THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: A CRITICAL LEGAL SCRUTINY ON THE PRINCIPLE OF COMPLEMENTARITY ADOPTED IN THE ROME STATUTE

ULUSLARARASI CEZA MAHKEMESİNİN YARGI YETKİSİ: ROMA STATÜSÜNDE KABUL EDİLEN TAMAMLAYICILIK İLKESİ ÜZERİNE ELEŞTİREL HUKUKİ BİR İNCELEME

Araştırma Makalesi/Research Article

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ABSTRACT

In this paper, our focus will be on the International Criminal Court's (the ICC) jurisdiction in terms of the principle of complementarity. When the provisions regarding the jurisdiction of the ICC in the Rome Statute (the Statute) are examined, it is clear that the jurisdiction of the ICC is not universal but a subsidiary jurisdiction. Therefore, the ICC cannot exercise its jurisdiction directly and must give priority to the jurisdiction of the state in case of an international crime mentioned in the Statute. It has been argued that the jurisdictional relationship between the ICC and state parties has a horizontal framework. That is, national systems have priority, but the ICC may take over the jurisdiction when national systems completely fail in prosecution process. Since the relationship between national states and international jurisdictions is not vertical, the principle of universal jurisdiction has not been preferred for the ICC. However, preventing major international crimes requires cooperation between states and international jurisdictions such as the ICC in criminal matters.

The subject of the jurisdiction, that is, crimes within the jurisdiction of the ICC, was not dealt with in detail while we aim to critically examine how the ICC use their jurisdiction against the national powers of the states and what kind of mechanism is accepted in this regard. Furthermore, the issue is not only dealt with the perspective of the states' sovereignty, but also theoretical and practical dimensions of the complementarity principle adopted in the Statute in the legal framework are taken into consideration. All

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in all, it has been argued that the complementarity mechanism can be a well-balanced and functional tool between the ICC and the states for preventing serious international crimes.

Keywords: Universal Jurisdiction, Complementarity Principle, International Criminal Court, International Crimes, Sovereignty

ÖZ

Bu çalışmada odak noktamız tamamlayıcılık prensibi bağlamında Uluslararası Ceza Mahkemesi'in (UCM) yargı yetkisi üzerine olacaktır. Roma Statüsü'nde mahkemenin yargılama yetkisine ilişkin hükümler incelendiğinde mahkemenin yargı yetkisinin evrensel yargı yetkisi olmadığı ve ikinci nitelikte bir yargı yetkisi olduğu görülür. Bu yüzden, Statü'de düzenlenen uluslararası suçlardan biri işlendiğinde mahkeme doğrudan yargı yetkisini kullanamaz ve önceliği yargı yetkisi doğan devlete vermelidir. Bu kapsamda yapılan tartışmalarda mahkeme ile taraf devletlerarasındaki yetki ilişkisinin yatay bir çerçeveye sahip olduğu ileri sürülmüştür. Yani, ulusal sistemlerin yargı yetkisi önceliklidir, fakat ulusal sistemler yargılama sürecinde tamamen başarısız olduklarında uluslararası kurumlar yetkiyi devralabilirler. Ulusal devletler ile uluslararası yargı yetkileri arasındaki ilişki dikey olmadığı için evrensel yargı ilkesi UCM için tercih edilmemiştir. Ancak bu, önemli uluslararası suçları önlemek için cezai konularda devletler ve UCM gibi uluslararası yargı mercileri arasında işbirliğini gerektirmektedir.

Yargı yetkisinin konusu yani mahkemenin görev alanına giren suçlar çalışmada detaylı olarak ele alınmazken, amacımız mahkemenin yargı yetkisini devletlerin ulusal yetkileri karşısında nasıl kullandığını ve bu bağlamda nasıl bir mekanizma kabul edildiğini eleştirel bir gözle incelemektir. Bunun yanında mesele salt anlamda devletlerin egemenliği perspektifiyle ele alınmamış, Statü'de kabul edilen tamamlayıcılık ilkesinin yasal çerçevede teorik ve pratik boyutlarına değinilmiştir. Nihayetinde uluslararası önemli suçların işlenmesini önlemede tamamlayıcılık mekanizmasının UCM ile devletlerarasında dengeli ve fonksiyonel bir araç olabileceği savunulmuştur.

Anahtar Kelimeler: Evrensel Yetki, Tamamlayıcılık İlkesi, Uluslararası Ceza Mahkemesi, Uluslararası Suçlar, Egemenlik

INTRODUCTION

The developments in international law upon the foundation of the International Criminal Tribunal for Yugoslavia (ICTY, 1991)[1] and International Criminal Tribunal for

[1] For the development of the tribunal see Ebru Çoban Öztürk, 'The International Criminal Court: Jurisdiction and the Concept of Sovereignty' (2014) 10 European Scientific Journal 141, 144–145. For

Rwanda (ICTR, 1994)[2]; as well as the foundation of the International Criminal Court (ICC, 1998)[3] have urged the need for a contribution to the legislations of the prosecution of individuals on the basis of the principle of universality as exercised by many states whose courts have the power to judge offenders who allegedly committed grave crimes.[4] However, as *Cryer/Friman et al* [5] indicate, practising national criminal jurisdiction over international offences requires accountability according to the Statute's preamble as follows: *'Recalling that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'*[6].

Ollson[7] has argued the links between the ICC and supranational jurisdiction and stressed the need for some principles in order to avoid problems in concurrent jurisdictions by several states and even the ICC; since the principle of universality may lead more than one states and even the ICC to feel responsible for fighting against

lessons about the ICTY experience see Minna Schrag, 'Lessons Learned from ICTY Experience' (2004) 2 Journal of International Criminal Justice 427, 433–434.

2 For the development of the tribunal see Öztürk (n 1) 145.

3 The International Criminal Court <http://www.hrw.org/topic/international-justice/international-criminal-court> accessed 19 December 2022. For the historical development of the ICC see ibid 142–144; Hamide Zafer, 'Ulusal Hukuk Sistemlerinin Roma Statüsü Ile Uyumlaştırılması-Alman Modeli' (2007) 6 MÜHFD (Aydın Aybay'a Armağan) 289, 289–290. *Telli* defines the ICC as a "hybrid court". See Kutlay Telli, *Cezasızlık Olgusuna Karşı Uluslararası Ceza Mahkemeleri ve Uluslararası Suçlar* (1 bs, On İki Levha Yayıncılık 2015) 15. To me, with the establishment of the ICC, domestic substantive and procedural criminal law has become an internationally applicable legal science beyond locality.

4 Anna Olsson, 'The Principle of Complementarity of the International Criminal Court and the Principle of Universal Jurisdiction' (Thesis of Master, University of Lund, (Law Faculty) 2004) 38. For details on the relationship between the powers of these courts and the theory of sovereignty see Ali Şahin Kılıç, 'Devletlerin Egemenliği Üzerine Ulusal Egemenlik Odaklı Bir İnceleme' (2009) 58 Ankara Üniversitesi Hukuk Fakültesi Dergisi 615, 615 ff.

5 Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn Cambridge University Press 2010) 153.

6 These crimes are defined as acts against international public order. See Ülkü Halatçı, 'Uluslararası Ceza Mahkemesinin Yargı Yetkisini Kullanabilmesinin Önkoşulları' (2005) 1 Uluslararası Hukuk ve Politika 57, 60. For the definition of international crimes also see Telli (n 3) 10–11; Merve Şahin Akdemir, 'Egemenlik ve Evrensel Yargı Yetkisi İlişkisinin Uluslararası Ceza Hukuku Boyutu' (2022) 8 Anadolu Üniversitesi Hukuk Fakültesi Dergisi 261, 270. For the difference between international and domestic crimes see Cengiz Başak, *Uluslararası Ceza Mahkemeleri ve Uluslararası Suçlar* (1st edn Turhan Kitapevi 2003) 1–2. For the aim of the foundation of the ICC see ibid 53.

7 Olsson (n 4) 22, 40, 83.

perpetrators of serious crimes against humanity[8]. Presuming that many states claim jurisdiction above the same facts, the International Criminal Court is eager to have a share in this play. In this sense, the concept of concurrent jurisdiction and the principle of universal jurisdiction[9] might compete. As stated by *Schabas*[10], implying the principle of complementarity, national systems have priority[11] in eliminating their troubles about human rights, but international institutions might take over jurisdiction when national states ultimately get nowhere.

Cryer/Friman et al[12] states that an international criminal court may be one alternative but not the most excellent road in all instances whereas *Olsson*[13] claims that it provides an equilibrium between sovereignty and the principle of universal criminal jurisdiction. Either way, the principle of complementarity seems to function as a stabilizer mechanism between international and national justice systems in the exercise of jurisdiction.

This paper first attempts to give a brief overview of the affairs between the principles of complementarity and sovereignty from a critical point of view and will then

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8 For meanings of humanity see Hüseyin Günal, *Hannah Arendt ve İnsanlığa Karşı Suçlar* (1st edn Dost Kitapevi 2015) 80; Mireille Delmas-Marty and others, *İnsanlığa Karşı Suç* (Berna Ekal tr, 1st edn İletişim Yayınları 2012) 11.

9 Universal jurisdiction means the power of the state to enforce its laws on crimes which are committed outside its territory, even if the victim and perpetrator are not citizens of the state. See: Akdemir (n 6) 267.

10 William A Schabas, *An Introduction to the International Criminal Court* (4th edn Cambridge University Press 2011) 191.

11 The relationship between jurisdiction of national states and the jurisdiction of the European Court of Human Rights (ECHR) is the same. The main function of the individual application is to secure human rights and to make a further contribution to their development. Individual application to a national constitutional court is an accepted excercise at a domestic level. Opportunities for application to high courts, such as individual application to the constitutional court, which is recognized at national level, must be exhausted due to the complementary nature of international systems in the protection of human rights. Individual application to the constitutional court in domestic systems functions as a "pre-filter" for applications to the ECHR. However, it does not mean that the application to the ECHR is a closed way for applicants, which fails in domestic law. See: Seyithan Kaya, *2017 Anayasa Değişiklikleri Çerçevesinde Anayasa Yargısı* (1st edn Adalet Yayınevi 2018) 136–139. For details about individual application to the constitutional court at domestic level in the example of Turkey see Yeşim Çelik, *Türk Hukukunda Bireysel Başvuru ve Anayasa Mahkemesi Uygulaması* (1st edn Adalet Yayınevi 2016) 5 ff; Kaya 15 ff.

12 Cryer and others (n 5) 153.

13 Olsson (n 4) 22.

assess the perception of complementarity in the Statute in practice. Here, the aim is not only to discuss sovereignty, but also to determine the setting of the principle of complementarity in legitimacy[14] with supporting instances (current cases) in practice. Finally, complementarity can work as a well-balanced tool between the ICC and local judicial authorities to end up impunity in local enforcement and contribute to form up a practical criminal justice system.

I. THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT BASED ON STATE SOVEREIGNTY

A. In General

When one looks at art 12/1[15], it is clearly understood that the jurisdiction of the ICC is inherent, which means it is automatic. Inherent or automatic jurisdiction has been a matter of debate in the *Dusco Tadic* decision of ICTY. *Tadic* briefly claimed that the establishment of ICTY violated the United Nations Charter and the ICTY was not authorized to prosecute him. the ICTY accepted that the prosecution would mean examining the authority of the Security Council[16] and considered itself incapable of substantive review. The Appeals Chamber of the ICTY, on the other hand, rejected *Tadic*'s objection to jurisdiction, stating that the Tribunal was properly established by the Security Council, and it has the authority to adjudicate Tadic's alleged offences. Consequently, the main contention between *Tadic* and the ICTY was whether the ICTY was authorized to evaluate and determine its jurisdiction. The Chamber of Appeals unanimously confirmed the Tribunal's jurisdiction and concluded that the ICTY was authorized to make such an assessment and determination. Every international judicial

[14] For discussions about the "democratic legitimacy" of international criminal tribunals, such as the ICC, see Glasius Marlies, 'Do International Criminal Courts Require Democratic Legitimacy' (2012) 23 The European Journal of International Law 43, 43 ff.

[15] Art 12/1 of the Statute: *"A state which becomes a party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in art 5."*

[16] For an evaluation of the effect of Security Council Resolutions see Mouats Madjid, 'The Effect of Security Council Resolutions on the International Criminal Court Complementarity Regime' (2021) 7 Journal of Legal Studies 266, 275 ff.

body has the authority to determine its jurisdiction, which is one of the basic principles of customary international law[17]. In this context, the doctrine of international law propounds two views, one of which claims that the parties negotiate over the jurisdiction of the ICTY and determine the area in which the jurisdiction is reserved. However, according to the second and the best-known, it is an inherent authority, meaning it is an inherent power for every judicial organ. As a matter of fact, the jurisdiction of the ICTY did not stem from the consents of state parties, it was rather based on coercive powers indicated in Chapter 7 of the United Nations Charter. That is to say, the ICTY has obtained its inherent jurisdiction upon the decision of the United Nations[18].

According to the aforementioned article (art 12), every state-party to the Statute accepts the jurisdiction of the ICC without any further actions or a declaration of intent. It is noteworthy that the acceptance of the inherent jurisdiction of the ICC after the Rome Conference has been a significant diplomatic success for the states with a desire to establish a strong international court[19].

B. The Concept of Jurisdiction in the Rome Statute

The concept of jurisdiction is referred in many articles in the Statute[20] such as art 5 "crimes within the jurisdiction of the ICC", which embodies subject-matter jurisdiction (*ratione materiae*)[21]. International crimes are the subject-matter of the ICC's jurisdiction,

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17 For the historical development of international law see Akdemir (n 6) 262–263.

18 Louise Symons, 'The Inherent Powers of the ICTY and ICTR' (2003) 3 International Criminal Law Review 369, 376–378. See also Kai Ambos, *Internationales Strafrecht* (5th edn C H Beck 2018), § 8, Rn 5, 6; Mohammad Golam Sarwar, 'Complementarity Principle in Prosecution of International Crimes: Assessing Its Necessity and Efficacy' (2021) 32 Dhaka University Law Journal 161, 169.

19 Tezcan Durmuş, M Ruhan Erdem and Murat Önok, *Uluslararası Ceza Hukuku* (6th edn Seçkin Yayıncılık 2021) 373.

20 The Statute, which came into force on 1st July 2002, created a court whose aim is to prosecute perpetrators of war crimes, genocide and crimes against humanity. See Dawn L Rothe and Victoria E Collins, 'The International Criminal Court: A Pipe Dream to End Impunity?' (2013) 13 International Criminal Law Review 191, 191; Madjid (n 16) 267. "States agreed to set up the international criminal court on the ground of securing primacy of jurisdiction in the hands of sovereign states and international forums only in case of their failure in prosecution." See Sarwar (n 18) 166.

21 Schabas (n 10) 62.

namely, the scope of duty is clearly stated in the article[22]. The article titled "crimes within the jurisdiction of the court" can be presented as follows:

> *The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) the crime of genocide, (b) crimes against humanity, (c) war crimes, (d) the crime of aggression*[23].

As is seen, in terms of their essence and consequences, core international crimes called the crime of genocide (art 6), crimes against humanity (art 7), war crimes (art 8) and the crime of aggression are crimes that damage the basic elements of the international community and threaten its basic values[24]. The main common feature of these crimes is that they violate not only the interests of the state in which the crimes are committed but also the interests of the entire international community. Every state suffers from these crimes to an extent either directly or indirectly[25]. Last but not least, these provisions are accepted as *jus cogens* norms in international law [26].

Within the past decade, the ICC has taken some criminals into jurisdiction such as perpetrators of attacks on diplomats. However, the number is considerably restricted[27] and as *Akande* has noted, it is unlikely for the jurisdiction to be universal because of the approaches of states non-party to ICC[28].

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22 Durmuş, Erdem and Önok (n 19) 379–380.

23 Art 5/1 of the Statute. See also Madjid (n 16) 269.

24 Durmuş, Erdem and Önok (n 19) 380.

25 Halatçı (n 6) 60.

26 Akdemir (n 6) 271.

27 Schabas (n 10) 64.

28 Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 Journal of International Criminal Justice 618, 650. It has also been pronounced in the fourth session of the Preparatory Committee, clarifying support of applying to universal jurisdiction; therefore, states will assert the principle on key offences with no permission from any other countries. During the sixth session, Germany attempted to make a suggestion, attaching a non-formal deputed paper, which was about the exercise of universal jurisdiction by states to judge crimes fell in 'subject-matter' (genocide, crimes against humanity, war crimes and aggression); in the meantime, the ICC could have been able to proceed with core crimes; yet, the United States did not powerfully endorse -all through the Rome Conference- the rule of universal jurisdiction. For the

In addition, *Warbrick* defines the ICC as a project in international criminal justice and identifies the fundamental elements on which jurisdiction in criminal law depends as territory, protection, active and negative personality, and universality[29]. Regarding this basement, *Schabas* points out that the jurisdiction can be based on territory and nationality. It means that the concept of the ICC's jurisdiction has restrictions rather than the states' courts, but it should be considered that the prosecution in their criminal courts is the initial step for the ICC[30]. Following this, *Akande* claims that countries, which are non-party to the ICC's jurisdiction, objects to the jurisdiction if they commit a crime on their territories[31].

As well known, the ICC was not initially founded as an organization for universal criminal jurisdiction in 2002, which means it did not deal with the crimes that might have been committed in any place or by anyone. That is why the Statute ruthlessly confines the jurisdiction of the ICC[32]. Instead, the principle of complementarity has been adopted; thus, the ICC shall be complementary to national criminal jurisdictions[33]. One of the most important logical justifications for the adoption of the principle of complementarity is to protect the sovereignty of both party and non-party states to the Statute. Another important reason underlying the adoption of the principle of complementarity is that the Statute does not offer retrospective jurisdiction but extends only to prospective crimes[34].

discussion between Germany and America in terms of universal jurisdiction see Cryer and others (n 5) 144–149.

29 Colin Warbrick, 'International Criminal Courts and Fair Trial' (1998) 3 Journal of Conflict and Security Law 45, 45 ff.

30 Schabas (n 10) 62.

31 Akande (n 28) 621.

32 Cedric Ryngaert, 'International Criminal Court and Universal Jurisdiction: A Fraught Relationship' (2009) 12 New Criminal Law Review 498, 499–500.

33 Zafer (n 3) 290. For historical evaluation of the principle see Sarwar (n 18) 162–164.

34 Sarwar (n 18) 165, 166.

C. Debates on the Principle of Complementarity: A Scrutiny Focused on State Sovereignty

Through the years, the approach to complementarity has been widely discussed, either in favor or against, concerning the sovereignty[35] of states. Some scholars have argued that the complementary nature of the ICC's jurisdiction is a marvellous solution to the conflict between the states concerning about sovereignty and the ICC while others consider it as an excessive concession to sovereignty, which could endanger the functioning of the ICC[36].

Damaska identifies the principle of complementarity as a failure of the Statute on the conduct of judicial process of the ICC. He claims that the nature of subsidiary jurisdiction of the ICC contains considerable difficulties and identifies the system as a "cumbersome" and "delay-prone" mechanism[37].

Melandri emphasizes art 1[38] and defines it as the "milestone" of the system in the light of the Preamble of the Statute; then adds that the principle does not have a clear definition in the Statute; thus, the term should be conceived as setting out the rules, which leads to interactive relations between the ICC and domestic jurisdictions. The main question here is why the drafters of the decision at the meeting in Rome used this term. Considering that the complementarity should be the changing nature of sovereignty,

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[35] Sovereignty would be defined as the recognition of the state's demand to exercise the highest level of authority in a restricted territory. For the definition see Akdemir (n 6) 264. This concept was defined differently by *Machiavelli*, *Hobbes*, *Bodin* ve *Locke.* See in details ibid 265.

[36] Sarwar (n 18) 161.

[37] Mirjan R Damaška, 'International Criminal Court between Aspiration and Achievement' (2009) 14 University of California Los Angeles Journal of International Law and Foreign Affairs 19, 24.

[38] Art 1 of the Statute: *"An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and* ***shall be complementary to national criminal jurisdictions****. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute."*

As seen, the article includes the main aspect of the ICC's jurisdiction in international law emphasising the principle of complementarity. *Sarwar* deduces that "the purpose of the ICC is to supplement the domestic adjudication of international crimes rather than supplant the domestic enforcement of international norms." See Sarwar (n 18) 164.

Melandri lists some reasons alongside the "complementarity or subsidiary approach"[39]. *Gioia* adopts the same approach, as well[40].

Sifris defines the principle of complementarity as "an example of deference to national sovereignty" and draws attention to the last resort feature of the ICC. The author claims that the feature of the ICC can be seen "a practical manifestation" of the fact. To him, the principle of complementarity provides an opportunity for the correct balance between "deference to national sovereignty and maintaining the independence of the prosecutor" in order to prosecute the most serious crimes committed to the international community as a whole[41].

A prediction for the principle of complementarity could be symbolizing the effort to uncover conciliation between respect to the state sovereignty and the requirements of international liability. More explicitly, as *Leonard* suggests, in a socially constructive approach, the foundation of an international criminal court may well be an illustration of transferring sovereignty from one instrument to another[42]. According to the socially reconstructive approach:

> *The first thing that one must recognize is that no concept, term, institution, or agent of international politics is static. Because of the socially constructed nature of the world, there production or reconstruction of everything is possible. Change is dependent on the interaction between the relevant agents and social arrangements, and more importantly, the rules that guide those agents and social arrangements. Therefore, we cannot think of sovereignty, or any other defining*

[39] Manuela Melandri, 'The Relationship between State Sovereignty and the Enforcement of International Criminal Law under the Rome Statute (1998): A Complex Interplay' (2009) 9 International Criminal Law Review 531, 535, 536.

[40] Federica Gioia, 'State Sovereignty, Jurisdiction, and "Modern" International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 Leiden Journal of International Law 1095, 1097.

[41] Ronli Sifris, 'Weighing Judicial Independence against Judicial Accountability: Do the Scales of the International Criminal Court Balance?' (2008) 8 Chicago Kent J International & Comparative Law 88, 107–108.

[42] Eric K Leonard, 'Discovering the New Face of Sovereignty: Complementarity and the International Criminal Court' (2005) 27 New Political Science 87, 94.

concept of world politics, as a static institution or discourse—the world is socially constructed[43].

The formation of the ICC based on *a multiparty treaty*[44], named the Rome Statute, and then signing the Statute reveals that the states, which renounce absolute authority, consent to the ICC's attempt to exercise its jurisdiction. Of course, national powers are still in charge of jurisdiction as long as they have the competence to prosecute or reject the prosecution by the ICC in favour of their nationals[45].

Moreover, *Leonard* describes the picture upon his deduction of 'transitional authority' with a constructive approach. According to the author, "we cannot think of sovereignty, or any order defining concept of world politics, as a static institution or discourse-the world is socially constructed."[46]. Therewith, he defines the transitional authority as a new structure of sovereignty, which preserves the relationships between national and international systems, and thinks that the principle of complementarity reflects this new understanding of sovereignty. What is more, he puts forward that this change in sovereignty creates a new post-international society. The sovereignty has been perpetuated as a 'social arrangement' at the post-international level. In this respect, despite the ICC's subsidiary licence on core crimes (e.g. war crimes), walking around the principle of complementarity, and even going beyond that, the principle has been regarded – especially in America – as an opponent of the right of absolute authority[47].

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43 ibid 89.

44 The ICC is the first permanent international institution founded by a treaty. See Mohammad Amin Alkrisheh and Waleed Mahameed, 'The International Criminal Court Statute and State Sovereignty: The Implicit Impact of the Complementarity Principle' (2020) 6 Multicultural Education 1, 2.

45 Melandri (n 39) 536; Leonard (n 42) 94.

46 Leonard (n 42) 89.

47 For furhter information see ibid 88 ff. The ICC is described as "a hand without hand, feet and body". See Zafer (n 3) 390.

II. THE PRINCIPLE OF COMPLEMENTARITY IN THE ROME STATUTE: CAN COMPLEMENTARITY WORK FOR INTERNATIONAL CRIMINAL COURT?

A. The Principle of Complementarity in the Rome Statute: A Scrutiny Focused on Article 17

As stated previously, the principle of complementarity[48] has been preferred in the Statute[49]. This complementarity principle, which could be appeared to handle the jurisdictional relationships between the ICC and national authorities, is the most significant one of principles accepted in the Statute. However, a clear definition[50] for the principle is not included in the Statute[51]. In this sense, *Robinson* indicates art 17[52], refers to the principle of complementarity[53].

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[48] *Burke/White* use the concept of "proactive complementarity." They believe that "the ICC would cooperate with national governments and use political leverage to encourage states to undertake their prosecutions of international crimes. For the ICC to meet expectations, national governments must fulfil their obligations to provide accountability. The formal adoption of a policy of proactive complementarity would help the ICC come far closer to meeting expectations with its limited resources." See William W Burke-White, 'The International Criminal Court And National Courts in the Rome System of International Justice' (2008) 49 Harvard International Law Journal 53, 54. Complementarity may cause several challenges and weaknesses such as determining an effective domestic prosecution of international crimes and limited intervention of the ICC in the trials of international crimes committed in national states. See Sarwar (n 18) 169–172.

[49] Rothe and Collins (n 20) 192; Zafer (n 3) 290. *"An international court is only one way to enforce international criminal law and it may not be every instance the best one. The ICC is a court of last resort and intended to supplement, not to supplant."* See Cryer and others (n 5) 153; cited also in Sercan Tokdemir, 'International Criminal Court within Global Realities, And Desires beyond the Cuff Mountain: "Is the ICC A Proper International Institution?' (2013) XVII EÜHFD 163, 174.

[50] Complementarity between the ICC and national judicial bodies is described by *Madjid* as follows: The *ICC is a court that complements and supplements national criminal jurisdictions and does not have supremacy over national judiciary orders, as it only plays a subsidiary role.* See Madjid (n 16) 267. Also Alkrisheh and Mahameed (n 44) 2.

[51] Sarwar (n 18) 161, 165. See also Beatriz E Mayans-Hermida and Barbora Holá, 'Balancing 'the International'and "the Domestic" Sanctions under the ICC Principle of Complementarity' (2020) 18 Journal of International Criminal Justice 1103, 1104, 1129.

[52] Art 17 of the Statute: *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 prosecute.*

[53] Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 European Journal of International Law 481, 498. The term appeared in the International Commission's draft in 1994. See Schabas (n 10) 190. For more assessment of the principle see Ambos (n 18), § 8, Rn 10 ff.

According to art 17, the ICC shall be complementary to national criminal jurisdictions. The principle is not mentioned anywhere in the Statute, but in paragraph 10 of the preamble, which only indicates that the ICC, founded under the Statute, will be complementary to national criminal systems. Therefore, my focus will be on examining art 17 in terms of 'unwillingness and inability' but related to 'genuine' prosecution by the state under the heading of admissibility.

Stegmiller has labelled the article as an essential provision regarding art 18, 19 and 53. As stated by the author, the elucidation of the concepts of inability and unwillingness discovers the vital role of the principle of complementarity[54]. *Cryer/Friman et al* draw attention to the evaluation of terms located on 'procedural and institutional factors' but not the actual results of a case or an enquiry[55].

According to paragraph 10 of the Preamble and art 1 of the Statute, the ICC shall determine that a case is inadmissible if the case cannot be investigated or prosecuted by a state because it is unwilling or truly unable to carry out the investigation or prosecution[56]. It means that "the ICC has no superior judicial authority over a national criminal judiciary, except for its implicit authority to exercise a supervisory role over judicial jurisdiction over the crimes stipulated in the Statute"[57].

The ICC jurisdiction functions as a last resort when states fail in prosecuting criminal cases. The adoption of this regime seeks to balance between the interests of states and the interests of justice on an international level in order to avoid impunity for criminals[58].

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54 Ignaz Stegmiller, 'Complementarity Thoughts' (2010) 21 Criminal Law Forum 159, 160. See also Florian Razesberger, *The International Criminal Court: The Principle of Complementarity* (1st edn Peter Lang 2006) 201.

55 Cryer and others (n 5) 156.

56 Art 17/1 of the Statute. See also Mayans-Hermida and Holá (n 51) 1104; Alkrisheh and Mahameed (n 44) 4.

57 Alkrisheh and Mahameed (n 44) 3.

58 Madjid (n 16) 268, 269.

Gordon has addressed art 17/2 and 17/3 in order to determine unwillingness and inability, respectively[59]. When a state is thought to be unwilling or unable to prosecute a person charged with so-called international crimes, the ICC immediately starts an investigation of these provisions. In case that a national court aims to protect a person accused of international crimes against the jurisdiction of the ICC under art 5, a deliberate and unfair delay occurs during the trial process, or the local authority does not carry out the process impartially and independently, the ICC may consider that the local authority is reluctant to judge the accused[60].

As for the concept of ability, in accordance with some other authors, *Melandri*[61] and *Cryer/Friman et al*[62] claims that the concept can be conceived more easily than unwillingness because it is relatively more objective as seen in art 17/3 follows:

> *In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial 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*[63].

B. Can Complementarity Work for International Criminal Court?

According to international jurisprudence, as some authors claim, the perpetrators of core international crimes should be punished severely to reflect how serious they are. It is because there is a potential inconsistency between penalties imposed on the perpetrators by national courts and the gravity of these crimes. Particularly, pardons, amnesties and short-term sentences are widely discussed[64]. In this regard, "lenient" and "inadequate"

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59 Art 17/2 of the Statute, a-b-c. See also Mayans-Hermida and Holá (n 51) 1104; Madjid (n 16) 270 ff; Sifris (n 41) 106 ff.

60 Gregory S Gordon, 'Complementary and Alternative Justice' (2009) 88 Oregon Law Review 101, 112.

61 Melandri (n 39) 537."Fact-driven criterion": Such as physical and intellectual collapse of a judicial system'.

62 Cryer and others (n 5) 157.

63 Art 17/3 of the Statute.

64 Mayans-Hermida and Holá (n 51) 1104. For more information about the sentences under the Statute regarding domestic situation see ibid 1111 ff.

punishments at the domestic level could be a signal for "unwillingness or inability of a state to comply with its duty [of ending to impunity and the commitment of international crimes in the future] to genuinely hold perpetrators accountable". Based on this context, the penalties imposed on the perpetrators of international crimes by national judicial bodies have an indicative role in the assessment of the complementarity principle[65].

On one hand, the rule of complementarity, both as a principle and exercise, can be regarded as the ability of the ICC to commence an investigation and prosecute perpetrators, but only in the states which are unwilling in that legal action despite their abilities. In other words, if these states cannot manage to overcome these criminals via a genuine process of investigation, they can confront the jurisdiction of the ICC. On the other hand, taking into account the challenges between the ICC and states, the principle of complementarity adopted by the ICC is difficult to understand, especially, in current cases. As seen in many cases, Kenya for instance, the appliance of ability and unwillingness is not consistent although "the ICC has two goals, thinking of justice and fair trial on the evaluation of the process"[66].

The ICC should also present its ability and willingness in case that the state cannot overcome the trouble despite its most rigid practices. In the Uganda case, for example, no genuine actions could be taken for trying the commander of Lord Resistance Army (LRA), so the approach of government seemed unable and unwilling, to a certain extent, and the apprehension of the senior commander was a problem for the government because he could not be detained for a long time. In the Libya case, however, the problem was that the prosecutor[67] acted compassionately and ignored the case agains Saif al-Islam Gaddafi and Abdullah al-Senussi in the ICC. In that case, the Office of the Prosecutor (OTP) was claimed to utilize 'double–standards' in the implementation and functioning

65 Mayans-Hermida and Holá (n 51) 1105, 1106–1108.

66 Mba Chidi Nmaju, 'Violence in Kenya: Any Role for the ICC in the Quest for Accountability?' (2009) 3 African Journal of Legal Studies 78, 94.

67 For the position of the prosecutor in the criminal justice system see Sercan Tokdemir, 'The Powers of the Prosecutor in the Turkish Criminal Justice System' (Thesis of Master (unpublished), University of Sussex (Law School) 2013) 3–8.

of the principle of complementarity[68]. Although the principle of complimentarity could draw a parallel between the ICC at present, especially in ongoing post-conflicts, and the proper ICC as "a potential facilitator of peace"; "complementarity dilemmas" within jurisdictional concerns have been pronounced[69].

As a requirement of being a sovereign state and exercising the rights to sovereignty, it is primarily the duty of every state (party or non-party) to prosecute international crimes in their territorial[70] criminal jurisdiction[71]. The responsibility concerning the concept of sovereignty has a connection with the essence of the principle of complementarity[72]. This essence is based on two obligations [73] for states, as *Sarwar* expresses:

> *...firstly, by requiring the states on part of their obligations to prosecute alleged perpetrators at the domestic level and secondly, referring to an international prosecution in case when they failed to carry out their duty to prosecute. Thus, complementarity principle allowed the prosecution at international level where national systems failed to take measures to avoid impunity and prevent future crimes*[74].

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68 Outsourcing justice <http://justiceinconflict.org > accessed on 19 December 2022.

See also Uganda and Ivory Coast cases for implementation of the complementarity principle <http://justiceinconflict.org/2012/10/31/outsourcing-justice-to-the-icc-what-should-be-done/#more-4050> [in the legality of 'outsourcing justice'] accessed 6 December 2022.

69 Carsten Stahn, 'Libya, the International Criminal Court and Complementarity A Test for 'Shared Responsibility' (2012) 10 Journal of International Criminal Justice 325, 336.

70 Madjid (n 16) 267.

71 Mayans-Hermida and Holá (n 51) 1122; Madjid (n 16) 267. The investigation, prosecution and punishment are in general the duty of every state in international law, which means that proceedings in criminal matters should be genuine. See Mayans-Hermida and Holá (n 51) 1122.

72 Sarwar (n 18) 167. The responsibility of investigating, prosecuting and imposing sentences on perpetrators of international crimes is the international legal obligation of states. See Alkrisheh and Mahameed (n 44) 2.

73 *Sarwar* also highlights another important responsibility of states in relation to the rights of the accused. The author states as follows: *The essence of complementarity principle also lies on the fact that international criminal court relied on domestic adjudication of international crimes with the expectation that human rights of the accused will be protected with due consideration at the domestic court and this mandate got recognition in Articles 17-19 that defined complementarity principle*. Sarwar (n 18) 168.

74 ibid 167.

As a result, the Statute addresses the necessity for effective domestic prosecution of international crimes in question. Since the collection of evidence and witnesses is a key factor to provide an effective prosecution, and there are practical benefits in conducting the proceedings close to the place where the criminal incident took place[75], it is worth noting that proceedings are crucial as a main focus in the assessment of the principle of complementarity. The main focus is on the process for the assessment of the complementarity principle, whilst leniency and inadequacy[76] of sentences are considered just as an indication for determining unwillingness[77].

CONCLUSION

The paper is devoted to the examination of the ICC's jurisdiction. Since the principle of complementarity is an undeniably significant aspect of the Statute, our focus, here, is on the principle of complementarity which refers to the jurisdictional relationship between the ICC and the state parties within a horizontal framework, regardless of a vertical relationship between the ICC and sovereign states. In this regard, the relation between the principle of complementarity and the sovereignty of states has been explored from a critical legal perspective.

On one hand, some argue that complementarity might be a stabilizer-mechanism and a well-balanced tool between the sovereignty of states and universal (criminal) jurisdiction. On the other hand, others believe that the principle of complementarity undermines the functions of the ICC. These authors characterize the subsidiary

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75 ibid 169.

76 It is a big challenge to determine the adequacy of penalties for core international crimes because of not only the nature of these crimes but also the lack of clear standards in international law. See Mayans-Hermida and Holá (n 51) 1129.

77 For more information see ibid 1108–1111. *Mayans-Hermide and Holá* emphasize the role of sanctions for grave international crimes within transitional justice noting the following explanations: *Reduced/alternative sanctions seem a viable option to comply with the duty to investigate, prosecute and punish in transitional justice contexts and, at the same time, gives space to the warring parties that are trying to end up a conflict and reach peace. Future research on the type, goals, and scope of these sanctions can shed further light on how they can contribute to achieving the rationales and objectives of both the Rome Statute and the transitional justice processes — this necessarily requires rethinking dominant punishment theories in transitional contexts.* See ibid 1130.

jurisdiction of the ICC as excessive and think that the system will cause delays and make the system unwieldy. The optimistic arguments may be true as absolute authority of a state has been subjected to global realities socially and politically; however, the fact remains within the idea of a need to have justice to build peace.

The paper critically examines the jurisdiction of the ICC based upon the sovereignty of states and attempts to show that the principle of complementarity is at the heart of our understanding of the balance between the supranational authority of the ICC and the obligations of states in international criminal law in terms of holding offenders accountable. The question is whether the principle of complementarity, which is widely discussed, might supply a perfection for supranational justice and also fill the gaps in municipal systems, given that the state does not want to or cannot proceed with the criminals and the judicial system collapses. All the arguments given above prove that complementarity could be a well-balanced, practical and functional tool provided that the trial of perpetrators do not involve double-standards by the prosecutors due to political reasons. The ICC support the enforcement by national systems to end impunity because even though the ICC does not enforce directly and so, it needs national forces to execute its decision. Consequently, the principle is of great significance to assist the enforcement of domestic systems. The ICC is an example of integration between international and national powers as a means of merging the sovereignty and the legal enforcement of the international system. Here, the principle of complementarity can be considered as a balancing instrument between the ICC and states. Preventing core international crimes depends on cooperation between the states and the ICC, which is possible by giving priority to the competence of the national judicial authorities. The ICC intends to investigate and prosecute core crimes against all humanity under its subsidiary jurisdiction by acting as a catalyst for genuine national justice through the principle of complementarity.

To sum up briefly, all aforementioned explanations clearly shows that the existence of a permanent international criminal court is a significant and desired step in international law for individual responsibility. However, it is still not sufficient for international action. As noted previously above, an international criminal court is an

alternative but not the most excellent one in all instances. The ICC is a court of last resort and intends to supplement, not to supplant. In other words, to establish an international criminal institution such as the ICC is not the only and the best way for putting international criminal rules into practice because the existence of the ICC is not adequate itself without establishing the required mechanisms to balance between states and the ICC.

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