CHAPTER II

JURISDICTION, ADMISSIBILITY, APPLICABLE LAW

The ICC was established to prosecute individuals for committing “the most serious crimes of international concern”. As such, limitations regarding who can be prosecuted, for which crimes, and under what circumstances—i.e. matters of the ICC’s jurisdiction—are not only relevant for procedural purposes, but also serve to highlight the very essence of the Court. By determining the boundaries of the ICC’s jurisdiction in its first twenty-one articles, the Rome Statute defines the function and purpose of the Court. Only some of the “most serious crimes” such as grave breaches of the 1949 Geneva Conventions and the 1977 first Optional Protocol, are subject to compulsory universal jurisdiction under international treaty law. The Rome Statute does not explicitly provide for the application of the principle of universal jurisdiction over the crimes within its competence. The Court functions in complement with national criminal prosecution; the ICC’s jurisdiction begins when the state is “unwilling or unable genuinely” to investigate and/or prosecute the accused. Four types of jurisdiction are clearly delineated in the Statute: subject-matter jurisdiction, territorial jurisdiction, temporal jurisdiction, personal jurisdiction. These categories are then further limited by the preliminary rules of admissibility, which often overlap with, but more often further constrain, the rules of jurisdiction. There are various considerations to be made by the Court whenever a question of admissibility or jurisdiction arises, for a decision of admissibility or jurisdiction, like a deferral, might alter the entire process.

---


782 On the jurisdiction of the ad hoc Tribunals, see above at 18–19.

783 Article 17 of the Rome Statute.
1. Jurisdiction of the International Criminal Court

The Court was granted the power to prosecute most serious crimes; more specifically, it has jurisdiction over the three “core” crimes: the crime of genocide, crimes against humanity, and war crimes, with a provision to include aggression at a later date.\footnote{Ibid., Article 5.} The Court exercises its jurisdiction over individuals, and significantly not over states.\footnote{Ibid., Article 25.} Jurisdiction applies only to crimes committed after the Rome Statute came into effect,\footnote{Ibid., Article 11.} but its territorial reach extends to states that are not parties to the Statute, provided that either the national state of the accused or the state on whose territory the crime was committed is a party to the Statute.\footnote{Ibid., Article 12.} Jurisdiction is “triggered” either by a state party, the Security Council, or the Prosecutor, the Court must then decide on the “admissibility” of the case. Thus procedural matters of determining jurisdiction and admissibility lead to the exclusion of certain cases and the inclusion of others.

1.1 Complementary Jurisdiction

The drafters of the Rome Statute walked a thin line between respecting national sovereignty and creating a permanent setting for the prosecution of those held responsible of the gravest crimes known to humanity. Nonetheless, the same Statute stresses that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” There exists a presupposition that the state is responsible for, and, unless demonstrated otherwise, will adjudicate the case in good faith.\footnote{For general issues of admissibility and complementary criteria see Ruth B. Philips, \textit{The International Criminal Court Statute: Jurisdiction and Admissibility}, 10 Criminal Law Forum (1999), at 63–66, and 73 (hereinafter “Jurisdiction and Admissibility”).} As of its Preamble, the Statute emphasizes the complementary nature of the Court.\footnote{Triffiter Otto, in \textit{COMMENTARY ON THE ROME STATUTE}, above note 7, at 59–60.} The ICC functions as a safeguard mechanism for situations in which “the State is unwilling or unable genuinely to carry out the investigation or Prosecution.”\footnote{Article 17 of the Rome Statute.} The Court is the sole arbitrator of whether or not the state’s