



Issues of Admissibility in the International Criminal Court: Exploring the Principle of Complementarity and the Principle of Gravity

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Abstract

Almost three decades since the adoption of the Rome Statute, the International Criminal Court (ICC) continues to face significant controversy regarding the exercise of its jurisdiction, particularly in relation to the principles governing admissibility, namely the Principle of Complementarity and the Principle of Gravity. In line with this, this blog critically examines Article 17 of the Rome Statute and evaluates how these admissibility requirements may undermine the Court's effectiveness. It argues that ambiguities surrounding complementarity and gravity, together with restrictive jurisdictional requirements, justify reforms to strengthen the Court's legitimacy and effectiveness in international criminal law.

Key words: Admissibility; Complementarity; Gravity; International Criminal Court; Rome Statute.

Introduction

The International Criminal Court (ICC) was established by the Rome Statute in 1998 and marked a historic milestone in international law. Adopted by 120 states, the Rome Statute established the first permanent international criminal tribunal to prosecute individuals responsible for the most serious international crimes, including genocide (Article 6), crimes against humanity (Article 7), war crimes (Article 8), and the crime of aggression (Article 8 bis).¹ The Rome Statute entered into force on 1 July 2002 and currently has 125 States Parties.² Accordingly, this blog aims to examine issues of admissibility, focusing on the principles of complementarity and gravity.

Exploring the Issues of Admissibility in the ICC Rome Statute

¹ Minhas Majeed Khan, 'International Criminal Court (ICC): An Analysis of its Successes and Failures and Challenges Faced by the ICC Tribunals for War Crimes' (2016) 3 RG 243, 243.

² J Daley and K Birkett, 'Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of National Implementing Legislation in Asia' (2019) 18(2) OA 353, 357.



Under Article 17 (1) of the Rome Statute, the concept of issues of admissibility is determined by the conditions set out in the article before a case is brought before the Court.³ Under the provision, the Court implements a two-step test for determining challenges to admissibility under Article 19. Firstly, complementarity is considered to determine whether the case presented to the Court has already been investigated under the State's national jurisdiction to a sufficient level or is subject to ongoing investigations.⁴ Secondly, the admissibility test examines the inability or unwillingness of a State as provided for under Article 17 (1) (a). The State has jurisdiction over a case unless genuinely unwilling or unable to carry out the prosecution or investigation.⁵ A notable example of the two-step test was illustrated in *The Prosecutor v. Simone Gbagbo-Gbagbo* was accused of crimes against humanity, murder, rape, other sexual acts, persecution and other inhumane acts which were brought before the Court.⁶ The Appeals Chamber rejected the Republic of Côte d'Ivoire's appeal and confirmation of the ICC's Pre-Trial Chamber decision and declared the case admissible before the Court as the State had failed to take the necessary actions to prosecute the accused.⁷

The Court's procedure for ruling on admissibility has been praised for its independence, avoiding bias and the political sway of national governments in the decision-making process of the Prosecutor. However, one of the ICC's greatest institutional limitations is its restricted jurisdictional scope, as states must have ratified the Rome Statute to be bound by the Court's jurisdiction. Likewise, the ICC's exercise of jurisdiction over the crime of aggression is subject to the additional jurisdictional requirements established under the Kampala Amendments and Articles 15 bis and 15 ter of the Rome Statute. As such, these jurisdictional limitations may hinder the ICC's ability to fulfil its commitment to maintaining international peace and security. It suggests that the power the Prosecutor obtains offers little flexibility for states to play a role in the ICC's jurisdictional process of admissibility. Ultimately, the Rome Statute should offer a degree of flexibility, particularly for States with limited judicial capacity and those that have not yet become States Parties to the Rome Statute, to ensure the prosecution of those who have committed crimes under the Court's jurisdiction.

³ Article 17(1) ICCS.

⁴ *Ibid* p. 15.

⁵ *Ibid* p.15.

⁶ *The Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12- 75- Red.

⁷ *Ibid* p. 5.



Principle of complementarity

The principle of complementarity under Article 17 outlines that the ICC can only intervene in cases when national legal systems are unable or unwilling to prosecute individuals for crimes that are within the jurisdictional capabilities of the Court.⁸ Complementarity is significant as it ensures that the ICC does not supersede national jurisdictions but instead operates alongside them.⁹ Ultimately, the ICC under the Rome Statute works to respect the primary jurisdiction of states as they have effective and reliable access to domestic judicial resources to carry out proceedings.¹⁰ This contrasts with the statutes of the ad hoc tribunals which were developed by the United Nations Security Council in light of the crimes committed in the former territories of Yugoslavia and Rwanda. Likewise, the principle of complementarity can foster a more coherent framework, as the ICC's predecessors (the Nuremberg and Tokyo Tribunals) have been heavily criticised for perceived victor's justice, allegations of bias towards the victorious powers, and limitations in developing international criminal law.¹¹ Holmes argued that the adoption of the complementarity principle is essential to secure the support of negotiating states for a permanent ICC.¹² Article 17(1)(a) provides direction to the Court by stating that a case is inadmissible where it is being genuinely investigated or prosecuted by a State with jurisdiction.¹³ Article 1 outlines the same concept.¹⁴

The provisions of the ICC were designed to balance the rights of individuals protected by the international community with the principles of accountability under international law. However, these provisions have been criticised for highlighting the limitations of the Court's authority. Former UN Secretary-General Javier Pérez de Cuéllar emphasized the close relationship between state sovereignty and international responsibility. The links between sovereignty, humanitarian concerns, and responsibility are all rooted in the principles of international law. The establishment of the ICC reflects this growing interdependence, demonstrating how the traditional concept of state sovereignty has evolved to include obligations under international law. The Court

⁸ International Criminal Court, *supra* note 3 at p.15.

⁹ Mohammed El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development, Practice* (Martinus Nijhoff Publishers 2008) p. 59.

¹⁰ *Ibid* p. 9.

¹¹ Linda Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of *Ne Bis in Idem*' (2010) 8 SCJIL 165, 167.

¹² *Ibid* p. 167.

¹³ The International Criminal Court, *supra* note 3, at p.15.

¹⁴ *Ibid*.



understands the value of states' jurisdictional and constitutional sovereignty under the principle of complementarity. However, the ICC's ability to assess unwillingness and inability may place pressure on states to align their domestic processes with international standards. This can potentially undermine aspects of domestic autonomy despite the Court's commitment to complementarity.¹⁵ This can be considered particularly significant as the Court acquires the use of treaty powers as established in Article 21(b) to enable states to comply with its ruling while the ICC does not have to provide any prior materials or documentation before deciding on admissibility.¹⁶

However, the principle of complementarity, connected to admissibility can help State Parties and protection to the person accused of crimes under national law. For example, under Article 20, the concept of complementarity provides that no person shall be tried before the Court for a case where the person has already been acquitted.¹⁷ Article 20 (3) declares that no person will be tried by another Court for conduct outlined in Articles, 6, 7 and 8, unless the other Court failed to comply with the standards of international law as per the ICC's statute.¹⁸ Further protection of the accused is provided for in Article 55, which is essential to ensure a person's rights when being prosecuted.¹⁹

Unwillingness of a state

Article 17 (2) establishes the criteria for a State's 'unwillingness to prosecute. The Appeals Chamber proclaimed in *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* that a State needs to prove that it is conducting a genuine investigation or prosecution under domestic jurisdiction.²⁰ In the case, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, the Appeals Chamber defined the process of investigation as the taking of steps directed at ascertaining whether the individual is responsible for the alleged conduct.²¹ However, the concept of 'unwillingness' has been greatly debated due to breadth of its interpretation and the difficulty in determining when a State qualifies as "unwilling."²² This could

¹⁵ Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round?' (2005) 16(5) TEJIL 980, 984.

¹⁶ Article 21(b) ICCS.

¹⁷ Article 20 ICCS.

¹⁸ Article 20(3) ICCS.

¹⁹ Article 55 ICCS.

²⁰ *The Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11-695.

²¹ *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-1005.

²² Britta Lisa Krings, 'The Principles of Complementarity and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?' (2012) 4(3) GJIL 737, 754.



result in national courts to contravene the purpose of the Rome Statute and values of the ICC.²³ Ultimately, this could impact the long-term capacity of the ICC to prosecute future criminals and the stability of the international community, as well as the development of both national jurisdictions and the ICC.

However, concerns regarding the concept's subjectivity are mitigated to some extent by the leading cases of *The Prosecutor v. Uhuru Muigai Kenyatta* and *The Prosecutor v. Saif Al-Islam Gaddafi*, which have helped to clarify the interpretation of the rules of admissibility in relation to complementarity. According to an ICC admissibility report, there are various examples of unwillingness identified in line with Article 17(2) for the purpose of assessing admissibility, including shielding the accused, unjustified delay in proceedings, a lack of judicial independence, impartiality, and the manner in which proceedings are conducted.²⁴ A suggestion to provide greater flexibility when assessing unwillingness would be for the Office of the Prosecutor (OTP) to adopt a more nuanced assessment of a State's willingness, taking into account differences in domestic judicial systems and governmental structures, while placing greater emphasis on procedural factors rather than focusing predominantly on the outcome of proceedings.

Inability of a state

A leading case that exemplifies the concept of State inability is the example of *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*. The Pre-Trial Chamber I recognised the difficulties faced by Libya in effectively exercising its judicial power within the guidelines provided in Article 17 (1) (3).²⁵ As such, the Prosecutor described “inability” under Article 17(3) as requiring the total or substantial collapse or unavailability of a national judicial system, such that the State is unable to carry out its legal proceedings properly.²⁶ The Pre-Trial Chamber ruled that Libya was unable to prosecute the case under its national jurisdiction as it could not safely transfer Gaddafi into state custody from his detention in Zintan. The judicial system and governmental authorities of Libya lacked effective control over satisfactory witness protection due to detention facility concerns.²⁷ Regardless of the concerns presented, the Appeals Chamber

²³ Ibid p. 738.

²⁴ International Criminal Court, https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009_02250.PDF accessed 10/09/2025

²⁵ International Criminal Court, supra note 24, at 12.

²⁶ Ibid p.11.

²⁷ Rúbia Marcussi Pontes and Leonardo Faria, ‘The International Criminal Court and the Cases of Muammar Al-Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’ (2015) 1(1) JOIS 298, 318.



concluded that both cases were inadmissible under Article 17.²⁸ From the case law presented, the concept of "inability" remains an ambiguous term, as highlighted by former ICC President Philippe Kirsch:²⁹

"The Court will really have to invent, create and define the meaning of a state that is unable or unwilling to conduct 'genuine' proceedings."

This is problematic because requiring the Court to develop the meaning of these concepts may signal to States Parties that international criminal law lacks certainty and a definitive legal framework. While the concept of "inability" is inherently fact-sensitive, clearer guidance is necessary. Without such clarification, the Court risks undermining its credibility and international standing, and non-States Parties may continue to decline to accept the Rome Statute.³⁰ Although state sovereignty is fundamental, the Rome Statute represents an international treaty that promotes accountability, supports international peace and security, and facilitates international cooperation. Without a clear definition, the full potential of the principle of complementarity remains constrained.

The Principle of Gravity: The Gravity Threshold

The principle of gravity is a vital contribution to international criminal law. Under Article 17(1)(d), formerly Article 35(c) of the 1994 Draft Rome Statute prepared by the International Law Commission, the term "gravity" can be interpreted as referring to the Court's mandate to prosecute those who have committed the most serious crimes of concern to the international community.³¹ The Trial Chamber will declare a case inadmissible if it fails to meet the gravity threshold requirements, and no further action by the ICC will be undertaken.³² Under both the original and current gravity requirements of the ICC, the Court has discretion to determine which cases are admissible and to manage its caseload. However, the gravity threshold has been criticised for excluding a significant number of cases from the Court's jurisdiction. Critics argue that the admissibility requirements under the Rome Statute are overly restrictive, despite Article 53

²⁸ International Criminal Court, <https://www.icc-cpi.int/sites/default/files/2022-08/GaddafiEng.pdf> Accessed 10/09/2026

²⁹ Gregory S McNeal, 'ICC Inability Determinations in Light of the Dujail Case' (2007) 39(1) CWRJOIL 325, 329.

³⁰ Ibid p.325.

³¹ United Nations, *Report of the International Law Commission on the Work of its Forty-sixth Session* UN Doc A/49/10 (02/05/1994–22/07/1994).

³² United Nations, *Draft Statute for an International Criminal Court* (07/04/1994).



granting the Prosecutor broad discretion to initiate investigations and select cases for prosecution.³³ Arguably, issues relating to the gravity threshold can be better understood by referring to the original draft of Article 35, which sought to remove aspects of judicial and prosecutorial control over states through the determination of gravity.³⁴ However, this method has significantly contributed to the court's failure of its preambular mandate. DeGuzman claims that the principle of gravity has been retained because the Court does not seek to rank the severity of different types of crimes.³⁵

Furthermore, the concept of the gravity threshold has attracted considerable criticism, most notably regarding the decision not to proceed with an investigation into the Iraq conflict. The Prosecutor stated that prior investigations did not adequately address the concept of gravity and concluded in the 2005 decision that the gravity threshold is the most significant aspect of determining the admissibility of cases.³⁶ From this, the Prosecutor concluded that, due to the limited scale and number of crimes when compared with other situations before the ICC, Iraq failed to meet the necessary gravity threshold for investigation.³⁷ Often hailed as one of the ICC's greatest failures, this decision has been criticised as undermining efforts to combat impunity and weakening States' confidence in the Court's ability to hold perpetrators of the most serious international crimes accountable, reinforcing the core message of protection and security. In 2005, Murphy stipulated that pragmatism cannot be the sole feature of prosecutorial policy and should not permit alleged perpetrators of high-level international crimes to avoid prosecution simply because they do not occupy positions of political or military leadership.³⁸

Gravity in the ICC's Case Selection Process

The interpretation of the principle of gravity has a significant impact on the selection of cases and situations that are brought to the attention of the ICC. The first stage is often understood as the period during which, and the location in which, the Prosecutor conducts an investigation. There are three methods by which a situation may come before the Court: a referral by the United Nations

³³ Article 53 ICCS.

³⁴ United Nations, *supra* note 48, at 52.

³⁵ Margaret M DeGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32(5) *FIJL* 1400, 1442.

³⁶ International Criminal Court, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_English.pdf accessed 11/09/2025.

³⁷ International Criminal Court, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf accessed 11/09/2025.

³⁸ Susana SáCouto, 'The Gravity Threshold of the International Criminal Court' (2008) 23(5) *AJIL* 806, 839.



Security Council (Article 13), a State Party referral (Article 14), and an investigation initiated proprio motu by the Prosecutor (Article 15). In terms of the second method, the Prosecutor conducts an investigation into the situation and selects the most relevant cases, subject to identifying the individuals who have committed crimes under the jurisdiction of the ICC.³⁹ This is significant because, to fulfil these responsibilities, the Prosecutor must consider the principle of gravity in the decision-making process.

Article 53(1) requires that, after evaluating the information provided, the Prosecutor shall commence an investigation unless there is no reasonable basis to proceed under the Rome Statute.⁴⁰ Article 53(1) (b) states that the Prosecutor will consider the admissibility of cases under Article 17, which includes an assessment of whether the gravity threshold has been met.⁴¹ With respect to the judicial review process, the admissibility of a case, including the assessment of gravity, is stipulated in Article 19, which provides that the Court may, on its own initiative, consider the admissibility of a case under Article 17.⁴² The Regulations of the Office of the Prosecutor provide under Regulation 29, paragraph 2, that, when assessing the gravity of cases, the Prosecutor will take into account multiple factors, including the scale, nature, manner of commission, and the impact of the crimes.⁴³

Conclusion

This blog has examined the issues of admissibility under the Rome Statute, focusing on the principles of gravity and complementarity. In particular, it has considered the core elements of the principle of complementarity, namely the concepts of ‘unwillingness’ and ‘inability’ of States. The two-step test under Article 17 of the Rome Statute explains the Court's process for determining admissibility, while also highlighting the role of the principle of gravity. However, this analysis has demonstrated that there are several key concerns surrounding the current admissibility framework. The use of broad judicial interpretation, issues relating to decision-making, and the process of establishing admissibility have been identified as limiting the Court's ability to prosecute individuals accused of crimes falling within its jurisdiction. Likewise, the issue of

³⁹ Ibid p. 806.

⁴⁰ International Criminal Court, *supra* note 49, at 36.

⁴¹ Ibid p. 36.

⁴² Article 17 ICCS.

⁴³ International Criminal Court, *Regulations of the Office of the Prosecutor* <https://www.icc-cpi.int/sites/default/files/Publications/Regulations-of-the-Office-of-the-Prosecutor.pdf> accessed 11/09/2025.



admissibility requiring the Court to balance respect for national jurisdiction and state sovereignty with international accountability has been highlighted as problematic and at times ineffective. Accordingly, reform aimed at clarifying the admissibility framework and reflecting the Court's current institutional capacity would strengthen legal certainty, improve cooperation between national jurisdictions and the ICC, and reduce criticism of the Court's prosecutorial procedures and the management of State expectations.

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