The complementarity test (Art. 17) and its application to the Colombian situation

The complementarity test is an on-going process and may be revisited several times before the commencement of the trial. The Kony Pre-Trial Chamber (“PTC”) made the continuing nature of the test clear stressing the possibility of “multiple determinations” of and “multiple challenges” to admissibility in a given case. It concluded:

Considered as a whole, the corpus of these provisions delineates a system whereby the determination of admissibility is meant to be an ongoing process throughout the pre-trial phase, the outcome of which is subject to review depending on the evolution of the relevant factual scenario. Otherwise stated, the Statute as a whole enshrines the idea that a change in circumstances allows (or even, in some scenarios, compels) the Court to determine admissibility anew.

It also follows from this that complementarity, being part of the admissibility of a situation, is to be examined at a very early stage during pre-trial proceedings, or, more exactly, during preliminary inquiries or the pre-investigation stage of the proceedings. In fact, once the OTP’s “Jurisdiction, Complementarity and Cooperation Division” (JCCD) has affirmed the ICC’s jurisdiction in all its aspects (ratione temporis, personae and materiae), it has to analyze the complementarity issue. Only if a situation is considered admissible, the Prosecutor is in a position to analyze more closely whether a formal investigation in the sense of Art. 53 may be opened. In fact, Art. 53 itself requires a positive decision with regard to

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1See also Stigen, Relationship (2008), at 245. On the double effect of this dynamic character of complementarity (vis-a-vis States but also vis-a-vis the ICC) see Olásolo, in Almqvist/Espósito (eds.) 2009, at 279.


3Ibid., paras. 25 et seq. (28), 52. - On the possibility of a retroactive abolishment of the basis of admissibility by a State’s activity after the Prosecutor’s start of an investigation, Pichon (2008) 8 ICLR 185, at 199–200.

4See on the structure of the pre-trial phase before the ICC Ambos, Internationales Strafrecht (2008), § 8 mn. 20a et seq.; Ambos, in Bohlander (ed.) 2007, 429, at 433 et seq.
jurisdiction and admissibility before coming to the more policy-based and discretion ary criteria of subparas. (c) of paras. 1 and 2. The Art. 53 decision is at least as complex as the decision under Art. 17 and the criteria to be applied, especially the “interests of justice” test (Art. 53 (1) (c), (2) (c)), may even be considered more relevant with regard to the specific challenges posed by transitional justice processes.5 This is especially true for the Colombian situation where it may well be possible that a situation or even a case may be considered admissible but, still, an investigation will not (formally) be opened for the reasons spelt out in Art. 53 (1) and/or (2). In any case, this last procedural step in the pre-trial phase of the ICC proceedings is not the object of this study but we must limit ourselves to a detailed analysis of the complementarity test. This analysis will first discuss, as necessary preliminary considerations, the object of reference of this test, examining in particular the distinction between situation and case (infra Chap. 4). Then, the actual complementarity test will be analysed distinguishing between complementarity striceto sensu on the one hand, and an additional gravity threshold on the other (Chap. 5).

5 See for an analysis of the interests of justice clause Ambos, in Ambos/Large/Wierda (eds.) 2009, at 82 et seq.; for a recent call for a broad prosecutorial discretion and the taking into account of the political context Rodman (2009) 22 LJIL 99; for criteria with regard to amnesties Olásolo, in Almqvist/Spósito (eds.) 2009, at 286 et seq.
Chapter 4
Preliminary Considerations: The Object of Reference of the Complementarity Test (Situation–Case–Conduct)

While Art. 17 and 53 explicitly only refer to (individual) “cases”\(^1\) – i.e. “specific incidents during which one or more crimes (…) seems to have been committed by one or more identified suspects”\(^2\) – it is clear that not cases but (general) “situations” – “generally defined in terms of temporal, territorial and in some cases personal parameters”\(^3\) – are referred to the Prosecutor under the triggering procedure (Art. 13). This also follows from PTC I’s situation–case demarcation focusing on the issuance of a warrant of arrest or a summons to appear, i.e., considering that a case only starts with Art. 58 proceedings.\(^4\) Accordingly, the procedural development from a situation to a case goes as follows:

1. The OTP obtains notitia criminis
2. Starts pre-investigating
3. Identifies a situation
4. Checks the criteria enshrined in Art. 53 (1), 15 (3), rule 48 with regard to the situation as a whole
5. Starts a formal investigation (in the case of a referral), or asks for authorization of a formal investigation (in the case of information under Art. 15) in the sense of Art. 54
6. Investigates all-embracing and ideally identifies individual suspects

\(^1\)See also Benzing (2003) 7 MPUNYB 591, at 603.
\(^3\)Ibid.; see also Olásolo (2003) 3 ICLR 87, at 99–100; Kleffner, Complementarity (2008), 199; WCRO, Relevance of a situation (2009), 21–22.
\(^4\)Prosecutor v. Lubanga (n 2) para. 65; see also Situation in DRC [9 November 2005] Decision following the consultation held on 11 October 2005 and the Prosecution’s submission on Jurisdiction and admissibility filed on 31 October 2005 (ICC-01/04-93-4); Olásolo (2007) 20 LJIL 193, at 194; Rastan (2008) 19 CLF 435, at 442–3.
7. Ultimately applies for a warrant of arrest or summons to appear if the reasonable grounds standard of Art. 58 (1), (7) is met; and
8. The PTC issues a warrant of arrest or summons to appear

Only with this last step does a formal or legal case exist in the PTC’s view. Within a situation, the OTP applies a sequential approach, i.e., it investigates specific cases within a situation one after another rather than all at once, whereby cases inside the situation are selected according to gravity. Upon completion of each case the Office examines whether other cases in the situation warrant investigation – bearing in mind the gravity and admissibility thresholds of the ICC Statute – or whether to select a new situation.

In practice, however, the stages mentioned above are blurry since the OTP will most likely focus on individuals before a legal case in the sense of Art. 58 exists. In fact, a case could begin at three potential stages: (1) during pre-investigation and investigation stages; (2) at the moment the Prosecutor makes an application for an arrest warrant or summons to appear; or (3) when the PTC issues a decision to issue a warrant of arrest or summons to appear. Therefore, one may distinguish between cases in a broad and narrow sense. The later refer to the (strict) legal cases that only come into being once a warrant of arrest or summons to appear is issued. Cases in a broad sense evolve very early during investigations and even during pre-investigations. As soon as the OTP bundles allegations against one or more specific individuals, and possibly even generates a “case file” with their names, a case in the broader sense arises. Such a broad case which may exist at an early stage of the (preliminary) investigation constitutes, in fact, a “case hypothesis”, i.e., a likely set of cases that arises from the investigation of a situation. The design of a solid case hypothesis is fundamental for the subsequent process, and it must cover: (1) the status of authority or role of the suspect; (2) the structure of the organization instrumental to the crime and subordinated or associated to the suspect; (3) the pattern and modus operandi of the criminal events; and (4) a conclusion on the

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7ICC-OTP, Update on communications (2006), 1, 5.


mode of responsibility.\textsuperscript{10} In any case, it is clear that cases – understood broadly or narrowly – may only result from a long and thorough investigation.\textsuperscript{11}

From all this follows that the Prosecutor has, at the pre-investigation stage, i.e. when he has not yet decided whether he will formally initiate an investigation in the sense of Art. 53, to examine the admissibility with regard to the situation referred.\textsuperscript{12} The Prosecutor operates on the basis of the said case hypothesis, and checks admissibility only in a “generalized manner”,\textsuperscript{13} albeit taking into account its general selection criteria, in particular the importance of the suspect and his role in the crimes.\textsuperscript{14} Only if the Prosecutor has identified concrete cases, potential criminal conduct and/or suspects, i.e. within the course of the Art. 53 decision,\textsuperscript{15} the admissibility test shifts to the case. This shift from situation to case also follows from Art. 18 and 19: While the former refers to “a situation” referred (Art. 18 (1)) and “criminal acts which may constitute crimes” (Art. 18 (2)), the latter provides for challenges as to the admissibility of “a case”. Thus, it has correctly been argued that the specificity increases from a comparatively general standard (Art. 53 (1)) – via Art. 18 – to selecting individual cases (Art. 53 (2)), until it reaches the highest level of cases in the strict sense (Art. 19).\textsuperscript{16} As a consequence, admissibility must be assessed both at the situation and case stage.\textsuperscript{17}

With the shifting of the investigation from the general situation to a more concrete case the question of the object of reference of the national proceedings vis-à-vis the ICC proceedings arises. The case law tends towards an identity requiring that the national proceedings must refer specifically (“specificity” test)\textsuperscript{18} to the OTP’s case encompassing “both the person and the conduct which is the subject of the case before the Court”.\textsuperscript{19} The Prosecutor requires an

\textsuperscript{11}See also Stigen, Relationship (2008), at 91; Kleffner, Complementarity (2008), at 195 et seq.; Razesberger, Complementarity (2006), 32–3; Stahn, in Stahn/Sluiter (eds.) 2009, 247, at 268. In addition, in the case of “inability” (Art. 17 (3)), the effect of a collapse of the national justice system may go well beyond the specific case and extend to the situation as a whole (cf. Bergsmo (1998) 6 Eur.J.Cr., Cr. L. & Cr. J. 29, at 43; Cárdenas, Zulässigkeitsprüfung (2005), 130–1).

\textsuperscript{12}See also Kleffner, Complementarity (2008), at 195 et seq.
\textsuperscript{13}Stahn, in Stahn/Sluiter (eds.) 2009, 247, at 268–9; for the criteria to be considered see Olásolo, Triggering procedure (2005), at 164 et seq.

\textsuperscript{14}For this ratione personae limitation see also Olásolo, in Almqvist/Espósito (eds.), 2009, at 267–68. For a critique in the the context of the gravity test see infra n 30 in Chap. 5 with main text.

\textsuperscript{15}See para. 1 (b): “case is or would be admissible”; para. 2 (b): “case is admissible”.

\textsuperscript{16}Kleffner, Complementarity (2008), at 197–98. See also his preceding analysis of articles 18, 19 at 168 et seq., 181 et seq.; for a detailed analysis see also El Zeidy, Complementarity (2008), at 239 et seq.; Razesberger, Complementarity (2006), 32–3, at 72 et seq., 123 et seq.

\textsuperscript{17}Stahn (2008) 19 CLF 87, at 106; Olásolo, in Almqvist/Espósito (eds.) 2009, at 266–67.

\textsuperscript{18}Rastan (2008) 19 CLF 435, at 436.

\textsuperscript{19}ICC-PTC I, Prosecutor v. Lubanga and Ntaganda [10 Feb. 2006] Annex II, Decision on the Prosecutor’s application for warrants of arrest, article 58 (ICC-01/04-01/07), para. 31 (emphasis added); ICC-PTC I, Prosecutor v. Harun and Kushayb [27 April 2007], Decision on the Prosecution application under article 58 (7) of the Statute (ICC-02/05-01/07), para. 24; ICC-PTC I,
investigation as to “the same incidents or conduct that are the subject of the case now before the Court”\textsuperscript{20} The significance of “conduct” also follows from the interplay of Art. 17 (1)(c) and 20 (3).\textsuperscript{21} “Conduct” in this sense, i.e., in the sense of the “idem” (the same) of the ne bis in idem principle enshrined in Art. 20, is to be understood strictly as incident-specific.\textsuperscript{22} This follows from the wording of the relevant ICC provisions\textsuperscript{23} and the general understanding of the ne bis in idem principle referring to the specific factual or procedural conduct of the respective case.\textsuperscript{24} Indeed, the Pre-Trial Chambers correctly examine whether the concerned suspect is being prosecuted at the national level for the same crimes referred to in the Prosecutor’s Application.\textsuperscript{25} Thus, in \textit{Lubanga} and \textit{Ntaganda} the PTC held that the DRC’s arrest warrants issued against the suspects did not encompass the same (factual) conduct of the Prosecutor’s application,\textsuperscript{26} namely the specific incidents relating to the “alleged UPC/FPLC’s policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen between July 2002 and December 2003”.\textsuperscript{27} In \textit{Katanga} and \textit{Chui} the admissibility test did not even reach this level of conduct-comparison and the Chamber did not decide on the “same conduct test” as such, because the State in question – the DRC – clearly expressed unwillingness to prosecute the case, i.e. the


\textsuperscript{20} ICC Prosecutor Presents Evidence on Darfur Crimes, The Hague, 27 February 2007, ICC-OTP-20070227-206-En (emphasis added); on the same conduct test see also the controversy before Trial Chamber II in \textit{Prosecutor v. Katanga and Chui} [16 June 2009] Motifs de la décision orale relative à l’exception d’irrecevabilité de l’affaire (article 19 du Statut) (ICC-01/04-01/07-1213) paras.11 et seq., 17 et seq., 95; \textit{Prosecutor v. Katanga and Chui} [11 March 2007], Motion challenging the admissibility of the case by the Defence of Germain Katanga, pursuant to article 19 (2) (a) of the Statute (ICC-01/04-01/07-949) paras. 39 et seq.; \textit{Prosecutor v. Katanga and Chui} [30.3.2009], Public redacted version of the 19th March 2009 Prosecution response to motion challenging the admissibility of the case by the Defence of Germain Katanga, pursuant to article 19 (2) (ICC-01/04-01/07-1007) paras. 50 et seq.

\textsuperscript{21} Rastan (2008) 19 CLF 435, at 437; see also conc. Sedman, in Stahn/van den Herik (eds.) 2010, at 262 et seq.


\textsuperscript{23} Article 20 (3) refers to the “same conduct” and article 17 (1) (c) to conduct “subject of the complaint”; article 17 (1) (a) and (b) refer to the more specific “case” instead of “situation”. See also articles 89 (4), 94 referring to a “different” crime or case with regard to domestic prosecutions.

\textsuperscript{24} See for example for the discussion of the “European” ne bis in idem rule of article 54 Schengen Agreement Ambos, \textit{Internationales Strafrecht} (2008) § 12 mn. 38 et seq. (49 et seq.).


\textsuperscript{26} \textit{Prosecutor v. Lubanga and Ntaganda} (n 19) para. 38.

\textsuperscript{27} \textit{Ibid.}, para. 39, 40.
DRC did not challenge admissibility and remained totally inactive, which rendered the *Katanga* case admissible without further ado.28

In sum, for a case to be declared inadmissible, national proceedings must refer to the *same concrete conduct and suspect(s)* as the investigation before the ICC unless the State remains totally inactive anyway. Clearly, there is a certain risk that this relatively strict requirement may too strongly limit a State’s legitimate choice in selecting conduct and crimes. One must not overlook that the complementarity regime should encourage domestic proceedings29 and that States should therefore have a certain margin of appreciation as to their prosecutorial policies.30 In addition, specificity also must be construed dynamically and with certain flexibility with regard to the different criteria of admissibility to be analyzed in the following section.31

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28 *Prosecutor v. Katanga and Chui*, Motifs (n 20) para. 95.
Chapter 5
Gravity and Complementarity Stricto Sensu

According to the Lubanga PTC, Art. 17 provides for a twofold test distinguishing between complementarity *stricto sensu* pursuant to Art. 17 (1) (a)–(c), (2) and (3) on the one hand, and an additional gravity threshold pursuant to Art. 17 (1) (d) on the other.¹ Thus, complementarity *stricto sensu* only becomes relevant if the respective case is of sufficient gravity in the first place.² It seems therefore logical to examine gravity first and only then, if the gravity standard is satisfied, complementarity *stricto sensu*.³

¹Prosecutor v. Lubanga and Ntaganda (n 19 in Chap. 4) para. 29: “The Chamber considers that the admissibility test of a case arising from the investigation of a situation has two parts. The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such a case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable, within the meaning of article 17 (1) (a) to (c), 2 and 3 of the Statute. The second part of the test refers to the gravity threshold which any case must meet to be admissible before the Court. Accordingly, the Chamber will treat them separately”. (footnotes omitted).

²Apart from Prosecutor v. Lubanga and Ntaganda (n 1) see also PTC I, Situation in the DRC in the case of Prosecutor v. Thomas Lubanga Dyilo [24 February 2006], Decision concerning PTC I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the case against Mr. Thomas Lubanga Dyilo (ICC-01/04–01/06), para. 41 (“... this gravity threshold is in addition to (…) the crimes included in articles 6 to 8 of the Statute …”). See also ICC-OTP, Report on activities (2006), at 6: “Although any crime falling within the jurisdiction of the Court is a serious matter, the Rome Statute (…) clearly foresees and requires an additional consideration of ‘gravity’ …”. See also Guariglia, in Stahn/Sluiter (eds.) 2009, at 209, at 213 (“overarching consideration … analyzed before any decision to investigate …”). For further references see Ambos et al., Justicia y Paz (2010), para. 38 with fn. 352.

³This is also the approach taken by the OTP. Thus, in the Iraq situation the Prosecutor reached a negative conclusion on “gravity”, and therefore found it unnecessary to elaborate on complementarity (Iraq response, Annex to the ICC-OTP, Update on communications (2006), at 9; available at http://www.iccnow.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (last visited 23 November 2009)). For a similar solution Meißner, Zusammenarbeit (2003), at 79.
5.1 Sufficient gravity (Art. 17 (1) (d))

5.1.1 The standard in current practice

Gravity in the sense of Art. 17 (1) (d) is relevant at two different stages of the proceedings, i.e., with a view to the initiation of the investigation of a situation and of the case(s) arising from this situation.\(^4\) Indeed, the OTP has so far\(^5\) applied gravity in this twofold way regarding situations and cases.\(^6\) One may in this sense distinguish between situation- and case-related gravity. Yet, the OTP has not systematically elaborated the gravity criteria or even proposed a more sophisticated gravity theory. In fact, the Office affirmed gravity in the situations of the Democratic Republic of Congo, Uganda and Sudan without further reasoning\(^7\) and only made public some more profound deliberations regarding the Iraq situation.\(^8\) Here it rejected gravity in the sense of Art. 53 (1) (b) comparing the relatively low number of victims (four to twelve) of alleged crimes by British troops with the large-scale violence in the situations of DRC, Uganda and Sudan. While this has been criticized as “comparing apples and oranges”\(^9\) there was not much choice for the OTP given that it had only jurisdiction over British troops by way of the active personality (nationality) principle (Art. 12 (2) (b)). In any case, the OTP could have avoided criticism by taking a more systematic and consistent approach to gravity in the first place, especially by clarifying the concrete factors it takes into consideration and by

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\(^4\)PTC I (n 2) para. 44. See also WCRO, Gravity threshold (2008), at 21 et seq., 25 et seq.; El Zeidy (2008) 19 CLF 35, at 39; crit. now regarding situational gravity WCRO, Relevance of a situation (2009), 28 et seq.

\(^5\)Between mid 2003 and 2005 gravity played no role, see Schabas, in Stahn/Sluiter (eds.) 2009, 229, at 229 et seq. Interestingly, it attracted either much attention in the negotiation history of the ICC Statute (Stahn, in Stahn/Sluiter (eds.) 2009, 247, at 267).


\(^7\)ICC-OTP, Report on activities (2006), at 10: “The Office selected the DRC and Northern Uganda as the first situations because they were the gravest admissible situations under the Statute’s jurisdiction, and, after the referral, the Office confirmed that the Darfur situation clearly met the gravity standard. The Office will continue to adhere to the rigorous standard of gravity established in the Statute”.


\(^9\)Schabas, Introduction (2007), at 190; id. (2008) 6 JICJ 731, at 741; id., in Stahn/Sluiter (eds.) 2009, 229, at 240. Schabas further criticizes that the Prosecutor did not compare the total number of deaths in Iraq with the total in the DRC or Uganda nor did he compare the total number of deaths resulting from the crimes attributed to specific perpetrators with those blamed on the British troops in Iraq (ibid., at 747 and 240). Crit. also El Zeidy (2008) 19 CLF 35, at 40–1; Heller, in Stahn/van den Herik (eds.) 2010, at 234 and passim.
distinguishing between the more legal and more policy (discretional) side of the complementarity test.  

Regulation 29 No. 2 of the OTP Regulations refers for the assessment of the gravity of “situations” to “various factors, including their scale, nature, manner of commission, and impact.”

This provision is a result of an ongoing process of external and internal consultation of the OTP and it has seen many changes. As to the specific factors mentioned – equally applicable to situations and cases – the OTP has offered definitions in declarations, papers and submissions. As to the “scale” the Office referred, as in the Iraq case mentioned above, to the number of victims and also took the geographic and temporal scope of the crimes into account. This approach has been criticized because of the difficulty to establish exact victim numbers, the lack of qualitative criteria and a proper methodology as to what to compare. Yet, the reference to “both qualitative and quantitative factors” in the last version of the Draft Regulations was replaced by “various factors” in the finally adopted version. With respect to the nature of the crimes, the OTP considers that all ICC crimes “are crimes of concern to the international community and, as such, grave in themselves”; still, assuming that there is an

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13 Iraq response (n 3), at 8.


16 See on this issue Brunborg, in ICC-OTP, First public hearing (2003), 2.

17 See for the prioritization of qualitative criteria, i.e., the systematicity of the crimes, the social alarm caused and State involvement Heller, in Stahn/van den Herik (eds.) 2010, at 229 et seq., arguing, essentially, that his qualitative approach would lend greater legitimacy to the Court and produce a greater impact in terms of deterrence and general prevention (“greater expressive value”, at 236). Yet, Heller’s approach, albeit certainly thought-provoking and allegedly principled, is from a theoretical perspective, apart from its practical implications, full of consequentialist assumptions and thus “more like a prudent concession to practical realpolitik, ... than a strong, independent argument for what the ICC is really about, what it is truly for.” (Osiel, in Stahn/van den Herik (eds.) 2010, at 258).


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