What may be the possible reservations of Turkey to access the ICC Rome Statute

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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.

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

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\(^{2}\) 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.

\(^{3}\) 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.

\(^{3}\) 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.
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. 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 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

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.
foreign country due to a crime, without prejudice to the liabilities required by being a party to International Criminal Court” on May 7, 2004. 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 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.

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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.
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

\(^6\) 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.
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, 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.

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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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.