Article 35

Issues of admissibility

1. [On application of the accused or at the request of [an interested State] [a State which has jurisdiction over the crime] at any time prior to [or at] the commencement of the trial, or of its own motion], ^1 the Court shall determine whether a case before it is inadmissible. ^2

2. Having regard to paragraph 3 of the preamble, ^3 the Court shall determine that a case is inadmissible where:

   (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; ^4

   (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, ^5 and a trial by the Court is not permitted under paragraph 2 of article 42; ^6
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(d) the case is not of sufficient gravity to justify further action by the Court. ^8

3. In order to determine unwillingness in a particular case, the Court shall consider whether one or more of the following exist, as applicable:

(a) the proceedings ^9 were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court as set out in article 20;

(b) there has been an undue delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) the proceedings were not or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

4. In order to determine inability in a particular case, the Court shall consider whether due to a total or partial collapse or unavailability of its national judicial system the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

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An alternative approach, which needs further discussion, is that the Court shall not have the power to intervene when a national decision has been taken in a particular case. That approach could be reflected as follows:

"The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it."

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1 The procedural aspects of the provision have not been fully discussed and have yet to be determined. There are other proposals relating to procedure.
2 The present text of article 35 is without prejudice to the question whether complementarity-related admissibility requirements of this article may be waived by the State or States concerned.
3 Suggestions were made that the principle of complementarity should be further clarified either in this article or elsewhere in the Statute.
4 The proposal on extradition or international cooperation is not included in the text, subject to the determination of whether the relevant State would be able to present arguments in the procedure on admissibility.
5 If the Security Council can refer situations to the Court or the Prosecutor can initiate investigations, then the appropriate wording may be considered.
6 It was noted that article 35 should also address, directly or indirectly, cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecutions and possibly also pardons and amnesties. A number of delegations expressed the view that article 42, as currently worded, did not adequately address these situations for purposes of complementarity. It was agreed that these questions should be revisited in light of further revisions to article 42 to determine whether the reference to article 42 was sufficient or whether additional language was needed in article 35 to address these situations.
7 Some delegations preferred the inclusion of the following subparagraph: "the accused is not liable under article 55 to be prosecuted before or punished by the Court".
8 Some delegations believed that this subparagraph should be included elsewhere in the Statute or deleted.
9 The term 'proceedings' covers both investigations and prosecutions.