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'Case' Law

An Analysis of the Development of the 'Same Case'-test in ICC Jurisprudence

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1 Introduction

1.1 Once Upon a Time in Rome

> *The success in Rome is due in no small measure to the delicate balance developed for the complementarity regime. States which were concerned primarily with ensuring respect for national sovereignty and the primacy of national proceedings were able to accept the complementarity provisions because they recognized and dealt with these concerns. Where the Court was given authority to intervene, the criteria on which such interventions would be based were clearly defined and in as objective a manner as possible.*[1]
>
> John T. Holmes,
> Coordinator of the consultations on complementarity during the
> Preparatory Committee to the Rome Conference

In carving out the framework for an international criminal court, one of the central problems the drafters were tasked with was the relationship between the jurisdictions of the Court and the national courts. Throughout the negotiations, which culminated in the signing of the Rome Statute in the summer of 1998, there was general agreement among the negotiating parties that the Court should not continue the policy of primacy adopted by the ad hoc tribunals of the 1990s.[2] Under this regime, the tribunals asserted the primary right to prosecute crimes under their jurisdiction at the expense of national courts.[3] This proved to be a viable arrangement in the particular, and limited, conditions in which the ad hoc tribunals operated. For the ICC, which bases its jurisdiction on the voluntary accession of State parties, this transfer of sovereignty would have proved an effective deterrent to state ratification.[4]

Rather, the general consensus was that the ICC should *complement* the national jurisdictions, leaving the primary responsibility of investigating and prosecuting international crimes to domestic courts.[5] The ICC would only exercise its jurisdiction in cases where the State failed to do so.

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[1] Holmes (1999), p. 74
[2] Stigen (2008), p. 64
[3] O'Keefe (2015), p. 499
[4] Stigen (2008), p. 17-18
[5] Holmes (1999), p. 41

The exact circumstances which would allow the Court to intervene was, however, heavily debated.[6] The main interests at play was, on the one hand, state sovereignty; on the other, an effective court.[7] The result of the negotiation is embodied in Article 17. In short, when there are national proceedings and ICC proceedings relating to the same case, the ICC will yield unless the State is *unwilling or unable to genuinely investigate or prosecute*. This represents the 'delicate balance' struck in Rome.

However, whereas the negotiations of the complementary regime dealt intently with the with meaning of *unwillingness* and *inability*, the focus of the Court's initial case law laid somewhere else. In several judgements on admissibility, which I will examine in this paper, the Court developed detailed guidelines concerning an element of complementarity that was given little attention in Rome – namely, the question of when ICC and national proceedings relate to the same case. If they do not, it is irrelevant whether a state is unwilling or unable to genuinely prosecute – there is no national proceedings to have priority over the ICC.

The doctrine developed on this issue – the 'same case'-test – has come under criticism for being too narrow, setting an excessively high bar for finding a conflict in the exercise of jurisdiction.[8] This, some argue, makes it difficult for States conducting proceedings in good faith to prevent the ICC from intervening.[9] In addition, it can been seen as a circumvention of the compromise reached in Rome, as the focal point of the assessment has shifted from the genuineness of the proceedings to their scope.[10]

In this paper, I aim to describe the development of the 'same case'-test in the ICC jurisprudence, and assess the Court's legal reasoning leading to the test in its present form. The question is what basis the reasoning has in the Rome Statute.

1.2 Article 17(1)

Article 17 of the Rome Statute governs case admissibility at the ICC:

> Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdic-

[6] *Ibid*, para 48

[7] *Judge Usacka's dissenting opinion to the Gaddafi Admissibility Appeal Decision*, para 15

[8] Rastan (2017), p. 21

[9] *Ibid*

[10] *Urbanová*, p. 165

> tion over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>
> (d) The case is not of sufficient gravity to justify further action by the Court.

The focal point of this paper is inadmissibility on grounds of ongoing proceedings, governed by subparagraph (a). From an immediate look at the wording, four observations may be noted.

First, admissibility is defined in the negative, setting out the scenarios in which a case is *in*-admissible. As such, the starting point of the Statute is that cases brought before the Court are admissible, as long the Court do not determine otherwise.

Second, the main rule of subparagraph (a) is that a case is inadmissible if it is 'being investigated or prosecuted by a State which has jurisdiction over it'. In other words, inadmissibility requires the existence of domestic *proceedings* ('investigation' or 'prosecution') that are *relevant* (relating to the 'case').

Third, even if there are relevant domestic proceedings, the case is still admissible if the State 'is unwilling or unable to genuinely carry out' these proceedings.

Fourth, if there are no relevant proceedings, the 'unwillingness or unable'-assessment does not come into play – the case is admissible.

Consequently, where there are no domestic *proceedings* at all, the assessment is straightforward – the case before the ICC is admissible. However, if *proceedings* exist, the question is whether they are *relevant*. The jurisprudence on this question is the subject of this paper.[11]

1.3 Way Forward

[11] See elaboration in chapter 3

The paper has two main parts. The first, in chapter five and six, is a description of the case law on the 'same case'-test. Here, I will detail and analyse the relevant judgements from the ICC with a goal of explaining the Court's reasoning leading up to the test. In the second, in chapter seven, I will assess the Court's reasoning and the arguments put forward in support of the Court's findings – both by the Court itself and in the literature.

In the assessment, I will apply the Rome Statute as this is the primary source which the Court is required to use.[12] Because the Statute is an international treaty,[13] I will interpret it applying international rules of treaty interpretation as embodied in The Vienna Convention on the Law of Treaties Article 31.[14]

Because the topic of this paper concerns a rather specific part of a specialised field of law, I will, in chapter two, provide a brief background on the ICC, admissibility and the principle of complementarity. This will both aid the understanding and be applied in assessing the case law. In chapter three, as a transition to the descriptive part, I explain in more detail the interpretational question that is the subject of the case law.

2 Background

2.1 On the Court

The International Criminal Court (ICC) was formally established when the Rome Statute entered into force on 1st July 2002.[15] The legal operation of the Court is governed by the Rome Statute,[16] which presently has 123 State Parties.[17] In its 18 years of operation it has had a total of 27 cases before it.[18] Eight persons have been convicted, of which four has been finally acquitted on appeal.[19]

[12] Along with the Elements of Crimes and the Rules of Procedure and Evidence, see Article 21

[13] Pursuant to VCLT art. 2(1)(a)

[14] Which is an expression of general international law, see Ruud (2018), p. 86

[15] O'Keefe (2015), p. 529

[16] *Ibid*, p. 533. When I reference simply "Article" without denomination, it is to the Rome Statute.

[17] United Nations (2020)

[18] International Criminal Court, (2020)

[19] *Ibid*

The Court has four organs: The Presidency, The Chambers, The Office of the Prosecutor and The Registry.[20] The Chambers has three divisions: The Pre-Trial Chamber (PTC), The Trial Chamber (TC) and The Appeals Chamber (ACH).[21]

The Office of the Prosecutor (OTP) is the largest organ of the Court and 'shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court'.[22]

2.2 On Jurisdiction and Admissibility

This paper concerns a rule of admissibility. To explain the term 'admissibility' we may contrast it to 'jurisdiction'. The Court has defined its own jurisdiction as its 'competence to deal with a criminal cause or matter under the Statute'.[23] Through the Rome Statute, this competence is delegated to the Court from the State Parties – whose jurisdiction is inherent to their sovereignty.[24] The rules on jurisdiction in the Statute thus provide the basis and limits of the Court's legal competence.

While the rules on jurisdiction governs the *existence* of legal competence, admissibility rules regulate the *exercise* of that competence.[25] It is common for both national and international courts to permit a narrower range of cases to proceed before it than falls under its jurisdiction. Hence, they have rules of admissibility that are more case-specific than jurisdictional rules, seeking to preclude cases that, out of various considerations, are unwanted. Some of these considerations are equally applicable to both national and international courts, such as ensuring the effective use of resources. Other are specific to international courts because their jurisdiction runs concurrent to national legal systems. A purpose of the admissibility criteria is then to regulate the court's relationship with national jurisdictions.[26]

2.3 Admissibility in the Rome Statute

[20] Article 34
[21] *Ibid*
[22] *Ibid*, Article 42(1)
[23] *Lubanga Jurisdiction Decision*, para. 24.
[24] Crawford (2019), p. 440
[25] Schabas (2016), p. 451
[26] Schabas and El Zeidy (2016), p 784

In broad terms, the ICC admissibility rules are designed out of three main considerations: ensuring the effective use of the Court's resources, protecting human rights and regulating the Court's relationship with parallel exercise of national jurisdiction. These are reflected in the different subparagraphs of Article 17(1).

According to (d), a case is inadmissible if it is not of sufficient *gravity*. Even among cases that fall within the subject-matter jurisdiction of the ICC – *i.e.* 'the most serious crimes of international concern'[27] – the Court may have a need to prioritise the use of its limited funds.

Subparagraph (c) gives effect to the *ne bis in idem*-principle which is an important human rights guarantee. The principle is defined in Article 20(3) and prohibits a trial of a person for crimes of which she/he has already been convicted or acquitted.

Lastly, subparagraphs (a), (b) regulates the Court's relationship with parallel exercise of domestic jurisdiction. As made clear in the *chapeau* of Article 17(1) by its reference to preambular paragraph 10 and Article 1 of the Statute,[28] these provisions implement the principle of complementarity.

2.4 A Closer Look at Complementarity

2.4.1 Introduction

Complementarity is the term used to describe the Court's relationship with national jurisdictions that runs concurrent to its own. Commentators and legal actors commonly refer to it with characterisations such as a 'cornerstone of the Statute'[29] and 'part of the Court's DNA'[30]. The invocation of the principle in the Preamble and first provision of the Statute seems to justify such labels.

As a first observation, we can say that a *complementary* international jurisdiction is opposite to one that is *primary*: it may be exercised only when the concurrent (national) jurisdiction is exercised wrongly or not at all.[31] To elaborate on this rudimentary understanding, I will examine at the history and considerations behind the principle.

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[27] Article 1

[28] According to these, the Court 'shall be complementary to national criminal jurisdiction'.

[29] Stahn (2015), p. 228

[30] Schabas (2016), p. 447

[31] Stigen (2008), p. 5

2.4.2 History

When the ICC was established, a criminal court deriving its competence from international law[32] was no new invention. The concept was contemplated already in the aftermath of the First World War, in order to prosecute, most notably, the Kaiser.[33] While nothing came of it then, the end of the Second World War saw the creation of two international military tribunals, presiding over the Nuremberg and Tokyo trials.[34] In the 1990's two international courts were established, the *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).

When the Rome Statute was agreed to in 1998, it formed the legal basis of an international criminal court that was fundamentally different from its predecessors. It was permanent, and not limited in is geographical scope.[35] This gave rise to concerns over the Court's potential to impinge on national sovereignty. Since the Court would base its authority on the voluntary accession of States, this issue had to be addressed for the ICC to become reality.[36] Complementarity 'provided the key'.[37]

As the negotiations of a Statute for the Court commenced, there was therefore general support for the principle of complementarity – as opposed to primacy – but disagreement on the preconditions for ICC interference.[38] While most States accepted that the Court could intervene where the national efforts were unavailable or ineffective, some argued that "unwillingness" – as a ground for intervention – was too imposing on state sovereignty. The resistance to the criterion itself eventually died out, but the *definition* of "inability" and "unwillingness" – *i.e.* the conditions on which the Court's exercise of jurisdictions depended – were core issues in the negotiations.[39]

The result of these negotiations is reflected in Article 17(1)(a) and (b) – it represents the 'delicate balance' referred to in the opening quote of this paper. Holmes, writing shortly after the agreement in Rome, adds that '[i]t remains clear […] that any shift in the balance struck in Rome would likely have unravelled support for the principle of complementarity and, by extension, the Statute itself'.[40]

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[32] Using the definition of an international criminal court in O'Keefe (2015), p. 88
[33] Schabas (2016), p. 1
[34] *Ibid*, p. 6
[35] See Article 1
[36] Stigen (2008), p. 16-17
[37] Lee (1999), p. 27
[38] Stigen (2008), p. 64
[39] Holmes (1999), p. 48
[40] *Ibid*, p. 74

2.4.3 Considerations Behind the Admissibility Rule

The history of the complementarity principle sheds light on the purposes behind it. One purpose is to 'ensure that the ICC only deals with cases that truly deserve its attention'.[41] By allocating to States the primary responsibility to prosecute the crimes under its jurisdiction, the Court is in a position to take only the number of cases fitting its budget.

Further, the paramount purpose of complementarity is to safeguard national sovereignty.[42] Accession to the Rome Statute inevitably entails a certain infringement on the accessor's sovereignty, because the ICC is deriving its jurisdiction form that of the State Parties. When the Court is adjudication a case, it is, in effect, exercising national jurisdiction on behalf of the State.[43] "Infringing" on State sovereignty is therefore inherent to the idea of the ICC. The complementarity principle seeks to protect the State's interest in retaining as much sovereignty as possible.

However, the purpose of the complementarity principle is not necessarily identical to the consideration behind the admissibility rule implementing it. The ACH has put it as follows:

> […] the complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to "put an end to impunity"[44]

One may therefore say that while the main purpose of the principle of complementarity is to safeguard sovereignty, the rules *implementing* the principle seeks to find a balance between the goals of complementarity and the goal of the Rome Statute as a whole.

It may be debated whether striking this balance is the purpose of complementarity principle or just the purpose of the rules implementing the principle.[45] In any case, in endorsing complementarity, the Statute recognises the potentially conflicting interests of safeguarding national

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[41] *Ibid*, p. 19

[42] *Ibid*, p. 15

[43] See *supra* chapter 2.2. Unless its jurisdiction derives from a UNSC referral.

[44] *Katanga Admissibility Decision*

[45] See Stigen (2008), p. 17, suggesting that the balance-striking is a purpose of the complementarity principle as such.

sovereignty and ending impunity for international crimes, and accepts that the former may – to a certain degree – prevail at the expense of the latter.

3 Same Case

3.1 Inactivity

Much of the early commentary on complementarity discussed exclusively the *unwillingness and inability*-criterion.[46] This is perhaps not surprising, given the focus it was given both in the drafting process and in Article 17 itself.[47] However, when the Court first expressed itself on the issue, it found that not only will a case be admissible if the State is *unwilling* or *unable*, but also if it is *inactive*. Complementarity was viewed by some to be so closely connected with unwillingness and inability that this limb of the assessment was claimed to be a result of 'judicial activism'. [48]

In fact, *inactivity* is simply a reference to the main rule in Article 17(1)(a), namely that a case is admissible if there are no relevant proceedings, *i.e.* if the State remains inactive in relation to 'the case'.[49] Despite some initial opposition, the basis for the *inaction*-criterion has been thoroughly explained and affirmed in ICC case law and the literature.[50]

Where the admissibility of a case has been challenged, Court has indeed usually found the jurisdictional State to be *inactive* and, thereby, largely avoiding *unwillingness* and *inability*[51] In many of these cases, the State had, however, not been completely inactive – there were some national proceedings in place against the individuals sought by the ICC.[52] As such, the Court was compelled to draw the distinction between proceedings that would lead to inadmissibility (subject to the *inability* and *unwillingness* criteria) and those that would not. This distinction – the jurisprudence on which will be examined below – was framed as a question of the interpretation of 'case' in Article 17(1)(a).

3.2 'Case' in Context

[46] Robinson (2010), p. 71

[47] The terms are carefully defined in subparagraphs (1) and (2).

[48] Schabas (2008), p. 757

[49] See *supra* chapter 1.2

[50] See, *inter alia*, *Katanga Admissibility Appeal Judgement*, paras 74-78, and Robinson (2010)

[51] Urbanovà (2019), p. 165

[52] Nouwen (2013), p. 45

Before examining the jurisprudence of interpretation of 'case', some general comments on the interpretation are warranted in order to properly understand the discussions on 'case'.

The first observation is that Article 17(1)(a) does not speak of a generic 'case' – it refers to *the* case. In other words, 'case' in the provision is not a reference to an abstract legal concept with certain criteria which need to be met in order to label a certain group of circumstances a 'case'. Rather, the use of 'the case', in the determinative, suggest that the term is a reference to actual existing proceedings. More specifically, it is a reference to the Prosecutor's case – the admissibility of which is under assessment.

As such, we are not interested in the abstract meaning of 'case'. Looking at the provision, the question is whether that case 'is being investigated or prosecuted by a State with jurisdiction'. Obviously, this does not require the State to investigate the documents, evidence and processes making up the Prosecutor's actual case. Rather, 'the case' must refer to *subject* of the Prosecutor's case. This is what the State is required to investigate or prosecute in order to render a case inadmissible before the Court.

Thus, the assessment is a process of identification, where the subject of the national proceedings is compared to the subject of the case before the Court. 'The case', in the provision, is one side of that comparison. As such, the question is not what 'the case' means, but how it is defined as the object of comparison for national proceedings. More precisely, the question is *how elaborately* it is defined.

The 'case' which the Prosecutor has brought before the Court may be defined on a number of different levels of specificity.[53] We can imagine a scenario where the OTP's case concerns mass killings. Different ways of describing these proceedings could be, for example, 'investigation of mass killings in country Y'; 'of mass killings in village X in country Y on Z date'; 'of person A for mass killing in country Y'; or 'of person A for the mass killings as an act of genocide in village X of country Y on Z date'.

These could all be valid definitions of the same case, but the level of specificity used will have a major impact on the admissibility assessment.[54] If the Court uses the first description to define the Prosecutor's case, it is sufficient, in order to avoid ICC intervention, for State Y to investigate or prosecute any mass killing within its borders committed by anybody – regardless of who and what is the subject of the Prosecutor's case. If the case is defined as in the

[53] See *Judge Usacka's dissenting opinion to the Gaddafi Admissibility Appeal Decision*, para 51

[54] See Nouwen (2013), p. 52

last example, the domestic proceedings will have to cover the same *person* (A), the same *conduct* (mass killings), the same *incident* (defined by time Z and place X in Y) and apply the same *legal characterisation* (genocide).[55]

This illustrates that the definition of case determines how closely a State must mirror the ICC case in order render a case inadmissible, or, in other words, how much of a "wiggle room" is afforded the domestic prosecutor in conducting the investigation and prosecution. 'Case' in Article 17(1)(a) denominates the elements of the Prosecutor's case which the domestic proceedings need to cover in order to satisfy the inadmissibility clause. The question is therefore: what are the minimum defining elements of a 'case'?

4 Early Case Law

4.1 Introduction

The interpretation of 'case' was first made in a handful of decisions from the PTC, mostly concerning applications from the Prosecutor for arrest warrants on suspected individuals. Through its judgements, the PTC developed what would later be known as the 'same person/same conduct'-test. As we will see, this early doctrine was the basis on which the ACH formulated the test as it presently stands. In this chapter, I will therefore examine the relevant PTC jurisprudence and the reasoning behind it.

4.2 Origins of the 'Same Person/Same Conduct'-test in the DRC Situation

4.2.1 Introduction

On 23 June 2004, the Prosecutor opened investigations into the situation in the Democratic Republic of the Congo ("DRC")[56] – the first in ICC history. The situation was referred to the Court by the country itself. In its letter of referral, dated 3 March 2004, then-president Joseph Kabila explicitly requested the ICC to investigate crimes committed on the territory of the DRC, adding that '[d]ue to the specific circumstances in which my country finds itself, the relevant authorities are unable to carry out investigations into the [crimes under the ICC's ju-

[55] As we will see later, these elements are not chosen at random. To a large extent they framed the debate on the definition of 'case' in the Court's jurisprudence. Note that the Court seems to employ different definitions of *conduct* and *incident* at different occasions.

[56] *Lubanga Judgement*, para. 125

risdiction which appear to have been committed] or to conduct the necessary prosecutions without the participation of the International Criminal Court'.[57]

Through the course of its investigation, the Prosecutor would eventually charge several individuals with war crimes and crimes against humanity. Among these, we will later examine the decision on the arrest warrant for Thomas Lubanga, in which the 'same person/same conduct'-test was formulated. However, the first decision with relevance to the present issue came before any specific suspects was identified. In a decision on the victims' participation ("DRC Victims Decision") – although not in the context of admissibility – it gave its opinion on the meaning of 'case'.

4.2.2 DRC Victims Decision

The PTC's judgement concerned an application from victims to participate under Article 68 (3) of the Rome Statute, which affords a right to participate in 'stages of proceedings'. This did not, according to the OTP, include the situation-stage – to which the application related – only the case stage. The Court concluded that the wording included the situation-stage[58], but that the terms of participation differs on the two stages. Hence, the Court laid out the distinction between 'situation' and 'case'[59]:

> Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such. Cases, which comprise **specific incidents during which one more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects**, entail proceedings that take place after the issuance of a warrant of arrest or summons to appear. [Emphasis added]

The PTC gives a definition of 'case' that contains three discernible elements: (i) the *specific incident,* referring, presumably, to a certain factual occurrence; (ii) the *apparent commission of a crime* within the jurisdiction of the court; and (iii) the *individual(s)* suspected of committing said crimes. These, in turn, denote (i) temporal and territorial, (ii) subject-matter and (iii) personal parameters of the case.

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[57] *Letter from Mr. Joseph Kabila*

[58] *DRC Victims decision*, para. 54

[59] *Ibid*, para 65

Using the terms introduced in chapter 4.2.1, we see that the PTC defines a 'case' by (i) *incident*, (ii) *conduct* and *legal characterisation*[60] and (iii) *person*. Comparing this with the examples given in chapter 4.2.1, it seems to be a rather specific definition. However, it should be borne in mind that the purpose of this definition is to distinguish the term from 'situation', not to compare it with domestic proceedings.

Exactly how the PTC arrived at its definition is not explained in the judgement. In a footnote, the PTC refers to the first edition of Triffterer's commentary on the Rome Statue.[61] The level of detail in the definition is difficult to infer from the commentary,[62] which holds that '[t]he concept of a 'case' would seem to imply that an individual or individuals had been or were targeted as the result of an investigation of a 'situation".[63] I will return to possible justifications for the PTC's definition in the assessment-part.

4.2.3 Lubanga Decision on Warrant of Arrest

Notwithstanding its absent explanation, the *DRC Victims Decision* definition of 'case' was employed when admissibility was explicitly addressed for the first time by the Court in the case against Thomas Lubanga Dyilo. Lubanga was a leading figure in the *Union des Patriotes Congolais* ("UPC"), a rebel group operating in the region of Ituri in the DRC. As the President of UPC and commander-in-chief of its military wing, *Force Patriotique pour la Libération du Congo* ("FPLC"),[64] he was involved in the violent conflict over political control over Ituri in 2002 and 2003.[65]

On 13 January 2006, the Prosecutor filed an application for a warrant of arrest for Lubanga, which was subsequently granted by the PTC.[66] It was not the first arrest warrant issued in the DRC situation[67], but the Chamber decided, in contrast to the previous cases, to *ex officio* undertake a preliminary assessment of the jurisdiction and admissibility of the case against Lubanga.[68]

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[60] See the same distinction in *Nouwen* (2013), p. 49

[61] This is pointed out in *Judge Usacka's dissenting opinion to the Gaddafi Admissibility Appeal Decision*, para. 25. See *DRC Victims Decision*, para

[62] *Judge Usacka's dissenting opinion to the Gaddafi Admissibility Appeal Decision*, para. 25

[63] Hall (1999), pp. 407-8

[64] *Lubanga judgement*, para 1142

[65] *Ibid*, paras. 1351 and 67

[66] *Lubanga Decision on Warrant of Arrest*

[67] Se, inter alia, *Warrant for Arrest for Joseph Kony*

[68] *Lubanga Decision on Warrant for Arrest*, para 19. This right is provided for in Article 19 (1).

At this time, Lubanga was already the subject of proceedings in the DRC. On 19 March 2005, he was arrested by DRC authorities on charges of genocide and crimes against humanity.[69] An additional arrest warrant was later issued, containing charges of murder, illegal detention and torture.[70]

Despite the domestic charges, the Prosecutor argued that the case was admissible due to *inability*, referencing the letter of referral of the DRC from 2004.[71] The Chamber agreed that, at the time of the referral, the DRC's was unable to investigate and prosecute crimes under the jurisdictions of the ICC. Lubanga had, however, later been charged by a tribunal in the region of Ituri, which was re-opened after the referral. The Chamber therefore concluded that the 'inability' criterion was not automatically applicable to the case.[72]

Nevertheless, the Chamber was not required to assess the *unwillingness* of the DRC justice system because the DRC was found to be *inactive* in relation to the Prosecutor's case against Lubanga. Having first introduced the *inactivity*-criterion,[73] the Chamber elaborated that 'the first requirement for a case […] to be declared inadmissible is that at least one State with jurisdiction over the case is investigating, prosecuting or trying that case, or has done so.'[74]

The next question was, naturally, when a State can be said to be 'investigating, prosecuting or trying that case'. To answer this, the PTC applied the definition in the *DRC Victims decision*:

> Having defined the concept of case as including "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects," the Chamber considers that 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.**[75] [Emphasis added]

In other words, the Chamber held that the State is investigating the 'same case' when the investigation relates to the same 'person' and the same 'conduct'.

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[69] *Ibid*, para 33
[70] *Ibid*
[71] *Ibid,* para 34, see *supra* note 62
[72] *Ibid*, para 36
[73] See chapter 3.1
[74] *Ibid*, para 30
[75] *Ibid*, para 31

Applying this test to the facts, the Court acknowledged that the domestic charges did concern the same *person* – Lubanga. However, while they included genocide, crimes against humanity, murder, illegal detention and torture, the charges did not include the crime of enlisting, conscripting and using child soldiers.[76] The latter was the sole subject of the ICC Prosecutor's charges against Lubanga, and the Chamber therefore concluded that 'the DRC cannot be considered to be acting in relation to the specific case before the Court'.[77] The domestic investigation did not relate to the same *conduct*. Consequently, no examination of 'unwillingness' nor 'inability' was needed.[78]

Two elements in the Chamber's reasoning is worth taking note of. Firstly, it does not explain how it infers from the definition of 'case' that *same person* and *same conduct* are conditions *sine qua non* for inadmissibility. Such an inference is, in my view, not obvious. The definition of 'case' employed by the PTC in *Lubanga* was originally construed[79] in order to distinguish it from a 'situation'. As such, the definition does not necessarily entail requirements *sine qua non* to the 'sameness' of cases in Article 17(1)(a). On this point the reasoning is insufficient, because it does not explain why the *Victims* definition automatically translates to the 'same person/same conduct-test'. Nouwen calls it a '*deus ex machina* appearance'[80] – the test seems to emerge out of thin air.

Secondly, if we accept that the *DRC Victims Decision* definition entails conditions for inadmissibility *sine qua non*, it is pertinent to ask why the Pre-Trial omits listing *same incident* as one of those conditions. It is quite clearly an element of the *Victims* 'case' definition, yet it seems to get lost on the way from reference to inference. It appears to be three possible explanations: (i) 'conduct', in the PTC's understanding, is incident-specific – meaning that it does not refer to acts generically (e.g. recruitment of child soldiers), but to a certain manifestation of that act (e.g. the recruitment of child soldiers in village X on Z date); (ii) same incident is an independent condition *sine qua non*, but one which the PTC did not see the need mention; or (iii) same incident is **not** a condition *sine qua non*, in which case the PTC's reasoning is convoluted at best.

The subsequent application to the facts of the case in *Lubanga* does not give a definite answer. Since the national investigation did not include the "generic" conduct of recruiting and

[76] *Ibid*, para 38
[77] *Ibid*, para 39
[78] *Ibid*, in fine
[79] In the *DRC Victims Decision*, *supra* chapter 4.2.2
[80] *Nouwen* (2013), p. 53

using child soldiers, it did not include specific incidents of said conduct Therefore, we cannot discern from the decision whether it is necessary for the State to cover the same manifestation of the conduct in question, or if investigating the type of conduct in general is enough.

4.3 Possible Clarification in *Kushayb*

The 'same person/same conduct'-test – as formulated in *Lubanga* – was reiterated in several subsequent decisions by different Pre-Trail Chambers when deciding on applications for arrest warrants. In the DRC situation, it was invoked in the cases against Germain Katanga[81] and Mathieu Ngudjolo Chui[82]; in Sudan/Darfur in the case against Ahmad Muhammad Harun and Ali Kushayb[83]. The definition of case originating in the *DRC Victims Decision* was also repeated – though not under the question of admissibility – in the decision to issue a warrant of arrest for Jean-Pierre Bemba Gombo in the Central African Republic situation.[84]

Among these, the decision in the case against Harun and Kushayb, may give further guidance on the Court's interpretation of Article 17(1)(a). The case originates from investigations into the situation in Darfur, Sudan, which was referred to the Court by the UN Security Council in March 2005.[85] The context was the violent conflict between Sudanese government forces and insurgent groups in Darfur, which had been ongoing since 2002.[86] The part of the case that is important for our purposes relates to Ali Kushayb, a leading figure within the Sudanese Armed Forces.[87] He was arrested in 2006 and under investigation by Sudanese authorities at the time of the OTP's application for arrest warrant.[88]

Nouwen argues that the decision on the warrant of arrest for Harun and Kushayb indicates that the PTC's understanding of 'conduct' is, in fact, incident-specific.[89] In the decision itself, the Chamber is brief, merely reciting the *Lubanga* formulation and finding admissibility '[o]n the basis of the evidence and information provided to the Chamber'[90] submitted by the Prosecutor in his application.[91] A closer examination of the Prosecutor's submissions suggests,

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[81] *Katanga Decision on Warrant for Arrest*, para 20.
[82] *Ngudjolo Decision on Warrant for Arrest,* para 21.
[83] *Harun and Kushayb Decision on Warrant for Arrest*, para 24.
[84] *Bemba Decision on Warrant for arrest*, para 16.
[85] UNSC resolution 1593 (2005)
[86] *Harun and Kushayb Decision on Warrant for Arrest*, para 36.
[87] *Ibid*, para 95.
[88] *Ibid*, para 20.
[89] *Nouwen* (2013), pp. 47-48.
[90] *Harun and Kushayb Decision on Warrant for Arrest*, para 25
[91] The proceedings were conducted *ex parte*, with only the Prosecutor being heard

however, that the PTC – by coming to the same conclusion – adopted an understanding of the test that requires the State to investigate the *same incidents* as the ICC proceedings.

Setting out the criteria for inadmissibility in his application, the Prosecutor quotes both the 'same person/same conduct'-test from *Lubanga* and the case-definition from the *DRC Victims Decision* – thereby including the term *incident*.[92] When comparing the two investigations, the Prosecutor found that they related to some of the same acts, but that the ICC case included 'a much broader array of acts'.[93] He concluded:

> To the extent that the investigations do involve one of the individuals named in this application, they do not relate to the same conduct which is the subject of the case before the Court: the national proceedings are not in respect of the same incidents and address a significantly narrower range of conduct.[94]

In deciding on the application, the PTC did not elaborate on the 'same person/same conduct test'.[95] Yet, by concluding that the case 'appears to be admissible' on the basis of the application, Nouwen holds that the Chamber 'implied that the Prosecutor's formulation of the 'same conduct' test as requiring the same incidents was correct'.[96]

4.4 Contextual Elements of the Early Case Law

Early PTC jurisprudence was influential when the ACH eventually was tasked with the issue of what constitutes the same case. It is therefore pertinent to make some observations on the context in which the 'same person/same conduct'-test originated.

First of all, as is frequently mentioned in the commentary,[97] the test was first construed in cases with no significant opposition to admissibility from any of the parties. Typically, the literature points out that the cases originated from so-called 'self-referrals' – situations where the Court is 'invited' to investigate and prosecute crimes in the referring state. Of the cases

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[92] *OTP Application Kushayb*, para 253.

[93] *Ibid*, para 266

[94] *Ibid*, para 267

[95] *Harun and Kushayb Decision on Warrant for Arrest*, para 24. Curiously, the Chamber applies the test in the negative, holding that it is a condition *sine qua non* for admissibility that the domestic case is not the same (in person and conduct) as the ICC case - ostensibly disregarding the 'unwillingness' and 'inability' criteria altogether. The passage should probably not be read quite so literally.

[96] *Nouwen* (2011), p. 48.

[97] See, *inter alia*, Schabas (2008) p. 757, Nouwen (2013) p. 107, *Judge Usacka's dissenting opinion to* the *Gaddafi Admissibility Decision*, para. 20.

referenced above, this is true for those arising from the situations in the DRC (*Lubanga*, *Ntaganda*, *Katanga* and *Ngudjolo*) and the CAR (*Bemba*). In the Darfur situation (*Harun and Kushayb*) the Court did not have the consent of Sudan – which is not a State Party. It was referred, as mentioned, by the UN Security Council. However, the government had decided that it would not challenge the admissibility of the ICC cases.[98]

The argument seems to be that the absence of any interest in protecting the State's sovereign right to exercise criminal jurisdiction led to an "artificially" narrow definition of 'case'. Schabas, criticising the appearance of the *inaction*-criterion in *Lubanga*, writes that all parties – the prosecutor, the Court, the State and the accused – wanted a trial at the ICC.[99] Since the criterion, according to Schabas, had no basis in the Statute, the PTC resorted to 'judicial activism' in order to find the case admissible.[100]

Although the inaction-criterion itself is not 'judicial activism',[101] it is not difficult to imagine that a narrow interpretation was convenient in the *Lubanga* case. Having ruled out 'inability', this allowed a finding of admissibility without having to assess the 'unwillingness' of the DRC, which actively cooperated with the Court.

Second, another factor is the nature of the proceedings in which the 'same person/same conduct'-test was developed. The decisions listed above are all regarding applications for warrants of arrest, in which the Court used its competence to *ex officio* review the admissibility of a case.[102] In these proceedings, the Court is entitled to 'decide on the procedure to be followed' in these proceedings.[103] The Court decided to hold hearings before deciding on the issue of admissibility. However, the hearings were held *ex parte*, with the Prosecution as the only party expressing its view.[104] As such, when developing the 'same person/same case'-test, the Court did not have the benefit of adversarial proceedings.

5 Modification of the 'Same Person/Same Conduct'-test in *Kenya*

[98] Stahn (2015), p. 235
[99] Schabas (2008), 757
[100] *Ibid*
[101] See *supra*, chapter 3.1
[102] Article 19 (1)
[103] Rule 58 (2) of the *Rules of Procedure and Evidence (RPE)*
[104] See, *inter alia*, *Lubanga Decision on Warrant of Arrest*, para 6

5.1 Introduction

In this section, I will examine the Kenyan admissibility challenge, in which the ACH reviewed and modified the 'same person/same conduct'-test developed in the early case law. The ACH had been seized with admissibility challenges before, but had not ruled on the correctness of the 'same person/same conduct'-test.

Notably, Katanga challenged the admissibility of his case during the trial stage, *inter alia*, on the ground that that the test is wrong.[105] The ACH was nonetheless able to conclude with admissibility without assessing the validity the 'same person/same conduct'-test.[106]

What differed in *Kenya* was that the admissibility was challenged by the State, not the suspect.[107] Thus, the interests of the OTP and the jurisdictional State conflicted for the first time – it was the first investigation opened on the Prosecutor's own initiative (*proprio motu*) and the first to see an admissibility challenge from a State.

5.2 Background

In March 2010, the PTC granted the Prosecutor's request to open an investigation into the 2007-2008 post-election violence in Kenya. Contrary to when a situation is referred to the Court by a State Party or the Security Council, a *proprio motu* investigation is dependent on the approval of the PTC.[108] The review of the request prompted an admissibility assessment by the Chamber, since the Prosecutor, when initiating an investigation, shall be satisfied, *inter alia*, that 'the case is or would be admissible under Article 17'.[109]

This presented a slight interpretational problem, in that that the assessment is tied to the term 'case', but undertaken at a stage where no concrete cases have materialised – at the aforementioned "situation"-stage. The PTC therefore held that 'case' should be construed in the context in which it is applied.[110] As such,

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[105] *Katanga Admissibility Challenge*, para. 39

[106] *Katanga Admissibility Judgement*, para 95 and *Katanga Admissibility Appeal Judgement*, para. 81. In the latter, the inaction criterion was confirmed by the ACH.

[107] Article 19 (2) allows for challenges from both

[108] Article 15(4)

[109] *Kenya Investigation Authorisation*, para 40. See Article 53(1)(b)

[110] *Ibid*, para 48

> admissibility at the situation stage should be assessed against the criteria defining a "potential case" such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future cases.[111]

The Chamber found that there existed some national proceedings relating to the post-election violence, 'but only in relation to minor offences' and 'directed against persons that fall outside the category of those who bear the greatest responsibility and are likely to be the focus of the Prosecutor's investigation'.[112] Kenya, in other words, did not cover the 'potential case'. Hence, the admissibility requirement for opening an investigation was satisfied.

5.3 Pre-Trial Proceedings

A year later, on 8 March 2011, the PTC issued two summonses to appear for, respectively, Uhuru Kenyatta, Francis Muthaura and Mohammed Ali (*Kenyatta et al.*); and William Ruto, Henry Kosgey and Joshua Sang (*Ruto et al*.). Known as the "Ocampo six",[113] the suspects were, mostly, high-ranking government officials.

Shortly after, Kenya challenged the admissibility of both cases pursuant to Article 19(2)(b). In the challenge, Kenya stressed that it was in the middle of a judicial and prosecutorial reform-process following the post-election crisis.[114] With regards to the 'same person/same conduct'-test, Kenya referred to the above-quoted part of the decision authorising the investigation.[115] It argued that this was the test which Kenya was required to satisfy, and held that 'national investigations must, therefore, cover the same conduct in respect of the persons at the same level in the hierarchy investigated by the ICC'.[116]

In its decision, the PTC did not agree that the test set out in the authorisation decision was applicable in Article 19 challenges.[117] These challenges are made at the "case" stage, at which

[111] *Ibid*, para 50
[112] *Ibid*, para 185
[113] Al-Jazeera (2011)
[114] *Kenya Admissibility Judgement*, para 4
[115] *Ibid*, para 13
[116] *Ibid*, para 48
[117] *Ibid*, para 50

the suspect has been identified by the arrest warrant or summons to appear. Thus, the *person*-limb of the test is more specific.[118]

Rather, the Chamber cited the formulation in *Lubanga*.[119] Although Kenya argued that the 'same person/same conduct'-test had not yet been authoritatively settled in ICC case law, the Chamber held that the *person*-limb was in fact confirmed by the ACH in *Katanga*.[120] In applying this part of the test to the present case, the Chamber found that Kenya had not proven 'any concrete investigative steps regarding the three suspects in question'.[121] It failed the 'same person'-requirement, and the Chamber thus found Kenya to be inactive.[122]

5.4 Appeals Chamber Decision

5.4.1 Kenya's Submissions

On appeal, Kenya claimed that the PTC had not addressed the substance of its position that there is 'no sound basis to find that the persons being investigated by State must necessarily always be the same as those the ICC Prosecutor has named'.[123] It argued that such a requirement is too stringent considering that 'the State may simply not have evidence available to the Prosecutor of the ICC or may even be deprived of such evidence'[124]. It also pointed out that, even with the same evidence, two independent investigations may reach different conclusions. According to Kenya, the principle of complementarity grants the State discretion to pursue other individuals than the ICC.[125]

5.4.2 Interpretation of Article 17(1)(a)

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[118] *Ibid*

[119] *Ibid*, para 51

[120] *Ibid*, para 52. The ACH in *Katanga* explicitly stated, however, that it did not rule on the correctness of the test, see *Katanga Admissibility Appeal Judgement*, para. 81

[121] *Kenya Admissibility Judgement*, para 61. The Chamber refers to *three* suspects because the six aforementioned individuals were targeted in two separate cases covering three each. Kenya challenged the admissibility of both and the Chambers (both Pre-Trial and Appeals) rendered separate decisions. These were identical in the parts pertaining to admissibility, and I am therefore only citing the Kenyatta et al. judgements.

[122] *Ibid*, para 66

[123] *Kenya Document in Support of the Appeal*, paras 79-82

[124] *Ibid*, para 84

[125] *Ibid*, para 43

In its decision, the ACH initially rejected the PTC's assertion that the correctness of the 'same person/same conduct'-test had been confirmed in *Katanga*.[126] Hence, it was the first time the ACH was tasked with the issue.

The Chamber prefaced its interpretation by emphasising the function of Article 17. According to the ACH, this is to 'resolve a conflict of jurisdictions between the Court on the one hand and a national jurisdiction on the other'.[127] On basis of the function of the provision, the Chamber surmised that the question is 'whether the *same case* is being investigated by both the Court and a national jurisdiction'.[128]

Moving on, the ACH held that 'the meaning of the words 'case being investigated […] must […] be understood in the context to which it is applied'.[129] While on the "situation" stage the 'contours of the likely cases will often be relatively vague', Article 19 proceedings concerns a 'concrete case'. This "case" is defined by the warrant of arrest or summons to appear,[130] or the charges brought by the Prosecutor for confirmation by the PTC.[131][132]

The Court then referenced the *ne bis in idem*-provisions – Article 17(1)(c) and 20(3) – which 'state that the Court cannot try a person tried by a national court for the same conduct'.[133] On this background, the Chamber concluded:

> Thus, the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover **the same individual and substantially the same conduct** as alleged in the proceedings before the Court [emphasis added].[134]

It is not explained why the State must cover only 'substantially the same' conduct. Since Kenya only challenged the *person*-limb, the content of this requirement is not elaborated upon.

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[126] *Kenya Admissibility Appeal Judgement*, para 34
[127] *Ibid*, para 36
[128] *Ibid*
[129] *Ibid*, para 38
[130] Pursuant to Article 58
[131] Pursuant to Article 61
[132] *Kenya Admissibility Appeal Judgement*, para 38
[133] *Ibid*, para 39
[134] *Ibid*

5.4.3 Application to the Case

Turning to the case at hand, the ACH asserted that it arose out of a summons to appear. According to its previous interpretation, the case was thus defined by this document.[135] Consequently, the case would be inadmissible only if the Kenya's investigation covered the individuals named in the summonses.[136] If not, 'it cannot be said that the *same case* is (currently) under investigation by the Court and by a national jurisdiction, and there is therefore no conflict of jurisdictions'.[137]

The ACH could have moved straight on to the facts from here, *i.e.* to determining whether the persons named in the summons were under investigation. However, it proceeded to discuss the arguments submitted by Kenya in favour of a lenient approach to the *person*-limb. In this, the Court sheds light on its reasoning behind the interpretation of Article 17(1)(a).

Regarding Kenya's position that it was sufficient to investigate persons at the same hierarchal level, the Chamber referred to the advanced stage of proceedings at the "case" stage, where 'specific suspects have been identified'.[138] The question at this point, according to the Chamber, is whether these are under investigation 'by both jurisdictions'.[139] It rejected the notion that difference in available evidence should entail a less stringent requirement – if lack of evidence prevents the State from investigate the same persons there is no conflict of jurisdiction.[140]

The same argument was applied to rebut Kenya's contention that the complementarity principle affords the State some discretion in conducting domestic proceedings. Referring to the purpose of the Article 19 admissibility proceedings – 'to determine whether the case brought by the Prosecutor is inadmissible because of a jurisdictional conflict' – the Chamber deemed Kenya's contention to have 'no merit'.[141] It stated:

> Although article 17 (1) (a) to (c) of the Statute does indeed favour national jurisdictions, it does so only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level. If the suspect or conduct have not been inves-

[135] *Ibid*, para 40.
[136] *Ibid*
[137] *Ibid*
[138] *Ibid,* para 41
[139] *Ibid*
[140] *Ibid,* para 42
[141] *Ibid*, para 43

tigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible.[142]

Safeguarding national sovereignty, the Court argued, is taken into account in the complementarity regime as a whole – Article 19 proceedings is 'but one aspect', in which 'the focus is on a concrete case that is the subject of proceedings before the Court'.[143]

5.4.4 Conclusion

The Chamber thus concluded that the PTC had applied the correct test when requiring the Kenyan proceedings to cover the same individuals as the ICC. It further found that Kenya had failed to support its assertions with 'tangible proof to demonstrate that it is actually carrying out relevant investigations'.[144] Kenya's appeal was dismissed.

5.5 Commenting on the Decision

5.5.1 A New Rationale for 'Same Person/Same Conduct'

The ACH starts where it "left off" in *Katanga*. In this decision, it confirmed the inactivity-criterion, asserting on the basis of a textual interpretation that inadmissibility depends on the existence of some form of domestic proceedings.[145] In *Kenya*, it specifies that these proceedings must relate to the *same case*. This deduction is, however, not based on an interpretation of the wording, but rather on the purpose of Article 17(1)(a) to (c) which – according to the Chamber – is to resolve conflicts of jurisdictions.[146] In other words, in order for Article 17(1)(a) to apply, there must exist a conflict of jurisdiction. This conflict arises when the proceedings relate to the same case.

Interpreting Article 17 to require that investigations must cover the same case was not new – as we have seen from PTC jurisprudence – but grounding it in the provision's function as solver of jurisdictional conflicts was. With this, it seems that the Court presented a new rationale for the 'same person/same conduct'-requirement.

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[142] *Ibid*

[143] *Ibid*, para 44.

[144] *Ibid*, para 62

[145] See *Katanga Admissibility Appeal judgement*, para. 75-78

[146] *Supra*, chapter 5.4.2

Whereas the PTC in *Lubanga* infers 'same person/same conduct' from the definition in the *DRC Victims Decision*, the ACH seems to "borrow" those elements from the *ne bis in idem*-principle.

This is not explicitly stated. In its reasoning leading up to 'same person/substantially the same conduct', the ACH invokes both the documents 'defining the case' and the *ne bis in idem*-principle in Articles 17(1)(c) and 20(3), without explaining the link between the two. From my understanding, however, it is the latter provisions which are determinative on what constitutes *same case*.

These provisions implement the *ne bis in idem*-principle, according to which the Court cannot try a person that has already been tried for the same conduct in a national court. Because the ACH has already asserted that the application of Article 17(1)(a) presupposes a conflict of jurisdiction, it is reasonable to conclude that the ACH views the existence of such a conflict dependent on a *ne bis in idem*-situation. In other words, the ICC's exercise of jurisdiction is in conflict with that of the State only if the Statute forbids a trial in both, *i.e.* when they cover the same person and the same conduct. The result: inadmissibility requires the domestic proceedings to cover the same *person* and (substantially) the same *conduct*.

This understanding is supported by the Chamber's rebuttal of Kenya's position regarding the 'same person'-requirement. None of Kenya's arguments find any support with the Chamber simply because there is no conflict of jurisdiction as long as domestic proceedings do not cover the *same person(s)*. References to prosecutorial discretion for the State and safeguarding of national sovereignty were deemed irrelevant. This further indicates the link between *ne bis in idem* and *same case*, because it is obvious that the prohibitive force of *ne bis in idem* does not extend to any other than the individual tried. So, if proceedings relate to different persons, the jurisdictions do not conflict and they do not relate to the same case.

5.5.2 The 'Defining' Documents

With the reference to the *ne bis in idem*-provisions explained, the question remains of what role does the warrant of arrest/summons to appear and document containing the charges play in the *same case*-test. According to the ACH, the ICC case is 'defined' by these documents.[147]

It seems that these simply provide the factual parameters – the actual *person(s)* and *conduct* – which the domestic proceedings must cover in order to succeed in an Article 19 challenge.

[147] *Kenya Admissibility Appeal Judgement*, para 39

Thus, Articles 17(1)(c) and 20(3) prescribes what elements, *in abstracto*, must overlap, while the documents point out these elements in the concrete ICC case.

5.5.3 The Meaning of 'Person' and 'Conduct'

This prompts the question of the content of the abstract terms 'person' and 'conduct'. In other words, what person and what conduct – found in the 'defining' documents – are the State required to cover? Regarding the *person*-limb, the ACH is unambiguous. The abstract element *person* refers to a specific individual, not a larger group of people. The person which needs to be same is readily identifiable – it is the one(s) named in the 'defining' documents.

The ACH does not comment on the content of the abstract term 'conduct'. Yet, given the rationale for the *person*-limb, the natural inference is that 'conduct' should also be interpreted in light of the function of solving conflicts of jurisdiction. In other words, its meaning should be governed by the *ne bis in idem*-principle. This would be a rigorous interpretation, as the principle relates to specific criminal incidents.[148]

5.5.4 'Substantially the same'

However, the ACH indicates that whatever 'conduct' refers to, the State may not have to cover all of it to be investigating the same case. While it is clear that the person subject to the domestic proceedings must be the same as in the ICC case, the ACH requires the conduct covered to be 'substantially the same'.

This implies for the *conduct*-limb, there are two questions. One regards the meaning of 'conduct', *i.e.* with what level of specificity the term is defined. The other regards the meaning of 'substantially the same', *i.e.* how much of that 'conduct' the domestic proceedings are required to cover.

5.5.5 Summing Up

To summarise, the ACH in *Kenya* confirms the 'same person/same conduct'-test, but gives important insights that had not yet been formulated in ICC jurisprudence. The first is that inadmissibility presupposes a conflict of jurisdiction, and that the existence of a conflict of jurisdiction is determined by the *ne bis in idem*-principle. This seems to mean that, in assessing whether the jurisdictional State is inactive, the safeguarding of national sovereignty is not a

[148] See note 219

relevant consideration. As the Court put it, Article 17(1)(a) to (c) favours national jurisdiction 'only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level'.[149]

The second is that the State may not be required to cover exactly the same conduct, only 'substantially the same'. Neither the rationale behind this modification nor its consequences was explained by the ACH. Apart from the 'substantially'-addition, the *conduct*-limb was not addressed at all in *Kenya*. However, it would be extensively dealt with in the *Libya* judgements.

6 *Libya* and the Test in its Present From

6.1 Background

The situation in Libya was referred to the ICC by the UN Security Council on 26 February 2011, in light of the 'gross and systematic violation of human rights' and 'the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government'.[150]

On 27 June 2011, arrest warrants were issued for Muammar Gaddafi, his son Saif Al-Islam Gaddafi, and Libyan Intelligence Chief Abdullah Al-Senussi,[151] accompanied by requests to Libyan authorities for their arrest and surrender to the ICC[152]. In late 2011, Muammar Gaddafi was killed and Saif Al-Islam captured as the Gaddafi regime was successfully overthrown.[153] The ICC case against "the Colonel" was subsequently terminated. Regarding the case against his son, the new Libyan government sought in January 2012 a postponement of the surrender to the Court, on grounds that he was already under investigation nationally for different crimes.[154] Additionally, initiating national proceedings for the 'same conduct for which he was sought by the Court' was under consideration.[155] The request was rejected by the Court, leading Libya to formally file an admissibility challenge.[156]

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[149] *Ibid*, para 43
[150] UNSC Resolution 1970 (2011)
[151] *Gaddafi Admissibility Challenge*, para. 18
[152] *Ibid*, para. 19
[153] *Ibid*, para. 20-22
[154] *Ibid*, para 26
[155] *Ibid*
[156] *Gaddafi Admissibility Decision*, para 3.

Al-Senussi was arrested in March 2012 in Mauritania,[157] and arrived in Libya in September.[158] An admissibility challenge was filed on 2 April 2013.[159] I will examine both proceedings below.

6.2 Submissions

In neither case did Libya challenge the test set out in *Kenya* itself – that the domestic case must cover the *same person* and *substantially the same conduct*. The *person*-limb was not at issue at all because both proceedings concerned the same persons – Gaddafi and Al-Senussi. The meaning of 'substantially the same conduct' was, however, contended. Libya put forward a broad understanding of 'conduct', arguing in *Gaddafi* that the national investigation 'need not "mirror" the case before the Court' as

> such an onerous standard would unreasonably defeat the national jurisdiction, not least because States ordinarily do not have access to the Prosecutor's investigative material, would be unnecessary to bring an end to impunity, and would be manifestly inconsistent with the presumption in favour of the primacy of national proceedings.[160]

It elaborated on this in the Al-Senussi challenge, arguing that

> a domestic prosecutor may legitimately hold genuine differences of opinion with the ICC Prosecutor regarding the appropriate contours of a particular case and the overall interests of justice and the domestic authorities should not be unduly restrained in pursuing a national accountability agenda by being compelled to conduct an investigation and prosecution that mirrors precisely the factual substance of the investigation being conducted from time to time by the OTP.[161]

The Prosecutor, on the other hand, held that while the legal characterisation may differ, the conduct, referring to the acts and incidents, must be the same in both proceedings.[162] It held that 'substantially the same conduct' does not allow for variations in the incidents covered as this would undermine the purpose of complementarity.[163] However, 'substantially the same'

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[157] *Gaddafi Admissibility Challenge*, para. 30
[158] *Al-Senussi Admissibility Challenge*, para 28
[159] *Ibid*, para 34
[160] *Gaddafi Admissibility Judgement*, para 62
[161] *Al-Senussi ADmissibility Challenge*, para 88
[162] *Gaddafi Admissibility Judgement*, para 67
[163] *Ibid*, para 68

means that the national investigation need not match '*exactly* all of the features of the ICC's investigation or prosecution'– the national prosecutors has 'considerable latitude regarding the particular focus on their investigation into the conduct alleged'.[164]

6.3 Pre-Trial Decisions

6.3.1 Gaddafi Decision

Starting point of the assessment

In its decision, the PTC starts with setting out the framework of the assessment. It recalled the jurisprudence regarding the 'same person/same conduct'-test, originating in *Lubanga*.[165] It also referenced the opinion by some PTCs that a case must encompass specific incidents.[166] However, it concluded that the ACH in *Kenya* had only confirmed the test originating PTC jurisprudence insofar as it relates to 'conduct' – not 'incidents'.[167]

Since this conduct needs to be 'substantially the same', the Chamber held that the determination of the *conduct*-limb 'will vary according to the concrete facts and circumstances of the case and, therefore, requires a case-by-case analysis'.[168]

Thus, the Chamber set out a two-stepped approach to the *conduct*-limb. First, it must identify the relevant conduct of the Prosecutor's case. Second, it must undertake a concrete assessment of the Libyan investigation in order to determine if the conduct covered is 'substantially the same.

Describing the "Conduct" in Question

Elaborating in the context of the present case, the Court held that the Libyan proceedings 'must be compared to the conduct attributed to Mr Gaddafi in the Warrant of Arrest issued against him by the Chamber, as well as in the Chamber's decision on the Prosecutor's application for the warrant of arrest'.[169] The Warrant of Arrest describes the conduct with which Gaddafi is accused – using the Libyan Security Forces to commit murder and persecution as

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[164] *Prosecution's response to Libya's further submissions*, para 29
[165] *Gaddafi Admissibility Judgement*, para 74
[166] *Ibid*, para 75
[167] *Ibid*, para 76
[168] *Ibid*, para 77
[169] *Ibid*, para 78

crimes against humanity – but not specific incidents.[170] The Arrest Warrant Decision, on the other hand, lists several incidents underpinning the allegations.[171] According to the PTC, however, the list is not exhaustive, but rather 'samples of a course of conduct of the Security Forces':[172]

> Therefore, in the circumstances of the case at hand and bearing in mind the purpose of the complementarity principle, the Chamber considers that it would not be appropriate to expect Libya's investigation to cover exactly the same acts of murder and persecution mentioned in the Article 58 Decision […]. Instead, the Chamber will assess, on the basis of the evidence provided by Libya, whether the alleged domestic investigation addresses the same conduct underlying the Warrant of Arrest and Article 58 Decision […][173]

It then set out the conduct to which the Libyan efforts were to be compared:

> Mr. Gaddafi used his control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including by the use of lethal force, the demonstrations of civilians, which started in February 2011 against Muammar Gaddafi's regime; in particular, that Mr Gaddafi activated the Security Forces under his control to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi's regime, across Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities from 15 February 2011 to at least 28 February 2011.[174]

This is the comparator in the concrete assessment of the Libyan investigation.

On Differences in Legal Characterisation

Before assessing the domestic investigation, the Chamber dispelled the notion that inadmissibility requires the State to copy the Prosecutor's legal characterisation of the conduct – prosecuting it as "international crimes" is not necessary. The Court concluded that 'a domestic investigation or prosecution for "ordinary crimes", to the extent that the case covers the same conduct, shall be considered sufficient'.[175]

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[170] *Ibid*, para 80
[171] *Ibid*, para 81
[172] *Ibid*, para 82
[173] *Ibid*, para 83
[174] *Ibid*, para. 83, repeated in para. 133
[175] *Ibid*, para 88

Assessment of the Investigation – substantially the same?

After thoroughly examining the evidence presented by Libya, the Chamber found that Libya was indeed conducting an 'investigation' which covered 'certain discrete aspects' of the of the conduct constituting the Prosecutor's case.[176] Nonetheless, the Chamber concluded that

> Libya has fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, the submission that the domestic investigation covers the same case that is before the Court.[177]

As such, the Chamber rejected the Libyan admissibility challenge. It should be noted that Libya was not only found to not be investigating the same case – the Court also concluded it was not able to do so genuinely. It indicated that, because of this, its finding on 'same case' was not determinative for the admissibility.[178]

6.3.2 Al-Senussi Decision

Confirming 'conduct'

In *Al-Senussi*, the PTC echoed the finding in Gaddafi that the determination of 'substantially the same conduct' requires a case-by-case analysis.[179] Further, it supported the notion that the relevant 'conduct' is determined by the warrant of arrest,[180] elaborating further:

> […] Mr Al-Senussi's alleged criminal conduct as described in the Warrant of Arrest has confined temporal, geographical and material parameters which are sufficiently precise to meet the requirements of Article 58(3)(c) of the Statute, according to which a warrant of arrest shall contain a "concise statement of the facts which are alleged to constitute those crimes [for which the person is sought]". Contrary to the Prosecutor's argument, no reference to the "incidents" that are mentioned in the Article 58 Decision is therefore necessary in order to define, and purportedly narrow down, Mr. Al-Senussi's conduct as alleged in the proceedings before the Court.[181]

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[176] *Ibid*, para 132
[177] *Ibid*, para 135
[178] See *ibid*, para 137
[179] *Al-Senussi Admissibility Decision*, para 66(iii)
[180] *Ibid*
[181] *Ibid*, para 77

The Chamber did, however, acknowledge that the degree of overlap in incidents 'may still constitute a relevant indicator that the case […] is indeed the same as the one before the Court.[182]

Assessment of the investigation

In contrast to the *Gaddafi* case, the Pre-Trial found that Libya was investigating 'substantially the same conduct' in *Al-Senussi*. This was based on differences in fact. The PTC was 'satisfied that the facts that have been investigated by the Libyan authorities in relation to Mr Al-Senussi […] comprise the relevant factual aspects of Mr Al-Senussi's conduct as alleged in the proceedings before the Court[183] On this basis, it was able to conclude that Libya 'are taking concrete and progressive steps directed at ascertaining the criminal responsibility of Mr Al-Senussi for substantially the same conduct as alleged in the proceedings before the Court'.[184] After finding Libya neither unwilling or unable to genuinely carry out the proceedings against Al-Senussi, the case was deemed inadmissible.[185]

6.3.3 Commenting on the Decisions

The meaning of "conduct"

The PTC rejected an incident-specific notion of 'conduct' in favour of an understanding employing a lower degree of specificity. This seems to be based on the way the conduct is described in the arrest warrant and 'the purpose of the complementarity principle'.

In Al-Senussi, the PTC points out that Article 58(3)(1) determines how the conduct shall be described in an arrest warrant. The implication is that this provision provides the specificity with which 'conduct' is defined for the purpose of Article 17(1)(a) – 'a concise statement of the facts which are alleged to constitute [the crimes for which the person's arrest is sought]'. As such, it deviates from *Kenya* which derived the abstract definition of 'case' from the *ne bis in idem*-principle.

[182] *Ibid*, para 79
[183] *Ibid*, para 160c
[184] *Ibid*, para 164
[185] *Ibid*, para 311

This level of specificity is exemplified by the Pre-Trial's description of the 'conduct' in the Gaddafi case.[186] This included certain geographical, temporal and subject-matter parameters, yet they are sufficiently broad to cover several different incidents. *Incident* is therefore not a defining parameter of the PTC's definition – it is possible to imagine the 'conduct' being covered by two cases investigating different incidents. However, as pointed out, if the two cases cover the same underlying incidents, this may be an indicator that they are same.

Lastly, an important point is that the Pre-Trial's rejection of incident-specificity is 'bearing in mind the purposes of the complementarity principle'. Thus, the PTC seemingly acknowledges that safeguarding national sovereignty is relevant in the 'same case'-limb of Article 17(1)(a), contrary to what was held in *Kenya*.[187]

On the 'substantially the same'-threshold

The PTC applies the 'substantially the same'-standard from *Kenya*, which, it adds, implies a concrete assessment of the facts. In other words, there must be a comparison between the 'conduct' covered by the two proceedings, with the requirement that they are 'substantially the same'. The Chamber does not elaborate on the threshold. However, covering 'discrete aspects' of the conduct was not enough in *Gaddafi*. In Al-Senussi, it seems that Libya managed to substantiate that it was covering the conduct of the ICC case entirely.

6.4 Appeals Chamber Decisions

6.4.1 Introduction

Both the *Gaddafi* and *Al-Senussi* cases were appealed. Through its judgements, the ACH elaborated on the *conduct*-limb of the 'same case'-test, setting out the test in its present from.

6.4.2 Gaddafi Appeal

Structure of the 'Same Case'-assessment

The ACH divided the assessment into two issues. **The first** regarded the meaning of the term 'case', 'including the role of the underlying incidents in defining the scope of a case'.[188] **The second** regarded the comparison between the cases, including 'addressing the requisite degree

[186] See *supra*, p. 30

[187] See *supra* chapter 5.5.5

[188] *Gaddafi Admissibility Appeal Decision*, para 59

of sameness of the investigations, the meaning of the phrase "substantially the same conduct" […] and whether a State is investigating the same case if it has been established that "discrete aspects" of the case before the Court are being investigated domestically'.[189]

In this, the ACH applied the same structure as the PTC – first establishing what elements in the case must be same (the comparator), and then establish and apply the level of overlap required in those elements (the requisite degree of sameness).

Establishing the Comparator – Interpreting 'Case'

When interpreting 'case', the ACH quoted the reasoning in the *Kenya Appeal Decision*, including the paragraphs where the Chamber based its interpretation in Article 17's function of resolving conflicts of jurisdictions.[190] From this, the (Libya) Chamber deduced that 'the parameters of "case" are defined by the suspect under investigation and the conduct that gives rise to criminal liability'.[191] Or, in simpler terms, *person* and *conduct*. Only the latter was at issue in this case.

The ACH continues:

> For the purposes of defining a "case" in article 17 (1) (a) of the Statute, in situations such as the present, the Appeals Chamber considers that the conduct described in the incidents under investigation which is imputed to the suspect is a necessary component of the case.[192]

It further defines 'incident' as 'referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators'.[193]

Although the ACH seems to express itself somewhat conditionally, the implication is that 'conduct' is incident-specific.

The Requisite Degree of Sameness

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[189] *Ibid*
[190] See *supra* chapter 5.4.2
[191] *Gaddafi Admissibility Appeal Decision*, para 61
[192] *Ibid*, para 62
[193] *Ibid*

The next question regarded the meaning of 'substantially the same conduct'. The ACH frames the question thusly:

> It does not seem to be in dispute that the same conduct in relation to Mr Gaddafi must be under investigation. However, the question arises as to the extent to which it must be shown that the same incidents must be under investigation by both the Prosecutor and the State in question […].[194]

Like the PTC, the ACH affirmed that the determination of whether two cases are the same 'will depend upon the facts of the specific case'[195]. However, seemingly contrary to the PTC, this determination does not relate to the overlap in 'conduct', but to overlap in the incidents covered by the two proceedings.

Whereas the PTC did not elaborate on the assessment, the ACH set out some general guidelines. It first described the two extremes: the situation in which the State investigates *all* the incidents covered by the Prosecutor's case, and the situation in which it investigates *none*. In the former, the cases are 'same' for the purposes of Article 17(1)(a).[196] In the latter, 'the ACH finds it hard to envisage a situation in which the Prosecutor and the state can be said to be investigating the same case'[197].

The question, then, is when the overlap in incidents reaches the threshold where the investigation can be said to cover 'substantially the same conduct'.[198] The Chamber summarizes the assessment as follows:

> What is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating. The Appeals Chamber considers that to carry out this assessment, it is necessary to use, as a comparator, the underlying incidents under investigation both by the prosecutor and the State, alongside the conduct of the suspects under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents.[199]

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[194] *Ibid*, para 70
[195] *Ibid* para 71
[196] *Ibid*, para 72
[197] *Ibid*
[198] *Ibid*
[199] *Ibid*, para 73

While the degree of overlap in incidents under investigation is central to determining whether two cases are same, it is only a starting point – one cannot render the threshold in a certain percentage of incidents. The Chamber mentions several elements that may influence the degree of overlap required. For example, even if a State investigates a smaller number of incidents, it may still be investigating 'substantially the same conduct' if these incidents 'form the crux of the Prosecutor's case and/or represent the most serious aspects of the case'.[200] Additionally, the assessment should take into consideration the reason for a State not investigating incidents covered by the ICC case, as well as 'the interests of victims and the impact on them of any decision that a case is admissible at the Court despite not all of the incidents being investigated domestically'.[201]

Application to the Present Case

Turning to the facts of the case, the ACH examined whether it was sufficient for Libya to investigate 'discrete aspects'[202] of the conduct. The Chamber concludes that it was not,[203] and, as such, the section does not shed much light on the 'substantially the same'-threshold. However, it comments on some of Libya's arguments giving insight into its own reasoning.

Libya argued, *inter alia*, that accepting an investigation covering 'discrete aspects' of the case would give effect to the 'strong presumption in favour of national jurisdiction' envisioned by the drafters.[204] In response, the ACH recalled that the Court dismissed the Government's argument in *Kenya* that 'there must be some leeway to allow a domestic investigation to proceed'. In that case, the Court referred to the function of admissibility proceedings to solve conflicts of jurisdiction.[205] The ACH in *Libya* added that "complementarity' does not mean that all cases must be resolved in favour of domestic investigation', and repeated the finding in *Kenya* that Article 17(1)(a) to (c) only favours national jurisdictions if there are or have been relevant proceedings.[206]

6.4.3 Al-Senussi Appeal

[200] *Ibid,* para 72
[201] *Ibid*, para 75
[202] Referencing the PTC's finding, see *supra* chapter 6.3.1
[203] *Gaddafi Admissibility Appeal Decision*, para 77
[204] *Ibid*, para 76
[205] *Ibid*, para 77
[206] *Ibid*, para 78

Like the PTC in *Al-Senussi* mostly built on the findings in its *Gaddafi* decision, the ACH built on *its* findings in the *Gaddafi* appeal. As such, the test is not further developed. However, the Chamber in *Al-Senussi* explicitly affirms that 'conduct' is incident-specific.

Referring to the PTC's finding that specific incidents did not form part of the comparator in 'the same case'-test, the ACH affirmed that 'this is not in line with the jurisprudence of the Appeals Chamber […], which considers such incidents to play a central role in this comparison'.[207]

Despite this, it was able to conclude that Libya was investigating the same case as the ICC, concluding that

> […] while the Pre-Trial Chamber's findings as to the relevance of the incidents for the question of whether the same case is being investigated diverged from the Appeals Chamber's jurisprudence in the *Gaddafi* case, it nevertheless considered those incidents when actually assessing whether Libya was investigating the same case as that before the Court.[208]

6.5 The Test in its Present Form

In *Kenya*, the ACH confirmed that the domestic proceedings are required to cover the same person. The *Libya* cases completes the 'same case'-test as it presently stands in the ICC case law.[209] The ACH copied the approach of the PTC by asserting that *conduct* is an element of 'case', and that the domestic proceedings are required to cover 'substantially the same' – the latter dependant on a concrete assessment of the facts.

The ACH disagreed, however, on the comparator. While the PTC held that the State was not required to cover the same incidents, the ACH asserted that the number of overlapping incidents formed the basis for the determination. As such, 'conduct' in the 'same case'-test should be understood as incident-specific.[210] This is in line with the rationale implied in the judgement. By invoking the findings in *Kenya*, the ACH indicates that the interpretation of case is based on the function of solving jurisdictional conflicts. As mentioned in chapter 5.5.3, this

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[207] *Al-Senussi Admissibility Appeals Decision*, para 101

[208] *Ibid*, para 110

[209] The 'same case'-question came up later in the admissibility proceedings in the case against Simone Gbagbo, but the Court did not express itself on the legal content of the test.

[210] One can discuss whether 'conduct' is incident-specific or *conduct* and *incident* are two separate elements, but this would be purely theoretical.

entails incident-specificity. In contrast, the PTC referenced 'the purpose of complementarity' in *its* interpretation.

Regarding the 'substantially the same'-requirement, the test set out is a judicial assessment based on the facts of the concrete case. While the starting point of the assessment is the number of overlapping incidents, the amount of overlap required may be influenced by several elements, such as the significance of the covered incidents and the impact on victims. Conversely, from the ACH's comments on Libya's arguments in *Gaddafi*, it seems to reject that the assessment allows for any discretion for domestic prosecutors on grounds of protection of national sovereignty.

7 Assessment

7.1 Introduction

In chapter 3.2, I introduced the case law by writing that the main question of the 'same case'-assessment is how closely the domestic proceedings must mirror the ICC case in order to render it inadmissible. This may also be framed as a question of what degree of specificity with which 'case' is defined – what elements are needed to be the same (or sufficiently similar) for two cases to be considered same?

The case law has revolved around three elements – *person*, *conduct* and *incident*. In the early case law, the Court required that all these were the same in the domestic proceedings. This was modified in the ACH jurisprudence to require the *person* to be the same, but *conduct*, understood as incident-specific, only to be 'substantially the same'. Whether the conduct is 'substantially the same' depends on a concrete assessment. The basis of this assessment is the overlap in incidents covered, but other elements may influence the determination. However, the safeguarding of State sovereignty seems not to be one of these elements

In this chapter, I will assess the reasoning behind the development of the test, and the legal arguments put forward in support of the Court's definition of 'case'. The question is what basis the elements defining 'case' has in the Rome Statute as interpreted under international law.

7.2 Rules on Treaty Interpretation

The general rule on treaty interpretation holds that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[211]

The starting point is the ordinary meaning in the context of the treaty.[212] This is the primary expression of what the Parties' agreed too. However, where the wording in context does not provide a clear answer, the object and purpose carries a lot of weight.[213]

As a starting point, I will look at the term 'case' in its "immediate" context, provided in in chapter 3.2. I will then examine the arguments based on the broader context of Article 17 and the treaty as a whole. Lastly, I will examine the object and purpose-arguments.

7.3 Ordinary Meaning

'Case', in Article 17(1)(a), is not an abstract term, but a reference to an existing case – namely the Prosecutor's case, which the domestic case must sufficiently resemble.[214] The *ordinary meaning* of the term 'case', on the other hand, provides us with the threshold of specificity needed in order to give a set of circumstances the legal label 'case'. We are, however, concerned with a different threshold, namely when are two sets of circumstances – which are undoubtedly 'cases' – same? To find that threshold, the ordinary meaning is not very guiding, but we should take note of the specificity it does provide.

It is reasonable to say that the term 'case' requires a certain level of specificity as to the subject of investigative and prosecutorial efforts, but this level is not very high. The identification of a person is not necessarily required to qualify as a case – it may be a 'case' even if it is unknown who was involved, or if there is disagreement on who were involved. Furthermore, neither specification of crime, exact time and date or exact course of events are, individually, necessary in order to label something a 'case', according to our normal understanding of the term.

Yet, the ordinary meaning of 'case' dictates a certain specification in time, place and act. This means that we do not consider two cases to be same if they deviate completely in these pa-

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[211] VCLT Article 31(1)

[212] Ruud (2018), p. 95

[213] Pursuant to the principle of effectiveness, see *ibid*, p. 98. One could discuss if the restrictive principle is applicable in this case, see *ibid*, p. 99. However, my view is that it is not, because the sovereignty-consideration is already implemented in the object and purpose.

[214] See chapter 3.2

rameters. However, defining 'case' using the element *person, conduct* and *incident* is well within the constraints of the ordinary meaning of 'case', even if not all of them are necessary.

It thus follows that the ordinary meaning of 'case' does not point to specific elements as mandatory. The lack of rigidity in the meaning of 'case' thus supports the finding in *Kenya* that the conduct must only be 'substantially the same'. This acknowledges that a 'case' does not have clearly defined limits, and a concrete assessment of the facts in order to determine if they are same thus seems in line with the ordinary meaning if the term.

The word 'case' allows for, but do not require, the inclusion of the above-listed elements. Therefore, we move on to examine the arguments put forward for including them in the interpretation of 'case' as this term is used in the Statute.

7.4 Contextual Arguments

7.4.1 Significance of Subparagraph (c) and Article 20(3)

P*erson* and *conduct* first appeared in *Lubanga* as elements the domestic proceedings were required to cover. These were inferred from a definition of 'case' stemming from the *DRC Victims Decision*. As pointed out in chapter 4.2.3, the PTC gave no legal justification for what became known as the 'same person/same conduct'-test. A rationale was, however, provided by Rastan in a 2008 article, based on the context of Article 17 as a whole and Article 20(3).

He argues that 'case' in subparagraph (a) is defined by *person* and *conduct* (with *conduct* being *incident*-specific) because that is how it is defined in subparagraph (c).[215] He starts by pointing to the assessment in (c), according to which a case is inadmissible if 'the person concerned' has been tried for 'conduct which is the subject of the complaint'.[216] The provision must be 'read together' with Article 20(3) – the *ne bis in idem*-rule – which states, more plainly, that a 'person' shall not be tried again for the 'same conduct'.[217]

According to Rastan, since *person* and *conduct* are the relevant comparative elements in Article 20(3), the same must be true for 17(1)(c). Because 'case' must be interpreted consistently throughout Article 17, this also extends to subparagraph (a):

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[215] Rastan (2008), p. 437
[216] *Ibid*
[217] *Ibid*

> The Pre-Trial Chamber seems to have followed the reasoning that if the provision that is spelled out with the most clarity (article 17(1)(c) linked with article 20(3)) leads to one conclusion of what constitutes a case, there is merit to applying the same criteria to the provisions defined with less certainty […]. Evidently, the case being challenged under article 19 cannot mean something different in the context of each subparagraph[…].[218]

This argument entails that *conduct* in Article 17(1)(a) is incident-specific because it originates in the *ne bis in idem*-principle: the principle, in its traditional understanding, prohibits duplication of trials concerning 'a specific, discreet event'[219]

Although Rastan presents a plausible explanation of how the PTC arrived at its definition in *Lubanga*, there are some issues with his deduction. The first regards the link between 20(3) and 17(1)(c). Nouwen points out that while the former prohibits a trial if the person has already been tried for the 'same conduct', the latter deems a case inadmissible if the person has been tried 'for the conduct which is the subject of the complaint'.[220] According to Nouwen, the conduct-criterion in 17(1)(c) is 'different and broader'.[221]

The more problematic point is perhaps the "transport" to (a), which is more remotely connected to 20(3). Rastan develops the consistency-argument in a 2011 article, holding that if the test is less stringent in subparagraph (a) and (b) than (c), 'this might discourage states from completing trials of persons domestically as they would stand a better chance successfully challenging admissibility if domestic processes are ongoing'.[222] This is not completely true, as the Court in (a) and (b) situations have a more grounds on which to nonetheless declare admissibility[223] – one of which is 'an unjustified delay in the proceedings'.[224]

Generally, there is however merit to the argument that the terms of a legal document should be interpreted consistently, and Rastan may be right when he says that 'case' cannot have different meanings throughout the Statute. However, this does not necessarily entail that the State, under subparagraph (a), is required to cover the same *person*, *conduct* and *incident*.

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[218] *Ibid*, p. 438
[219] *Ibid*
[220] *Nouwen* (2013), p, 54
[221] *Ibid*
[222] Rastan (2011)
[223] Comparing *unwillingness* and *inability* defined in Article 17(2) and (3) to the exceptions from *ne bis in idem* in 20(3)(a) and (b)
[224] Article 17(2)(b)

Firstly, one may object to the notion that the *ne bis in idem*-provisions defines 'case'. Article 20(3) does not mention 'case' at all. Article 17(1)(c) regards the admissibility of a 'case', but only insofar that certain elements of the OTP's case[225] has already been the subject of a trial. I am unable to see how one can infer from this a definition of 'case'.

Secondly, contrary to Rastan, Stigen uses the difference in wording to argue that Article 17(1)(a) shows that *same person* is *not* a requirement:

> The fact that ongoing proceedings only refers to "the case" implies that a proceeding against *another person* for the same conduct will lead to inadmissibility provided that the proceeding is genuine.[226]

The point is that the wordinh subparagraph (c) is more rigorous – it is not enough that the *cases* are same; specific elements within the case needs to be the same.

As explained in the section above and in chapter 3.2, the question of admissibility is not about a generic definition of 'case' – it is a comparison between two actual cases, and the question is if they are sufficiently similar. The wording of Article 17(1)(a) indicates a different assessment than subparagraph (c): in (a) the question is if the prosecutor's *case* is being investigated or prosecuted; in (c), the question is if *certain elements* of that case have already been tried. One could therefore argue that consistency – or rather lack thereof – indicates that the requirements in subparagraphs (a) and (c) are *different*.

In conclusion, subparagraph (c) and Article 20(3) do not provide a basis for a requirement that the domestic proceedings must cover the same *person* and (incident-specific) *conduct*. If anything, the context of Article 17 as a whole militates against the *same person*-requirement.

7.4.2 Article 90

Nonetheless, in his 2011 article, Rastan presents a different argument for the *same person* and *same conduct* requirements, pointing to Article 90 of the Statute.[227] This argument was seemingly referenced in a footnote in the *Kenya* appeal.[228] The provision deals with the scenario

[225] 'The person concerned' and 'the conduct which is the subject of the complaint'

[226] Stigen (2008), p. 197

[227] Rastan (2011), pp. 444-45.

[228] *Kenya Admissibility Appeal Judgement*, footnote 75

where a State Party has received competing extradition requests from ICC and a third State for the same person. It sets out rules for which of the conflicting request the State party shall comply with – evidently, it cannot fulfil both at the same time.

The general rule in these situations is that a State Party is obligated to give the ICC priority. However, if another State requests the extradition of a person that is sought by the OTP, this may be indication that there exist proceedings that can render the ICC case inadmissible under Article 17(1)(a). If a case is inadmissible at the ICC, there is of course no obligation for the State Party to extradite.

Therefore, different procedures are set out based on whether the request from the third State regards the *same conduct* as that which is the subject of the ICC case, or not.[229] If it does, the State Party's obligation to extradite is dependent on a positive determination of the admissibility of the case at the ICC.[230] If the extradition request does not concern the *same conduct*, the State Party's obligation to extradite to the ICC is not dependent on an admissibility assessment.[231] The implication is that if the third State's proceedings does not concern the same conduct as the ICC case, it cannot render it inadmissible on grounds of ongoing proceedings. Ergo, if a case does not concern the *same conduct* it is not the 'same case'.

This, Rastan claims, confirms the correctness of the 'same person/same conduct'-test.[232] However, while Article 90 is a strong contextual argument in favour of the *same conduct*-requirement, it does not indicate whether or not 'conduct' is incident-specific. Apart from confirming the term's place in the 'same case'-test, there is little to infer from Article 90 as to the meaning of 'conduct'. The reason is that the existence of an obligation to extradite is governed by admissibility. As such, 'conduct', as an indicator of admissibility in Article 90, must derive its meaning from Article 17 – not *vice versa*.

Further, Article 90 does not confirm the *same person*-requirement. The reason one can infer the *same conduct*-requirement is that the Statute treats extradition requests differently based on whether they cover the same conduct or not. However, both these scenarios relate to requests for the same person – the Statute says nothing about how an extradition request for a different person for the same conduct affects the admissibility of the ICC case. This is not surprising, as such requests would not compete and, therefore, there is no conflict in need of priority rules.

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[229] Article 90(1) and (7)

[230] Article 90 (2)

[231] Article 90 (7)

[232] Rastan (2011), p. 444

7.4.3 Summing Up

After examining the contextual arguments put forward in support of *person*, *conduct* and *incident*, we see that the context only expressly supports the *conduct*-element. However, the contextual arguments say nothing about the content of *conduct*. Especially if we are not bound by the *ne bis in idem*-interpretation, we see that *conduct* may be given a broad interpretation – perhaps even as broad as the ordinary meaning of 'case'. Above, we asserted that 'case' requires some degree of specificity with regards to time, place and act. In my view, *conduct* may reasonably be interpreted in the same way. To illustrate: "the murder in Oslo in 1994" can be used both as defining *case* and *conduct*.

The context does not confirm the *same person*-requirement. As pointed out by Stigen,[233] the context indicates the opposite, that 'same case' *does not* require proceedings to cover the same person.

7.5 Object and Purpose-Arguments

7.5.1 Resolving Conflicts of Jurisdictions

As demonstrated, the literature on the early case law – applying context – tried to connect Article 17(1)(a) and *ne bis in idem* by way of subparagraph (c). In *Kenya,* this link is made directly with reference to the purpose of the provision.

In its interpretation, the ACH stated that the 'same case'-test is based on the function of Article 17(1)(a)-(c) of resolving conflicts of jurisdictions between the Court and States.[234] Since, according to the Chamber, a conflict of jurisdiction is determined by the *ne bis in idem*-provisions, the State is required to cover the *same person* and (substantially the) *same conduct*. [235]

The view that the purpose of Article 17(1)(a) is to 'solve conflicts of jurisdictions' has been challenged. This role – usually referred to as one of 'forum-allocation'[236] – implies that the Court's and the State's jurisdiction may not be exercised simultaneously, and that the Court chooses which to proceed. The consequence is that if a case is admissible at the ICC, the State

[233] See *supra* chapter 7.4.1

[234] See *supra*, chapter 5.4.2

[235] *Ibid*

[236] Schabas and El Zeidy (2016), p 783

must cease its proceedings. However, contradictory to the PTC's assertion, nothing in the wording of Article 17(1)(a) gives the Court competence to limit national exercise of jurisdiction – it only limits that of the Court. Nouwen argues that, in principle, a State may continue or even initiate domestic proceedings after the ICC is involved.[237]

Rastan, who on the other hand claims the admissibility rules gives the ICC a role as forum-allocator, points to the fact that once a case is admissible, State Parties are under a duty to cooperate under Part 9 of the Statute.[238] For instance, State Parties must comply with requests for extradition.

Certainly, this represents practical obstacles for the execution of national proceedings. Yet, the duty to cooperate only applies to State Parties,[239] while the admissibility rules regulate the Court's relationship with any competing exercise of national jurisdiction – not just State Parties.[240] It is clear that the Court may not restrict the exercise of jurisdiction by non-State Parties.[241] The same restriction on State Parties would require a clear basis in the Statute.

In contrast, national exercise of jurisdiction is explicitly limited in Article 20(2), implementing the *ne bis in idem*-principle. In these situation, jurisdictions may not be exercised simultaneously because it would breach the double jeopardy-prohibition. But here, the exercise of jurisdiction in question is a trial.

Because Article 17(1)(a) does not prohibit a concurrent exercise of national jurisdiction, my view is that it is inaccurate to assert that its function is to solve conflicts of jurisdiction. This means that it is unfounded to impose the *ne bis in idem*-principle on the Article 17(1)(a)-assessment. Additionally, *ne bis in idem* is not based on the same considerations as Article 17(1)(a), and, as I will discuss in the next chapter, limiting the application of the inadmissibility rule in this way may infringe the main objects and purposes behind it.

7.5.2 Fighting Impunity Versus State Sovereignty

The relevant object and purpose

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[237] Nouwen (2013), p. 79. See also Robinson (2013) p. 381

[238] Rastan (2017), p. 4

[239] Article 86

[240] The Court's jurisdiction may compete with that of a non-State Party when both a State Party and a non-State party has jurisdiction over a criminal incident on different grounds.

[241] VCLT art. 34

What object and purpose shall Article 17(1)(a) be interpreted in light of, if not the function as solver of jurisdiction-conflicts? In my view, the reference to preambular paragraph 10 and Article 1 in the *chapeau* of Article 17 makes it clear that it must be interpreted in light of its function to implement the complementarity principle, *i.e.* to strike a balance between the safeguarding of national sovereignty and ending impunity for international crimes.[242] This is the 'delicate balance' to which the success of the negotiation of the Rome Statute 'is due in no small measure'.[243]

The implication of the object and purpose

This prompts the question of how this function influences the 'same case'-test. To answer that, one must first look at what result the two considerations promote.

The goal of fighting impunity is expressed in preambular paragraphs 4 – which 'affirms that the most serious crimes of concern to the international community as a whole must not go unpunished' – and 5 – which asserts determination 'to put an end to impunity for the perpetrators of these crimes'.[244] The fighting impunity-consideration thus promotes a result whereby every person and all conduct that is not strictly dealt with by the domestic proceedings are admissible at the ICC. This is the outcome that will ensure the least impunity.

The safeguarding of State sovereignty, on the other hand, concerns the State's interest in avoiding that the ICC interferes with its exercise of criminal jurisdiction. This includes, firstly that their genuine exercise of jurisdiction should not be overruled.[245] The *unwilling and unable*-criteria of Article 17 thus limits the instances where the ICC may "override" domestic proceedings. Secondly, the sovereignty-interest also includes maintaining competence to decide how, and if, the jurisdiction should be exercised.[246] The scope of the *same case*-limb determines the degree of prosecutorial discretion the State have in the (genuine) exercise of jurisdiction over crimes within the jurisdiction of the Court.

As such, safeguarding State sovereignty promotes an interpretation of 'same case' that gives the most freedom in the way a State may conduct its proceedings without ICC interference. Essentially, it promotes defining 'case' with a low degree of specificity, in order to allow for a

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[242] See *supra*, chapter 2.4.3

[243] Holmes (1999), p. 74. See *supra* chapter 2.4.2

[244] See *ibid*, p. 11

[245] During the negotiations, the "sovereign-minded" States stressed that the Court should not act as an international court of appeals, see Holmes (1999), p. 42

[246] See *Judge Usacka's dissenting opinion to the Gaddafi Admissibility Appeals Decision*, paras 52-3

greater flexibility regarding persons, conduct, incidents etc. This allows for a higher number of options in the conducting the domestic proceedings. However, this would entail that the domestic prosecutor may choose to not investigate certain elements covered by the ICC proceedings, and still remain within the constraints of the 'same case' – which may of course lead to a degree of impunity.

In short, the fighting impunity-consideration promotes an interpretation of 'case' which allows for the least deviation from the scope of ICC case, while the state sovereignty-consideration promotes the opposite. The object and purpose of Article 17 is to find a balance between these results. It falls outside the scope of this paper to discuss more precisely where the proper balance lies. However, because a balance is required, we can assert that both considerations are mandatory in the interpretation of 'same case'. On this background, we can evaluate the reasoning in the case law.

7.5.3 Evaluating the 'same case'-test in light of its object and purpose

A limit on the interpretation

Given the discussion above, the object and purpose of Article 17(1)(a) sets out limits on the interpretation which are somewhat narrower than what follows from the ordinary meaning and context. The object and purpose dictate that 'case' cannot be given a meaning that only implements one of the two competing considerations at the expense of the other. The meaning of 'case' cannot be too broad so that the State may protect itself from ICC intervention with proceedings that are so limited in scope that they defeat the goal of fighting impunity. On the other hand, it cannot be too narrow so that the State's prosecutorial discretion is obliterated. There must be a balance. Yet, within these limits, there are many ways this balance may be struck.

Person

The object and purpose of Article 17(1)(a) seems to militate against same *person* as a mandatory element of 'case'. First of all, the *justification* given for why 'case' should be interpreted with this level of specificity contradicts the object and purpose as I have laid it out. In *Kenya*, the ACH bases the *same person*-requirement in the function of solving jurisdictional conflict, does not take into account the safeguarding of national sovereignty. As such, my view is that the reasoning does not adhere to the object and purpose of Article 17(1)(a).

Second, one can also argue that the *consequence* of requiring a State to cover the same person is not in line with the object and purpose. If the State is required to target the same person(s)

as the ICC, it might be stuck in the dilemma of choosing between an infringement on its sovereignty and targeting someone who it may not believe is involved.[247] As discussed in chapter 2.4.3, the principle of complementarity recognises that avoiding ICC interference in genuine criminal proceedings is a legitimate interest for State Parties.

Conduct

For the *conduct*-limb, a distinction must be made between the inclusion of *conduct* as an element in 'case', and the requirement that the State must cover 'substantially the same' conduct.

The ACH asserts an incident-specific understanding of conduct. This is seemingly based on the finding in *Kenya* that the function of Article 17(1)(a) is to solve conflicts of jurisdiction. As such, the understanding of 'conduct' is derived from *ne bis in idem*. The result is that *incident* is an element of 'case'. Given my discussion above, it can be argued that this *justification* is not in line with the object and purpose of Article 17(1)(a).

If the State was required to cover all the same incidents as in the ICC case, one could say that the test leaves no room for prosecutorial discretion and would be contradictory to object and purpose. However, the State is only required to cover 'substantially the same' conduct. The ACH have not explained the reasoning behind the 'substantially the same'-modification, but as discussed above, it seems to have a basis in the ordinary meaning of 'case'.

'Substantially the same' points to a concrete assessment of the facts, starting with the number of overlapping incidents. The degree of overlap required depends on several different factors. From the ACH's reasoning, it seems that safeguarding of national sovereignty is not one of those factors.[248] However, it is clear that a certain deviation in incidents covered is permissible.

This leads to the conclusion that in *consequence*, the 'substantially the same conduct'-test is within the limits of the object and purpose of Article 17(1)(a). This is because there is some discretion for the national prosecutor in which incidents she/he chooses to pursue. As such, the *effect* of the test is not that only one of the considerations behind Article 17(1)(a) is implemented at the expense of the other.

[247] Keep in mind that proceedings are assumed to be 'genuine' in the *same case*-assessment

[248] *Supra*, chapter 6.5

However, the reasoning behind the test's content – its *justification* – seems to not give adequate weight to the object and purpose. Neither the rationale given for applying an incident-specific understanding of 'conduct', nor for rejecting the safeguarding of national sovereignty as a factor in the concrete assessment, do, in my view, secure compliance with the object and purpose behind Article 17(1)(a).

8 Concluding remarks

My conclusion to the initial research question in 1.1 is that neither rationales presented for the two limbs of the 'same person/(substantially the) same conduct'-test complies completely with the Rome Statute interpreted under international law.

This does not necessarily mean that the test itself is in violation of the Rome Statute. One must distinguish between the *justification* for the test and its *consequences*. It is my view that the test must strike a proper balance between the safeguarding of national sovereignty and the overall goal of the Rome Statute to fight impunity. One can imagine many different interpretations of 'case' within the constraints of an interpretation under international law. Which of them represents the proper balance will depend on other aspects than just the wording of Article 17(1)(a) – for instance the procedural framework for challenging admissibility. As such, it falls outside the scope of this paper to ascertain the 'correct' test.

It follows from this that the test set out in the case law – at least for the *conduct*-limb – may be within the interpretational constraints. However, my view is that the Court has not provided a sufficient justification for landing on that specific test, which has been dubbed a 'strict mirror'-approach in the literature.[249] If we look to "non-legal" factors, the test originated in a situation which favoured a strict approach, and was developed mostly in non-adversarial proceedings. Although the test has modified underway, it is a clear link between the 'same person/same case'-test first formulated in *Lubanga* and the test as it presently stands. This does not necessarily infringe on the legal validity of the test, but the contextual elements of those initial judgements amplify the need for proper justification. In this, it seems the Court have not succeeded completely.

When it comes to the *person*-limb, one may, in light of my discussion in this paper, perhaps go one step further and argue that the requirement itself is not compatible with the Rome Statute interpreted under international law. However, this immediately strikes one as wrong. If the OTP presents solid evidence that a person has committed a crime within the jurisdiction

[249] Stahn (2015), p. 243

of the ICC, it seems absurd that the ICC must dismiss the case if the State is investigating another person for the same crime. It could potentially mean that a perpetrator of e.g. genocide goes free.

One could say that this risk is the price to pay to ensure the ICC enough support among States to be an effective Court. However, one must keep in mind that the 'same case'-test is only one limb of the admissibility assessment, and that under this limb we assume the proceedings are genuine.[250] Even if the national proceedings concern the 'same case', it may still be admissible under the *unwilling* and *unable*-criteria. For instance, in many cases before the Court, the facts of the case may point so heavily towards certain individuals that proceedings that do not include them cannot be genuine. More specifically, Article 17(2)(a) prescribes that when determining *unwillingness*, the Court shall consider if the domestic proceedings are being conducted 'for the purpose of shielding the person concerned from criminal liability'. Where the person concerned – the OTP's suspect – is different from the one under national proceedings, the wording will include domestic proceedings undertaken against one person in an attempt to shield another under the protection of complementarity.

This illustrates another, broader point. Despite the focus on the content of *unwillingness* and *inability* in the drafting, the narrow interpretation of 'same case' has moved the focus away from the compromise reached in Rome.[251] Instead, it has shifted to a requirement which content has exclusively been determined by the Court. One can imagine that a more lenient approach to 'same case' would put the 'delicate balance' achieved by the negotiating parties to the use it was intended.

[250] See Stigen (2008), p. 203

[251] Urbanová, p. 165

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