Chapter 13

THE COMPLEMENTARITY PRINCIPLE ACCORDING TO THE ROME STATUTE AND THE IMPORTANCE OF THIS PRINCIPLE IN TERMS OF JUDICIAL POWER OF THE ICC*

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INTRODUCTION

The International Criminal Court was established to prosecute the most serious crimes of concern to the entire international community. The prosecution of these crimes imposes responsibility on states as well as on the court. In paragraph 10 of the Introduction to the Statute of Rome, it is emphasized that the International Criminal Court is complementary to the national criminal jurisdiction and Article 1 states the same characteristic. The principle of complementarity is one of the controversial issues during the preparation of the Rome Statute. The reason for this discussion is the concerns of states about transferring their jurisdiction to another institution. Therefore, putting the complementarity principle into the Statute is very important for the adoption of the jurisdiction of the ICC. The principle of complementarity also universalizes the jurisdiction of the ICC. Because states have to go to regulation in their domestic law in the context of complementarity principle. This situation both extends the jurisdiction of the Statute and imposes responsibility on states. The most important responsibility of the state is to make an effective trial at the national level. The ICC's jurisdiction only comes into play if the state is "unwilling" or "insufficient" in investigations and proceedings. In this way, states will make their judgments regarding severe international crimes by regulating their national legislation in accordance with the principle of complementarity. This will enable the prosecution of serious crimes, which concern the whole of humanity within the scope of the Statute, at the national level. In this study, the characteristics of the complementarity principle, its application and its importance in terms of the International Criminal Court and international crimes are emphasized.

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1.SCOPE AND CONDITIONS OF COMPLEMENTARITY PRINCIPLE

The International Criminal Court has a jurisdiction complementary to the national criminal judiciary. It is stated that this authority, which is based on Articles 17/1 (a) and (b) of the Statute, is the most important feature of the International Criminal Court's judicial system. (Bergsmo, Triffterer, 2008, s. 13; William, Schabas, 2008, s. 606). In order to be able to convince states that oppose an international criminal court, especially with concerns about state sovereignty, the principle of complementarity has been introduced as a savior principle. (Önok, 2003, s. 140). Paragraph 10 and Article 1 of the preamble to the Statute emphasize the principle of complementarity as the nature of the Court.

In order for the ICC to exercise its jurisdiction, the most important requirement is that it should comply with the principle of complementarity, although conditions must be met in terms of person, place, time and substance, and applications must be submitted by the parties provided for in the Statute.

Although the International Criminal Court was established under an international agreement and the majority of the states in the world were at the preparatory stage, although the jurisdiction over the most serious crimes concerning the whole of humanity has jurisdiction, the jurisdiction was limited to the principle of complementarity and the national jurisdiction was given priority over the ICC. (Yang, 2005, s. 122).

With regard to crimes falling under the jurisdiction of the ICC, the jurisdiction of states takes precedence and is considered a natural consequence of states' right to sovereignty. (Aksar, 2015, s. 164). The ICC's principle of secondaryness of jurisdiction set out in the Statute states that it is necessary to harmonize multiple jurisdictions competing or conflicting on international law offenses. (Tezcan, Erdem& Önok, 2015, s. 319). Therefore, the conditions under which the Court can exercise its jurisdiction in the face of national criminal proceedings are regulated in the Statute. If States exercise their jurisdiction in accordance with the requirements of the Statute, the possibility of the ICC to exercise jurisdiction will be eliminated.

It is stated that the principle of complementarity is a mechanism to harmonize between the competing and competing jurisdictions as a result of the political and utilitarian approach. It is also emphasized that with the adoption of the complementarity principle in the Statute, a hierarchy has been created which gives national jurisdiction superiority over the ICC. Thus, it is ensured that the Court cannot replace the jurisdiction of states as a last resort in respect of crimes falling under the jurisdiction of the Court (Önok, 2003, s. 140; Tezcan vd., 2015, s. 318).

One reason for the sensitivity shown to the concept of sovereignty on the basis of discussions on the complementarity principle during the preparatory phase of the Statute of the International Criminal Court is the priority of the jurisdiction of the previously established ad hoc courts over national jurisdiction.(Turhan, 2007, s. 131; Yang, 2005, s. 122; Jacobs, 2007, s. 324)).

The most important characteristics of the International Military Courts of Nuremberg and Tokyo are that they have the full superiority of criminal jurisdiction over the national criminal jurisdictions they are dealing with. Both courts have exercised their jurisdiction in the territory of the state to which the person to be tried is a citizen. The International Criminal Courts of Yugoslavia and Rwanda also have a superiority and priority over national courts. They have the authority to request the transfer of the case to them at all stages of a case before the national courts. Because of this problem of superiority, the struggle for the powers of the Court regarding the jurisdiction of the Court prior to the Rome Conference was ended with the acceptance of the principle of complementarity (Eser, 2007, s. 20).

The adoption of the principle of complementarity in the Statute imposes responsibility on the states concerned as well as on maintaining state sovereignty, emphasizing the priority of national criminal justice over international crimes. For offenses punished in the Statute, states will have to make arrangements in national legal systems to ensure that their jurisdiction does not conflict with the ICC. Thus, a responsibility will be imposed on states for the prosecution of crimes that concern the whole of humanity and the scope of the trial of these crimes will be expanded. At the same time, this principle allows states to ensure their integrity and internal security with the international system (Yang, 2005, s. 122).

In this context, one of the most important roles of the principle of complementarity is to mobilize the states parties in order to prosecute the crimes in the Statute. States parties shall not be subject to any interference from the International Criminal Court if one of the crimes listed in the Statute is committed, if they are effectively prosecuted. Thus, the principle of complementarity has an indirect effect on the essential international criminal law practices of a state. First of all, in order for the State courts to prosecute these crimes, they must make legal arrangements and harmonize their laws with the Rome Statute. As a matter of fact, after the adoption of the Statute, many countries have introduced ICC-related provisions in their laws. In this way, States parties will have to establish a legal system in line with the requirements of the Statute to ensure that they have the right to fundamental investigations and prosecutions on these crimes and to avoid being declared an inadequate state before the ICC proceedings. (Yang, 2005, s. 124; Karakehya, 2013, s. 139). It should also be noted that the Statute did not impose

an obligation on States parties to regulate and prosecute domestic law in respect of offenses in the Statute.(Turhan, 2005, s. 10).

The establishment of the ICC did not, in fact, affect only those States that had ratified the Statute of the Court. It has raised awareness of international criminal justice and crimes covered by the Statute throughout the international community. States have restructured their legal systems and aligned their legislation with the Statute in order to prosecute offenses under the Statute.(Tezcan vd., 2015, s. 320). Even states that are not parties to the Statute have regulated their laws on related offenses, although they are expected to mobilize States parties in the context of complementarity. Thus, the area of regulation of international law crimes, which concern the whole of humanity, has been enlarged in national laws. It is also stated that thanks to these regulations, states have protected their sovereign rights against the ICC by conducting criminal prosecutions for international law crimes themselves. It is also stated that this situation imposes force on the state to prosecute in terms of legal policy. (Turhan, 2005, s. 10).

There are also arguments that suggest that the term complementarity is not the correct expression to describe the situation in the Statute. According to these views, what is created by the Statute is the relationship between national justice and international justice, which are systems that work against each other. According to this principle, the regulations in the relevant articles of the Statute and the ambiguity of certain statements constitute a situation in favor of the developed countries and against the undeveloped countries. (Schabas, 2007, s. 109-110).

Despite the opposing views, the Rome Statute's establishment of the Court on the principle of complementarity is expressed as a balance between state sovereignty and efforts to punish crimes of international law. It is stated that this principle protects the sovereignty of states by showing that the ICC is the ultimate resort. In addition, the principle of complementarity is recognized as one of the main reasons why the jurisdiction of the ICC is accepted by the majority of world states. (Tezcan vd., 2015, s. 320).

2. CONDITIONS OF ADMISSIBILITY OF THE CASE

The complementary nature of the jurisdiction of the International Criminal Court is based on Article 17 on the admissibility issues of the Rome Statute. Although the term complementarity is not used, Article 17 is regulated on the basis of this principle. The court cannot accept the case before it in the presence of one of the following situations (Önok, 2003, s. 206-211).

1) If a state having jurisdiction has made an investigation or prosecution of a case brought before the International Criminal Court, the Court cannot exercise jurisdiction over these crimes. The International Criminal Court may exercise its jurisdiction only if the national criminal prosecution bodies are reluctant or insufficient to seriously investigate and prosecute the offense (Article 17/1 -a). With this article, the priority of the national criminal justice before the ICC is guaranteed. Accordingly, as long as a crime under the Statute is "seriously and effectively" prosecuted and prosecuted by the State concerned, the International Criminal Court will not have jurisdiction over these crimes (Turhan, 2007, s. 132-133).
2) The second case that prevented the International Criminal Court from accepting a case was that the state with jurisdiction had investigated the case and decided that there was no need to prosecute. However, the state concerned should not be reluctant or insufficient.(art. 17/1 -b).
3) The third case concerning the inadmissibility of the case is that the national court has already tried and convicted a criminal offense before the ICC (art. 17/1-c). This article also refers to the principle of ne bis in idem, which is one of the basic principles of criminal law and regulated in Article 20 of the Statute, which cannot be tried twice for the same offense. Accordingly, no one shall be tried again in another court for an offense which he has been convicted or not guilty of under Article 5 of the Statute. However, 20/3 of the Statute. regulates the exceptions to this rule. If the trial of the court is for the purpose of protecting the person who has criminal responsibility for the crimes falling under the jurisdiction of the ICC from the proceedings to be made by the ICC (article 20/3-a) or if the trial is not carried out independently and impartially and bringing the person concerned to justice if it is inconsistent with its intention, the ICC will be entitled to retrial (Turhan, 2001, 78-79; Tezcan vd., 2015, s. 339).
4) Lastly, the matter in question is not of sufficient weight to require an action by the Court (art. 17/1 -d). This regulation states that there is a restriction on the jurisdiction that the ICC will only prosecute the highest level of responsibility in the event of crimes committed under the Statute. This situation is also considered as a justice policy to limit the scope of its activities rather than a legal regulation regarding the jurisdiction of the ICC in terms of its nature. In this context, it is stated that many international crimes will not even be included in the investigation by the ICC (Tezcan vd., 2015, s. 340).

Article 17 of the Statute gives the Prosecutor another responsibility as well as determining the conditions of the principle of complementarity. The prosecu-

tor will determine the gravity and gravity of the crime and see if the gravity and gravity of the crime make the investigation necessary (William, Schabas, 2008, s. 613). In a judgment of 10 February 2006, in the context of Article 17 § 1 d of the Statute, the Preliminary Investigation Chamber ruled that in order for the case to be dealt with by the ICC, the perpetrators of the offense should be systematic and large-scale and at the same time the perpetrators must be senior leaders.(Tezcan vd., 340).

Consequently, the International Criminal Court will have the authority, above all, to prosecute the most serious offenses involving the entire international community. Thus, there will be no fear of external criminal prosecution for the state, which has any internal conflict in its country. In addition, if the national judiciary is only reluctant or incapable of judging a crime under the Statute, the ICC will have jurisdiction. With this regulation, both the sovereignty of states is respected and the prosecution of crimes where possible is ensured. When the national judiciary does not fulfill its obligations to prosecute these crimes, there will be an opportunity for the International Criminal Court to prosecute these crimes (Turhan, 2007, s. 131-132).

a. Reluctance of National Criminal Justice

Article 17, paragraph 2 of the Statute clarifies the circumstances in which the State may be reluctant. If the International Criminal Court determines the existence of one of the cases listed in this Article, it may decide that the national judicial bodies are reluctant to proceed with it. These provisions are stated as follows:

1) Where the national criminal prosecution is for the sake of freeing the accused from the proceedings of the International Criminal Court (article 17/2 -a), the ICC will question the intention of the State in question by looking at the hearing procedure and the decision-making process. (Yang, 2005, s. 123). It is stated that the NCC may aim to get rid of the jurisdiction of the ICC by making use of the ne bis in idem rule. (Turhan, 2007, s. 132).
2) There is an unjustifiable delay in the proceedings in a manner incompatible with the intention of bringing the person concerned to justice (art. 17/2 -b).
3) The national judicial bodies shall be deemed reluctant in cases where the proceedings have not been carried out in an independent and impartial manner or are not carried out in a manner that is incompatible with the intention of bringing the person concerned to justice (Article 17/2 -c).

These provisions in the Statute, all states, including the states that are not parties to the ICC, are also presumed to be innocent of international human rights law, non-involuntariness, ne bis in idem, not being forced to admit the crime,

silence, benefit from the defense of the defendant. rights, such as the basic standards, the need to regulate in domestic law (Yang, 2005, s. 123).

The State concerned may prove to the Court that it has conducted an impartial and independent trial in accordance with the human rights principles regarding the proceedings of the criminal procedure. It is argued that the determination of the existence of reluctance depends on the establishment of a fair balance between the victim and the accused. Accordingly, both the accused should be provided with the necessary means to defend himself and the victim should be provided with an environment to seek his right (Önok, 2003, s. 207-208).

In the context of the principle of complementarity, it is also argued that all the cases the ICC considers, except for the applications of the Security Council, imply that the state with jurisdiction over the case is in fact insufficient or unwilling to investigate and prosecute the suspect. (Yang, 2005, s. 131).

b. Inadequacy of National Criminal Justice

The situations concerning the inadequacy of the national judicial bodies are regulated in Article 17, paragraph 3. Accordingly, the International Criminal Court examines whether it is possible to prosecute the accused or to obtain the necessary evidence, as the national judicial system collapses or becomes ineffective, in part or in part, in determining whether there is a shortage of the state in question in a given case (article 17/3).

The inadequacy adopted in the Statute does not imply the complete or partial collapse of the national judicial system due to the civil war that took place only in the 1990s in the territory of the former Yugoslavia and Rwanda. This also includes the situation in which states have an unfavorable system in which they cannot conduct national criminal proceedings. The inadequacy in the latter case also includes deficiencies in the legal system of the country or situations where the existing laws do not meet the international human rights standards (Yang, 2005, s. 123).

Although there is no provision in the Statute regarding who will determine the cases of inadequacy and unwillingness, it is accepted in the literature that the International Criminal Court will make its decision. The court will decide whether there is a reluctance or inadequacy in accordance with the principles of criminal procedure recognized in international law. The ICC will also check whether the state's criminal procedure law is in compliance with international criminal procedure rules and shall determine it according to the standards specified in the International Covenant on Civil and Political Rights as "minimum guarantees (Yang, 2005, s. 126).

It is also stated that the obligation will be with the ICC Prosecutor, as the party responsible for proving its claim will be the ICC. It was argued during the Conference that the relevant state had to prove that it was willing and sufficient, since it would be difficult for the public prosecutor to obtain the necessary information and documents from the State concerned to determine their reluctance or inadequacy. However, at the end of the Conference, the view that the burden of proof was in the state was not accepted to emphasize the superiority of the national judiciary and the superiority of the jurisdiction of the ICC before the national judiciary. However, it was criticized for being an intervention in national sovereignty because the ICC was the final decision-making authority and evaluated the fairness and effectiveness of the national judiciary. Indeed, granting this authority to the International Criminal Court is an important force for the ICC. It is also considered to be an appropriate decision in terms of both the purpose of the Court's establishment and the likelihood that the State concerned may not make an objective decision (Turhan, 2007, s. 133; ÖNOK, 2003, s. 209-210).

The principle of complementarity is one of the principles that states discuss with more political concerns during the preparation of the Statute. In addition to securing the priority jurisdiction of states, the Statute, in fact, article 17, which embodies the principle of complementarity, also guarantees the authority of the ICC when these conditions are met, counting the exceptions to that jurisdiction. (Roach, 2005, s. 435). Thus, as mentioned above, when the most serious crimes pertaining to the whole of humanity are committed, the aim is to prevent their impunity.

As a result, for the states that voted for the adoption of the principle of complementarity, a mechanism was developed that respects the sovereignty of the state politically, and the states are also responsible for violations of international criminal law. It can be understood from the words of the ICC Prosecutor that it is acceptable to the Court that the ICC operates within the framework of the complementarity principle: The effectiveness of the International Criminal Court should not be measured by the number of cases submitted to the Court. On the contrary, as a result of the effective functioning of the national systems, the lack of judgment of the ICC could be a great success (Jacobs, 2007, s. 325).

3.THE FUNCTIONING OF THE COMPLEMENTARITY PRINCIPLE FOR NON-STATES PARTIES IN THE APPLICATION OF THE SECURITY COUNCIL

The fact that the International Criminal Court also has jurisdiction over states which are not parties to the Statute does not preclude the application of the principle of complementarity. Upon the application of the State party, the Prosecutor

shall in any event decide by examining the admissibility of the case. In terms of the events to be notified to the ICC by the UN Security Council, the principle of complementarity will be taken. The Statute does not specify a different situation for the Security Council amongst the conditions for the Prosecutor to initiate the investigation. Failure to do so would pose a threat to the independence of the Court and an interference with the sovereignty of states. It is also stated that the adoption of such a situation could make the ICC an organ that looks like an institutionalized ad hoc court acting under the guidance of the Security Council (Önok, 2003, s. 210).

4.COMPLEMENTARITY PRINCIPLE IN TERMS OF VARIOUS POLITICAL SITUATIONS

Another issue that has been discussed in relation to the implementation of the complementarity principle is the effect of the decisions taken by the country's domestic policy on the work of the ICC. In various cases, such as the general amnesty issued in the country, peace processes in mixed societies, it is necessary to look at whether the state acts in accordance with the political situation as well as the purpose of the international conventions.(Jacobs, 2007, s. 326).

As regards amnesty, it is argued that the necessity of amnesty and how the amnesty decision is taken should be considered in terms of the protection of social peace and peace in the country of the state. Accordingly, personal and collective special amnesties issued without any examination of the incident in question can be regarded as an indication of the state's unwillingness to criminal proceedings. However, if the events were investigated and it was decided that it would be in the best interest of the country not to prosecute to ensure national peace, no reluctance will be mentioned (Önok, 2003, s. 216). This is also a result of the inability to intervene in the internal affairs of the state as a result of national sovereignty. However, what is important here is the responsibility of the state concerned to prosecute the most serious crimes of concern to the entire international community. Article 53 of the Statute also provides for the decision of the ICC in this respect, foreseeing the Prosecutor to investigate whether there are any reasons to initiate an investigation.

RESULT

Due to the principle of complementarity, the ICC will first expect states with jurisdiction to investigate and prosecute if there is a claim that one of the crimes listed in the status has been committed. Thus, the priority of the national judiciary against the ICC and the sovereignty of the state are guaranteed. The principle of

complementarity encourages states to implement their national criminal jurisdictions in respect of crimes covered by the Statute. If the states concerned are reluctant to prosecute, or if their judicial systems are inadequate, the ICC will have jurisdiction. The principle of complementarity requires states to align their national laws with the ICC Statute. The prosecution of crimes under the statute in their own countries ensures that the national legal systems of the states become compatible with the universal legal system. As a result, thanks to the principle of complementarity, the state of intervention in the sovereignty of states is eliminated and the national legislation of the states becomes compatible with the rules of international law. In addition, this principle enables the ICC to expand its jurisdiction in terms of crimes covered by the Statute and to universalize it.

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