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Ali Emrah Bozbayındır

Turkey and the International Criminal Court

A Substantive Criminal Law Analysis in the Context of the Principle of Complementarity

Nomos

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Abbreviations

CUP	Cambridge University Press
Harv Int L J	Harvard International Law Journal
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
JICJ	Journal of International Criminal Justice
OUP	Oxford University Press
TMPC	Turkish Military Penal Code
TPC	Turkish Penal Code
VStGB	Völkerstrafgesetzbuch

Introduction

The International Criminal Court (ICC or Court hereinafter) issued its first verdict in its second operational decade on 14 March 2012: The Court unanimously decided that Thomas Lubanga Dyilo is guilty, as a co-perpetrator, of the war crimes of conscripting and enlisting children under the age of 15 and using them actively in hostilities within the meaning of Articles 8 (2) (e) (vii) and 25 (3) of the Rome Statute of the International Criminal Court (the Rome Statute or the ICC Statute hereinafter) from early September 2002 to 13 August 2003.[1] This is the first ever judgment issued by a permanent international criminal court that has jurisdiction to try individuals for serious crimes.[2] The Court has jurisdiction over -as in the case of Mr. Lubanga- war crimes, the crime of genocide, crimes against humanity and the crime of aggression.[3] The objective of the Court, as explained in the preamble of the Rome Statute, is 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes',[4] and the Statute assigns the same duty on States by stating 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[5]

Unlike *ad hoc* international criminal tribunals created by Security Council Decisions, the ICC was born as a result of a multilateral treaty that produced a statute for the new Court, which entered into force on 1 July 2002, after the required 60 ratifications on 12 April 2002 were achieved.[6] As of July 2012, 121 countries have ratified or acceded to the Rome Statute. That said, non-State parties to the Court include major powers like the United States of America, the Russian Federation, China and India. Each of these States and other non-State parties have their own reasons for remaining outside, or as in the case of some States, even remain against the ICC itself, and it is worthy to note that the reasons and policies of these states tend to at times overlap. Additionally, in Rome in 1998, Turkey abstained voting for adopting the Statute and is currently neither a State party to the ICC nor a signatory to the Statute. The first chapter of this study is, therefore, dedicated to the analysis of Turkey's position in regards to the creation of a permanent inter-

1 Prosecutor v. Thomas Lubanga Dyilo, Judgment Pursuant to 74 of the Statute, Case No. ICC-01/04-01/06, 14 March 2012, paras. 1355-1358; Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90.

2 Article 1 ICC Statute provides that: 'An International Criminal Court [...] is hereby established. It shall be *a permanent institution* and shall have power to exercise its jurisdiction *over persons* for the most serious crimes of international concern [...]' (Emphasis Added).

3 Article 5 (1) ICC Statute.

4 Paragpraph 5 of the Preamble ICC Statute .

5 Paragpraph 6 of the Preamble ICC Statute.

6 Article 126 ICC Statute.

national criminal court, her concerns during and in the aftermath of the Rome Conference, her reasons for remaining outside of the ICC regime, and the changes in its policies towards the Court, The chapter will also touch on the current situation and Turley's prospects regarding the issue of membership to the ICC from a comparative perspective.

Notwithstanding the fact that the ICC ultimately aspires to become a world court that would have jurisdiction over core international crimes wherever and by whomever they might have been perpetrated, the Court shall for the time being, in principle, solely try cases committed on the territory of State Parties and the crimes committed by nationals of these States, unless exceptional jurisdiction rules with regard to non-State Parties have been satisfied. The ICC has jurisdiction over core crimes committed on the territory of State Parties or by the nationals of the State Party abroad, which means that the Court accepts territorial jurisdiction and active nationality principles for exercise of jurisdiction over the nationals of State Parties.[7] Additionally, the Court may exercise its jurisdiction over individuals who are nationals of non-Party States in three different circumstances. Firstly, if nationals of a non-State party commit statute crimes on the territory of a State party or on the territory of a State that has accepted the jurisdiction of the Court with regard to that crime[8] (save the crime of aggression); secondly, if a situation has been referred to the Prosecutor of the ICC by the United Nations Security Council,[9] and thirdly, if a non-State party accepts jurisdiction of the ICC over its nationals for particular offenses on an *ad hoc* basis.[10] In other words, the immunity of third States nationals from the Court's jurisdiction is not absolute. Therefore, non-State Parties as well as State parties may prevent their nationals from being tried before the ICC only when they take advantage of the principle of complementarity, namely to provide a national prosecution that would satisfy the principle of complementarity. This would at the same time be an appropriate policy since the Court was intended primarily as a court of last resort, or, in other words the ICC shall not replace national justice systems. The principle of complementarity is a formula created by the ICC founders who have sought to balance the conflicting interests of international justice and state sovereignty.

The principle of complementarity, which lies at the heart of the ICC's jurisdictional system and is widely seen as the cornerstone of the Rome Statute, basically means, as opposed to the principle of primacy, which was the governing principle of the *ad hoc* Tribunals, that the national courts have precedence over the ICC for investigating and prosecuting statute crimes, or in other words, the principle prohibits the ICC from pre-empting the national prosecutions for conduct that would

7 Article 12 (2) ICC Statute.
8 Article 12 (2) (a) and 12 (3) ICC Statute.
9 Article 13 (2) ICC Statute.
10 Article 12 (3) ICC Statute.

satisfy definitions of offences in Article 6-8 ICC Statute.[11] Under the complementarity regime of the ICC, one may be tried before the Court only for a case that involves a certain level of gravity and where the State Party is unwilling or genuinely unable to carry out the proceedings for such a case.[12] The genuineness of a national investigation or prosecution shall be determined by the Court itself, which means that whether the tests set out in Article 17 of the Statute have been satisfied is subject to the authority of the ICC, not the national courts or authorities. From this vantage point, the principle of complementarity is a test that is employed by the Court itself in order to determine whether a case is admissible or not.

Yet another rather implicit, but at the same time for national jurisdictions, highly relevant aspect of the multifaceted concept of complementarity, which is embedded in the term 'unavailability' of the national judicial system in Article 17 (3) ICC Statute, is the fact that each state shall need a legal infrastructure, if they are intending to effectively take advantage of the principle of complementarity. In other words, albeit the fact that there is no explicit obligation to incorporate the Rome Statute's core crimes or other substantive law provisions of the Statute into national law,[13] States still feel inclined to enact legislation in order to bring their municipal laws in accord with the normative framework set out in the Rome Statute. Thus, the incorporation of the Rome Statute's legal content into national law is, in

11 See paragpraph 10 of the Preamble, Articles 1, 17, 20 (2) ICC Statute.

12 Article 17 ICC Statute reads:
1. Regarding 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 jurisdiction over it, unless the State is genuinely unwilling or unable 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 to genuinely 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.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
(a) The proceedings 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 referred to in article 5;
(b) There has been unjustified 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 the intent to bring the person concerned to justice.
3. 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.

13 The obligation provided in Article 70 (4) regarding offences against the administration of justice excluded.

essence, a legal policy matter, but not an obligation under an international treaty. This being said, by making such changes to municipal law, States may strengthen their capacity to prosecute and avoid the risk of being held by the ICC 'unwillingly or unable' to genuinely carry out proceedings in their national courts. Incidentally, especially State Parties have been passed such implementation legislations, and Turkey has, though it is not a State Party, incorporated the two core international crimes into the new Penal Code, i.e., the crime of genocide and crimes against humanity. These offenses are incorporated into the new Penal Code due partly to Turkey's intention to become a State Party to the Rome Statute and as in the case of the crime of genocide, as a result of Turkey`s obligation to incorporate the said crime into its municipal legal system under the Genocide Convention. The second chapter will, thus, compare the ICC crimes and the corresponding norms in the Turkish criminal justice system with the assistance of classical legal interpretation and comparative law methods in order to determine whether there are inconsistencies between the norms of Statute and Turkish law, and if so, whether these inconsistencies in all cases necessarily imply a need for revision of the current Turkish legislation.

In a similar vein, the third chapter will analyze the issues stemming from the general principles of the Rome Statute's criminal law, which calls for a review and comparison with their Turkish counterparts. Ultimately, the chapter will assess which parts of the general principles of criminal law set out in the Rome Statute need to be implemented into the Turkish legal order. In this regard, the chapter shall address not all the themes of general part, but a limited number of selected issues, which are relevant for the purposes of this study. Accordingly, the chapter confines its scope to the analysis of irrelevant issues of official capacity, superior orders, statute of limitations, and grounds for excluding criminal responsibility from a comparative law perspective.

After substantive norms of the Rome Statute and Turkish criminal law, in the context of the principle of complementarity are compared, and possible gaps or inconsistencies in Turkish criminal law ascertained, the fourth chapter of the study shall shift its focus from substance to form of legislation through comparing models for implementing international criminal law into municipal law, which has emerged in the preceding decade. In so doing, the chapter touches upon the issues of relationship between international law and national law, comparative advantages of each method of implementation, and finally, the issue of whether or not there is a need for a separate code for international crimes in Turkey shall be addressed.