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THE *NE BIS IN IDEM* PRINCIPLE AND ALLEGED DRIFTS
IN THE INTERNATIONAL PRACTICE:
THE “MISTRIAL WITHOUT PREJUDICE” IN THE KENYAN ICC CASES

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The *ne bis in idem* principle and alleged drifts in the international practice: the “mistrial without prejudice” in the Kenyan ICC cases

Jean Paul Pierini

Abstract

La “Trial Chamber” della Corte penale internazionale (CPI) ha recentemente concluso l’ultimo procedimento nei casi riguardanti la situazione keniana con una decisione di “mistrial” abortiva del procedimento senza pregiudizio per il successivo esercizio dell’azione penale. La “Trial Chamber” ha in particolare ritenuto che l’accusa non fosse “genuinamente debole” a causa delle interferenze e che una assoluzione degli accusati sarebbe stata gravemente ingiusta. Il presente scritto focalizza l’attenzione sulle premesse e sulle possibili conseguenze della suddetta decisione e in particolare sull’affermazione che l’art. 20 dello Statuto della CPI non è più in linea con le legislazioni processuali penali che progressivamente hanno introdotto “rimedi straordinari” al fine di ri-processare, nell’interesse della giustizia, individui assolti in via definitiva. Nello scritto sono pertanto analizzati lo stato attuale ed i trend relativi al principio del *ne bis in idem* nella sua applicazione “internazionale”, avendo riguardo alla giurisprudenza delle corti che hanno giurisdizione in materia di diritti dell’uomo, della Corte europea di giustizia e dei tribunali internazionali. Il fine di tale analisi è di verificare se la tendenza all’espansione della portata oggettiva del principio è in qualche misura “bilanciata” dall’introduzione progressiva dei suddetti rimedi straordinari.

The Trial Chamber of the International Criminal Court (ICC) recently terminated the last trial in the “Kenyan cases” declaring, as a consequence of a finding of no case to answer, a “mistrial without prejudice” for subsequent prosecutions. The Chamber found the prosecution not to be “genuinely weak” due to the politicization of the case, a hostile climate against the Court and interferences with the proceeding and estimated an acquittal to be grossly unjust. The paper focusses on the premises and possible consequences of the majority opinion and particularly on the assertion that article 20 of the ICC Statute is no longer in with criminal legislations progressively introducing “extraordinary remedies” in order to retrial in the interest of justice acquitted individuals. Accordingly, the paper analyzes the current stand of the *ne bis in idem* rule in its “international” application (characterized by a relevant potential for domestic and cross-jurisdictional influence) having regard to the jurisprudence of Human Rights bodies, and international criminal tribunals. The aim of this analysis is to verify if the current trend towards the extension of the principle is to some extent “balanced” by the progressive introduction of extraordinary remedies allowing the retrial of finally acquitted defendants.

Keywords

Ne bis in idem – revisione – annullamento del giudizio – rimedi straordinari – interferenze con il procedimento – procedimenti viziati – poteri inerenti – Corte penale internazionale – tribunali penali internazionali – diritti dell’uomo – Corte europea di giustizia - reati contro l’amministrazione della giustizia internazionale

Ne bis in idem – reopening - retrial – mistrial – extraordinary remedies – interferences – tainted proceedings – inherent powers – International Criminal Court – International Criminal Tribunals – European Court of justice - human rights – Offences against the administration of justice

THE *NE BIS IN IDEM* PRINCIPLE AND ALLEGED DRIFTS IN THE INTERNATIONAL PRACTICE: THE “MISTRIAL WITHOUT PREJUDICE” IN THE KENYAN ICC CASES

by Jean Paul Pierini

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1. Introduction

On April 5, 2016, the Trial Chamber V(A) of the International Criminal Court (ICC) terminated the trial in the “Kenyan cases” against Mr. *Ruto* and Mr. *Sang* and declared, as a consequence of a finding of no case to answer, a “mistrial without prejudice”¹ for subsequent prosecutions.

The Trial Chamber found the prosecution not to be “genuinely weak” due to the politicization of the case, a hostile climate against the Court and interferences with the proceeding, although such interferences could not be attributed, based upon available evidence, to the two accused. In the given circumstances, the majority estimated an acquittal to be grossly unjust.

This paper focusses on the premises and possible consequences of separate approach followed in the majority opinion of the mistrial decision. The “premises” are represented by the assertion of judge *Fremr* that article 20 of the ICC Statute is no longer in with criminal legislations progressively introducing “extraordinary remedies” in order to retrial in the interest of justice acquitted individuals.

Upon highlighting in the second paragraph, the circumstances of the decision, it will be shown in the third paragraph that such premises are not only wrong, but are also of an unclear relevance, if any, in the context article 21 of the Statute and applicable law.

In the fourth paragraph, we will consider the creative preemptive remedy of a mistrial not entailing a bar for subsequent prosecutions, imported with undeniable and intriguing eloquence by judge *Oboe Osuji*, will be considered. In the fifth paragraph we will analyze the current stand of the *ne bis in idem* rule in its “international” application (characterized by a relevant potential for domestic and cross-jurisdictional influence) with reference to the jurisprudence of the European Court of Justice (ECJ), trends emerging from the jurisprudence of human rights bodies and also recent decision of international courts and tribunals.

In the following paragraphs, while dealing with the *ne bis in idem* principle, references to the double jeopardy or to the *autrefois* convict or acquit rule reflect specific references made in the majority opinion. The reader is supposed to be familiar with such principles, at least in respect of the identity of the material fact rather than the offence and also with the circumstance that the double jeopardy may attach much earlier in a proceeding. To the same extent references are made to the *res iudicata*, the finality of findings and estoppel.

2. The circumstances of the decision

The “mistrial decision” *de facto* buried the original strategy aimed at the affirmation of the responsibilities of the so called “Ocampo’s six” for crimes against humanity committed in Kenya during the post electoral violence and riots in 2007. The termination decision followed the decision of

¹ ICC, Decision of 5 April 2016, Trial Chamber V(A), Case n. ICC-01/09-01/11-2027-Red-Corr 16-06-2016 1/259 NM T, *The Prosecutor / William Samoei Ruto and Joshua Arap Sang, Decision on Defence Application for a Judgment of Acquittal*.

Trial Chamber V(B) on withdrawal of the charges (inherently without prejudice for subsequent prosecutions) against *Uhuru Kenyatta* in March 2015².

The outcome of the Kenyan cases, despite not being prejudicial for prosecutions in better times or for better prosecutions, raised a widespread outcry about betrayed expectations of justice for victims and questions as to who is to blame for the failure. The prosecutor itself released a statement on April 6, 2016³ asserting that the Chamber had endorsed the Prosecution's position that the case had been severely undermined by witness interference and politicization of the judicial process and that the decision further noted that other evidence could have been available to the Prosecution «had it been able to prosecute the case in a different climate, less hostile to the Prosecution, its witnesses and the Court in general».

The collapse of the case seemed likely since the Appeals Chamber decision reversing the Trial Chamber decision partially granting the Prosecutor's request for the admission of prior recorded testimony for the truth of its contents. The Trial Chamber had applied in four circumstances out of sixteen, the amended provision contained Rule 68(2). The amendment to Rule 68 with the insertion of *sub*-paragraphs (c) and (d) adopted on November 2013 by the Assembly of States Parties in order to allow the admission of recorded testimony where a witness died or is presumed dead and in situations of interference. The Trial Chamber had held the amendment to apply retrospectively as not detrimental to the rights of the accused and rather "neutral" because in theory applicable also to the advantage of the accused. Upon the quashing of the admission of the evidence, the accused moved for an early termination of the case in the form respectively of an acquittal (*Mr. Ruto*) and a declaration of no case to answer (*Mr. Sang*) according to the non-statutory, procedural provisions enshrined in procedural order n. 5, previously agreed among the parties and inspired by the purpose of article 64(2)⁴. The adherence of the majority decision on the mistrial to the procedural decision has itself been questioned by the dissenting judge *Corbuccia*.

In a follow up of the case, the Trial Chamber V(A) declared, this time judge *Eboe-Osuji* dissenting, its lack of jurisdiction to entertain the request for reparations due to the absence of a conviction as a consequence of the prior termination of the case⁵. This closed the window previously left open in the "mistrial decision" for reparation, even in the absence of conviction, by judge *Eboe-Osuji's* in what can be viewed *ex post* as a "minority consideration" in his separate majority opinion.

3. The alleged obsolescence of art. 20(1) of the ICC Statute in judge *Fremr's* opinion

The mistrial decision in the case of *Mr. Ruto* and *Mr. Sang* was adopted by a majority agreeing about the finding of no case to answer, disagreeing "in theory" on the legal consequences of such finding and in the end able to agree solely because judge *Fremr* gave up its "first choice". He accordingly, joined judge *Eboe-Osuji's* departure from the ICC Statute towards a mistrial decision⁶.

² ICC, Decision of 3 March 2015, Trial Chamber V(B), Case n. ICC-01/09-02/11-1005 13-03-2015 1/7 EC T, *The Prosecutor/Uhuru Muigai Kenyatta, Decision on the withdrawal of charges against Mr. Kenyatta*, 1.

³ Statement of the Prosecutor of the International Criminal Court, *Fatou Bensouda*, regarding Trial Chamber's decision to vacate charges against Messrs. William Samoei Ruto and Joshua Arap Sang without prejudice to their prosecution in the future, <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-160406>.

⁴ ICC, Decision of 3 June 2014, Trial Chamber III(A), Case n. ICC-01/09-01/11-1334 03-06-2014 1/20 RH T, *The Prosecutor/William Samoei Ruto, Joshua Arap Sang, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on "No Case to Answer" Motions)*. In the decision, despite the fact that the defense of *Mr. Ruto* stressed the Court's inherent powers to determine that there is no case to answer, the Chamber relied on the Court's power to rule on any other relevant matter, as contained in Article 64(6)(f) of the Statute and on article 64(2), para 15.

⁵ ICC, Decision of 1 July 2016, Trial Chamber V(A), Case n. ICC-01/09-01/11-2038 01-07-2016 1/6 EK T, *The Prosecutor /William Samoei Ruto, Joshua Arap Sang, Decision on the Requests regarding Reparations*.

⁶ ICC, *The Prosecutor /William Samoei Ruto, Joshua Arap Sang, Decision on Defence Application for a Judgment of Acquittal*, cit., para 148: «judge *Eboe-Osuji* concludes that a mistrial should be declared and that the proceedings should end in this manner. I generally agree with my esteemed colleague that there was a disturbing level of interference with witnesses, as well as inappropriate attempts at the political level to meddle with the trial and to affect its outcome. Although these circumstances had an effect on the proceedings and appear to have influenced the Prosecution's ability to produce more (credible) testimonies, I do not consider the impact to have been of such a level so as to render the trial null and void».

The composition of the disagreement within the majority occurred when judge *Fremr* with reference to the special circumstances of the case and the interferences with witnesses, made the following astonishing notation: «the overly strict wording of Article 20 of the Statute [...] is no longer in line with the contemporary criminal laws of numerous national jurisdictions I therefore find it appropriate to leave open the opportunity to re-prosecute the accused, should any new evidence that was not available to the Prosecution at the time of the present case, warrant such a course of action»⁷.

The notation is inasmuch disturbing as there is no further reasoning about the relevance that should be attached to an alleged evolution of domestic criminal legislation and if the “misalignment” of article 20 could mandate the departure from the Statute in the shape of the choice for a *tertium genus* of judgment, being neither an acquittal nor a conviction. As a matter of fact, legal implications of the alleged obsolescence of the statutory provision and questioning article 21 and applicable law are left totally unaddressed in the opinion.

Criminal legislations relied upon by judge *Fremr*, include “Part 10 of the Criminal Justice Act 2003 of England and Wales” which inspired a similar legislation in Australia, and effectively introduced narrowly stated exceptions to the *autrefois* rule.

Another criminal legislation quoted by judge *Fremr* does not. The provision enshrined in paragraph 362(4) of the German Code of Criminal Procedure or *Strafprozeßordnung* (*StPO*) establishes an extraordinary proceeding aimed at the reopening (*Wiederaufnahme*) of the proceeding at a detriment of a person acquitted with an irrevocable final decision upon his confession within a judicial proceeding or in extrajudicial context («wenn von dem Freigesprochenen vor Gericht oder außergerichtlich ein glaubwürdiges Geständnis der Straftat abgelegt wird»)⁸. The *sub*-paragraphs (1) – (3) of paragraph 362 allow further for such a reopening respectively when⁹ untrue or forged documents had been presented to the accused’s discharge and witnesses or expert witnesses had either made their deposition at the discharge of the accused by intentionally or negligently violating their obligations under oath or had intentionally made false statements and finally when a judge or a juror concurring in the decision had made himself, in the specific context, guilty of a breach of his official duties. The above provision, far from supervening to article 20 of the Statute, reflect a long standing rule in the German criminal procedure, dating back to paragraph 402 of the *Reichsstrafprozeßordnung* (*RStPO*) of 1877¹⁰. A recent draft bill proposed the insertion of a *sub*-paragraph n. 5 in paragraph 362, allowing for the reopening of a final proceeding *contra reum* when supervening technical investigation techniques show that the acquittal was wrong¹¹. The bill, as of today, has not been approved.

The introduction on 11 April 2013 of extraordinary review against an irrevocable final decision at the detriment of the former suspect in the Dutch Code of Criminal Procedure¹² differently from the

⁷ ICC, *The Prosecutor / William Samoei Ruto, Joshua Arap Sang, Decision on Defence Application for a Judgment of Acquittal*, judge *Fremr*, cit., para 147. The judge quotes in this respect, footnote 210, «part 10 of the Criminal Justice Act 2003 of England and Wales, Section 362(4) of the German Code of Criminal Procedure, Articles 482a-i of Dutch Code of Criminal Procedure (added on 11 April 2013), which – in certain circumstances – allow for re-prosecution in case of new evidence, not available to the prosecuting authority at the time of the trial. See also Article 4(2) of Optional Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedom».

⁸ On the Provision, See K. BAJOHR, *Die Aufhebung rechtsfehlerhafter Strafurteile im Wege der Wiederaufnahme*, Peter Lang, Frankfurt am Main, 2008.

⁹ A. GRÜNEWALD, *Die Wiederaufnahme des Strafverfahrens zuungunsten des Angeklagten*, in *ZStW*, 120 (2008), n. 3, pp. 545.

¹⁰ S. PABST, *Wider die Erweiterung der Wiederaufnahme zuungunsten des Angeklagten Eine zu Recht unterbliebene Reform*, *ZIS*, 2/2010, p. 127, in http://www.zis-online.com/dat/artikel/2010_2_411.pdf. fn. n. 17, «Der bisherige § 362 StPO sei trotz des fehlenden Gesetzesvorbehaltes in Art. 103 Abs. 3 GG jedoch zulässig, da bei dessen Auslegung das bei Inkrafttreten des GG geltende Prozessrecht zu berücksichtigen sei. BVerfGE 2, 249 (252)« ... § 362 StPO stimmt im Wesentlichen mit der Regelung des para 402 RStPO von 1877 überein. Diese traditionellen Beschränkungen sind deshalb als immanente Schranken des Verfahrensgrundrechts aus Art. 103 Abs. 3 GG anzusehen». A. GRÜNEWALD, *Die Wiederaufnahme des Strafverfahrens zuungunsten des Angeklagten*, *ZStW* 120 (2008), n. 3, pp. 545, considers the practice of extraordinary appeals under the Prussian legislation and in its historical perspective (pp. 550).

¹¹ Bundesrat Drucksache 222/10, 21 April 2010 (but See also the previous Drucksache 16/7957 dated 30 January 2008) aimed at the introduction of a new provision, 362(5).

¹² Under article 482a, the Supreme Court may, on application of the Board of Procurators General revise to the detriment of the former suspect an irrevocable final decision of the courts in the Netherlands on acquittal or dismissal from prosecution if it is in the interest of justice, provided that new fact not known to the judge are discovered, the decision to be revised was based upon false documents or a witness or expert is guilty of perjury and if the proceeding was tainted and the judge was guilty of corruption. The above extraordinary proceeding is outlined in articles 482b – 482i.

above provisions of the German *Strafprozessordnung*, effectively postdates the adoption (drafting) of the Rome Statute.

The opinion also quotes, in order to support the assessment of the obsolescence of article 20 of the Statute, Article 4(2) of Protocol VII to the European Convention on Human Rights (ECHR), allowing for an extraordinary reopening of final decision in accordance with the law of the concerned State party. The provision pre-dates the adoption of article 20 by several years.

Considering judge *Fremr*'s notation narrowly, two out of four legislations quoted do not support a conclusion that article 20 is "no longer in line". Nevertheless, the opinion refers to "contemporary criminal laws of numerous national jurisdictions" without substantiating if such national laws outweigh or not those sticking to a narrow a prohibition and not establishing extraordinary reopening of cases at the accused's detriment.

It should also be observed that the reference to Article 4(2) of Protocol VII to the *ECHR*, is intrinsically contradictory, as the provision, is also evidence for the long standing existence and acknowledgment of extraordinary remedies against irrevocable final decisions, also at the detriment of acquitted persons.

Article 14(7) of the international covenant on political and civil rights (ICCPR) was apparently more restrictive establishing that «no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country». The provision has been the object of declarations and reservations at the time of ratification by Austria, Finland, Iceland and the Netherlands whilst Denmark amended its reservation on April 2, 2014¹³. According to the 2007 General Comment n. 32, Article 14, paragraph 7 does not prohibit retrial of a person convicted *in absentia* who requests it, but applies to the second conviction and ... «it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal»¹⁴. The Previous General Comment n. 13, dating back to 1984, contained the following distinction «some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases ... It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of *ne bis in idem* as contained in paragraph 7»¹⁵.

Similarly to the above provision of the ICCPR, article 50 of the European Union Charter of fundamental rights doesn't expressly establish an exception in respect of the reopening of final acquittal of conviction.

Extraordinary remedies, where not prevented by constitutional constraints or domestic legal view as to the reach of the *ne bis in idem* principle, could be found also in early liberal criminal codifications.

The delegates at Rome diplomatic conference simply chose not to introduce an extraordinary remedy as the "revision" *contra reum* in the Statute in a historical moment in which such remedies were far from being new or unknown.

Further the reopening or revision of a final case at the accused's detriment had previously not been introduced in the ICTY's Statute and Rules of Procedure and Evidence (RPE) and the issue, as will be observed in the fourth paragraph, surfaced as a matter of inherent powers of the Court.

A recent exception amongst courts and tribunals composed by international judges, is represented by the "Kosovo Specialist Chambers"¹⁶, established upon an amendment of the Kosovo Constitution and the passing of law No.05/L-053¹⁷ on August 3, 2015. The said law established as

¹³ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

¹⁴ CCPR/C/GC/32, adopted by the Human Rights Committee at its Ninetieth session, Geneva, 9 to 27 July 2007, http://ccprcentre.org/page/view/general_comments/27741.

¹⁵ Adopted at the Twenty-first Session of the Human Rights Committee, on 13 April 1984, <http://www.refworld.org/docid/453883f90.html>.

¹⁶ On the Specialist Chambers, See R. MUHARREMI, The Kosovo Specialist Chambers and Specialist Prosecutor's Office, in ASIL Insights, Vol. 20, Issue 11, May 26, 2016, https://www.asil.org/insights/volume/20/issue/11/kosovo-specialist-chambers-and-specialist-prosecutors-office#_ednref2.

¹⁷ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, at <http://www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf>

“Extra-ordinary Legal Remedy” the reopening of the proceeding also at the accused’s detriment in circumstances in which the case has been tainted a result of a criminal offence committed by the accused or someone acting on his/her behalf or in his/her interest (art. 48(2)(a) and (b) in conjunction with paragraph (3)) and where new facts are discovered or new evidence is produced «which was not known at the time of the proceedings ... and which, alone or in connection with previous evidence, would have been a decisive factor in reaching a decision and would have fundamentally altered the balance of evidence in the case, leading to a miscarriage of justice were it to be ignored». Whilst the first situation seems to be rooted, with a slightly different wording, in the Kosovo Criminal procedure code¹⁸ (art. 423(1.1) and (1.2) in conjunction with (2)), the discovery of new facts and evidence appears not be any longer limited to circumstances in which such evidence appears likely to justify the acquittal¹⁹. Nevertheless, the reopening of a case at the accused’s detriment due to new evidence is mirrored in criminal procedure codes succeeding to the former Federal Republic of Yugoslavia criminal procedure laws dating back to 1948 (articles 292 and 293) and 1953 (articles 415 to 418)²⁰. and their ancestor inspired by the Austrian criminal procedure. Accordingly, it seems more appropriate to assess the provision to be applied by the Specialist Chambers as marking a “fluctuation” within already existing legal traditions, rather than a real development.

In the light of the above considerations and taking the notation in the first part of the mistrial decision as it is, the solution in the end agreed contradicts the Statute²¹ and is by far more radical than the contemporary domestic criminal legislation relied upon by judge *Fremr* in order to argue the obsolescence of article 20 of the Statute. Accordingly, the attempt to derive consequential assumptions from the reasoning “recomposing” the majority results is a contradiction with the outcome of the case.

4. The mistrial: questionable legal imports in judge *Eboe Osuji*’s opinion

The *rationale* in judge *Eboe Osuji*’s majority opinion for the departure from an acquittal in accordance with the Statute towards a declaration of mistrial is introduced by a question in respect of the “no case to answer” finding: was the prosecution genuinely weak or rather affected by interference and political intimidation? In answering what appears, based upon the outcome of the decision, a rhetorical question, the judge declares to be unable to do because of the tainted process and therefore to prefer a mistrial²².

Whilst a “genuine weakness” would, according to the opinion, have mandated an acquittal upon a no case to answer motion, a conduct «in the nature of obstruction to justice, such as troubling incidence of interference with witnesses or undue meddling from an outside source, that is capable of prejudicial impact on the case, it should be proper exercise of discretion for the Trial Chamber to declare a mistrial without prejudice ... is so even in the absence of evidence showing that the accused played any part in the interference or meddling»²³.

¹⁸ Criminal No. 04/L-123 Procedure code, at:

www.legislationline.org/download/action/download/id/.../Kosovo_CPC_2012_en.pdf

¹⁹ In a similar shape See also the Criminal procedure act of Croatia of September, 26, 1997, art. 422, at <http://www.wipo.int/wipolex/en/details.jsp?id=15444>

²⁰ See, at this purpose, the Criminal Procedure Code of Bosnia and Herzegovina of 2003 (articles 327 and 328) at: <http://www.ohr.int/ohr-dept/legal/oth-legist/doc/criminal-procedure-code-of-bih.doc>, but not any longer the Serbian criminal procedure code.

²¹ According to W. SCHABAS, *The Mistrial, An Innovation in International Criminal Law*, in *PhD studies in human rights*, 7 April 2016, <http://humanrightsdoctorate.blogspot.it/2016/04/the-mistrial-innovation-in.html>, «Article 84 of the Rome Statute poses another obstacle [...] It allows a revision of a judgment of conviction in the event of new evidence being available [...] There is no similar procedure in the case of acquittal [...] Allowing the Prosecutor to get a second chance if new evidence comes available is not consistent with this provision and with the vision of the drafters of the Statute».

²² ICC, *The Prosecutor /William Samoei Ruto, Joshua Arap Sang, Decision on Defence Application for a Judgment of Acquittal*, Judge *Oboe Osuji*, cit., para 2.

²³ ICC, *The Prosecutor/William Samoei Ruto, Joshua Arap Sang, Decision on Defence Application for a Judgment of Acquittal*, Judge *Oboe Osuji*, cit., paras 7-8.

Such a decision would preserve the presumption of innocence of the accused on one side and allow the Prosecution «the freedom to re-prosecute the accused at a later time without the constraints of double jeopardy»²⁴. This reasoning is recalled later in the opinion whereas judge *Oboe Osuji* argues, in respect of the critical test and standard for review of evidence for a no case to answer decision, that the «basic assumption comprises the following propositions ... [t]he prosecution case was conducted freely, not only in the presentation but also the investigation; yet, untroubled by any incidence of undue interference or intimidation, the case remained weak ... [o]n that premise, the case must be terminated with a judgment of acquittal entered in favor of the accused»²⁵.

Once theorized the pre-requisites for an early acquittal judge *Oboe Osuji* concluded to be unable to conclude that such a premise was valid for the no-case motions and compelled to declare a mistrial²⁶.

The finding excluding a “genuine weakness” of the prosecution was based upon the notations about «troubling direct interference with witnesses» in the previous Chamber decision in respect of the application of Rule 68. The extent of the evidence of interference was in the judge’s view, enough to make an acquittal of the accused “grossly unjust” taking into consideration the “atmosphere of intimidation” surrounding the trial²⁷. Interestingly judge *Oboe Osuji* felt obliged to distinguish the decision from a situation affecting «the ability of the Chamber itself to do justice in the case». The later terminology reminds the basics for jury nullification and the declaration of a mistrial. In an attempt to conjugate conflicting thoughts, the opinion affirms the such ability be unaffected as the conduct - which could not be attributed to the accused - did not permit the Chamber «to conclude that witnesses themselves had been left free to come forward in the first place or to testify freely even when they appeared in person before the Chamber»²⁸.

Further, the opinion asserts that «the statics generated by the pro-conviction campaign were not as troubling - in the particular circumstances of this case as the impact of the pro-acquittal campaign ... [t]he principal difference, of course, had to do with the reasonably likely impact on witnesses». The standards for the adoption of a decision of mistrial rather than an acquittal are according to the opinion to be found in existence of a situation obstructing «a clear judicial view that the Prosecution case had collapsed under the sheer weight of its own weakness»²⁹.

The departure from the Statute and the adoption of a mistrial decision has been asserted as a matter of justice and justified in the light of an alleged open list of circumstances under which domestic courts used to declare a mistrial. Such non exhaustive circumstances included the impairment of confidentiality, the obvious situation in which a jury is unable to deliver a verdict and struck, but also serious misconduct³⁰, procedural errors and obstruction to justice³¹.

The relevant source of power for a mistrial declaration was found³² in articles 64(2) and (4) as a matter of fairness of the trial and ... in the inherent powers doctrine by referring to the string of cases supporting inherent powers of international organizations and bodies (of non- judicial character)

²⁴ *Ibidem*.

²⁵ *Ibid*, para 139.

²⁶ *Ibid*, para 140.

²⁷ *Ibid*, para 144.

²⁸ *Ibid*, para 141. Perhaps, this idea impairment of the courts ability, is echoed in the definition of “influencing” under 70(1)(c) of the Statute in *The Prosecutor /Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case n. ICC-01/05-01/13-1989-Red 19-10-2016, Trial Chamber VII, *Judgment pursuant to Article 74 of the Statute*, 19 October 2016, para 46, referring to «interference with the witness in such a manner also defeats the principles of immediacy and orality and renders impossible any adequate assessment of the credibility of the witness».

²⁹ *Ibid*, para 170.

³⁰ Prosecutorial misconduct may bar a retrial upon a mistrial if it was aimed at moving the defendant to seek a mistrial decision. At this purpose, See United States Supreme Court, in *Oregon v. Kennedy*, 456 U.S. 667, 675–76 (1982), holding that the «rationale for the exception to the general rule permitting retrial after a mistrial declared with the defendant's consent is illustrated by the situation in which the prosecutor commits prejudicial error with the intent to provoke a mistrial»; in similar terms also *Commonwealth vs. Stuart Merry*, 453 Mass. 653 January 6, 2009 - April 16, 2009 Suffolk County, at <http://masscases.com/cases/sjc/453/453mass653.html>. Misconduct by the defense counsel in the form of prejudicial comments about the prosecutor, has been dealt in *Arizona v. Washington*, 434 U.S. 497 (1978), asserting that misconduct resulting from court records does not require a specific assessment of manifest necessity of the mistrial.

³¹ *Ibid*, paras 180-186 and, in respect of obstruction to justice, para 214.

³² *The Prosecutor/William Samoei Ruto, Joshua Arap Sang, Decision on Defence Application for a Judgment of Acquittal*, Judge *Oboe Osuji*, cit, para 192.

currently characterizing the assertion of inherent powers to issue *subpoenas*³³. Article 64 was also the basis on which the Court accepted the remedy of stay of proceedings, at the instance of accused persons, in consequence of abuse of process and the no-case motion in the case³⁴. The opinion also quoted also the previous Trial - chamber *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*³⁵. The quote is noteworthy as the Appeals Chamber reviewed the terminology of the Trial Chamber decision referring to "implicit" powers rather than to "inherent" ones and addressed the extent of imports of other sources under article 21 of the Statute³⁶.

The import of a mistrial requires the existence of a *lacuna* in the Statute and the "Rules", the possibility to derive a mistrial declaration from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime.

If the level of deference to the last mentioned laws mandated under the "as appropriate" clause is still in the need of a clarification, it may be excluded with a sufficient degree of certitude that the derivation under article 21 consist in the picking-up of tool of choice, insulated and systematically inconsistent with the statute and solely because such tool is found in the world's emporium of procedural tools. Such a questionable approach is even less a derivation if the "tool" is selected with the knowledge and intent use apply it for a purpose and extent other than that it was developed for in domestic systems.

The authorities relied upon in the opinion includes ancient British cases which are hardly relevant in the subject matter. *Rex v Wilkes*³⁷, was mentioned in the opinion as a matter of external interferences, in the shape of media interventions, and behavior comparable to the politically orchestrated campaigns in the Kenyan cases³⁸. One could also question if the quote of Lord Mansfield invoking "fiat justitia, ruat caelum" before reviewing the conviction of the accused, is proper and could support a mistrial deferring justice to better times.

Other authorities relied upon in the opinion in order to underline the existence of a wide judicial discretion in declaring a mistrial are simple cases of hung juries. This is true for *United States v. Perez*³⁹ whereas the SC set the "manifest necessity" standard for a mistrial, narrowly limiting the power of appellate courts to question a trial judge's mistrial order⁴⁰ and observing that «it is impossible to define all the circumstances, which would render it proper to interfere». While quoting from the Supreme Court Judgment, judge *Oboe Osuji* stated that the «mistrial outcome is inspired by the remedy of a similar name in some jurisdictions around the world, where, in appropriate circumstances, a criminal court may declare a mistrial - even without the consent of the accused or over his objection»⁴¹.

In a similar shape, the majority opinion reproduce phrasing from the United States Supreme Court decision in *Illinois v. Sommerville*⁴², marking the return to the "manifest necessity" standard, abjuring «the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial» and

³³ ICJ, *Reparations for Injuries Suffered in the Service of the United Nations case*, ICJ Rep. (1949) p. 171. Curiously, decisions relied upon in respect of *subpoenas* appears to follow a path closer to the "implicit powers" essential to the performance of duties of International organizations and institutions, rather than to the "inherent powers" of judicial bodies as such.

³⁴ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on Defence Application for a Judgment of Acquittal*, judge *Oboe Osuji*, cit, para 192.

³⁵ ICC, Decision of 17 April 2014, Trial Chamber V, case n. ICC-01/09-01/11-1274-Corr2, *Prosecutor/Ruto & Sang, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*, para 67.

³⁶ *Judgment on the appeals of William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*, case n. ICC-01/09-01/11-1598, Appeals Chamber, 9 October 2014, para 101. The Appeals Chamber considered, para 105, that «exploring the import of the concept of "implied powers" or "customary international criminal procedure" on the question of whether the Trial Chamber is empowered to compel a witness to appear before the Court would be incorrect in circumstances where the Court's legal framework provides for a conclusive legal basis [...] This is because, as previously held by the Appeals Chamber, pursuant to article 21 (1) of the Statute, recourse to other sources of law is possible only if there is a lacuna in the Statute or Rules of Procedure and Evidence».

³⁷ *Rex/Wilkes*, 4 Burr. 2527, 2550, 98 Eng. Rep. 327 (1770).

³⁸ ICC, *The Prosecutor/William Samoei Ruto and Joshua Arap Sang, Decision on Defence Application for a Judgment of Acquittal*, judge *Oboe Osuji*, cit., para 148.

³⁹ *United States/Perez*, 22 US 579 (1824).

⁴⁰ S. J. SCHULHOFER, *Jeopardy and mistrials*, cit., p. 459.

⁴¹ ICC, *The Prosecutor/William Samoei Ruto, Joshua Arap Sang, Decision on Defence Application for a Judgment of Acquittal*, judge *Oboe Osuji*, cit., para 184.

⁴² *Illinois v. Sommerville*, 410 US 458 (1973), quoted in the majority opinion at para 186.

underlining the «broad discretion reserved to the trial judge in such circumstances has been consistently reiterated» as the «is best situated intelligently to make such a decision».

Taken out of the context of situations of a “hung jury” unable to deliver a verdict, characterizing all cases quoted in the majority opinion⁴³ such phrasing should according to judge *Oboe Osuji* support a *non liquet* decision, as the prosecution is not genuinely weak. A concept which should be questioned in itself as weak bad faith prosecutions and prosecutorial interferences with the proceeding, do not qualify as “genuine” but nonetheless mandate an acquittal. If the application of mistrial beyond situations of juries unable to deliver a verdict or jurors misconduct or undue influence over a jury may not be denied⁴⁴, outcome of the case, preserving the prosecution for more favorable conditions, overstretches the limits of the remedy imported in the case.

The invocation of the remedy in reference to interferences and obstruction to justice determined further the need to address the issue of the relationship between the option to declare a mistrial stepping with one foot in the muddled terrain of inherent powers, on one side, and those statutory remedies specifically establishing the Court’s power to punish offenses against the Court. According to judge *Oboe Osuji*, the possibility of collateral proceedings pursuant to article 70 had no bearing on whether or not the view as to the correct verdict of acquittal in the cardinal case (especially on a no-case submission) has been appreciably impaired by the conducts that gave rise to the collateral proceedings and ... «the correct view of the verdict of acquittal of an accused is a particular question to be answered in the particular case that engages that question»⁴⁵. The reasoning on this specific point seems to focus on the interplay between the decision in the collateral proceeding and the cardinal proceeding rather than answering the question if the statutory provisions by establishing remedies aimed at the punishment of interferences exhaustively address the issue.

Finally, the opinion clarifies the meaning of “without prejudice” for a prosecution started afresh, as not automatically engaging the «doctrine of double jeopardy or autrefois acquit codified in article 20 of the Statute under the heading of *ne bis in idem*» and also without prejudice «for a Pre-Trial Chamber or Trial Chamber of this Court or of a national court, as the case may be, to review the circumstances and decide whether there is a question of double jeopardy, in the event of a future proceeding on the same charges»⁴⁶. This is perhaps the most interesting part of the insertion of the mistrial concept in the Courts practice. The review of the mistrial decision by the courts, either an ICC Chamber or a domestic judicial body, dealing with a subsequent charge for the same fact is consequential with the doctrine relied upon. As argued in legal literature, the double jeopardy claim constitutes an attack on the propriety of the original mistrial declaration⁴⁷. If with the mistrial declaration in the last Kenyan case, the Court’s complementarity has gone and the onus went back to domestic courts, is yet open for guesses; the reference to national courts suggests it has.

5. Current stand and trends of the *ne bis in idem* principle

The mistrial decision provides an opportunity to verify if the *ne bis in idem* principle has, as a balance to its current and progressive momentum of substantive and procedural widening, become procedurally less “resistant” through an extension of extraordinary reviews or forms of termination mandating an exclusion of a bar of subsequent prosecutions.

⁴³ Reference is to *R v Bell* [2010] EWCA Crim 3 (third retrial upon jury struck second time); *Bowe v R* [2001] UKPC 19 [Privy Council] (struck jury discharged and retrial); *Benguit* [2005] EWCA Crim 1953 [England and Wales CA] (158, fan 350) (multiple failures of Jury to return a verdict).

⁴⁴ At this purpose, See United States Supreme Court *Wade v. Hunter, Warden* 336 U.S. 684 (69 S.Ct. 834, 93 L.Ed. 974). In the underlying case a general court martial had been discontinued due to the tactical situation. A new general court martial was smoothly reconvened and the accused claimed a violation of the *double jeopardy* rule and later availed himself of federal *habeas* remedies.

⁴⁵ ICC, *The Prosecutor/William Samoei Ruto and Joshua Arap Sang, Decision on Defence Application for a Judgment of Acquittal*, Judge *Oboe Osuji*, cit., para 193. Interestingly the relationship between contempt jurisdiction and mistrial is incidentally addressed in two Canadian cases: *R./Froese*, [1980] 1 W.W.R. 667 (B.C.S.C.) and *R./Bannerman* [1979], 17 B.C.L.R. 238 (B.C.S.C.).

⁴⁶ ICC, *The Prosecutor/William Samoei Ruto, Joshua Arap Sang, Decision on Defence Application for a Judgment of Acquittal*, Judge *Oboe Osuji*, cit., para 186.

⁴⁷ S. J. SCHULHOFER, *Jeopardy and mistrials*, in *UPaLR*, Vol. 125 (1977), n. 3, p. 458 and in respect of the determination about the property of the prior mistrial, pp.493.

The rule has, as known, undergone to a progressive expansion under the jurisprudence of the European Court of Human Rights (ECtHR) to include, under Article 4 of Protocol No. 7, bars deriving from prior proceedings which qualify under the autonomous criteria of the European Human Rights Convention (ECHR) as “criminal”. The resulting preclusion of criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the “same facts”⁴⁸. The European Court of Justice (ECJ) has also focused on the application of the principle within the same EU Member State where the proceedings concern a substantive criminal law issue linked to EU law under article 50 of the Charter of Fundamental Rights of the European Union⁴⁹.

Such jurisprudence expanded the understanding of what represents a “second set of proceedings” irrespective of their qualification under domestic law and clarifies what represents a *bis* for purpose of the bar.

The principle in its “international version”, applicable to prior decisions in other States, has also been subject to a not less relevant expansive interpretation within the European Union through the jurisprudence of the European Court of Justice (ECJ), stressing the relevance of the principle in respect of the exercise of the right to freedom of movement within the EU.

This jurisprudence faced the difficulty to establish under the principle of mutual recognition a common understanding of the meaning of what should be understood under article 54 of the Convention implementing the Schengen Agreement (CISA) for a “decision”, “finality”, “same fact” and also “merits of the case”, “reopening” and fresh or new evidence. The jurisprudence to some extent helps clarify domestic issues and has also been invoked in proceedings in front of international criminal tribunals as a matter of cross fertilization⁵⁰.

In the following *sub*-paragraphs, the stands and trends of the *ne bis in idem* principle will be considered within “thematic block” through the recent jurisprudence of the different bodies.

5.1. *Decisions to which the ne bis in idem may attach and procedural requirements*

In its first decision⁵¹, the ECJ held that art. 54 of the CISA was to apply to decisions as the *transactie* under the criminal procedure of the Netherlands and to those in which the public prosecutor discontinuation of criminal proceedings without the approval of the competent court under para 153-a of the German *StPO*. In both cases the further prosecutions were barred under domestic law even if the decisions were adopted without the intervention of a judicial authority.

Some years later the ECJ held that the same effect is not to be recognized⁵² to a decisions adopted by police authorities to suspend the proceeding after examining the merits, «where the suspension decision does not, under the national law of that State, definitively bar further prosecution and therefore does not preclude new criminal proceedings, in respect of the same facts, in that State».

The European *ne bis in idem* under art. 54 of the CISA is to be applied, as established in the *Van Straaten* case, also in respect of a decision of judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence as a ruling on the merits⁵³. Also decision of *non-lieu* adopted at the end of an investigation during which various items of evidence were collected and examined must be considered to have been the subject of a determination as to the merits ... in so far as it is a definitive decision on the inadequacy of that evidence and excludes any possibility that the case

⁴⁸ ECHR, Judgment of 4 March 2014, *Affaire Grande Stevens et al/Italy*, Applications nn. 18640/10, 18647/10, 18663/10, 18668/10 et 18698/10.

⁴⁹ C-617/10, Judgment (Grand Chamber), 26 February 2013, holding that «the *ne bis in idem* principle laid down in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine».

⁵⁰ Reference is to, ICTY, *Prosecutor/Naser Orić*, case n. IT-03-68-A, Appeals Chamber, Judgement, 3 July 2008.

⁵¹ Judgment of 11 February 2003, C-187/01 and C-385/01 (*Gözütok and Brügger* cases).

⁵² Judgment of 22 December 2008, (Grand Chamber), C-491/07 (*Turanský* case). In its decision the Court found that, in fact, a decision such as that in question in the main proceedings was not, under Slovak law, of such a nature that it must be regarded as having definitively barred further prosecution at national level.

⁵³ Judgment of 28 September 2006, (First Chamber), C-150/05 (*Van Straaten* case).

might be reopened on the basis of the same body of evidence⁵⁴. The reopening on the ground of fresh evidence is to be decided by the Courts of the State in which the decision of *non-lieu* was adopted.

One may wonder how the issue could even have come up, but the ECJ had also to clarify that art. 54 of the CISA is not applicable to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings had been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.

Such a decision cannot constitute a decision finally disposing of the case against that person⁵⁵.

The prohibition of a new trial attaches, according to the ECJ to a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred⁵⁶. In its decision the ECJ had also to clarify that the *ne bis in idem* does not apply to persons other than those whose trial has been finally disposed of in a Contracting State (...).

The ECJ has recently upheld the “enforcement requirements” established for a *ne bis in idem* bar in reference to a prior conviction in another EU Member State, clarifying the compatibility of the provision contained in art. 54 of the CISA⁵⁷ and art. 50 of the Charter of Fundamental Rights of the European Union, not reproducing such requirement. Custodial suspension and mechanism enabling national courts to suspend a sentence if the legal conditions are satisfied are a feature of the criminal systems of the Contracting States and satisfy the so called “enforcement requirement”.

5.2. Characterization of same facts and concurrence formal d’infraction

Several decisions have dealt with the issue of the “same fact” which is «identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal qualification given to them or the legal interest protected»⁵⁸. The definitive assessment as to the identity of the facts is to be made by the Court subsequently invested with the case. Different acts should not be regarded as “the same acts” solely because the competent national court finds that those acts are linked together by the same criminal intention⁵⁹.

The question if and to what extent criminal proceedings or sentences for different infractions arising out of the same conduct under what is best defined in French as *concourse formal d’infraction*, represent a violation of the *ne bis in idem*, is still uneasy to answer⁶⁰. According to the ECtHR, the different purpose and scope of provisions established in criminal law does not matter as such, when conduct is essentially the same⁶¹. Sometime later, separate convictions for different offenses arising out of the same conduct have been considered not to be precluded; at least as long as penalties are not cumulative and the lesser absorbed by the greater⁶²; this second approach of the ECtHR tried

⁵⁴ Judgment of 5 June 2014, C-398/12, (*M* case), para 30.

⁵⁵ Judgment of 10 March 2005, (Fifth Chamber), C-469/03 (*Miraglia* case).

⁵⁶ Judgment of 28 September 2006 (First Chamber), C-467/04 (*Gasparini* case).

⁵⁷ Recently See Judgment of 27 May 2014, (Grand Chamber), C-129/14 PPU, (*Spasic* case). The Court answered positively holding that the condition laid down in art. 54 CISA did not go beyond what is necessary to prevent, in a cross-border context, the impunity of persons definitively convicted and sentenced in the European Union.

⁵⁸ Judgment of 9 March 2006, C-436/04, (*Van Esbroeck* case); Judgment of 28 September 2006, C-150/05, (*Van Straaten* case); Judgment of 28 September 2006, C-467/04, (*Gasparini* case); Judgment of 18 July 2007, C-288/05 (*Kretzinger* case); Judgment of 18 July 2007, C-367/05, (*Kraaijenbrink* case).

⁵⁹ Judgment of 18 July 2007, C-367/05, (*Kraaijenbrink* case).

⁶⁰ At this purpose, See ECHR, Judgment, of 3 July 2002, *Affaire Göktan/France*, Application n. 33402/96, in which the Court held that the sentencing to imprisonment and to *contrainte par corps* (measure involving the impoundment of a debtor of sanctions and measures established under custom laws) within the same criminal proceeding of the claimant amounted to a violation of article 4 of Protocol VII.

⁶¹ In the case of *Gradinger v. Austria*, Application n. 15963/90, Judgment of 23 October 1995, the Court found that the prior conviction for death by negligence and the subsequent imposition to him of two weeks’ imprisonment in default, for driving under the influence of alcohol amounted to a breach of article 4 of Protocol VII. In its decision the Court asserted to be «fully aware that the provisions in question differ not only as regards the designation of the offences but also, more importantly, as regards their nature and purpose ... nevertheless, both impugned decisions were based on the same conduct».

⁶² In the case of *Oliveira v. Switzerland*, Application n. 84/1997/868/1080, Judgment, 30 July 1998, the applicant had been prior convicted for failing to control her vehicle and subsequently for negligently causing physical injury and the Court had to address the question of separate convictions instead of a single one for both offenses. In its decision, the Court found that «the fact that that procedure was not followed in Mrs *Oliveira’s* case is, however, irrelevant as regards compliance with Article 4 of Protocol No. 7 since that provision does not

apparently not to interfere with domestic criminal law systems. The relevance of absorption mechanism for lesser offenses for the purpose of the legitimacy of multiple trials was left unaddressed.

In a subsequent attempt to drive a line between admissible *concourse formal d'infraction* and offenses only nominally different, the ECtHR held that, in case of separate proceedings, it was necessary to additionally examine whether or not such offences had the same “essential elements” whilst an only slight overlapping would not represent a reason to hold that the defendant could not be prosecuted for each of them in turn⁶³.

The ECtHR’s jurisprudence subsequently emphasized the need to identify the “essential elements” of the criminal offenses in order to establish if there had been a violation of the *ne bis in idem*.

Nonetheless the concrete criteria to establish when the “essential elements” of different criminal offenses are the same, allow for a differentiation based upon “special aggravating circumstances”⁶⁴, criminal intent and purpose⁶⁵ and also gravity and consequences and even the social value being protected⁶⁶.

The above differentiating circumstances are also heterogeneous in that some refer to the “offenses” as such, whilst others refer to the findings in the set of domestic proceedings. Further, elements essential to both offenses which were not ascertained in the prior acquittal because preliminary factual circumstances could not be established, has shown to resurface as different “essential elements” in the subsequent proceeding⁶⁷.

Subsequently, in an attempt to harmonization its prior jurisprudence, the ECtHR concluded that in order to prevent a second trial an «inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings»⁶⁸. The Court further held that that Article 4 of Protocol No. 7 must be understood as «prohibiting the prosecution or trial of a second “offence”, in so far as it arises from identical facts or facts which are substantially the same»⁶⁹.

While stressing the “identical fact”, the ECtHR hasn’t yet addressed the issue of the relevance for the purpose of the *ne bis in idem* of the “event” which is the physical (not legal) consequence of the conduct and the underlying causality *nexus*.

The question was raised recently in domestic Courts questioning if the ECtHR’s jurisprudence subsequent to the *Zolotukhin* decision, consider solely the conduct or also the event and the material

preclude separate offences, even if they are all part of a single criminal act, being tried by different courts, especially where, as in the present case, the penalties were not cumulative, the lesser being absorbed by the greater». In its dissenting opinion judge *Repik* shows to prefer the rationale of the Courts decision in the case of *Gradinger v. Austria*, as it prevents «prevents a single, well-defined actus reus being broken down by changing some of its specific aspects and the same individual being prosecuted more than once in respect of the same incident as a result of different legal qualifications».

⁶³ Judgment of 29 May 2001, Case of *Fischer/Austria*, Application n. 37950/97; Judgment of 30 May 2002, case of *W.F. v. Austria*, Application n. 38275/97; Judgment of 6 June 2002, case of *Sailer/Austria*, Application n. 38237/97.

⁶⁴ Decision of 2 September 2004, Application n. 77413/01, Case of *Bachmaier/Austria*. In its decision, the Court rejected the claim and observed that, the applicant was prosecuted for causing death by negligence in particularly dangerous conditions, i.e. under influence of alcohol ... however, he was acquitted of these charges without any further consideration of the applicant’s state of drunkenness because it had not been possible to establish whether it was him or the deceased passenger who had caused the accident. Accordingly, the ECtHR found that only the essential element of the offence of “causing death by negligence” was considered in the first proceeding and found to be lacking [and that] ... the “additional element” of driving in a state of drunkenness was considered only in the subsequent administrative criminal proceedings. In the end the ECtHR didn’t attach any consequence to the prior charge for special circumstances ... because such circumstances were absorbed by the impossibility to establish the essential element of the fact.

⁶⁵ Judgment of 7 December 2006, Case of *Hauser-Sporn/Austria*, Application n. 37301/03. In its decision the Court also found that «the criminal offence of abandoning the victim under Article 94 para 1 of the Criminal Code and the administrative criminal offence of failure to inform the police about such an accident under section 4(2), second sentence, of the Road Traffic Act also concern different acts and omissions».

⁶⁶ Decision of 4 March 2008, Application n. 2529/04, Case of *Garretta/France*. In this case the Court quotes from the domestic decision stating that «un unique fait matériel peut donc être retenu simultanément sous plusieurs qualifications dès lors qu’il peut relever de plusieurs éléments moraux différents, violant plusieurs valeurs sociales différentes”. In its decision the Court held that: “lesdites infractions n’ont pas le même caractère de gravité” and further that “Ces infractions se distinguent également quant à la valeur sociale qu’elles protègent».

⁶⁷ Case of *Bachmaier/Austria*, cit.

⁶⁸ Judgment of 10 February 2009, (Grand Chamber), Case of *Zolotukhin/Russia*, Application n. 14939/03, paras 74-74, 83. On the decision, See S. SWOBODA, *Das Recht der Wiederaufnahme in Europa Bestandsaufnahme und Ausblick*, in *HRRS Onlinezeitschrift für Höchstgerichtliche Rechtsprechung zum Strafrecht*, May 2009, <http://www.hrr-straftrecht.de/hrr/archiv/09-05/?sz=7>.

⁶⁹ *Ibid*, para 82.

object of the conduct. Such jurisprudence for the time being wasn't considered⁷⁰ conclusive as there are indicators for the need to assess the identity of facts based also upon the identity of the victim and/or the material object of the said conduct and it cannot be ruled out that also the event is to be taken into consideration⁷¹.

5.3. *Same fact under ICL*

The issue of "same fact" has recently been dealt in a slightly different perspective by international criminal courts and tribunals in their *ne bis in idem* cases. In the case of *Elizaphan Ntakirutimana* the ICTR answered positively the question if an accused could be convicted for the two counts of genocide in respect of «allegations [which] "do not come out of the same act or ... same transaction", without violating the *non bis in idem* rule»⁷².

In the case of *Naser Orić*, following a conviction in first instance⁷³ later on reversed by the Appeals Chamber⁷⁴, the ICTY had to decide if subsequent proceedings in Bosnia and Herzegovina were in breach of the *ne bis in idem* rule as enshrined in article 10 of the ICTY Statute and if remedies, in the form of an order to discontinue the domestic proceedings, prior under article 13 of the ICTY rules of procedure and evidence (RPEs)⁷⁵ and then under art. 16 of the Mechanism for International Criminal Tribunals (MICT)⁷⁶ should be granted.

In his most recent motion, the accused relied on the ECJ's interpretation of "identity of the material acts"⁷⁷ in order to argue that the fact he had in the meantime been charged in Bosnia and Herzegovina were part of the "same military activity" of the Muslim army units and also the "same alleged course of conduct" he was charged for in the ICTY indictment. Both definitions represent attempts to widen the concept of identity of material acts. The single judge, while defining the purported extensions of the *ne bis in idem* principle to be unpersuasive, concluded that the "charges" in subsequent domestic proceeding were different «with respect to the alleged victims and the nature, time, and location of *Orić's* alleged criminal conduct».

The most interesting issue raised in the *Orić* case was related with the fact that the allegations in the subsequent domestic proceeding were allegedly already available to the ICTY prosecutor, in the form of "Rules of the road" submissions⁷⁸, prior to the issuance of the indictment. The circumstance

⁷⁰ Italian Constitutional Court, Judgment n. 200/2016, dated 21 July 2016. The question of the apparent exclusion under the ECtHR jurisprudence upon the case of *Zolotukhin v. Russia* of any relevance of the "event" caused by the conduct for the purpose of that certain facts are the same was raised in front of the Italian Constitutional Court. The question was of constitutional relevance and the Court had to decide on unconstitutionality of the provisions of the criminal procedure code on the *ne bis in idem* as such provisions could allow for an assessment of diversity of facts when such facts would have been to be considered the same according the *Zolotukhin* decision. In the end, the Court held that the "event" should be considered exclusively in its material effects and physical modifications induced and declared the domestic provision partially unconstitutional as it permitted a retrial for offences arising out of the same fact and in "concourse formal" with those for which the accused had already been tried.

⁷¹ Reference is to: Case of *Muslija v. Bosnia and Herzegovina*, Application n. 32042/11, Judgment, 14 January 2014, referring to (para 34) «same conduct towards the same victim and within the same time frame»; Judgment, of 12 December 2013, Application n. 20383/04, Case of *Khmel/Russia*, mentioning (para 65) «same behavior ("uttered obscenities", "caused damage to his dignity and undermined his authority") that had taken place on the same day at the same police station, with the same police officers having been recognized as victims and cross-examined during the trial»; Judgment of 23 June 2015, Application n. 8516/07, Case of *Butnaru, Bejan-Piser/Romania*, referring (para 65), to «mêmes faits de violences qu'elle aurait infligées à la même personne, ... , et à la même date».

⁷² ICTR, Judgement of 13 December 2004, Appeals Chamber, *The Prosecutor/Elizaphan Ntakirutimana, Gerard Ntakirutimana*, case n. ICTR-96-1 O-A and ICTR-96-17A, para 19. The Appeals Chamber further noted (20) that the appellant did «not elaborate any argument that double jeopardy principles are offended by two convictions with mental elements established by the same conduct but each with an *actus reus* distinguishable in time, location, and identity of victims».

⁷³ ICTY, Judgement of 30 June 2006, Trial Chamber II, case n. IT-03-68-T, *Prosecutor/Naser Orić*.

⁷⁴ ICTY, Judgement of 3 July 2008, Appeals Chamber, case n. IT-03-68-A, *Prosecutor/Naser Orić*.

⁷⁵ ICTY, Decision of 7 April 2009, Appeals Chamber, case n. IT-03-68-A, *Prosecutor/Naser Orić, Decision on Orić's Motion Regarding a Breach of Non-Bis-In-Idem*, ("First *Non Bis in Idem* Decision").

⁷⁶ MICT, Decision of 15 December 2015, Single judge, *Prosecutor/Naser Orić*, case n. MICT-14-79, *Decision on Second Motion Regarding a Breach of Non-Bis-In-Idem*.

⁷⁷ Judgment of 9 March 2006, case C-436/04 (*Van Esbroeck* case). *Orić* also relied on the decision of the Supreme Court of the Republika Srpska, Judgment of 22 November 2012, case n. 110K00918212Kz, (*Dmišić* Judgement), finding a violation of the *non bis in idem* principle where an accused was convicted in separate trials for the killing of different victims in the course of the same armed conflict.

⁷⁸ The expression defines submissions by domestic Courts for review by the ICTY prior to the issuance of any arrest order or indictment. Such measures were established as a matter of Cooperation on war crimes and respect for human rights (art. 5) of the Rome Implementation Agreement of 18 February 1995 adopted for the implementation of the Dayton Accords.

that the conduct he was subsequently charged in front of a domestic court could already have been included in the ICTY indictment and were not, amounted according to the accused to an “abuse of process”. Interestingly this second argument was dismissed as unsubstantiated as, based upon the records in front of the single judge, the “Rules of the road” submissions were communicated to the prosecutor nearly one year after the indictment.

The ICC Presidency on his own has addressed the issue of “Identity of facts” within the article 108 proceeding aimed at verifying if domestic criminal proceeding started against *Germain Katanga* in the DRC in which sentence of the ICC was being enforced, should be authorized⁷⁹. The Presidency rejected the view that the term “conduct” had a wider ambit in article 108(1) than the principle of *ne bis in idem* in article 20(2) and rejected also the interpretation advanced by the sentenced person that for the purpose of article 108(1) «the entire ambit of investigations» should be considered as «evidence pertaining to the localities and events which feature the [domestic] “Décision de renvoi” were presented to the Court», as such an outcome would be inconsistent with the notion of complementarity⁸⁰.

5.4. Res iudicata *under ICL*

The *res iudicata* and the finality of findings of non-appealed or non-annulled parts of judgment in a partial retrial, has been addressed by the ICTY in the *Haradinaj* case⁸¹. The Appeals Chamber distinguished retrial following a conviction from that following an acquittal. In the later the judge should in «determining the admissibility of evidence in the retrial, [...] be particularly mindful of any potential prejudice that the admission of new evidence may cause to the fair trial rights of the accused and should explicitly consider whether re-litigation of this same issue in the retrial would be unduly prejudicial»⁸². The Appeals Chamber further found that considering a broader joint criminal enterprise (JCE) as well as the submission by the prosecution of additional factual allegations in the statements of fact, since limited to the charges the retrial is ordered for, does not in itself place the accused in potential double jeopardy or otherwise affect his fundamental rights and interests⁸³.

Older references to the *double jeopardy* rule to be found in the Trial of war criminals before the Nuremberg Military Tribunals⁸⁴ seem to reflect domestic views as to a prohibition of retrial upon appeal by the prosecution.

5.5. Extraordinary remedies aimed at the “reopening” of a case

The possibility of a reopening of a proceeding as such is not regarded *per se* as a circumstance preventing a bar to subsequent proceedings. Accordingly, in the *Bourquain* case, the ECJ held in respect of a judgment delivered *in absentia*, that the sole fact that that criminal procedure would, under national law, have necessitated the reopening of the proceedings does not, in itself, mean that the judgment cannot be regarded as “final” for the purposes of Article 54 of the CISA⁸⁵.

Extraordinary remedies are rarely considered by the jurisprudence. According to the ECJ «extraordinary remedies are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion»⁸⁶. The ECtHR held that although these remedies represent a continuation of the first set of proceedings, the “final” nature of the decision does not

⁷⁹ ICC, Decision of 7 April 2016, The Presidency, Case n. ICC-01/04-01/07-3679 07-04-2016 1/13 NM, *Prosecutor/Germain Katanga, Decision pursuant to article 108(1) of the Rome Statute*.

⁸⁰ At this purpose, See P. LABUDA, *Complementarity Compromised? The ICC Gives Congo the Green Light to Re-Try Katanga*, <http://opiniojuris.org/2016/04/11/complementarity-compromised-the-icc-gives-congo-the-green-light-to-re-try-katanga/>. The A. *inter alia* questions the role of the ICC in ensuring respect for fair trial guarantees in the subsequent trial.

⁸¹ ICTY, Decision of 31 May 2011, Appeals Chamber, case n. IT-04-84bis-AR73.1, *Prosecutor/Ramush Haradinaj et al., Decision on Haradinaj's Appeal on Scope of Partial Retrial*. The President Patrick Robinson attached a dissenting opinion to the decision.

⁸² *Ibid*, para 26.

⁸³ *Ibid*, paras 32 and 38.

⁸⁴ *United States/Josef Alkstoetter, et al. (Justice case), v. III, United States Gov. Printing Office, Washington, 1951, pp. 49, 87.*

⁸⁵ ECJ, Judgment of 11 December 2008, case C-297/07, (*Bourquain* case).

⁸⁶ ECJ, Judgment of 5 June 2014 case C-398/12, para 39.

depend on their being used and it «is important to point out that Article 4 of Protocol No. 7 does not preclude the reopening of the proceedings, as stated clearly by the second paragraph of Article 4»⁸⁷.

The ECtHR in the recent *Marguš v. Croatia* case considered in respect of the reopening of a case upon a prior application of amnesty for war crimes, that the guarantees under Article 4 of Protocol No. 7 and States' obligations under Articles 2 and 3 of the Convention should be regarded as parts of a whole⁸⁸ and that developments under international law should be taken into account. In its decision the ECtHR relied on the case law of the Inter-American Court of Human Rights (IACtHR) dealing with the respondent State's obligation to punish despite a prior final judgment⁸⁹.

The ECtHR appears perhaps to too easily giving up the guarantees of the *ne bis in idem* in a case which could ultimately be resolved by focusing on "unlawful amnesties" and devoting more attention to the question if judicial decisions dismissing a case due to an amnesty law really entail the prohibition of a second trial. Significantly the concurring opinions point out that such decisions should not have triggered article 4 of Protocol VII⁹⁰.

Further the circumstances underlying the cases examined by the IACtHR (and also by the ECtHR in the *Marguš* case) resembles closely those established in the ICC Statute under article 20(3) allowing for the retrial of a person already tried in the context of the ICC's complementarity.

The reopening and the review *contra reum* of definitive decision of International Courts and Tribunals has not been established their respective Statutes and Rules. The existence of an "inherent power" of an international court or tribunal to review final acquittals has been in the end excluded by the jurisprudence. The ICTY Appeals Chamber, in the *Mucić* case hold that reconsideration was fundamentally an exercise of a Tribunal's «inherent discretion to prevent injustice» and also that reconsideration required an impugned decision be wrong and also have led to an injustice⁹¹. Upon such initial attitude towards the possibility to review final decision in the *Mucić* case, the Appeals Chamber in the later *Žigić* case (judge *Shahabuddeen* dissenting) adopted an opposite approach⁹². The Appeals Chamber concluded that existing appeal and review proceedings established under the Statute provided sufficient guarantees to the person. Subsequent decision confirmed the jurisprudence, excluding the court's inherent jurisdiction to review final judgments, when standards for the "reopening" of the case under article 26 of the Statute, requiring the discovery of new facts non known at the time of the proceeding, are not met, final judgments⁹³. Finally, in the *Perišić* case the Appeals Chamber dismissed the prosecution's motion for reconsideration of a final judgment at the acquitted person's detriment

⁸⁷ ECtHR, Judgement 10 February 2009, Grand Chamber, Application no. 14939/03, Case of *Sergey Zolotukhin /Russia*, para 108.

⁸⁸ Judgment of 27 May 2014, Grand Chamber, Application n. 4455/10, Case of *Marguš/Croatia*, para 128.

⁸⁹ IACtHR, Judgment of 26 September 2006, *Case of Almonacid-Arellano et al/Chile*, (Preliminary Objections, Merits, Reparations and Costs) in which the Court noted (para. 154): «the *ne bis in idem* principle, although it is acknowledged as a human right in Article 8(4) of the American Convention, it is not an absolute right, and therefore, is not applicable where [...] a judgment [...] produces an 'apparent' or 'fraudulent' *res judicata* case. On the other hand, the Court believes that if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle». In the said case the IACtHR held (para 155) that the respondent State could not «rely on the *ne bis in idem* principle to avoid complying with the order of the Court». In a similar shape the IACtHR observed in the case of *La Cantuta v Peru*, judgment of 29 November 2006 (Merits, Reparations and Costs, para. 151) that «double jeopardy does not apply inasmuch as they were prosecuted by a court who had no jurisdiction, was not independent or impartial and failed to meet the requirements for competent jurisdiction».

⁹⁰ Case of *Marguš/Croatia*, cit. para 135. Judges *Spielmann*, *Power-Forde* and *Nussberger* delivered a joint concurring opinion arguing that the outcome of the case, could have inferred directly from article 4 of Protocol 7, as the application of an amnesty law by a Court does not finally acquit a person.

⁹¹ ICTY, Decision of 8 April 2003, Appeals Chamber, Case n. IT-96-21-A-bis, *Prosecutor/Mucić et al., Decision on Appeal against Decision on Appropriate Remedy*.

⁹² ICTY, Decision of 26 June 2006, Appeal Chamber, Case No. IT-98-30/1-A, *Prosecutor v Zoran Žigić a/k/a/ as "Žiga"*, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgment IT-98-30/1-A delivered on 28 February 2005, para 9.

⁹³ See ICTY, Decision of 30 August 2013, Appeals Chamber, *Prosecutor/Milan Lukić and Sredoje Lukić*, Decision on Sredoje Lukić's Motion Seeking Reconsideration of the Appeal Judgement and on the Application for Leave to Submit an *Amicus Curiae* Brief Case No. IT-98-3211 -A, p. 3; ICTY, Decision of 8 December 2009, Appeals Chamber, Case No. IT-95-13/1-A, *Prosecutor/Mile Mrkšić, Veselin Šljivančanin*, Decision on Motion on Behalf of Veselin Šljivančanin Seeking Reconsideration of the Judgement Rendered by the Appeals Chamber on 5 May 2009 - or an Alternative Remedy, paras 2-3; ICTY, Decision of 7 June 2007, Appeals Chamber, Case No. IT-01 -42-A, *Prosecutor/Pavle Strugar*, Decision on Strugar's Request to Reopen Appeal Proceedings, para 23; ICTY, Decision of 23 November 2006, Appeals Chamber, Case No. IT-95-14-R, *Prosecutor /Tibomir Blaškić*, Decision on Prosecutor's Request for Review or Reconsideration, paras 79-80.

and affirmed that «existing appeal and review proceedings under the Statute provide for sufficient guarantees of due process»⁹⁴.

What remains unclear is how “extraordinary” such remedies should be as a matter of evidentiary burden required in order not to deprive the *ne bis in idem* principle of its meaning. The ECJ jurisprudence regarding decisions of *non-lieu* adopted at the end of an investigation and regarding them as “definitive decision” excluding any possibility that the case might be reopened on the basis of the same body of evidence⁹⁵ should not induce an assimilation between the “resilience” of a *non lieu* decisions and that of final decisions. The ECJ jurisprudence is rather to be evaluated in the perspective the subjection of domestic decisions in one State to remedies established in such State, either exceptional or not.

The ECtHR has examined the issue from the viewpoint of the exhaustion of domestic remedies and has excluded that extraordinary appeals against final convictions represent an effective remedy as they do not fulfil the requirements of a full accessibility⁹⁶. In the case of *Assanidze v. Georgia*, the Grand Chamber incidentally dealt with a situation in which the reopening of a final acquittal was invoked but ultimately excluded, remarking the need to prevent any interference by non-judicial-bodies in the matter⁹⁷. In the said circumstance, the assessment as to when an evidentiary situation mandated a reopening was left with the domestic law.

According to the ECtHR extraordinary appeals seeking the reopening of terminated judicial proceedings do not normally involve the determination of “civil rights and obligations” or of “any criminal charge” and therefore Article 6 is deemed inapplicable to them. Nevertheless, «should an extraordinary appeal entail or actually result in reconsidering the case afresh, Article 6 applies to the “reconsideration” proceedings in the ordinary way» ad well as «where the proceedings, although characterized as “extraordinary” or “exceptional” in domestic law, were deemed to be similar in nature and scope to ordinary appeal proceedings, the national characterization of the proceedings not being regarded as decisive for the issue of applicability»⁹⁸. Such jurisprudence had crossed the jurisprudential path developed in respect of the enforcement of decisions of the ECtHR and subsequent reopening of final domestic proceedings - essentially convictions - following a finding of violation of conventional rights⁹⁹, but determination as to how extraordinary an extraordinary reopening has to be in order not the erode the meaning of *ne bis in idem* rule is still missing.

6. Conclusions

Beyond the alleged political interferences and hostile climate towards the Court, the outcome of the case and its smooth termination should be re-considered in a historical perspective as a part of the sometimes turbulent relationship of the Court with African States.

The outcome of the case went through three steps: the procedural decision on the no case to answer motion, the decision on the application of the amended Rule 68 and finally the decision upon the collapse of the case and the no case to answer motion.

Trying to keep the final remarks on the mistrial decision within the boundaries of elementary principles of constructive criticism, the decision is simply wrong. There is very little in the decision which is agreeable. Nor did the impressive erudition in the opinion of judge *Oboe Osuji* succeed in concealing the fact the *mistrial* is a *coup de theatre*, allowing to close the case, reduce the blame on the

⁹⁴ ICTY, Decision of 20 March 2014, Appeals Chamber, Case No. IT-04-S1-A, *Prosecutor/Perisic*, Decision on Appeal against Decision on Appropriate Remedy, p. 2.

⁹⁵ C-398/12, (M case) cit., para 30.

⁹⁶ *Ex plurimis* ECtHR, Decision of 11 January 2011, Application n. 34586/10, 4th Section, *Paul Tucka/the United Kingdom*. Recently, in similar terms, ECtHR, Judgment of 13 September 2016, Grand Chamber, Applications n. 50541/08, 50571/08, 50573/08 and 40351/09, Case *Ibrahim and others/The United Kingdom, Jointly Partly Dissenting Opinion of judges Sajó, Karakaş, Lazárova Trajkovska and De Gaetano*.

⁹⁷ ECtHR, Judgment of 8 April 2004, Grand Chamber, *Assanidze/Georgia*, Application n. 71503/01.

⁹⁸ National practice and jurisprudence has been recently examined by the ECtHR, Judgment of 5 February 2015, Grand Chamber, Application n. 22251/08, *Case of Bochan/Ukraine* (n. 2), para 46.

⁹⁹ National practice and jurisprudence has been recently examined by the ECtHR, *Case of Bochan/Ukraine* (n. 2), cit., para 47.

prosecution and let the persistent believers of the Court feel that nothing was definitively lost and sooner or later the sun will shine again.

Both separate majority opinions are characterized by an approach which may be represented as the “sketching”, on an imaginary canvas, of “fragments of a legal thoughts” leaving it to the reader to guess how this spots could fit together in an image and eventually appraise (by appraising himself), the depth of the judge’s reasoning. We believe that the issue of article 21 and applicable law deserve more than a legal piece of abstract art.

This said, article 20 of the Statute is neither obsolete nor out of line with domestic criminal legislations and the mistrial does not seem to mark a new trend in international practice.