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ICLS Newsletter

New members/friends of ICLS in 2010

- **ICLS Events**
- **The Review Conference in Kampala – Short summary**
- **The International Criminal Court and Brazil**
- **What may be the possible reservations of Turkey to access the ICC Statute**
- **'Rule of law in India'**

Dear all,

after almost a year we, the ICLS board, would like to send you our next newsletter and provide you with updates on developments in the field of international justice.

Please find a summary of upcoming ICLS events as well as articles of our members on the Review Conference in Kampala, Brazils ICC related legislation, the Rule of Law in India and on what may be the possible reservations of Turkey to access the ICC Statute.

We would therefore like to encourage you to participate in the redaction of future newsletters and to let us know if you can provide information on a topic of general interest in the field of international criminal law. Should you have interesting information on events in your respective countries, it would be great to share them.

Nikola Gillhoff
Susen Wahl
Matthias Neuner
(Executive Board)

New members/friends of ICLS

Ozobodo Ikechukwu Emmanuel - Nigeria
Arpit Batra – India
Lucia Brieskova - England

Libero Penello – Brazil
Maksim Kovalionok – Belarus
Sabine Klein – Germany
Kirstin Janssen-Holldiek – Germany
Patrick Kroker – Germany
Williams Emoni - Nigeria

We want to thank all new members for their interest in ICLS and international criminal law.

ICLS Events

In the winter term 2010/2011 members of ICLS offer the seminar " Prosecution of Crimes against Humanity – Political Negotiations, Legal Processing"

Our next **ICLS meeting** will take place in Berlin at the restaurant Nola's am Weinberg, Veteranenstraße 9, 10119 Berlin on **19 March 2011, 2 p.m.** You are cordially invited to the meeting.

ICLS plans to open an office in Croatia.

The Review Conference in Kampala – Short summary

by Kirstin Janssen-Holldiek

The Review Conference of the Rome Statute, which took place from May 31 to June 11, 2010 in Kampala, took stock of the current work of the Court and reviewed the Rome Statute by examining possible amendments, in particular on the crime of aggression.

True to the motto of this Conference, "A stronger ICC for a safer world," several efforts were undertaken in strengthening one's commitment to the ICC through individual statements, as well as in a collective manner by adopting the Kampala Declaration. Furthermore, pledges and specific contributions were made by many countries. Germany, for example, promised financial support for the Victims Trust Fund, as well as for projects related to the promotion of accession to or implementation of the Rome Statute.

The Stocktaking of International Criminal Justice focused on the following: The impact of the Rome Statute system on victims and affected communities, peace and justice, cooperation, and complementarity. The discussion was extremely fruitful and revealed further potential for improvement and in

particular stressed the need for a guide on "best practice". In this regard, having chosen Kampala as the conference venue was particularly apt to this task. The presence of many NGOs from the conflict regions and the strong appearance of the African State Parties to the ICC enabled a very enriching exchange.

The most important outcome of the Review Conference is the adoption of the amendment on the Crime of Aggression which included a definition and the conditions under which the Court would exercise jurisdiction, as well as a list of understandings. The agreed definition is based on the definition of the crime of aggression on UN General Assembly resolution 3314 (1974). To qualify as a crime, an act of aggression "which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations" must have taken place. Furthermore, this crime – unlike the other three crimes in the Rome Statute - is defined as a leadership crime, and as such it must have been committed by a political or military leader in the position to plan, prepare, initiate and executive such crime.

The exercise of jurisdiction is based on the trigger mechanisms already common in the Rome Statute: The Security Council, acting under Chapter VII, can refer a situation to the ICC. As decisions under Chapter VII are binding to all states any state might be involved, irrespectively whether it has accepted the jurisdiction or not.

In the absence of such determination by the Security Council, the prosecutor can also initiate an investigation upon request from a State Party and on his own initiative under certain preconditions. The prosecutor must first "ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned". If there is no such determination the prosecutor has to wait six month after his notification to see whether such determination will be made. He can then proceed with an investigation of an alleged crime of aggression when being authorized by the Pre-Trial Division. Regarding those two mechanisms, the reach of the ICC is only among those State Parties that have ratified the amendment on the Crime of Aggression and have not previously made a formal declaration (Opt-out) not to accept this jurisdiction.

The actual exercise of the jurisdiction over the Crime of Aggression, however, needs to be confirmed by a majority (2/3 majority as required for the adoption of the amendment) at an Assembly of States Party that will take place after January 1, 2017. The entry into force will come to

effect one year after the 30th ratification, however again not before 2017.

The negotiations were extremely intensive, in particular between the permanent members of the Security Council and the Non-Aligned Group, as well as several Western Countries. In fact, it was uncertain until the very end whether an outcome could be achieved. Despite the various positions, with the adoption of this crime the international community sends a clear signal to potential perpetrators and victims alike: the planning or conducting of an act of aggression will invoke individual criminal liability.

Apart from the Crime of Aggression, two proposed amendments were discussed. The Belgian proposal on extending the Court's jurisdiction over the crimes in Article 8 also to armed conflicts not of an international character was adopted. As no consensus could be found in withdrawing Article 124, that gives states the possibility to opt-out from war crimes for a period of seven years, it was decided to retain this article.

Altogether, the Review Conference has left us with more aspirations and more work to do - for states, as well as for the civil society. The next seven years can be devoted to foster the ratification and implementation process not only of the Rome Statute but also of the new amendment of the Crime of Aggression and to persuade states not to opt-out on that crime. Moreover, it will be important to raise awareness on the possible prosecution of this crime so that any development in this regard will be observed closely and hopefully deter future crimes of aggression.

© Kirstin Janssen-Holldiek

Kirstin Janssen-Holldiek is Associate Fellow in the Transatlantic Program at the German Council on Foreign Relations (DGAP) and teaches at the Free University of Berlin on international criminal law.

THE INTERNATIONAL CRIMINAL COURT AND BRAZIL

by Libero Penello

1. The International Criminal Court in Brazil

Through the constitutional amendment No. 45, of December 08, 2004, Article 05 of Brazil's Federal Constitution gained its paragraph 4, which states the following:

"Brazil hereby submits to the jurisdiction

of the International Criminal Court, the creation of which Brazil has manifested its adhesion to."

Since Brazil subscribes to the Rome Statute, of which it is a member, the ICC's jurisdiction is automatically applicable to the country, in compliance with the criteria of residual competency and non-retroactivity of the criminal law, as mentioned above.

A few alleged conflicts between the wording of Brazil's Constitution and the ICC ruling ultimately reveal to be of relatively simple solution. For instance: How can Brazil's government surrender a Brazilian citizen to be judged by the ICC, if the Article 05, LI, of Brazil's Federal Constitution prohibits the extradition of a born Brazilian citizen?

Actually, there is no conflict in that point, since the approach is technical: surrender established by the ICC is a different norm from extradition. Article 102 of the Rome Statute itself explains that:

"Surrender means the delivering up of a person by a State to the Court, pursuant to this Statute: extradition means the delivering up of a person by one State to another as provided by treaty, convention, or national legislation."

It is important to remember that Article 05, LI, of our Federal Constitution prohibits the extradition of born Brazilian citizens, and the extradition of naturalized Brazilian citizens is only permitted if they are involved in illegal drug trafficking or committed a common crime before naturalization.

While extradition requires two States in mutual cooperation, the surrender represents the submission of a State to the jurisdiction of the international court of which the State has signed the establishing treat. In the former the relationship is a bilateral one, and in the latter it is a relationship of submission.

Another apparent conflict: Article 05, XLVII, of Brazil's Constitution prohibits the following punishments:

XLVII – there shall be no punishment:
a) of death, save in case of declared war under the terms of article 84, XIX;
b) of life imprisonment;
c) of hard labor;
d) of banishment;
e) which is cruel;

And Article 60, Paragraph 04, of Brazil's *Magna Carta* is quite clear:

"No proposal of amendment shall be considered which is aimed at abolishing:
,,,
IV- individual rights and guarantees."

The Rome Statute, on its turns, established a life imprisonment sentence.

In its Article 120, it establishes:

"*No reservations may be made to this Statute*."

How is Brazil to act in the hypothesis of surrendering to ICC a person who is accused of a crime that, according with the Rome Statute, incurs in a life sentence punishment?

The first conclusion is that the Brazilian government cannot refuse to surrender an accused person facing such punishment claiming prohibition established by the country's legislation. The fact is that the claiming of validity of the country's juridical norms is incompatible with the submission to the jurisdiction of a court governed by the principles of trans-nationality and universality.

It is important to notice that the Federal Constitution admits the possibility of capital punishment, which is more severe than life sentence punishment, in the case of declared war, pursuant to Article 84, XIX (Article 05, XLVII, a).

Another important aspect is that any eventual immunity resulting from job or position, such as parliamentary, diplomatic, or Head-of-State immunities, among others, does not preclude ICC from performing its duties as usual. In summary, they are not impediment to the ICC's jurisdiction.

2. How Brazil ratifies international treaties

Simpler treaties that represent no serious consequence to Brazil of the not require approval by Brazil's National Congress; simply signing it suffices to incur in consent, if so results from the negotiation. They are the so-called executive agreements.

After the signing of the treaty comes its ratification, which is simply the manifestation of the relevant government authority in order to demonstrate acceptance and willingness to comply with the provisions of the treaty.

In Brazil, more complex agreements and international treaties have their text analyzed and submitted for acceptance by the National Congress, upon message from the President of the Republic.

In the Congress, the document follows the procedures established by the Internal Rules of the House of Representatives and the Federal Senate, where the treaty is submitted to analysis by the Foreign Relations Committee, which shall verify its merits, and by Constitution, Justice, and Writing Committee, which shall debate its adequacy to the Constitution and its legality.

the Foreign Relations Committee of the House of Representatives shall issue a report, as well as the Legislative Decree bill that shall make the treaty an integrant part of Brazil' legal rules and regulation

Once the text is approved by simple majority of the representatives attending the voting, both in the House of Representatives and the Senate, the Legislative Decree shall be edited, by initiative of the Chairman of the House, and then it shall be published. If the text is rejected, a message is forwarded to the President of the Republic communicating such fact.

After publication, the President of the Republic may ratify the treaty with a ratification letter. Upon ratification the presidential decree is edited in order for the treaty to be valid in Brazil.

Picture of the National Congress

Picture of the floor of the National Congress in the day of promulgation of the Federal Constitution in 1988

Fernando Henrique Cardoso, President of Brazil who signed the Validation Decree for the International Criminal Court in Brazil

The full text of the Presidential Decree that validated ICC in Brazil is the following:

DECREE No. 4.388, OF SEPTEMBER 25, 2002.

The PRESIDENT OF THE REPUBLIC,

in the performance of his duties under Article 84, sub-item VII, of the Constitution,

Whereas the National Congress has approved the text of the Rome Statute of the International Criminal Court, through the Legislative Decree No. 112, of June 06, 2002;

Whereas said International Law became valid as of July 1st, 2002, and became valid in Brazil as of September 1st, 2002, pursuant to the provisions of its Article 126;

DECREES:

Article 1 The provisions of the Rome Statute of the International Criminal Court,

with copy attached to this Decree, shall be fully executed and complied with.

Article 2 Any actions that may result in revision of said Agreement are subject to the approval of the National Congress, as well as any complementary adjustments that, pursuant to the provisions of Article 49, sub-item I, of the Constitution, incur in burdens or onerous commitment to the national heritage.

Article 3 This Decree becomes valid as of the date of its publication.

Brasília, September 25, 2002, 181st year of Independency, and 114th year of the Republic.

FERNANDO HENRIQUE CARDOSO
Luiz Augusto Soint-Brisson de Araujo Castro

3. Res judicata

Brazil's Federal Constitution establishes, on sub-item XXXVI of Article 5, that "*the law shall not injure the vested right, the perfect juridical act and the res judicata*". *Res judicata* happens when a decision is longer subject to further appeal. Brazil's Supreme Court has the competency to judge, upon extraordinary appeal, the cases decided in a single or final instance, when the appeal decision contradicts a provision of the Federal Constitution or decide for the unconstitutionality of a treaty or federal law (Article 102, III, "a" and "b").

But the Rome Statute created an exception to *res judicata* arising from the national court, when it established in its Article 17 that:

a. *when the case is being investigated or prosecuted by the State which has jurisdiction over it, but the International Criminal Court considers that said State is "unwilling or unable genuinely to carry out the investigation or prosecution";*

b. he 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 *when the case is being investigated by the State which has jurisdiction over it, but said State has decided not to prosecute the person concerned, and it is considered that the decision resulted from the unwillingness or inability of the Sate to carry out the prosecution;*

c. when the case has been prosecuted by the Sate which has jurisdiction over it, with conviction or acquittal, but the International Criminal Court understands that the proceedings in the other Court had the purpose of delivering the accused from their criminal responsibility under the jurisdiction of the International Criminal Court;

d. when the case has been prosecuted by the Sate which has jurisdiction over it, with conviction or acquittal, but the International Criminal Court understands that the proceedings in the other Court have not been conducted in a independent or impartial manner, in compliance with the norms of due

process acknowledged by international law, but in a way that, under the circumstances, was not compatible with the intent of actually submitting the person concerned to justice;

e. when, simply put, the case if sufficiently serious to justify the action of the International Criminal Court.

What can be inferred from the aforementioned provisions is that said "complementarity" of ICC jurisdiction seem to defy the *res judicata*, since it admits the re-examination of the cases already decided without room for appeal in Brazil.

Article 7 of the Transitory Constitutional Provisions Act, which is a body of rules edited with Brazil's Constitution, which had and still has the purpose of regulating and not leaving uncovered legal transition situations that have not been regulated yet by infra-constitutional legislation, on the other side, establishes that:

> *"Brazil shall strive for the formation of an international court of human rights."*

If the constitutional text so establishes, it is a logical conclusion that the ICC's jurisdiction has to accepted by Brazil. And the treaty shall prevail not only under the logic interpretation,, but also under the systematic interpretation.

4. Brazil's Representatives in Global Courts

Sylvia Helena de Figueiredo Steiner was elected for a nine-year term of office. She is part of a selected group of Brazilian jurists who are judges in international courts, such as Francisco Resek at ICJ (Hague) and Marotta Rangel at the International Maritime Court (Hamburg).

Specialized in International Law, Sylvia Helena is a post-graduate by the Law School of the University of São Paulo. From 1992 to 1995, she was a member of the Federal Public Prosecution Office; since 1995 she has worked as Appellate Judge of the Federal Regional Court of the 3rd Court Region (São Paulo).

5. The Treaty of Rome in Brazil's Military Law

Paulo Tadeu Rodrigues Rosa, at www.buscalegis.ufsc.br/revistas/index.php/buscalegis/article/.../21977, is quite direct:

> *"Paragraph 2 of Article 5, of the FC, ensures to all citizens, in the broader sense, not only the rights listed in the constitutional text, but also those arising from the international treaties subscribed by the Federative Republic of Brazil.*
>
> *By force of the Treaty, Brazilian military troops who practice war crimes,*

genocide, acts of aggression against civilians, or violations of war conventions, shall be subject to judgment pursuant to the provisions of the International Stature under a subordinate fashion. One cannot forget that the Military Penal Code, Executive Order 1001, of 1969, may be applied outside Brazil's territory. In order to do that, the Military Judges of the Union shall accompany the troops in their operations, as shall the Military Justice Judges, if Military Personnel of the Union States are deployed to the battle field.

Brazil has participated of several peacekeeping forces in compliance to UN resolutions, such a the peacekeeping Forces in Angola, Suez, and recently East Timor, which ensures the freedom and independency of the former Portuguese colony that experienced the horrors of war.

If Brazilian military personnel that are part of peacekeeping forces violate the norms established in the Treaty of Rome, Decree No. 4388 of September 25, 2002, they shall be judged by the International Criminal Court. It is important to mention that not only Armed Forces military personnel, but also civilians are subject to the International Court judgment for the crimes set forth in the Rome Statute.

Members of Assistance Forces, Military Police, and Military Firefighter Corps may join the Peacekeeping Forces, as has already happened before when Brazil was called by the UN to send troops to maintain order and peace in developing country during internal and external conflicts.

Military personnel under the command of Brazil's States who joins peacekeeping forces is subject to the penalties established in the Military Penal Code, and shall be judged by the State Military Justice, not the Federal Military Justice, military court of Brasília.

The Military Penal Code established the criterion of extra-territoriality, which means that the normal military punishment is applicable outside Brazil's territory to Federal and State Military personnel.

For State Military personnel to be judged by the Federal Military Justice, it is necessary for he or she to be a civilian member of the military reserve, or even a reformed official graduated in the Military Official Reserve Institutes, CPOR, CPOR, and for he or she to be called upon to defend the country in the case of war declared by the President of the Republic and dully authorized by the National Congress.

By force of the treaty subscribed by Brazil, the Military personnel who practice a crime listed in the Statue shall be subject to the penalties and punishments set forth therein.

The United States of America, due to internal policy issues, did not sign the

Treaty of Rome, precluding the possibility of American Military personnel to be judged by the International Court. England, in contrast to the American position, signed the treaty, showing its concern with the preservation of the basic rights and guarantees anywhere in the world.

6. Conclusion

It is thus our conclusion that the ICC has full jurisdiction in Brazil, and the trans-national aspect of its establishment, and the universal and complementary nature of its jurisdiction do not incur in any incompatibility with Brazil's constitutional and infra-constitutional legislation.

Libero Penello

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WHAT MAY BE THE POSSIBLE RESERVATIONS OF TURKEY TO ACCESS THE ICC STATUTE

by DEVRİM AYDIN

Turkey has both supported the foundation of ICTY and ICTR, and also actively participated to the Rome Conference but did not ratified the ICC Rome Statute. The Turkish delegate[1] who attended to the Rome Conference has proposed the inclusion of the crimes such as terrorism and drug trafficking within the jurisdiction of the ICC, however this proposal was not accepted.[2] Turkey claimed that war crimes should not be linked with internal unrest because such a linkage and considering some actions against the terrorists during internal unrest as crime will prevent the effective fight with terrorism. Turkey also advocated providing vast authority to the prosecutor to guarantee the independency and effectiveness of the Court. Since its proposals are not accepted, Turkey did not sign and it abstained from the agreement of the Statute shaped as a result of the Rome Conference.

[1] During the United Nations conference in Rome in July 1998, Turkey was represented by a distinguished diplomat Mehmet Güney who later became a judge at appeals chamber of ICTR.

[2] Actually, terrorism was included in the draft text. Trinidad and Tobago submitted a motion to the General Assembly of the United Nations in 1989 and demanded the prosecution of international narcotic bands of which they suffered a lot and demanded bringing them before the court. Following this demand, UN International Law Commission re-started the preparation of ICC Statute draft. Particularly USA objected this idea and claimed that national jurisdiction would be more effective through the fight with crimes of terrorism and drug trafficking.

Turkey is the unique country in the Council of Europe which has not signed or ratified the Rome Statute.[3] Council of European Union called the EU member and candidate states for the ratification of the Statute through its decision of "Council Common Position" dated June 11 of 2001. Moreover, through its decisions of December 17, 2001 and February 7, 2002 the European Parliament called the EU member and candidate states for the ratification of the Statute. Thus, the Parliament tried to provide optimum participation to the Statute. Turkey is a candidate country of which the membership negotiations continue. However, Turkey is the unique country which did not ratify the Statute among the candidate countries. The paragraph G of the decision of European Parliament dated September 19, 2002 stated that "*It is unacceptable that Turkey has not signed the Statute*". Being a party to the Rome Statute is not a required as a condition for European Union membership but it is obvious that these decisions are political suggestions for Turkey that continues its negotiations for EU membership.

The arguments in favour of the ICC are recognized by many scholars and some parts of the civil society in Turkey, but the position of the Turkish Parliament and the Government is not clear.[4] Although, Prime Minister Erdoğan declared that Turkey will ratify the Statute within a close time during his speech before the European Council Parliamentary Assembly on October 8 of 2004, 6 years passed since then and still there is not an official declaration in this regard. An official information or news about the existence of studies in terms of ratifying the Statute did not take place in the press. Presidency of General Staff is the official institution that is mostly interested in the ICC system and in international criminal law. There are successful products of some officers about these issues in terms of academic activities. One of the reasons of

[3] It does not mean that since Turkey is not a party to the Statute yet, Turkish citizens cannot be brought before this court. If a Turkish citizen working within the scope of the international peace force commits a crime within the territory of a country that accepts the jurisdiction of the Court, this citizen might be transferred to ICC. Although Turkey is not a party to the Statute, in accordance with the b clause of the Article 12 of the Statute, the actions of a Turkish citizen in the territory of Turkey or another country might be brought before the Court by the application of UN Security Council to the prosecution of the Court. Court might ask for the admission of the tried individual or other kinds of cooperation. Therefore, arrangements compatible to the Statute should be realized in domestic law before being a party to the ICC. Some jurists have suggested that a national court, responsible for the crimes taking place in the ICC Statute, should be founded for an efficient adjudication in the event of being a party to the ICC.

[4] Although Turkey is not party to the Statute yet, there is great interest regarding international criminal law and ICC. Many scholars have studied on international criminal law, many articles and some books were published and many national and international conferences were held on the issue. The Turkish Coalition for ICC is the leading institution that carries out these activities. Turkey's National Coalition for ICC -composed of 20 organizations (including various human rights organizations and bars- has been working vigorously to make Turkey a party to the Statute.

the lack of interest of many institutions of the State in this issue might be that the General Staff does not lean towards ICC for the time being.

Although Turkey is not a party to the Statute, it has carried out some arrangements in its Constitution and criminal law. The provision of "*a citizen cannot be extradited to a foreign country due to a crime*" took place in the Constitution of Turkish Republic within the article related to crime and punishments for a long time. This provision of the Article 38 of the Constitution was amended as "*a citizen cannot be extradited to a foreign country due to a crime, without prejudice to the liabilities required by being a party to International Criminal Court*" on May 7, 2004.[5] Although Turkey is a party to Genocide Convention dated 1948 and Geneva Convention and Hague Convention dated 1954, there was not a provision in the abrogated Turkish Criminal Code dated 1926 regarding the crimes taking place in the Statute. The Turkish Criminal Code which came into force by June 1, 2005 includes regulations in terms of both extradition of a citizen and the crimes in the Statute. Article 18, clause 2 includes the provision of "*a citizen cannot be extradited to a foreign country due to a crime, without prejudice to the liabilities required by being a party to International Criminal Court*" as Article 38 of the Constitution. The new Turkish Criminal Code regulates "crime of genocide" (Article 76) and "crimes against humanity" (Article 77) by including international crimes for the first time. The regulation regarding genocide is actually compatible to that of the Statute; however, Turkish Criminal Code (with an inspiration from French Criminal Code) seeks for the "existence of a plan" for the crime of genocide. It is difficult to state that the provision of "crimes against humanity" of the Turkish Criminal Code is compatible with that of the Statute. On the other hand, there is not a provision in the criminal code regarding war crimes. The regulations of military criminal code are very common and not harmonious with the provisions in the Statute. A regulation regarding the crime of aggression does not take place in criminal code and military criminal code.

What prevents Turkey to access the Statute?

There is not an official declaration in terms of the accession of Turkey to the Statute. However, the possible concerns of Turkey in terms of accession might be gathered under a number of headlines. These might be Armenian issue and genocide claims against Turkey, Cyprus

[5] This provision is technically erroneous in terms of international law and ICC Statute. The reason is that there is not a position of "*being a party to the International Criminal Court*". What is meant here is "being a party to ICC Rome Statute". Secondly, since the Statute has come into force, Turkey "*may access*" to the Statute.

and Aegean questions and the armed conflict with PKK members and military operations in Iraq territory against PKK members. The fact, that the Statute does not include a definition of aggression and terrorism are also considered in discussions about a possible accession of the Statute.

Armenian issue and genocide claims against Turkey

Some jurists refer to the events that ended by the deportation of a part of the Armenian population living in the borders of Ottoman Empire during its reign, particularly in 1915 as genocide. Moreover, some parliaments decided that these events were genocide. However, Turkish argument does not refer to these events as genocide and Turkey claims that Republic of Turkey -founded in 1923- cannot be held responsible for these events experienced in the territory of Ottoman Empire during the 1st World War. Since some parliaments refer these events experienced a century ago as genocide, this issue has gained an international character and it has become more complicated. Turkish argument is that historians deal with the issue and third countries does not involve within the problem. In accordance with the Article 11 of the Statue, the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. The jurisdiction ratione temporis of the Court is limited with the crimes committed after the Statute come into force. Therefore, whatever the international society call the 1915 events, it is not within the jurisdiction of the Court. Thus, this issue cannot be a concern for accession of Turkey to the Statute.

Cyprus Question

Following the conquest of Ottoman Empire in 1571, the Turkish existence began in the Cyprus Island. The Island was temporarily left to the English sovereignty during 1st World War. It became independent through the London Agreement signed among Greece, Turkey and United Kingdom in 1960. Thus, Republic of Cyprus was founded. However, the political conflict and tension between Cypriot (Muslim) Turks and Cypriot (Orthodox) Greeks turned into fights between these two communities, of which they still hold one another responsible even today. Thus, Turkey carried out a military action to the Island in 1974 - based on its right to guarantee taking place in London Agreement and aiming to protect the Turkish population that it claimed to be massacred. A new political and administrative order was formed in the northern region of the Island where the Turkish population was intense. The events created the "Cyprus Question" of today. Turkey recognized the

independence of the "de facto" Turkish Republic of Northern Cyprus declared by the Turkish community of Cyprus in 1983. On the other hand, Turkey refers to the administration formed by the Greeks in the southern part of the Island as "Greek Administration of Southern Cyprus" and it does not accept this administration as "Cyprus Republic". UN Security Council defined the declaration of the foundation of Turkish Republic of Northern Cyprus as a separatist movement with its decision no. 550 on May 13, 1984. UN and Council of Europe referred that the northern part of the island is under the "occupation" of Turkey. "Turkish Republic of Northern Cyprus" is a "*de facto*" state of which independence is not recognized by another country than Turkey. The northern part of the Island is "*de jure"* accepted as belonging to the Cyprus Republic. Today, direct negotiations continue between the representatives of these two communities under the auspices of UN observer. The tension between the Turkish and Greek States and between the two communities of the Island is less than the previous years. However, the "Loizidou v. Turkey" decision of the ECHR (The European Court of Human Rights) and "Orams" decision of ECJ have changed the aspect of the Cyprus Question for Turkey. According to these decisions, Turkey –that has occupant military force in the Island- is responsible for the situation that Ms. Loizidou and Orams family cannot reach to their property in the northern part of the Island. This decision states that the violation of property right is permanent. Thus, as long as Turkey keeps its military force in the Island, its existence in the Island will be referred as "occupancy". Today, the negotiations between the representatives of these two communities under the auspices of UN observer seek a solution for these problems. However, that Turkey's existence in the northern part of the Island is referred as occupancy in these decisions, the responsibility of Turkey with the view of the Statute might be controversial.

Aegean Question

The Aegean question between Turkey and Greece is consisted of territorial sea, airspace, continental shelf and finally armament of the Aegean islands. The Aegean problems experienced between Turkey and its neighbor Greece forms the axis of Turkish-Greek relations. The basis of the difference of opinion between these two countries regarding the enlargement of territorial sea and the determination of continental shelf is that the characteristics of the Aegean Sea do not allow the implementation of the general provisions of international law of sea due to its geographical and geological position. One of the disagreements between Turkey and Greece, which may inflame the tension in

a moment, is the efforts of these countries to enlarge the national territorial sea border from 6 miles to 12 miles at the Aegean sea to where they have shores.[6]

The Aegean territorial sea and continental shelf problem have re-emerged between Turkey and Greece by the preparation of UN 3rd Law of Sea Convention. Greece –who is a party to this convention- declared that it has the right to determination of enlargement of its national territorial sea border as 12 miles in accordance with this convention and it will use this right when necessary. Turkey –who is not a party to this convention- reacted strongly to these statements and declared that a decision of this regard will be considered as "casus belli". Today, both of these two countries preserve their national approaches. A significant convergence has been observed in terms of civil aviation flights to enable the optimum benefit from the tourism activities of Aegean sea and taking into consideration the airway connections of Turkey with the west. However, this sensitiveness might gain a strict character during military flights and exercises. Today, friendly efforts to solve this problem have been increased between these two countries. However, in the event that Aegean problem causes a military tension as of the past, this might create legal problems for these two countries to be evaluated within the scope of the Statute.

Military operations against PKK

Kurdish population of Turkey and Turks has been living together since the 1000s when Turks came to Anatolia. Although rebellions of some nationalist and Islamist Kurdish groups have been experienced following the foundation of the Turkish Republic, such a problem has not been observed for a long time from 1930s. The separatist Kurdish organization PKK (Kurdish Workers Party) founded in 1980s has aimed to found a separate state in the Eastern Anatolian Region where Kurdish population is particularly intense. As a result of the PKK –which takes place within the terrorist organization lists of USA and EU Council- activities -continued since an approximately 30 years- thousands of people have lost their lives,

[6] Greece determined its national territorial sea border as 6 miles by a decision taken in 1936. On the other hand, Turkey determined its national territorial sea border as 6 miles in 1964 and accepted reciprocity principle. Following these 6 miles of territorial sea border of these two countries by 1964, Greece has had a share of 35% -due to the advantage of its approximately 300 islands and islets- and Turkey has had a share of 8.8%. In the event that Greece enlarge its Aegean territorial sea border to 12 miles, its share will be 60.33% and Turkey's share will be 9%. If the Aegean territorial sea border is enlarged to 12 miles, the regions accepted as of national continental shelf of Turkey will be within the borders of Greece territorial sea and thus, Turkey will not be able to claim a right on those. If the territorial sea border is determined as 12 miles, the Aegean sea national airspace will accordingly enlarge. Therefore, the military flights and air and marine exercises over the Aegean sea cannot be realized. Turkey will also face economic and commercial loss regarding Aegean fishery.

including the civilians. Turkish Army enters to the territory of Northern Iraq from time to time within the scope of hot pursuit against PKK members who hide at the mountains of the Eastern Anatolia or who creep from the Iraqi border, attack the military units and stations and return back to their camps at the mountains of Northern Iraq. And sometimes military operations are carried out to the organization camps at the Northern Iraq. Turkish government states that they inform Iraqi government in terms of these operations. And, there is not a strong objection of the Iraqi government to these operations, since Iraqi central government does not have sanction power against PKK members at the northern part of the country. Therefore, Iraqi government does not object the Turkish operations for the time being. However, it is not certain that this situation will also last in the future. Due to a cross-border operation of Turkey, Iraq may ask for the adjudication of Turkish soldiers claiming that they committed crimes during this operations within the scope of the jurisdiction of ICC by accepting the jurisdiction of ICC in accordance with the paragraph 3 of Article 12 of the Statute.

On the other hand, according to the paragraph (d) of 2nd clause of Article 8 of the Statute, third type war crimes determined by the Statute will be applied to the non-international armed conflicts. This provision will not be applied under the conditions of internal unrest and tension of rebellion and violence and similar movements committed in an isolated way and rarely. According to the paragraph f, of 2nd clause of Article 8 of the ICC Statute, fourth type war crimes will be applied to the non-international armed conflicts. This provision will also not be applied under the conditions of internal unrest and tension of rebellion and violence and similar movements committed in an isolated way and rarely. However, it is determined that in the event of "prolonged armed conflicts" between government officials and organized armed groups within the borders of a country, ICC will have jurisdiction regarding these crimes. Turkey, USA and European Union Council refer to the PKK actions as "terrorist". However, the above mentioned provision of the Statute might create a concern for Turkey to access the Statute.[7]

[7] Thus, Turkey participating to the ICC preparation commission negotiations stated its opinions regarding crime of aggression under 3 points: 1. The Prosecutor shall not conduct direct investigation regarding any state leader. 2. The decision of UN Security Council as "a state has attacked against another state" shall be a pre-condition for investigation. 3. Although UN Security Council asked the Prosecutor to begin an investigation, the Prosecutor shall have the authority to decide independently from the UN Security Council to continue the investigation.

Conclusion

The recent relations between Turkey and Greece and the direct negotiations between the representatives of the two communities in Cyprus have increased hopes for the friendly solution of Aegean and Cyprus problems. It is highly possible that these two problems are solved in a friendly way in the future through bilateral relations and negotiations. On the other hand, genocide claims of some countries and jurists against Turkey are out of the jurisdiction of ICC because of ratione temporis of the Statute.

Today, the most serious concern towards Turkey's being a party to the ICC is the cross-border operations against PKK organization. The definition of aggression crime has a potential to effect the legal position of military operations of Turkey against PKK camps within the scope of the recognition and acknowledgement of Iraqi government in the northern part of the Iraq. Turkey's ratification of Rome Statute depends on the ending of armed fight against separatist PKK organization and realization of domestic law regulations required by the Statute.

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'Rule of law in India'

by ARPIT BATRA

The constitution of India declares that we are a Democratic, Secular and a Socialist Republic. The Rule of law governs our country. 'Equality before law' and 'Equal protection of law' are the most fundamental right conferred on its citizens. Independence of judiciary and highly qualified bureaucrats are the need of the hour. In the present situation, many just exist on paper. The question is about our compliance with the 'Rule of Law'.

Rule of law contains three principles or it has three meanings as stated below:

1. Supremacy of I.aw
2. Equality before Law
3. Predominance of Legal Spirit

The doctrine of Rule of Law has been adopted in Indian Constitution. The ideals of the Constitution, justice, liberty and

equality are enshrined (embodied) in the preamble. The Constitution of India has been made the supreme law of the country and other laws are required to be in conformity with the Constitution. Any law which is found in violation of any provision of the Constitution is declared invalid.

In India, the meaning of rule of law has been much expanded. It is regarded as a part of the basic structure of the Constitution and, therefore, it cannot be abrogated or destroyed even by Parliament. It is also regarded as a part of natural justice. In *Keshavanda Bharti vs. State of Kerala* (1973) The Supreme Court enunciated the rule of law as one of the most important aspects of the doctrine of basic structure. In *Menaka Gandhi vs. Union of India*, AIR 1978 SC 597. The Supreme Court declared that Article 14 strikes against arbitrariness. How many people respect or pay heed to this fundamental principle? In our country, there are many innocent people who are held guilty only because of the malicious acts of a few hypocrites. We know of a number of members of legislature and parliament who are facing criminal prosecution. It is a farce to talk of a nation ruled by highly qualified excellent men.

Politics has become the refuge of scoundrels, black marketers, corrupt and the mean to wield influence and for personal exaltation. It is really difficult to find good candidates during elections. Our leaders are law into themselves. There is neither justice to the victims nor fairness to the accused. Then what kind of 'Rule of Law' are we talking about. The judiciary is not above board, there have been abundant rumors about the adulterous and extravagant lives led by the judges from the lower to the highest judicial officers. The police just don't care about the landmark judgment of D.K. Basu or Section160 Criminal Procedure Code or any other judgment. The custodial violence has gone beyond description. Rape, molestation, murder are all becoming common occurrences in police custody. The injuries are not noted down scrupulously and valuable evidence is lost because of the neglect and lethargy of the medical profession. The most recent case being the Arushi Murder Case in which the investigation was done by the CBI. The actual vaginal swab was not sent for forensic examination. Is this acceptable negligence or voluntary negligence? We still do not have an answer. With the laws in favor of women, Is there a legal authority or sanction to check such a misuse? I am aware that the judiciary has tried to act in this regard but there is no formal structure to check such an abuse. The people including public servants just ignore the rule of law, even if it is for acts or omissions which are not difficult to follow or that they should be a part of the normal routine. Everyone is in a rush

without any kind of concern for the rest. Everyone wants to be first. Majority have a psyche to bend the law, cross the barricades, whether it be on the road or in any other walk of life to carve out short cuts for them to pass through and a psyche to justify their wrongs with a expectation only for others to follow the law and wait for the day when all other subject

themselves to the rule of law so that they could follow suit. There is no initiative by the government to check such a breach. It is not the rules which are required for such acts but norms coupled with awareness will suffice. I am not talking about any kind of formal structure to this but an informal initiative is the need of the hour because people in India just don't believe in formal initiatives.

From the ordinary traffic constable to the man driving a bicycle on the road, the pedestrian to the richest all of us as Indian have one psyche to bend the law, cross the barricades, whether it be on the road or in any other walk of life to carve out short cuts for them to pass through and a psyche to justify their wrongs with a expectation only for others to follow the law and wait for the day when all other subject themselves to the rule of law so that they could follow suit. So, we still are not ruled by LAW and it will be a long wait without an initiative.

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