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DOI:

[10.1163/15718034-12341295](https://doi.org/10.1163/15718034-12341295)

*Document Version*

Early version, also known as pre-print

[Link to publication record in King's Research Portal](#)

*Citation for published version (APA):*

Hamilton, T. F. B. (2015). Case Admissibility at the International Criminal Court. *The Law & Practice of International Courts and Tribunals*, 14(2), 305-317. <https://doi.org/10.1163/15718034-12341295>

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## Case Admissibility at the International Criminal Court

Tomas Hamilton<sup>1</sup>

**Keywords:** International Criminal Court; international criminal law; admissibility; complementarity; ability; willingness; gravity; Simone Gbagbo.

**Abstract:** The Appeals Chamber judgment in *Simone Gbagbo* solidifies the International Criminal Court's two-step test for determining challenges to the admissibility of a case under Article 17 of the Rome Statute. Notably, this is an area of ICC jurisprudence that does not suffer from excessive fragmentation. The Court has consistently required “substantially the same conduct” for a finding of parity between its own case and the case under investigation or prosecution by domestic authorities. Different outcomes in the *Al-Senussi* and *Gaddafi* cases are attributable to factual differences, leaving intact the fundamental approach of the Court to the “inability” and “unwillingness” aspects of complementarity. Although novel fact patterns may pose future challenges to the coherence of the current jurisprudence, the core principles of case admissibility are now established, increasing legal certainty for States and individuals who seek to challenge the admissibility of cases before the Court.

**Cite as:** Hamilton, Tomas. “Case Admissibility at the International Criminal Court.” *The Law & Practice of International Courts and Tribunals* 14 (2015): 305-317.

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## I. Overview of the jurisprudence

The 27 May 2015 issuance of the Admissibility Judgment in *Simone Gbagbo* presented a timely opportunity to review the ICC's current jurisprudence on the admissibility of cases.<sup>2</sup> Article 17(1) of the Statute sets out the legal framework for proceedings on admissibility. According to the ICC Appeals Chamber, the purpose of such proceedings is to determine "whether the case brought by the Prosecutor is inadmissible because of a jurisdictional conflict".<sup>3</sup> The Appeals Chamber has consistently endorsed a "two-step analysis" for determining admissibility, firstly in *Katanga*, then followed in *Bemba*, *Kenyatta*, *Ruto*, *Gaddafi*, *Al-Senussi*, and now in *Simone Gbagbo*.<sup>4</sup> Recent Pre-Trial Chamber decisions on admissibility<sup>5</sup> also confirm that the two-step test is the established practice of the Court.<sup>6</sup> The first step is to determine the existence of an "investigation or prosecution" at the domestic level. The second step is to address whether the State is "unwilling or unable genuinely" to investigate or prosecute. Pre-Trial Chamber I has held that "while distinct, [the two steps] are nonetheless intimately and inextricably linked".<sup>7</sup> The Appeals Chamber has clarified that both steps may rely on the same considerations.<sup>8</sup>

The burden of proof in an admissibility challenge is not explicit in the Statute, but in the Court's jurisprudence it rests with the challenger. The Appeals Chamber held: "a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible".<sup>9</sup> Trial

<sup>2</sup> Appeals Chamber, 27 May 2015, [ICC-02/11-01/12-75-Red](#) ("*Simone Gbagbo* Judgment").

<sup>3</sup> Appeals Chamber, 30 August 2011, [ICC-01/09-01/11-307](#) ("*Ruto* Judgment"), at para. 44; Appeals Chamber, 30 August 2011, [ICC-01/09-02/11-274](#) ("*Kenyatta* Judgment"), at para. 43.

<sup>4</sup> Appeals Chamber, 25 September 2009, [ICC-01/04-01/07-1497](#) ("*Katanga* Judgment"), at para. 78; Appeals Chamber, 19 October 2010, [ICC-01/05-01/08-962-CORR OA 3](#), ("*Bemba* Judgment") para. 107; *Kenyatta* Judgment, *supra* note 2, at para. 40; *Ruto* Judgment, *supra* note 2, at para. 41; Appeals Chamber, 21 May 2014, [ICC-01/11-01/11-547-Red](#) (OA 4) ("*Gaddafi* Judgment"), at para. 213; Appeals Chamber, 24 July 2014, [ICC-01/11-01/11-565](#) (OA 6) ("*Al-Senussi* Judgment"), at para. 68; *Simone Gbagbo* Judgment, *supra* note 2, at para. 27.

<sup>5</sup> Pre-Trial Chamber I, 31 May 2013, [ICC-01/11-01/11-344-Red](#) ("*Gaddafi* Decision"), at para. 58; Pre-Trial Chamber I, 11 October 2013, [ICC-01/11-01/11-466-Red](#) ("*Al-Senussi* Decision"), at para. 26; Pre-Trial Chamber I, 11 December 2014, [ICC-02/11-01/12-47-Red](#) ("*Simone Gbagbo* Decision"), at para. 49. The Court's jurisprudence on admissibility also includes, in addition to Pre-Trial Chamber determinations on admissibility challenges, Pre-Trial Chamber decisions on the authorization of investigations. See Pre-Trial Chamber II, 31 March 2010, [ICC-01/09](#), ("*Kenya* Decision"), at para. 20; Pre-Trial Chamber I, 5 November 2007, [ICC-01/04-01/07-55](#), at para. 20.

<sup>6</sup> Nonetheless, only a limited number of fact patterns have been considered by the Court to date. The law on case admissibility may still evolve significantly, especially in light of the lack of formal *stare decisis* in Article 21(2).

<sup>7</sup> *Al-Senussi* Decision, *supra* note 2, at para. 210. *Al Senussi* Judgment, *supra* note 4, at para. 166: the "investigation or prosecution" must be "genuine".

<sup>8</sup> *Simone Gbagbo* Judgment, *supra* note 2, at para. 60. See also consideration in *Simone Gbagbo* Judgment, *supra* note 2, at para. 122: the relevance of "difficulties allegedly encountered in [a State's] investigations" to the first step of the analysis was not established by Côte d'Ivoire.

<sup>9</sup> *Ruto* Judgment, *supra* note 2, at para. 62; *Kenyatta* Judgment, *supra* note 2, at para. 61; *Simone Gbagbo* Judgment, *supra*

Chamber III held the burden was on the Defence, as the challenging party.<sup>10</sup> If the Court acts on its own motion to decide admissibility, the Prosecutor has the burden of showing admissibility.<sup>11</sup> In the absence of a statutory standard of proof,<sup>12</sup> the jurisprudence has required “evidence of a sufficient degree of specificity and probative value”.<sup>13</sup>

Since *Katanga*, the Appeals Chamber has confirmed that admissibility must be determined “on the basis of the factual situation [...] at the time of the proceedings concerning the admissibility challenge”, not, for instance, at the time of the issuance of the warrant of arrest.<sup>14</sup> The Appeals Chamber held: “The Statute assumes that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory”.<sup>15</sup> Pre-Trial Chamber I clarified: “a decision on the admissibility of the case must be based on the circumstances prevailing at the time of its issuance”,<sup>16</sup> suggesting that a Chamber could even consider factual developments occurring after the parties and participants have completed their submissions.

## II. The existence of an “investigation or prosecution”<sup>17</sup>

The first step of the test asks: “(1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned”.<sup>18</sup> An affirmative answer to either question means the case is

note 2, at para. 29.

<sup>10</sup> Trial Chamber III, 24 June 2010, [ICC-01/05-01/08-802](#) (“*Bemba* Decision”), at para. 204.

<sup>11</sup> Pre-Trial Chamber I, 6 July 2007, [ICC-01/04-01/07-4](#), at para. 9 *et seq.*

<sup>12</sup> Pre-Trial Chamber I held none of the standards of proof explicitly set out in the Statute apply to admissibility. *Gaddafi* Decision, *supra* note 2, at para. 54.

<sup>13</sup> *Ruto* Judgment, *supra* note 2, at para. 62; *Kenyatta* Judgment, *supra* note 2, at para. 61; *Simone Gbagbo* Judgment, *supra* note 2, at para. 29.

<sup>14</sup> *Katanga* Judgment, *supra* note 2, at para. 56.

<sup>15</sup> *Ibid.* As such, the “time of proceedings” appears to refer to the moment when the challenge is raised by a person or a State. See further *Simone Gbagbo* Judgment, *supra* note 2, at para. 32; Appeals Chamber, 28 July 2011, [ICC-01/09-02/11-202](#), at para. 9; Appeals Chamber, 28 July 2011, [ICC-01/09-01/11-234](#) (“*Kenya* Appeals Decision”), at para. 10.

<sup>16</sup> *Al-Senussi* Decision, *supra* note 2, at para. 34.

<sup>17</sup> See K. Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: An Inductive, Situation-based Approach* (2010), at pp 43-87; C. Cárdenas, “The Admissibility Test Before The ICC”, in G. Werle, (ed.) *Justice in Transition* (2006). The ICC jurisprudence has not yet considered a challenge to admissibility based on the existence of an amnesty or a Truth and Reconciliation Commission or a hybrid tribunal, which would potentially raise complex issues about the “unwilling or unable” criteria. The potential for such an issue to arise was highlighted in the Ongwen and others case. See Pre-Trial Chamber II, 10 March 2009, [ICC-02/04-01/15-156](#), at paras 5, 37. The possibility of hybrid tribunals appears to remain alive (see Patryk Labuda, “[The Mirage of Hybrid Justice in Africa?](#)”, on *Opinio Juris* Blog, accessed on 9 June 2015), despite the difficulties of establishing politically-neutral and cost-effective hybrid tribunals (see Tomas Hamilton and Michael Ramsden, “The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia”, *International Criminal Law Review*, 14(1) (2014), 115-147).

<sup>18</sup> *Katanga* Judgment, *supra* note 2, at para. 78.

inadmissible,<sup>19</sup> subject to the second step. It follows logically that “inaction” by the State, where no current or past “investigation or prosecution” exists, will “render a case admissible before the Court”.<sup>20</sup> In relation to past investigations under Article 17(1)(b), the Appeals Chamber held the term “decision not to prosecute” does not include “decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC”.<sup>21</sup> In *Bemba*, the Appeals confirmed that decisions of this nature made by a State’s authorities and its courts were not “decisions not to prosecute” within the meaning of Article 17(1)(b).<sup>22</sup>

#### A. An “ongoing investigation”

The Appeals Chamber has defined the Article 17(1)(a) phrase “the case is being investigated” as requiring investigative steps “directed at ascertaining” whether the person is responsible for the alleged conduct, “for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”.<sup>23</sup> The “mere preparedness to take such steps” is not sufficient – the investigative steps need to be actually taken.<sup>24</sup> Furthermore, the investigation must relate to the “case”, rather than being investigation in an abstract sense.<sup>25</sup> The Appeals Chamber in *Gaddafi* held that to establish an investigation is underway at the domestic level, the “the contours of the case being investigated [...] must be clear”, irrespective of the stage of the investigation.<sup>26</sup>

In *Simone Gbagbo*, the Appeals Chamber upheld Pre-Trial Chamber I’s finding based on a lack of any “tangible, concrete and progressive investigative steps” into criminal responsibility for the crimes alleged in the proceedings before the Court or a prosecution for these alleged crimes.<sup>27</sup> Pre-Trial Chamber I gave examples of investigative steps that Côte d’Ivoire’s investigating judge had failed to order: “the taking of witness testimonies, ordering confrontations between the suspect and the

<sup>19</sup> *Katanga Judgment*, *supra* note 2, at para. 75.

<sup>20</sup> *Katanga Judgment*, *supra* note 2, at para. 78. Although strictly speaking, in a case of inaction, admissibility remains subject to Article 17(1)(d) – see *infra* note 76.

<sup>21</sup> *Katanga Judgment*, *supra* note 4, at para. 83: “If the decision of a State to close an investigation because of the suspect’s surrender to the Court were considered to be a “decision not to prosecute”, the peculiar, if not absurd, result would be that because of the surrender of a suspect to the Court, the case would become inadmissible. In such scenario, neither the State nor the ICC would exercise jurisdiction over the alleged crimes, defeating the purpose of the Rome Statute”.

<sup>22</sup> *Bemba Judgment*, *supra* note 2, at paras 74-75; *Bemba Decision*, *supra* note 10, at para. 242. The decisions considered by Trial Chamber III included an order for severance that approximately coincided with the referral to the ICC, as well as judgments of the Court of Appeal of Bangui and the Court of Cassation. *Bemba Judgment*, *supra* note 2, at paras 65-74.

<sup>23</sup> *Ruto Judgment*, *supra* note 2, at para. 41; *Kenyatta Judgment*, *supra* note 2, at paras 1 and 40.

<sup>24</sup> *Ruto Judgment*, *supra* note 2, at para. 41; *Kenyatta Judgment*, *supra* note 2, at para. 40.

<sup>25</sup> *Ruto Judgment*, *supra* note 2, at para. 37; *Kenyatta Judgment*, *supra* note 2, at para. 36.

<sup>26</sup> *Gaddafi Judgment*, *supra* note 2, at paras 83-84. The *Al-Senussi* case was found inadmissible due to ongoing national prosecution.

<sup>27</sup> *Simone Gbagbo Decision*, *supra* note 2, at paras 36, 78-79.

witnesses or between the suspect and the *parties civiles*, or ordering any necessary forensic or other expertise concerning the crimes committed”.<sup>28</sup> The Appeals Chamber upheld as reasonable Pre-Trial Chamber I’s conclusion that “the investigative steps, in view of their number and frequency, were “sparse and disparate””.<sup>29</sup>

#### B. “Substantially the same conduct”

Since the *Ruto* and *Kenyatta* judgments, the Appeals Chamber has required that “substantially” the same conduct is being investigated or prosecuted in the domestic and ICC proceedings.<sup>30</sup> According to the Appeals Chamber, the relevant “conduct” is “defined by the warrant of arrest or summons to appear [...] or the charges [as] confirmed”.<sup>31</sup> Pre-Trial Chamber I suggested some flexibility, on the basis that “the determination of what is “substantially the same conduct [...]” will vary according to the concrete facts and circumstances of the case and, therefore, requires a case-by-case analysis.”<sup>32</sup> The Appeals Chamber in *Simone Gbagbo* found Pre-Trial Chamber I had not erred in disregarding interview evidence from a civil party related to events that fell outside of the scope of the case as defined by the Arrest Warrant Decision.<sup>33</sup> However, in *Gaddafi*. Pre-Trial Chamber I went beyond the underlying circumstances described in the charging documents of the Court, to consider specific factual incidents, holding that: “the incidents enumerated in the warrant of arrest do not “represent unique manifestations of the form of criminality alleged against Mr Gaddafi”, and therefore they constitute a “non-exhaustive list” of allegations.<sup>34</sup> Notably, the wording of “same person, same conduct” has not been used in the recent Appeals Chamber judgments.<sup>35</sup> Although there have been attempts during litigation to transform and extend the meaning of the “same person” criterion, there have been no substantive challenges to whether the identity of the person in question is the same in

<sup>28</sup> *Simone Gbagbo* Decision, *supra* note 2, at para. 67.

<sup>29</sup> *Simone Gbagbo* Judgment, *supra* note 2, at para. 131.

<sup>30</sup> *Ruto* Judgment, *supra* note 2, at para. 37; *Kenyatta* Judgment, *supra* note 2, at para. 36. Followed in *Simone Gbagbo* Judgment, *supra* note 2, at para. 98.

<sup>31</sup> *Ruto* Judgment, *supra* note 2, at para. 39.

<sup>32</sup> *Al Senussi* Decision, at para 66(iii).

<sup>33</sup> *Simone Gbagbo* Judgment, *supra* note 2, at paras 106-1-4.

<sup>34</sup> *Gaddafi* Decision, *supra* note 2, at paras 81-83.

<sup>35</sup> *Simone Gbagbo* Judgment, *supra* note 2, at para. 98; *Gaddafi* Judgment, *supra* note 2, at para. 83. The jurisprudence now treats the “same person” test as an aspect of the “substantially the same case” requirement. A Chamber simply verifies that the domestic proceedings refer to the specific individual subject to ICC proceedings. The “same person, same conduct” test derives from the wording of the arrest warrant in the *Lubanga* case. See Pre-Trial Chamber I, 10 February 2006, [ICC-01/04-01/07-520-Anx2](#), (“*Lubanga* Arrest Warrant Decision”), at para. 31: “it is a *conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court.”

the domestic and ICC proceedings,<sup>36</sup> which appears to have been one of the considerations underlying earlier references to the words “same person”.<sup>37</sup>

The Appeals Chamber held that the legal characterisation of the conduct as a particular “crime” is not determinative, and at the domestic level it need not be described as an “international crime”.<sup>38</sup> The conduct in the domestic proceedings may be considered to be the same, even if the investigation or proceedings are based on different crimes or result in different charges.<sup>39</sup> However, in *Simone Gbagbo*, Pre-Trial Chamber I did refer to “crimes of the same nature”,<sup>40</sup> the Appeals Chamber stating that Pre-Trial Chamber I had “primarily based its findings on the alleged conduct underlying the crimes and considered their legal characterisation as an added indicator of the actual subject matter of the domestic proceedings”.<sup>41</sup> In the Libya Judgments, Judge Ušacka opined separately that Pre-Trial Chamber I’s test followed the Appeals Chamber’s two-step structure, but incorrectly applied the first step of the test, representing perhaps the most significant dissent on this issue in the ICC jurisprudence to date.<sup>42</sup>

### III. Whether the State is “unwilling or unable”

During the second step of the test, there is a presumption in favour of the domestic jurisdiction.<sup>43</sup> The *Simone Gbagbo* Judgment has confirmed that this presumption does not apply during the first step.<sup>44</sup>

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<sup>36</sup> Pre-Trial Chamber II considered the “same person” requirement in rejecting Kenya’s proposal to investigate “persons at the same level in the hierarchy being investigated by the ICC” as a misleading interpretation of the requirement. The Chamber stated that “during the “case” stage, admissibility determination must be assessed against national proceedings related to those particular persons that are subject to the Court’s proceedings”. Pre-Trial Chamber II, 30 May 2011, [ICC-01/09-02/11-96](#), at para. 50.

<sup>37</sup> *Lubanga* Arrest Warrant Decision, *supra* note 35, at para. 31.

<sup>38</sup> *Al Senussi* Decision, at paras 66(iv), 85-87; *Gaddafi* Decision, *supra* note 2, at paras 85-88. This is particularly relevant where the jurisdictional State lacks domestic legislation for international crimes.

<sup>39</sup> Some academic commentary supports this interpretation: “[a]s long as the case covers the same conduct, its legal characterization is irrelevant”, according to G. Werle, *Principles of International Criminal Law* (2014) at p.104, fn 611. Pre-Trial Chamber I found that domestic charges of economic crimes in the *Simone Gbagbo* case were based on conduct that was “clearly of a different nature” to the alleged conduct in relation to the crimes against humanity of murder, rape and other forms of sexual violence, persecution and other inhumane acts, on the basis of which her Warrant of Arrest was issued. As to the crimes against the State alleges against Mrs Gbagbo in the domestic proceedings, the scope of the conduct “covered only [particular actions of Mrs Gbagbo]”. Pre-Trial Chamber I noted that the alleged domestic crimes were “felonies and misdemeanours against the safety of the State, the national defence and the public security [in the Ivorian Criminal Code]”. See *Simone Gbagbo* Decision, *supra* note 2, at paras 47, 49.

<sup>40</sup> *Simone Gbagbo* Decision, *supra* note 2, at para. 50. The wording might suggest that if the crimes are the same, the conduct is implicitly the same.

<sup>41</sup> *Simone Gbagbo* Judgment, *supra* note 2, at para. 71.

<sup>42</sup> Appeals Chamber, 21 May 2014, [ICC-01/11-01/11-547-Anx2](#), at paras 31, 47, 65; Appeals Chamber, 24 July 2014, [ICC-01/11-01/11-565-Anx2](#), at para. 5.

<sup>43</sup> *Ruto* Judgment, *supra* note 2, at para. 44; *Kenyatta* Judgment, *supra* note 2, at para. 43.

<sup>44</sup> *Simone Gbagbo* Judgment, *supra* note 2, at para. 59.

### A. Unwillingness of the State

The criteria to establish “unwillingness” are set out in Article 17(2). The Appeals Chamber held that a State needs to prove that it is conducting “a genuine investigation or prosecution”.<sup>45</sup> Pre-Trial Chamber I confirmed that “unjustified delays” under Article 17(2)(b) exist only where the delays appear to be inconsistent with “an intent to bring the person concerned to justice”, determination on which must be based on the “factual circumstances with a view to ultimately discerning the State’s intent as concerns its on-going domestic proceedings against the specific individual”.<sup>46</sup> However, Pre-Trial Chamber I also held that unjustified delay must be determined “not against an abstract ideal of justice, but against the specific circumstances surrounding the investigation concerned”, leaving scope for new fact patterns to develop the two-step test in this regard.<sup>47</sup>

In relation to the *chapeau* requirement of Article 17(2) concerning “the principles of due process recognized by international law”, the Appeals Chamber held that “the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights.”<sup>48</sup> The Appeals Chamber interpreted Article 17(2)(c) as requiring that “the proceedings were not or are not being conducted independently or impartially and that the proceedings were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”<sup>49</sup> This requirement did not involve an assessment of whether the due process rights of the suspect had been breached *per se*,<sup>50</sup> unless the violations of the rights of the suspect were “so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice”.<sup>51</sup> Accordingly, in the existing jurisprudence, Article 17(2)(c) relates primarily to

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<sup>45</sup> *Simone Gbagbo* Judgment, *supra* note 2, at para. 29. The Appeals Chamber’s interpretation clarifies the statutory wording “unable or unwilling genuinely”.

<sup>46</sup> *Al-Senussi* Decision, *supra* note 2, at para. 233: The relevant factors that the Court may consider include the chronology of domestic proceedings and the complexity of the case at hand. See Pre-Trial Chamber I, [ICC-01/11-01/11-239](#), 7 December 2012.

<sup>47</sup> *Al-Senussi* Decision, *supra* note 2, at para. 223.

<sup>48</sup> *Al-Senussi* Judgment, *supra* note 2, at para. 219. Further, at para 225: The Appeals Chamber considered that the Court should not pass judgment on the “operation of national courts in general” or on the “penal system of a State”. The negotiating history of the Statute points to the drafters having included this phrase “in order to introduce an element of objectivity to the assessment of unwillingness and to reduce the subjectivity that might creep into any assessment of the intent of the domestic authorities”, according to: J. Holmes, “The Principle of Complementarity”, in R. Lee (Ed.), *The International Criminal Court, The Making of the Rome Statute (1999)*, at p. 50.

<sup>49</sup> *Al-Senussi* Judgment, *supra* note 2, at paras 213, 230(1): “unwillingness” does not follow from the State’s non-respect for fair trial rights.

<sup>50</sup> *Al-Senussi* Judgment, *supra* note 2, at paras 220, 230(2).

<sup>51</sup> *Al-Senussi* Judgment, *supra* note 2, at para. 230(3).



sham proceedings.<sup>52</sup>

### B. *Inability of the State*

The leading case on “inability” is *Gaddafi*, in which Pre-Trial Chamber I analysed the difficulties faced by the Libyan national authorities in exercising judicial powers “across the entire territory” and found that the national judicial system was “unavailable” within the meaning of Article 17(3).<sup>53</sup> The Chamber found that Libya was “genuinely unable” because: it could not secure the transfer of Gaddafi into state custody from his place of detention in Zintan, it lacked the capacity to obtain necessary testimony, there were significant practical impediments to securing legal representation for Gaddafi and its judicial and governmental authorities were unable to exercise full control over certain detention facilities and to provide adequate witness protection.<sup>54</sup> The Appeals Chamber did not reach the second step of the two-step test, having not found an “investigation or prosecution”.<sup>55</sup> However, Judge Song opined separately that Libya was investigating the same case, and the case was admissible, on the basis that Libya was unable to obtain custody over Gaddafi.<sup>56</sup>

The factual parameters of the *Al Senussi* case were such that Pre-Trial Chamber I reached the contrary conclusion on Libya’s inability and unwillingness. Pre-Trial Chamber I based its decision on “the absence of effective witness protection programmes and the difficulties faced by the national authorities in exercising control over certain detention facilities”.<sup>57</sup> Although legal representation had not yet been implemented in the domestic case, Pre-Trial Chamber I was satisfied that several local lawyers had indicated their willingness to represent him. By contrast, in *Gaddafi*, there had been repeated unsuccessful attempts to secure legal representation.<sup>58</sup>

The Appeals Chamber upheld the finding that the capacity of Libya to collect sufficient evidence was one of the relevant considerations, and it was substantiated by differences in the “geographical and temporal scope” of the cases under investigation, which impacted the amount and quality of evidence and testimony required.<sup>59</sup> Whereas the allegations in *Gaddafi* spanned events occurring across Libya, the case against *Al-Senussi* concerned conduct occurring only during the repression of

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<sup>52</sup> *Al-Senussi* Judgment, *supra* note 2, at para. 230(2).

<sup>53</sup> *Gaddafi* Decision, *supra* note 2, at para. 205.

<sup>54</sup> *Gaddafi* Decision, *supra* note 2, at para 204 *et seq.*

<sup>55</sup> *Gaddafi* Judgment, *supra* note 2, at para. 213.

<sup>56</sup> Appeals Chamber, 21 May 2014, [ICC-01/11-01/11-547-Anx1](#), at para. 36.

<sup>57</sup> *Al-Senussi* Decision, *supra* note 2, at para. 297.

<sup>58</sup> *Gaddafi* Decision, *supra* note 2, at para. 215. Notably, the Prosecutor supported inadmissibility in *Al-Senussi*, but opposed it in *Gaddafi*.

<sup>59</sup> *Al-Senussi* Judgment, *supra* note 2, at para. 91.

demonstrations in Benghazi.<sup>60</sup> The Appeals Chamber also confirmed the approach of Pre-Trial Chamber I in taking into account whether Libya could exercise control over the two accused.<sup>61</sup>

#### IV. Procedure for challenges to admissibility<sup>62</sup>

Article 19(2) sets out who may bring a challenge,<sup>63</sup> but the jurisprudence has not conclusively settled the question of whether this includes non-member States,<sup>64</sup> or third States claiming jurisdiction under principles of universal jurisdiction. Pre-Trial Chamber II has found that Article 19(3) means that “a State shall be informed about an admissibility challenge and provided with a summary of its grounds only if the situation was received by way of a State Party referral as opposed to a *proprio motu* request submitted by the Prosecutor”.<sup>65</sup>

In relation to Article 19(4), Pre-Trial Chamber II has held that a challenge brought by a party does not “foreclose the bringing of a challenge by another equally legitimate party”.<sup>66</sup> Likewise, the right of a party to bring a challenge is not “curtailed or otherwise affected by the Chamber's exercise of its *proprio motu* powers.”<sup>67</sup> In cases where there are two or more accused persons, as in the *Gaddafi* and *Al-Senussi* proceedings, the State may challenge admissibility separately for each accused.<sup>68</sup> In relation to the second requirement of Article 19(4),<sup>69</sup> Trial Chamber II held, in the context of *ne bis in idem*, that once a trial chamber is constituted, challenges to admissibility are permissible only in “exceptional” circumstances and with leave.<sup>70</sup>

<sup>60</sup> *Al-Senussi* Judgment, *supra* note 2, at para. 266 *et seq.*

<sup>61</sup> *Ibid.* In *Gaddafi* the Libyan government could not effect Gaddafi's transfer and did not have control over the militia holding him in Zintan, but *Al-Senussi* was found to be in a government-controlled detention facility in Tripoli.

<sup>62</sup> Article 19 sets out the relevant procedure. The Court's existing jurisprudence has not yet developed Article 19(7), (8) and (9). This memorandum does not address Article 18 on preliminary rulings, which also has not been developed by jurisprudence.

<sup>63</sup> A challenge may be raised by an accused, or a person for whom a warrant of arrest or a summons to appear has been issued, or a State, either with jurisdiction over the case or from whom acceptance of jurisdiction is required. Article 17 has mainly been understood as contemplating investigations and prosecutions by States with jurisdiction based on the territory in which the crimes were committed. However, there is the significant likelihood that other States may seek to oppose the admissibility of a case in future.

<sup>64</sup> Academics disagree: L. Condorelli, *La Cour Pénale Internationale: un pas de géant*, *Revue générale de droit international public* 103.1 (1999): 7-21, versus; P. Benvenuti, “Complementarity of the International Criminal Court to National Criminal Jurisdictions”, in W. Schabas et al. (eds.), *Essays On The Rome Statute Of The International Criminal Court*, (1999), at pp 21, 48.

<sup>65</sup> Pre-Trial Chamber II, September 2011, [ICC-01/09-02/11-340](#), at para. 9 [emphasis added].

<sup>66</sup> Pre-Trial Chamber II, 10 March 2009, [ICC-02/04-01/05-377](#), at para. 25.

<sup>67</sup> *Ibid.*, p. 10.

<sup>68</sup> Pre-Trial Chamber I, [ICC-01/11-01/11-134](#), 4 May 2012 para. 8; Pre-Trial Chamber I, [ICC-01/11-01/11-325](#), 26 April 2013, at para. 10.

<sup>69</sup> “The challenge shall take place prior to or at the commencement of the trial”.

<sup>70</sup> Trial Chamber II, [ICC-01/04-01/07-1213](#), 16 June 2009, at para. 49; Trial Chamber III, [ICC-01/05-01/08-802](#), 24 June 2010, at paras 210-211.

Under Article 19(5), a State must make its challenge “at the earliest opportunity”, which the Appeals Chamber has interpreted to mean “once it is in a position” to “actually assert a conflict of jurisdictions”<sup>71</sup> and to “substantiate [a] challenge”.<sup>72</sup> The Appeals Chamber rejected Kenya’s argument that “the State cannot be expected to have prepared every aspect of its Admissibility Application in detail in advance of [the date of filing]”.<sup>73</sup> Article 19(6) has been interpreted strictly by the Appeals Chamber, stating: “the right to appeal a decision [on admissibility] is intended to be limited only to those instances in which [a Chamber] issues a ruling specifically on [admissibility]” the operative part of the decision must pertain directly to a question on the admissibility of a case, it cannot be “indirectly or tangentially” linked thereto.<sup>74</sup> Lastly, appeals of admissibility decisions do not extend to facts which postdate the impugned admissibility decision.<sup>75</sup>

## V. The “gravity” requirement

“Gravity” is also an aspect of Article 17 admissibility.<sup>76</sup> The Statute does not specify the degree of “gravity” sufficient to “justify further action” by the Court,<sup>77</sup> and the jurisprudence has not elaborated specific criteria. The Appeals Chamber rejected the approach of Pre-Trial Chamber I that, in the context of issuing an arrest warrant, the gravity threshold required “systematic or large-scale conduct” that may have “caused social alarm to the international community”, along with a person who was a “most senior leader suspected of being most responsible for the crimes within the jurisdiction of the Court”.<sup>78</sup> The Appeals Chamber did not, however, set out its preferred criteria.<sup>79</sup>

Pre-Trial Chamber I observed that the main reason behind the inclusion of the gravity threshold

<sup>71</sup> *Ruto* Judgment, *supra* note 2, at paras 46, 100; *Kenyatta* Judgment, *supra* note 2, at paras 45, 98.

<sup>72</sup> *Gaddafi* Judgment, *supra* note 2, at para. 164: the State should be “ready and able, in its view, to fully demonstrate a conflict of jurisdiction”.

<sup>73</sup> *Kenyatta* Judgment, *supra* note 2, at para. 45.

<sup>74</sup> Appeals Chamber, [ICC-01/09-78](#), 10 August 2010, at paras 15-16.

<sup>75</sup> *Simone Gbagbo* Judgment, *supra* note 2, at paras 33, 43; *Kenya* Appeals Decision, *supra* note 15, at para. 13.

<sup>76</sup> The Appeals Chamber’s “two-step analysis” must be understood as relating only to the core aspect of admissibility, namely the assessment based on the principle of complementarity, which deals with potential conflicts of jurisdiction. This must be the thinking that underlies the Appeals Chamber’s statement that: “unless there is a [jurisdictional] conflict, the case is admissible”. *Ruto* Judgment, *supra* note 2, at para. 44; *Kenyatta* Judgment, *supra* note 2, at para. 43. Strictly speaking, a case can still be inadmissible if there is no jurisdictional conflict – namely when Article 17(1)(d) “gravity” comes to bear. It is unlikely that “gravity” could be properly considered an aspect of jurisdictional conflict – the plain wording of the Statute suggests it is not.

<sup>77</sup> The concept of “gravity” runs through the Statute, in Articles 53, 59, 77 and 78 - it must be considered by the Prosecutor in the initiation of an investigation or prosecution; by a custodial State upon an application for interim release; and by a Chamber imposing sentence. Unlike the core principles of the two-step test, it can be said that the “gravity” requirement, and the degree to which it is consistent across different stages of proceedings, is legally uncertain to a substantial degree.

<sup>78</sup> Pre-Trial Chamber I, 24 February 2006, [ICC-01/04-01/06-8-Corr](#), at paras 50, 63.

<sup>79</sup> Appeals Chamber, 13 July 2006, [ICC-01/04-169](#), at paras 59, 68-82.

by the drafters was “to maximize the Court’s deterrent effect”,<sup>80</sup> while academics have argued that the purpose of the gravity provisions is “not to protect [S]tate sovereignty”, rather they arise from “considerations of judicial economy”.<sup>81</sup> In the context of authorisation of an investigation, Pre-Trial Chamber II ruled that the reference to the insufficiency of gravity in article 17 “is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases”.<sup>82</sup> Pre-Trial Chamber II has provided guidance as to the “gravity” required to initiate an investigation.<sup>83</sup>

## VI. Potential limits of the Prosecutor’s Article 19(10) power

This review of the ICC jurisprudence concludes by raising a potential problem that has been implicitly identified in the case law. As noted by Pre-Trial Chamber I in the *Al-Senussi* Decision,<sup>84</sup> Article 19(10) gives the Prosecutor the right to submit a request for a review of a previous decision that a case is inadmissible if “new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.” This raises questions over the practical implications of the fact that only the Prosecutor has the Article 19(10) power. In the *Al Senussi* appeal, the Appeals Chamber rejected a Defence request to use new evidence, including evidence of mistreatment in detention, which the Defence had filed as confidential and *ex parte*, the Appeals Chamber holding that it was for the Prosecutor to use such evidence to submit a request for review under Article 19(10).<sup>85</sup> However, this may point to a mechanical problem with the Statute’s provisions, since this situation would require the Defence to disclose evidence to the Prosecution in order to trigger the review, but doing so would potentially compromise the fair trial rights of the accused, *inter alia* by revealing the litigation strategy of the Defence and likely implying a breach of legal professional privilege. This example simply highlights that whilst existing jurisprudence has settled the core approach to case admissibility, and further increases in legal certainty will only occur after novel fact patterns have come before the Court.

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<sup>80</sup> *Supra* note 78, at para. 48.

<sup>81</sup> This view inevitably distinguishes Article 17 “gravity” from Article 53 “gravity”. See G. Werle, *Principles of International Criminal Law* (2014) para. 290; I. Stegmüller, *The Pre-Investigation Stage Of The ICC: Criteria For Situation Selection* (2011) p.332.

<sup>82</sup> *Kenya* Decision, *supra* note 2, at para. 56.

<sup>83</sup> Pre-Trial Chamber II, 31 March 2010, [ICC-01/09-19-Corr](#), at para. 56 *et seq.*

<sup>84</sup> *Al-Senussi* Decision, *supra* note 2, at para. 312.

<sup>85</sup> *Al Senussi* Judgment, *supra* note 2, at, at para. 61.