

Public Annex B

Triffterer / Ambos

The Rome Statute of the International Criminal Court

A Commentary

Third Edition

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ILC Draft Statute, the compromise established during the final session of the Preparatory Commission and subsequently adopted by the Rome Conference provides for evident variations in the wording regarding *idem* ('conduct which formed the basis of crimes', 'crime referred to in article 5', 'conduct also proscribed under article 6, 7 or 8') as well as *bis* ('has [already] been convicted or acquitted', 'has been tried').

B. Analysis and interpretation of elements

I. Paragraph 1

The 1994 ILC Draft Statute had not foreseen an express regulation prohibiting the Court from trying somebody already convicted or acquitted by the Court itself. In the 1998 Preparatory Committee, some delegations expressed concern about this lack of a general statement according to which the ICC would be bound by the *ne bis in idem* principle in relation to earlier decisions of its own. Although this was understood as self-evident by other delegations, the general feeling was that it would provide clarification and would do no harm⁷². Drafting was proposed by Portugal: '1. No person shall be tried before the Court without prejudice to article 75 [revision, footnote omitted] or before another court for acts constituting a crime of the kind referred to in article 5 (20) for which that person has already been tried by the Court'⁷³. The U.S. delegation put forward the following proposal: 'Except as provided in this Statute, no person shall be tried before the Court for acts for which he has already been convicted or acquitted by the Court'⁷⁴. Their proposals were deemed useful and a paragraph was added to the draft article.

1. 'Except as provided in this Statute'

This is a catch clause to avoid listing the provisions in the Statute enabling subsequent proceedings in a case, such as appeal and revision (on the reformulation of charges, see mn 24). Some delegations believed that no further drafting would have been needed to state that the means expressly provided for the ICC by the Statute do not contradict *ne bis in idem*. The substantive discussion on what exactly should be provided was conducted in the negotiations on Part 8 (Appeal and Revision) of the Statute. It reflected the general differences between the continental law and common law views on the acceptability of appeals by the prosecutor and of revision in general. The right of appeal was granted almost identically to the accused and the prosecutor, see article 81. This would not constitute an 'exception' to *ne bis in idem* for many civil law countries, where appeals are often considered as part of a proceeding and *ne bis in idem* only applies after all ordinary remedies have been exhausted (see also *infra* mn 23). However, although the Rome Statute allows for prosecutorial appeal, which is generally prohibited in common law systems, the language of this paragraph labelling it 'exceptional' seems at least to reflect the restraint of common law⁷⁵. It should be noted in this context that the Appeals Chamber may either reverse or amend a judgement itself, thereby enjoying all

⁷² Holmes, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 58.

⁷³ Portugal also argued that the title of the article should be changed from 'non bis' to 'ne bis' in *idem*, and that it should be in the part on 'the General Principles of Law', see UN Doc. A/AC.249/1998/WG.2/DP.6 (25 Mar. 1998), notes 1 and 2. This follows the commentary of Wise (1998) 13*bis* NEP 43 as well as the systematic of the 1996 ILC Draft Code. See also Eser (1993) 11 NEP 48, note 16.

⁷⁴ U.S. Delegation, 3/8/981.

⁷⁵ van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 722. See also e.g. Costa (1998) 4 *University of California Davis JIL&Policy* 198 *et seq.*; Baum (2001) 19 *WisconsinILJ* 222 argues that the absence of jury trials before the ICC may justify the ICC Prosecutor's right to appeal acquittals even from a double jeopardy perspective. For an analysis of relevant international provisions see e.g. Brady and Jennings, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 294.

powers of the Trial Chamber, or order a new trial before a different Trial Chamber, see article 83 para. 1 and 2 *lit.* a and b. Revision of a conviction or sentence may be claimed by or on behalf of a convicted person, if new evidence has been discovered, decisive evidence was false, forged or falsified, or in case of a serious misconduct of serious breach of duty by a judge, article 84, *lit.* a-c. A proposal to permit the prosecutor to seek revision on the basis of newly discovered evidence also to the detriment of the accused was met with strong criticism for being contrary to *ne bis in idem* and was omitted.

2. 'conduct which formed the basis of crimes'

- 22 When should a second prosecution for a different offence be barred? It became evident in the negotiations that no single, mechanical test could cope with the variety of situations that might arise. Each of the paragraphs of article 20 contains a different formulation to describe the scope of *ne bis in idem*⁷⁶. The wording of paragraph 1, defining *idem* by the same historical facts, leaves room for a broad interpretation of the protection. Accordingly, a subsequent trial for a different qualification based on the same historical facts would be prohibited. If a person was acquitted for genocide, a new trial for crimes against humanity with respect to the same conduct would constitute an *idem*. Certainly, this broad protection is inherently confined to the subject matter jurisdiction of the ICC⁷⁷. The Court has no competence to try crimes other than those listed in article 5 and defined in its Statute. In order to avoid acquittals on the ground of wrong legal qualification of the facts, the Prosecutor benefits from the fact that the categories of crimes under the jurisdiction are partly overlapping. It was standard practice of the prosecutor of the *ad hoc* Tribunals to include several types of charges for each alleged incident and leave the classification to the judges. One might wonder whether this policy does not complicate the work of the defence and prolong the trials considerably. Forthcoming case law might slowly ease the problem as the definitions of the crimes become more concrete and the borders between the categories become more established⁷⁸.

3. 'convicted or acquitted by the Court'

- 23 The application of *ne bis in idem* involves determining the point in time and the circumstances in which it can be said that the first 'jeopardy' has been attached. Even proceedings terminated before judgement might raise the question of a *bis in idem* in the same court. The drafters of the ICC Statute, however, did not think that the protection should cover such cases⁷⁹. Paragraph 1 restricts the scope of the protection to a person 'convicted or acquitted by the Court'. It targets the final decision of the ICC⁸⁰. However, the Rome Statute gives no clear indication of whether a conviction or acquittal rendered by the first instance is regarded as such a final decision or whether only a non-appealable judgment can establish *res iudicata*. The latter would be in conformity with the application of *ne bis in idem* by regional human rights organs, as well as the civil law tradition who consider a judgment as final only

⁷⁶ Critical Holmes, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 58 who comments that '[t]he rationale of this difference was never fully explained'.

⁷⁷ 'The broad and the narrow interpretation coincide', Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 722.

⁷⁸ The judges of the ICC expressed the view that they are bound by the facts underlying the charges against an accused but not by their legal qualification (*iura novit curia*): 'In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges'. (Regulation 55 para. 1). For the practice of the ICTY see above note 53.

⁷⁹ Similarly also the Trial Chamber of the ICTY: 'there can be no violation of *non-bis-in-idem*, under any known formulation of that principle, unless the accused has already been tried', *Tadić*, above note 50.

⁸⁰ See 1996 Preparatory Committee I, p. 39, para. 170.

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24-25 Article 20

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after all 'ordinary remedies' have been exhausted⁸¹. According to this view, only decisions of the Appeals Chamber and those of a Trial Chamber against which no appeal has been filed within a period of 30 days (extendable) after notification of the appealing party could be considered as final (see rule 150). But relying on the wording and the discussion during the drafting process, it seems arguable that not only revision but also appeal is an exceptional measure with regard to the prohibition of a retrial after conviction or acquittal by the Court⁸². Hence, a Trial Chamber's judgement on the merits of the case may suffice to trigger *ne bis in idem*. Appeal and revision before the ICC would still be in conformity with article 20 due to their exceptional character, but any other proceedings would be already barred through the Trial Chamber's judgement. The latter interpretation is more favourable to the individual, in particular regarding its application under para. 2 (*infra* mn 29).

Before the final decision is taken, however, paragraph 1 is not applicable. It covers neither a ruling on inadmissibility nor decisions on amendment, withdrawal, reclassification⁸³ or non-confirmation of charges, see, e.g., article 61 para. 7 (c) (ii) and article 53 para. 4. Furthermore, it was made clear during the negotiations that *res iudicata* should not apply for proceedings discontinued for technical reasons⁸⁴. As there are no provisions on statutory limitations, it seems that new evidence found any time after such proceedings may reactivate investigation and lead to a new surrender and procedure on the confirmation of the charges⁸⁵.

II. Paragraph 2

1. 'by another court'

Paragraph 2 establishes that a decision by the ICC is final with regard to any other proceeding before any other national or international court. This protection is absolute in terms of opening no exceptions⁸⁶. The focus during the negotiations was exclusively on national courts. The wording encompasses all civilian and military courts, be they permanent or *ad hoc*. At the Preparatory Committee 1998, attention was drawn to the fact that 'by another court' could mean courts of States parties only, as the Statute as a whole can in any case address parties only⁸⁷. This can, understandably, lead to unsatisfactory results from the point of view of the individual. There is, however, hardly anything the Statute could have done about it. It depends on the general respect for the ICC judgements whether an individual is – after conviction or acquittal by the ICC – to face secondary proceedings in a non-State party⁸⁸. It should be kept in mind that the notion 'any other court' is in not limited

⁸¹ See above notes 25 and 26. This was also the approach adopted by the 1996 ILC Draft Code, p. 68–9 'finally convicted or acquitted' applies 'only to a final decision on the merits of the charges against the accused which was not subject to further appeal or review'. See also AIDP (ed) (2004) 75 RIDP 802, I 5.2.

⁸² See mn 21; van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 722; Klip and van der Wilt (2002) 73 RIDP 1121; Staker, *article 81*, mn 7. See also e.g. *travaux préparatoires*, above note 36, the CCPR and *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision on the Prosecutor's Request for Review or Reconsideration, Appeals Chamber, 31 March 2000, para. 49.

⁸³ A reclassification may even occur at the latest possible time of the proceedings, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07-3319, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, Trial Chamber II (21 November 2012).

⁸⁴ See e.g. 1996 Preparatory Committee I, article 42, para 170, p. 39; 1996 ILC Draft Code, p. 69.

⁸⁵ Critical e.g. Costa (1998) 4 *University of California Davis JIL&Policy* 199; Conway (2003) 3 *ICLRev* 382 arguing for a strict construction of the provisions on prosecutorial appeal and revision.

⁸⁶ De la Cuesta (2002) 73 RIDP 732, van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 723.

⁸⁷ The same is true with regard to States that have accepted the jurisdiction of the Court with respect to a situation by declaration (article 12 para. 3, rule 44, see thereto e.g. Bassiouni (1999) 32 *CornellLLJ* 443, 453–4 and States involved in a situation, which is referred to the ICC by the Security Council under Chapter VII of the Charter of the United Nations (article 13 lit. b).

⁸⁸ See also e.g. Palmisano, in: Lattanzi and Schabas, *Essays on the International Criminal Court* (1999) 391, 415. On the evolution of a customary *ne bis in idem* rule with regard to international crimes see Cassese,

per se. Its restrictive application only to States parties derives from the international law maxim *pacta tertiis nec nocent nec prosunt*, also enshrined in article 34 VCLT. Therefore, in a reversed situation, namely a first trial in a non-State party, the ICC will have to conform to paragraph 3 and exercise jurisdiction only if the criteria for exceptions of that paragraph are fulfilled⁸⁹. Truth and reconciliation commissions, even if organised as quasi-judicial bodies, do not qualify as courts in the sense of article 20⁹⁰.

- 26 As already mentioned, 'by another court' also encompasses international or internationalized courts. Courts in this context are to be understood as international adjudicating bodies, including, *e.g.*, the *ad hoc* international criminal tribunals, other mixed or hybrid courts and tribunals⁹¹ and potential regional criminal courts⁹². As a result of their distinctly temporary jurisdiction, jurisdictional conflicts between the ICC and the ICTR are categorically excluded, but with regard to the ICTY, at least theoretically possible⁹³. Due to the particular nature of the ICTY, established by Security Council Resolution under Chapter VII of the Charter of the United Nations, as well as its speciality, the ICTY would prevail already at the stage of establishing jurisdiction⁹⁴. Therefore, it is most unlikely that the question of the *res iudicata* effect of an ICC decision towards the ICTY would come up in practice. If such a case occurred, the ICTY Statute, since it was drafted before the establishment of an international criminal court, does not acknowledge any *ne bis in idem* protection from ICC judgements. The same is true *e.g.* with regard to the Statute of the Special Court for Sierra Leone. It has been suggested in this regard that the ICC, based on the interpretation of its complementary jurisdiction as an extended national jurisdiction, should be treated the same way as a national court⁹⁵. However, this practical solution may not completely capture the particular nature of the ICC jurisdiction. To avoid loopholes, it would be advisable to include reference to the *res iudicata* effect of ICC judgements in Statutes of international, regional, mixed or hybrid courts and tribunals, should they be established

2. 'for a crime referred to in article 5'

- 27 Until the last session of the Preparatory Committee in 1998, the draft on this part read as follows: 'for conduct constituting a crime referred to in article 5'⁹⁶. During the discussions,

International Criminal Law (2003) 320. A related problem on whether a conviction or acquittal on the merits by a court without jurisdiction bars subsequent proceedings, is recognized in and between States, see Friedland, *Double Jeopardy* (1969) 77–86.

⁸⁹ See *e.g.* Klip and van der Wilt (2002) 73 RIDP 1123, referring to Lattanzi, in: Politi and Nesi (eds), *The Rome Statute of the International Criminal Court. A Challenge to Impunity* (2002) 181; Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2003) 70; Palmisano, in: Lattanzi and Schabas, *Essays on the International Criminal Court* (1999) 39, 395 *et seq.* See also articles 18 and 19 Rome Statute providing a possibility for non States-parties to challenge the admissibility of a case before the ICC. For details see *e.g.* Broomhall, *International Justice and the International Criminal Court* (2003) 88; El Zeidy (2006) 19 *LeidenJIL* 741; Holmes, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 77.

⁹⁰ Scharf (1999) 32 *CornellILJ* 507, 525; see also Dugard, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 702.

⁹¹ A classification of mixed or hybrid courts and tribunals as rather international or national is not necessary with regard to article 20, but may be relevant in the context of article 17. See thereto *e.g.* Benzing and Bergsmo, in: Romano et al. (eds), *Internationalized Criminal Courts* (2004) 407, 411 *et seq.*

⁹² See *e.g.* efforts of the African Union to establish a criminal chamber at the (proposed) African Court of Justice and Human Rights, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights as adopted by the African Union: Summit 2014, Doc. No. Ex.CL/846 (xxv) Annex 5.

⁹³ The temporal jurisdiction of the ICTR is limited to violations committed between 1 Jan. 1994 and 31 Dec. 1994 while the ICC's jurisdiction *ratione temporae* concerns crimes committed after the entry into force of the Rome Statute on 1 July 2002. The ICTY's jurisdiction for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, on the other hand, is open-ended.

⁹⁴ See Bohlander, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 688 *et seq.* Given the absence of a respective provision in the Rome Statute as well as in the ICC Rules Bohlander *op. cit.* 690 suggested an amendment to the Rules to this effect.

⁹⁵ De la Cuesta (2002) 73 RIDP 735.

⁹⁶ This formulation was introduced by a Chairman's working paper. Article 12[42] Zutphen Draft, p. 46 had used the formulation 'acts' instead of 'conduct', see also mn 39.

the question arose of whether somebody for murder or in genocide, *e.g.* because of improper interpretation, the red should always have the right various national legislations prosecute a person tried abroad imposed the earlier trial is wording conduct constituting courts, in a manner that con that loopholes were inserted could not try anew even if contradiction with the cons only have jurisdiction if the obtains evidence and conduct scenario might become plain towards prosecution change.

A proposal was made to additional drafting would ju interpreting the paragraph a the ICC. Some delegations protection of *ne bis in idem* be forced to bear the conse After elaborate discussions, The idea is that since the there is a need to ensure responsibility simply because the acts amounted to a crime however, a person convicted national law for the same co in article 5' that was not su Statute is silent with regard Considering the international to establish jurisdiction. T domestic acceptance of tra

⁹⁷ Amnesty International, abo

⁹⁸ Critical thereto, demanding national court to retry the accus the ICC, AIDP (ed) (2004) 75 1 Rome Statute of the Internation obligation to deduct the senten (2001) 19 *WisconsinILJ* 197, 22: is to be seen in conformity w teleological interpretation Schu Berücksichtigung der Kodifizier possibility of a national retria impunity of a perpetrator acq beyond reasonable doubt.

⁹⁹ Although the Rome Statu acceptance of transnational ne linked to the prosecution of cc tion acts comprise a detailed r complete protection of the inc I 1, III 4 and 806, III 2.1.

28 Article 20

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the question arose of whether this paragraph prohibited a national court from prosecuting somebody for murder or injury if the ICC had previously acquitted the same person for genocide, e.g. because of insufficient proof of his or her genocidal intent. If that was the proper interpretation, the reduction of wording was necessary. According to this view, a State should always have the right to charge for, e.g., murder or injury afterwards. References to various national legislations were made, emphasizing that they widely recognize the right to prosecute a person tried abroad. As a further justification it was supposed that the sentence imposed in the earlier trial is usually taken into account. In addition, it was suggested that the wording 'conduct constituting a crime' would restrict the right of interpretation by national courts, in a manner that contradicts the notion of complementarity. The fear was expressed that loopholes were inserted in the system of criminal repression because a national court could not try anew even if new evidence were found. This logic is, of course, somewhat in contradiction with the consequence of complementarity, according to which the ICC will only have jurisdiction if the national courts are unwilling or unable to prosecute. If the State obtains evidence and conducts a trial, the ICC has no jurisdiction to start with. The proposed scenario might become plausible only in cases where the domestic attitude or capability towards prosecution changes, after the ICC has already tried the case.

A proposal was made to improve the draft, but several delegations were of the view that additional drafting would just complicate matters. The result was to be achieved by merely interpreting the paragraph as it was: national courts can try crimes outside the jurisdiction of the ICC. Some delegations suggested that the proposed additions would undermine the protection of *ne bis in idem* completely. It was also pointed out that the accused should not be forced to bear the consequences of the fact that evidence was not found early enough. After elaborate discussions, the compromise 'for a crime referred to in article 5' was accepted. The idea is that since the ICC does not have jurisdiction over crimes under national law, there is a need to ensure that a person who commits such a crime does not escape responsibility simply because in the ICC trial it is not proven beyond reasonable doubt that the acts amounted to a crime under the jurisdiction of the ICC⁹⁷. As a result of this change, however, a person convicted by the ICC may consequently also be tried for crimes under national law for the same conduct⁹⁸. The wording even allows retrials for 'a crime referred to in article 5' that was not subject to the final judgement of the ICC. Furthermore, the Rome Statute is silent with regard to multiple subsequent procedures in different national systems. Considering the international character of the crimes in question, different States may be able to establish jurisdiction. The protection of the individual in these cases solely lies on the domestic acceptance of transnational *ne bis in idem*, which is limited⁹⁹.

⁹⁷ Amnesty International, above note 17, 39, supporting the drafting.

⁹⁸ Critical thereto, demanding that downward '*idem*' also has to be determined by the same facts, barring a national court to retry the accused on the basis of the same conduct which constituted the basis of the trial before the ICC, AIDP (ed) (2004) 75 RIDP 806 at III 2.1.; van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 724 also referring to the missing obligation to deduct the sentence imposed by the ICC; de la Cuesta (2002) 73 RIDP 732. In this line also Baum (2001) 19 WisconsinILJ 197, 223-4 claiming that the ICC downward *ne bis in idem* opens a loophole, although it is to be seen in conformity with the US Double Jeopardy Clause's dual sovereignty exception. Relying on a teleological interpretation Scheschonka, *Der Grundsatz ne bis in idem im Völkerstrafrecht unter besonderer Berücksichtigung der Kodifizierung durch das ICTY-Statut und das ISiGH-Statut* (2004) 270 argues against the possibility of a national retrial after conviction by the ICC: the purpose of the provision was only to avoid impunity of a perpetrator acquitted by the ICC e.g. for lack of genocidal intent although the *actus reus* was beyond reasonable doubt.

⁹⁹ Although the Rome Statute is arguably not the proper instrument to encounter shortcomings in the general acceptance of transnational *ne bis in idem*, it is unfortunate that the chance to regulate at least issues directly linked to the prosecution of core crimes has not been taken up. It has been suggested that national implementation acts comprise a detailed regulation regarding *ne bis in idem* to counter such shortcomings and provide for a complete protection of the individual. See e.g. de la Cuesta (2002) 73 RIDP 733; AIDP (ed) 75 RIDP 804 *et seq.*, I 1, III 4 and 806, III 2.1.

3. 'convicted or acquitted by the Court'

- 29 The term 'convicted or acquitted by a final judgement of the Court' was introduced by a proposal in the 1996 Preparatory Committee II¹⁰⁰ with regard to paragraph 2 as an alternative to the wording 'has already been tried' originally foreseen in the 1994 ILC Draft Statute. The implications of this change in language will be discussed in the context of paragraph 3 (*infra* mn 34). The term is to be understood identically as in paragraph 1, referring to a final decision on the merits of the case¹⁰¹. Before this decision has been rendered, *ne bis in idem* does not apply. An interpretation proposed by the U.S. Delegation suggested that 'convicted or acquitted' in the context of paragraph 2 means that national criminal systems can act also when the case has been withdrawn or stayed in the ICC. This would mean that in addition to the general right of States to always try the same conduct as crimes not falling under the jurisdiction of the ICC, they could also try a crime referred to in article 5, unless a conviction or acquittal was issued by the Court. This reveals a major imbalance with regard to article 17. A case will be inadmissible before the ICC as long as it is being investigated or prosecuted by a State (para. 1) or if a State has conducted an investigation and decided not to prosecute the person in question (para. 2). Besides, neither proceedings before the ICC, nor the ICC Prosecutor's decision not to proceed bar the opening of national investigations and prosecution¹⁰².

III. Paragraph 3

- 30 Paragraph 3 contains the most complicated and controversial part of article 20. Providing the possibility of exceptions to *ne bis in idem*, it confirms that the protection does not cover national and international decisions equally. In the case of national decisions, the presumption of the application of *ne bis in idem* can be overruled by the ICC. The core idea is that certain criteria concerning the quality of criminal justice need to be fulfilled by national proceedings. This thesis contains an implication of the primacy of the ICC and was vehemently contested by some delegations. Others held it as an indispensable element if the system of international repression is to gain any credibility. The *credo* was: If criminal justice is said to be done, it is to be done properly.
- 31 The exceptions to *ne bis in idem* were difficult to define. It has been suggested that they will also be burdensome to prove. The most frequent question during the negotiations was: who has the competence to decide on the exceptions? Who has the burden of proof on whether the national decision is flawed in the way described? How to overcome the fears that exceptions expose national jurisdictions to unauthorized and summary evaluation by an international organ? How to define the exceptions in a way that is not 'subjective' but 'objective'¹⁰³?
- 32 As noted earlier, article 42 of the ILC Draft Statute was built on the model of the *ad hoc* tribunals. Its paragraph 2 contained the exceptions: '(a) the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of

¹⁰⁰ 1996 Preparatory Committee II, article D, p. 86; article 42, p. 202. It may be noteworthy that at the same time the 1996 ILC Draft Code, referring in its *non bis in idem* provision uniformly to 'convicted or acquitted', was released and might have been a source of new language, see above mn 17.

¹⁰¹ For further consideration with regard to the finality of a judgment by the Court see above mn 23.

¹⁰² Klip and van der Wilt (2002) 73 *RIDP* 1121. See under this aspect also the possibilities of States to retry a person after ICC proceedings, whereas the ordinary crime exception was deleted also because of *ne bis in idem* arguments (see mn 33); Conway (2003) 14 *CLF* 358.

¹⁰³ The discussion seemed to take it for granted that objectivity of language as such could be achieved, if only the correct wording were found. See 1996 Preparatory Committee I, p. 39, paras. 172 and 174; 'article 42 (b) should not include any wording which could be conducive to subjective interpretation'. See also Triffterer, 2nd edition, *Preliminary Remarks*, mn 50; Holmes, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 673 *et seq.*

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