of the conduct involved.[82] Applying the *Blockburger* test, therefore, is not a matter of subsuming a less serious crime under the heading of a more serious offence; the test relates to the technical requirements of the offences, rather than the moral content of the conduct involved.[83]

A related issue that did not arise specifically in *Delalic* concerns treating a series of actions directed toward the same victim or victims as constituting, in effect, one offence and, therefore, resulting in only one charge against an accused. This scenario may be very likely in the context of the international crimes over which the ICC and the other criminal tribunals have jurisdiction. The offensive conduct may take place over a somewhat extended period and involve a series of incidents, *e.g.*, repeated rapes or destruction of property over a series of days in the one place and against the same victim(s). The ICC may then have to address the issue of how to categorise the conduct in terms of the number of offences and the effect on the overall sentence of the repetition of the wrongful conduct. Ashworth observes:

> Perhaps it could be said that in general the repetition of an offence against an established victim requires less deliberation and evinces less wickedness than the selection of a new victim. Yet the overall effect on the length or severity of a sentence should surely be little. If all other factors are held constant – a given number of offences committed over a given period; the nature and circumstances of violence, or the amounts involved in theft or fraud, or the degree of sexual violation – it is hard to see why the mere fact that the offences were committed against the same victim or, as the case may be, against different victims should make a substantial difference to the seriousness of the case. It is equally hard to see why the probably slight difference in overall gravity should be reflected in a decision to impose concurrent rather than consecutive sentences.[84]

In light of this reasoning, a preferable approach to this issue by the international criminal tribunals would be to minimise reliance on the concept of a single transaction as a basis for a single conviction in a case involving a series of incidents against one or more victims, and to punish the defendant accordingly as having committed a series of offences (taking into account questions of cumulation and totality at

[82] See *Prosecutor* v. *Tadic* (Case no. IT-94-1-A and IT-94-1-A*bis*), Judgment in Sentencing Appeals, 26 January 2000, para. 69.

[83] *Ibid.*, cf, *Akayesu*, *supra* note 68, para. 469.

[84] A. Ashworth, *supra* note 80, p. 195.

the sentencing stage). In the case of *Simic*, for example, the ICTY held that incidents occurring over separate days though within the same month and in relation to the same place were to be treated as two distinct and separate events and that a sentence was to be imposed accordingly, they could not be regarded as a single episode of criminality.[85] In this instance the time gap between the incidents would seem to clearly support the conclusion reached; in other cases, however, it may be more difficult to draw the line as in for instance, when there may be a lull or gap of only a few hours or less between the impugned actions alleged to constitute a single event. It is submitted that the best approach in such cases, in light of the reasoning set out by Ashworth, is to treat even instances where there may only a be a short time gap between the first act and the "continuation" or resumption of the acts against given victims as separate episodes and as the basis of separate charges.

5.3. *The Dissent in* Delalic

Judges Hunt and Bennouna dissented in *Delalic* on the issue of cumulative convictions. The dissenting judges agreed with the conclusion against cumulative convictions, but favoured a different test for determining whether or not offences were distinct and which offence was to be preferred in the event of cumulation. In an implied criticism of the majority's failure to justify its conclusion in a fuller way, the judges observed that they intended to give their conclusions as to "as to *why* cumulative convictions in relation to the same conduct, as well as cumulative penalties in sentencing, are impermissible".[86] The reasons given by the dissent in favour of non-cumulation are set out in the following passage:

> Prejudice to the rights of the accused – or the very real risk of prejudice – lies in allowing cumulative convictions. … [the prosecution's submissions do] not take into account the punishment and social stigmatisation inherent in being *convicted* of a crime. Furthermore, the number of crimes for which a person is convicted may have some impact on the sentence ultimately to be served when national laws as to, for example, early release of various kinds are applied. ... This may prejudice the convicted person notwithstanding that, under the Statute, the Rules and the various enforcement treaties, the President has the final say in determining whether a convicted person

[85] *Prosecutor* v. *Simic* (Case no. IT-95-9/2-S), Sentencing Judgment, 17 October 2002, paras. 71–75.

[86] *Prosecutor* v. *Delalic et al.* (Case no. IT-96-21), Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, 20 February 2001, para. 2.

should be released early. Finally, cumulative convictions may also expose the convicted person to the risk of increased sentences and/or to the application of "habitual offender" laws in case of subsequent convictions in another jurisdiction.[87]

These arguments seem open to a number of criticisms. First, the dissent refers to the rights of the accused without fully articulating what rights these are and explaining fully how cumulative convictions conflict with the same rights. The reference to the stigmatic effect of criminal conviction implies that cumulative convictions lead to *unfair* stigmatisation. However, the dissent does not explain how such convictions are *unfairly* stigmatic. If the accused has by his or her actions engaged in a series of very serious offences, then it may be argued that the accused's wrongdoing justifies the greater stigma that may attach to cumulative sentencing. As Ashworth points out (cited above), it is not clear why the concentration in a given incident of wrongful action is less objectionable, and therefore less deserving of more sustained punishment, than a similar level of wrongdoing committed in separate, discrete incidents. Secondly, the reference to national laws as to early release presupposes that those national laws reflect rights or entitlements of the accused; however, since national laws may vary, it is hard to see how they can be seen in terms of an entitlement of the accused that must necessarily prevail over any considerations in favour of cumulative charging in international tribunals. The solution to this issue may be the development of uniform national laws on the enforcement of Tribunal sentences, rather than in the avoidance of cumulation in convictions. Similarly, "habitual offender" laws may vary depending on the jurisdiction in question, and the implied presupposition of the dissent's argument that the accused is entitled to benefit to the maximum extent possible from such provisions is not one that the dissent justifies. Perhaps a better approach would again be the development of uniform national approaches as to the effect of prior decisions of international criminal tribunals.

As to the test to be applied, the dissent proposed a more flexible approach in preference to the "rigidly imposed choice"[88] proposed by the majority:

In our view the choice should involve a consideration of the totality of the circumstances of the particular case and of the evidence given in relation to the crimes charged, in order to describe most accurately the offence that the accused committed and to arrive at the *closest* fit between the conduct and the provision violated. This

[87] *Ibid.*, para. 23.
[88] *Ibid.*, para. 37.

would involve a consideration of *all* of the elements of the offences to determine whether one of the offences better or more specifically describes what the accused did.[89]

The argument made here, for the reasons set out above, is that the totality principle is best applied at the sentencing stage, rather than at the point of charging or entry of a conviction for certain offences.

5.4. *Recent Decisions*

In a number of recent decisions, the ICTY has followed the approach of the majority in *Delalic* on the issue of cumulative convictions: see, for example, *Jelisic*[90] *Krstic*,[91] *Kupreskic*,[92] *Kvocka*,[93] and *Vasiljevic*.[94] In the case of *Vasiljevic*, for example, cumulative convictions were entered, because the charges met the test in *Delalic* of containing materially distinct elements.[95]

VI. CHARACTER EVIDENCE AND *NE BIS IN IDEM*

One of the primary differences between the civil and common law systems in the field of criminal law concerns the law of evidence. In common law systems, a complex set of rules has developed governing the admissibility of evidence. In particular, important rules relating to the exclusion of certain types of evidence have emerged *(e.g.*, concerning hearsay or character evidence). The development of exclusionary rules is substantially attributable to the place of the jury in the

[89] *Ibid.*

[90] *Prosecutor* v. *Jelisic*, *supra* note 53, paras. 78–83.

[91] *Prosecutor* v. *Krstic*, *supra* note 80, paras. 664–689.

[92] *Prosecutor* v. *Kupreskic* (Case no. IT-95-16), Judgment, 23 October 2001, paras. 379–396.

[93] *Prosecutor* v. *Kvocka* (Case no. IT-98-33), Judgment, 2 November 2001, paras. 213–215.

[94] *Prosecutor* v. *Vasiljevic*, *supra* note 80, paras. 266–267. See also, *Naletilic*, *supra* note 44, paras. 718–719.

[95] *Ibid.*, para. 266: ''Convictions for the crimes enumerated under Articles 3 [violations of the laws or customs of war] and 5 [crimes against humanity] of the Statute based on the same conduct are permissible, as each contains a materially distinct element. The materially distinct element required by Article 3 is the requirement that there be a close link between the acts of the accused and the armed conflict. That required by Article 5 offences is that the offence be committed within the context of a widespread or systematic attack directed against a civilian population. Applying this test to the present case, convictions for murder as a violation of the laws or customs of war and any other crime charged under Article 5 of the Statute based on the same conduct are permissible.''

Anglo-American tradition. The role of lay people unfamiliar with legal rules and court practice gave rise to attempts to limit the admissibility of material that was thought likely to have a prejudicial effect if exposed to jurors with limited experience of weighing the significance of criminal evidence. In general, no such exclusionary rules developed in the adversarial tradition of the civil law, where the judge has a fact-finding role unfamiliar to a common law tradition (although the exclusionary rules in the latter tradition are exceptions to the general rule that all evidence is admissible; nonetheless, despite being exceptions to this general principle, these exclusionary rules make up a large part of the common law of evidence). The prevalent view in the civil law system is that the court should first consider all submitted evidence and may then determine its probative weight or lack of it.[96]

This general approach emphasising the admissibility of all evidence is consistent with the absence of a jury process in the ICC and the determination of questions of both law and fact by professional judges. However, the admission of what in the common law tradition is referred to as similar fact evidence has implications for double jeopardy protection.[97]

6.1. *Similar Fact Evidence*

Usually, in common law systems, character evidence, *i.e.*, evidence relating to the character of the accused generally and not bearing directly on the proof of the elements of the offence with which the accused is charged, is excluded from the trial because it is thought it will prejudice the accused in the eyes of the jury and prevent the latter from assessing the evidence bearing directly on whether or not the accused committed the specific offence with which he or she is charged.[98] Similar fact evidence is an exception to the exclusionary rule of char-

[96] K. Zweigert & H. Kötz, An Introduction to Comparative Law 274–275 (trans. by Tony Weir, 3rd ed., 1998). For a detailed discussion of the tension between the common law emphasis on fair trials and the civil law focus on the fact-finding role of a criminal court, see N. Jörg, S. Field & C. Brants, *Are Inquisitorial and Adversarial Systems Converging*?, in Criminal Justice in Europe: a Comparative Study (P. Fennell, B. Swart, N. Jörg & C. Harding, eds., 1995), and, generally, M. Delmas-Marty & J.R. Spencer, *supra* note 12. See also, C. Guillaume, *Inquisitoire-accusatoire devant les juridictions pénales internationales*, 68 Rev. Int'le Droit Pénal 149 (1997).

[97] See, *e.g.*, A.-M. La Rosa, *supra* note 10, pp. 637–642.

[98] For a discussion of civil and common law approaches to character evidence, see, J.R. Spencer, *Evidence*, in M. Delmas-Marty & J.R. Spencer, *supra* note 12, pp. 614–616.

acter evidence. Evidence of an accused's prior conduct may be admitted and may be used as evidence of a fact in issue in the present case if the prior conduct is of such an overwhelming or striking similarity (as the rule has traditionally been formulated) to the conduct forming the basis of the current charge that its probative weight outweighs any prejudicial effect it may have. It is, therefore, a matter of balancing the probative and prejudicial effect of admitting evidence. The threshold to be reached for such evidence to be admitted has traditionally been high: the similarity of the past and current conduct must be so striking that it would simply be inconceivable, in the light of general human experience, that the similarity with the offence charged in the current case must or could be considered as purely coincidental.[99]

6.2. *Recent Common Law Decisions*

A number of recent common law decisions specifically address the *ne bis in idem* or double jeopardy implications of the admission of evidence of prior conduct that has also been the subject of a prior trial leading to an acquittal, see, *e.g.*, the House of Lords decision in *R.* v. *Z.*[100] (overruling in part *Sambasivam*,[101] a decision of the Judicial Committee of the Privy Council). In *Z.*, it was held that admission of the evidence of three previous complainants did not infringe the principle against double jeopardy since the evidence was not being admitted to establish the guilt or innocence of the accused for offences for which he had already been tried, but to show, by similar

[99] See, *e.g.*, Lord Cross LJ in *Director of Public Prosecutions* v. *Boardman*, [1975] AC 421, who said that such evidence should be admitted in circumstances where it would be "an affront to common sense" to exclude it (at p. 456) and Lord Wilberforce LJ in the same case who observed that "[t]he probative force is derived, if at all, from the circumstances that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence. The jury may, therefore, properly be asked to judge whether the right conclusion is that all are true, so that each story is supported by the other" (at p. 444). However, more recent case law has tended to move away from this narrow approach based on striking similarity and evidence has been admitted that may be particularly relevant because, for example, it relates to a disposition of the accused: see, *e.g.*, *R.* v. *P.*, [1991] 3 All ER 337; *R.* v. *Clarke*, [1995] 2 Cr App R 425 (see also the earlier case of *Thompson* v. *R.*, [1918] AC 221). The differing approaches to be found in the case law reflect the difficulties experienced by the Courts in settling upon a clear and uniform standard for balancing the prejudicial and probative effects of admission.

[100] *Supra* note 32.

[101] *Supra* note 32.

facts, his guilt of the instant offence; therefore, the evidence was not inadmissible, and could be admitted by the trial judge in his or her discretion having regard to the relative probative and prejudicial effect of it. In contrast, the courts of both Canada and Australia adhere more closely to the approach in *Sambasivam* and have held that evidence relating to acts that have been the subject of a trial and acquittal should be excluded in view of double jeopardy protection (see, *e.g.*, the Canadian Supreme Court in *R.* v. *Arp*[102] and the Australian High Court in *R.* v. *Kemp*[103]), while the New Zealand Court of Appeal has recently followed the House of Lords's approach in *Z*.[104] The issue seems, simply a question of balancing two competing concerns - the probative value of the evidence versus the potential prejudicial effect with respect to a fair trial for the accused. Perhaps the judgments are based on an intuitive sense of the best approach based on judicial experience; clearly, however, there is no judicial consensus, at least across jurisdictions, on the best approach.

6.3. *Similar Fact Evidence and the International Criminal Tribunals*

Clearly, in the context of the ICC (and the *ad hoc* tribunals), no general exclusionary rule of character evidence exists, and such similar fact evidence could in that sense be regarded as automatically admissible, and not as an exception to an exclusionary rule. The Rules of Procedure and Evidence of the ICTY might be thought to have been more influenced by the common law tradition, in that, rather than stating that the Tribunal may consider all evidence (as do the Rules of Procedure and Evidence of the ICTR),[105] the General

[102] [1998] 3 SCR 339.

[103] 83 CLR 341.

[104] See *R.* v. *Degnan*, [2001] 1 NZLR 280.

[105] Rule 89(C) of the Rules of Procedure and Evidence of the ICTR (and of the Rules of Procedure and Evidence of the Special Court for Sierra Leone) states: "A Chamber may admit any relevant evidence which it deems to have probative value." Kittichaisaree observes that the trial procedure of the Yugoslavia and Rwanda tribunals reflects the adversarial nature of common law procedure, with the accused pleading "guilty" or "not guilty" to the charge against him or her: *supra* note 13, p. 304. Schabas observes that "[I]t is widely known that the Federal Rules of Evidence of the United States were influential in drafting the Rules of Procedure and Evidence [of the ICTY], largely the result of involvement in the process by such NGOs as the American Bar Association as well as the personal role of Judge MacDonald" and notes "[t]he Federal Rules have accordingly been consulted to assist in interpreting the provisions of the Rules" (W. Schabas, *Interpreting the Statutes of the ad hoc Tribunals*, in MAN'S INHUMANITY TO MAN 847–888 (L.C. Vohrah *et al.*, eds., 2003)).

Provisions on Evidence (see Rule 89(D)) make reference to the need to balance the probative value of evidence with the need to maintain a fair trial. Article 69(4) of the Rome Statute contains a similar provision on admission framed in terms of a balance between the probative and prejudicial value of evidence.[106]

Rule 93 of the Rules of Procedure and Evidence of the ICTY (and of Rwanda and Sierra Leone tribunals) expressly provides for the admission of evidence of a "consistent pattern relevant to serious violations of international humanitarian law", which it states, may be admitted in "the interests of justice", thereby removing any doubt as to the admissibility of evidence that could be characterised in common law terms as similar fact evidence. There is no equivalent provision in the ICC Statute or Rules of Procedure and Evidence.[107]

However, Rule 63(5) of the latter further provides that "[t]he Chambers shall not apply any national laws governing evidence, other than in accordance with article 21" (Article 21 contains a general provision on the law applicable before the ICC, and makes reference to international law and the laws of national states as sources from which the Court may determine its own rules of conduct). The admissibility of the type of evidence admitted here, therefore, will be at the discretion of the Court.

La Rosa points out that the admission of evidence of conduct that has sustained prior convictions, on the basis that it is evidence of a consistent pattern of conduct, may result in a violation of *ne bis in idem* in that the same evidence could ground further convictions (the issue addressed in the *Sambasiavam* and *Z.* cases referred to above).[108]

> This provision [Rule 93 of the rules of Procedure and Evidence of the ICTY concerning a prior consistent pattern of conduct on the part of the accused] calls to mind the concept of "similar facts" under common law, except for the fact that it makes

[106] Rule 63(2) of the Rules of Procedure and Evidence of the ICC states: "A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69."

[107] Although there is no equivalent general provision in the Statute or Rules of Procedure and Evidence of the ICC, one indirectly related provision exists with respect to offences with a sexual element. Here, similar fact type evidence is excluded as regards victims or witnesses; it is not excluded, however, as regards the accused. Rule 171 provides: "In the light of the definition and nature of the crimes within the jurisdiction of the Court, and subject to article 69, paragraph 4, a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness."

[108] A.-M. La Rosa, *supra* note 10, p. 323.

mention of a "consistent pattern of conduct relevant to serious violations of international humanitarian law"... if interpreted too liberally, this exception to the exclusion of character evidence runs the risk of introducing evidence which has negligible probative value but is liable to cause serious prejudice to the accused. Moreover, if this exception admits evidence of judicial antecedents, the accused runs the risk of being tried again for the same crime, in contravention of the principle non bis in idem...

However, given that the ICC chambers will be staffed by professional and experienced judges, the likelihood that the prejudicial effect of such evidence will unfairly tilt the Court's findings against the accused is arguably less than is the case in a jury system (the general rationale for the exclusion of character evidence in the common law tradition, as noted above, relates to the role of the jury as triers of fact). One possible approach to the issue would be to admit such evidence, but not to treat it as being alone a sufficient basis for a conviction, other accompanying or corroborating evidence being necessary. Adoption of such an approach in the ICC and other international criminal tribunals, coupled with the role of the judges as arbiters of fact, could ensure that an exaggerated significance is not attributed to evidence that has sustained a prior conviction or that such evidence might be used to compensate for a lack of compelling evidence in a current case.

VII. CONCLUSION

The inclusion of the principle of *ne bis in idem* in the Statutes of the various international criminal tribunals affirms its importance on an international level. A number of aspects of the rule in the context of the ICC were addressed in this article: prosecutorial appeals, cumulative sentencing, and evidence of prior convictions. The exact operation of the principle in these areas still poses some questions, despite the lengthiness of the negotiations leading up to the signing of the Rome Statute. To a certain extent, these remaining questions reflect the compromise necessary between different legal systems in order to establish a new international approach. The ICC and other international tribunals must put such inevitable compromise into practice in international trials; some tentative proposals as to how best to achieve this in the context of *ne bis in idem* were made here:

1. the strict construction of provisions allowing for prosecutorial appeals and for revisions of earlier judgments;
2. a reconsideration of the question of cumulative convictions; and

3. the relevance of the common law tradition concerning character evidence in the context of *ne bis in idem* concerns and the ICC and *ad hoc* tribunals to the extent that the ICC and the *ad hoc* tribunals should not permit convictions solely on the basis of such evidence and should require corroboration.