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The Cyprus Issue and the International Criminal Court*

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ABSTRACT

Since 1974, the Cyprus issue has occupied the agenda of Turkey and the international community. It has been recently argued that criminal proceedings regarding the Cyprus issue can be brought before the International Criminal Court (ICC) in relation to the 1974 intervention. Regarding this issue, a criminal complaint against Turkish government officials was filed at the ICC on 14 July 2014. The bill of complaint requested the initiation of an investigation into crimes committed, within the Court's jurisdiction, arising from the civilian displacement and settlement activities (as continuous crimes) of Turkey. On this ground, this study provides a holistic examination of the ICC's jurisdiction regarding the Cyprus issue and aims to analyze the extent to which Turkish civilians and military officials can be held responsible for the crimes allegedly committed on the Cypriot territory since 1974.

Keywords: Rome Statute, War Crimes, Criminal Responsibility, Civilian Displacement, Settlement Activities

Kıbrıs Sorunu ve Uluslararası Ceza Mahkemesi

ÖZET

Kıbrıs sorunu 1974'ten beri hem Türkiye hem de uluslararası toplumun gündemini meşgul etmektedir. Son zamanlarda yapılan tartışmalardan biri de Türkiye'nin 1974 askeri müdahalesinin Uluslararası Ceza Mahkemesi'nin (UCM) önüne getirilip getirilemeyeceği konusudur. Bu konu ile ilgili olarak, 14 Temmuz 2014 yılında, Uluslararası Ceza Mahkemesi'ne Türk hükümeti aleyhine şikâyetle bulunulmuştur. Şikâyet dilekçesi ile Mahkeme'nin yargılama yetkisine giren savaş suçlarından; sivillerin yerinden edilmesi ve yerleşim faaliyetleri (devam eden suç olarak) soruşturulması istenmiştir. Bu temelde, bu çalışma, UCM'nin Kıbrıs sorununa ilişkin yargı yetkisine bütüncül bir inceleme sunmaktadır. Bu çalışma, 1974 yılından beri Kıbrıs toprakları üzerinde işlendiği iddia edilen bu suçlardan Türk sivil ve askeri yetkililerin sorumlu tutulup tutulamayacağını analiz etmeyi amaçlamaktadır.

Anahtar Kelimeler: Roma Statüsü, Savaş Suçları, Cezai Sorumluluk, Sivillerin Yerinden Edilmesi, Yerleşim Faaliyetleri

* I hereby declare that this study (by papers) submitted for the degree of Doctor of Philosophy at University of Sussex in 2017.

Introduction

As of 2021, Turkey has yet to accede to the Rome Statute of the International Criminal Court (ICC). The reasons behind Turkey's attitude towards the ICC involve a wide range of different dynamics and complicate Turkey's engagement with the Court. The Cyprus issue is considered as one of the reasons that may concern Turkey in accepting the jurisdiction of the ICC. Although the Republic of Cyprus (RoC)¹ itself has not officially applied to the ICC, the intention to take Turkish citizens before the ICC was announced by a Cypriot official, who is represented by Shurat Hadin², in July 2014. The petition claimed that “[s]ince 1974, Turkey has implemented a systematic policy of colonization of the occupied part of Cyprus, from which it expelled approximately 170,000 Greek Cypriots³ to change the demographic character of the island and create *faits-accomplis*.⁴

In respect to this allegation, the first significant consideration of the petition rests on the 4th Geneva Convention of 1949, Relative to the Protection of Civilian Persons in Time of War. Article 49(6) of this convention maintains that the “occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”⁵ Besides the Geneva Convention, the complaint petition mainly refers to Article 8(2)(b)(viii) of the 1998 Rome Statute. According to this article, “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory” is a war crime. When considering these allegations, it should be noted that the complaint petition mainly refers to two criminal activities: 1) transfer of the civilian population into the occupied territories, and 2) settlement activity. On this ground, the *actus reus* (physical elements of a crime) requires a deep analysis to understand whether it covers only population transfers or both population transfers and settlement activity.

On these grounds, and as a first issue, this article will analyze the preconditions for the case. First, the statehood issue of the Turkish Republic of Northern Cyprus (TRNC) will be discussed because this is an important point in relation to the ICC's jurisdiction. Following this, the time limit (*ratione-temporis*) of the ICC's jurisdiction for war crimes will be considered. Regarding the statehood issue and the time limit, the arguments of both sides will be taken into consideration to make a judicious conclusion. Finally, the article will discuss how these related norms would be applied by the ICC in the case of Cyprus and whether Turkish civilians and military officials can be held responsible for the crimes allegedly committed on the Cypriot territory since 1974. Due to the lack of progress in this situation, the study will be based on the potential future judicial practice of the ICC.

1 Turkey does not recognize the Republic of Cyprus as representing the whole island and refers to it in its official documents as the Greek Administration of Southern Cyprus.

2 Shurat Hadin (Israel Law Center) is a non-governmental organisation founded in 2003.

3 “Time to End Turkey’s Illegal Occupation of Cyprus,” *Permanent Mission of the RoC to the United Nations*, 17 July 2014, <http://www.cyprusun.org/?p=6649> (Accessed 20 January 2015); Yonah Jeremy Bob, “ICC Prosecutor to Decide Cyprus File Before Exit,” *The Jerusalem Post*, 18 February 2021, <https://www.jpost.com/middle-east/icc-prosecutor-to-decide-cyprus-file-before-exit-659356> (Accessed 15 September 2021); Sotiria Nikolouli “Cyprus at the Disposal of International Criminal Court over Turkish Illegal Settlers,” *Greek Reporter*, 30 July 2014, <https://greekreporter.com/2014/07/30/cyprus-at-the-disposal-of-international-criminal-court-over-turkish-illegal-settlers/> (Accessed 14 September 2021).

4 “Illegal Demographic Changes,” Embassy of the Republic of Cyprus in Vienna, October 2006, http://www.mfa.gov.cy/mfa/Embassies/Embassy_Vienna/vienna.nsf/page74_en/page74_en?OpenDocument, (Accessed 9 August 2021).

5 The 4th Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War.

Preconditions to the Exercise of Jurisdiction

Jurisdiction of the ICC and Statehood under the Rome Statute

The main basis for the exercise of jurisdiction is called a pre-condition.⁶ As a matter of course, this issue is dealt with prior to the case itself. The subject of the case can only be dealt with after all pre-conditions are fulfilled. Pre-conditions for the ICC to practice its jurisdiction are governed by Article 12 of the Rome Statute. As well as the general preconditions for the practice of jurisdiction, it also regulates the main provision regarding the territorial jurisdiction (*ratione loci* jurisdiction) of the ICC. In contrast to temporal jurisdiction (*ratione temporis* jurisdiction), which is governed under Article 11 as a separate provision, the statute of the ICC does not establish a particular provision for the territorial jurisdiction of the ICC; thus Article 12 is the main legal basis for determining *ratione loci* the jurisdiction of the Court.

According to Article 12, the Court may only exercise jurisdiction under certain circumstances: if the alleged criminal is a national of a 'state party' or a 'state otherwise accepting the jurisdiction of the Court' or the United Nations Security Council (UNSC) has referred the situation to the prosecutor, regardless of the nationality of the suspect or the place of the crime. In short, Article 12 establishes "how a State may accept the jurisdiction of the ICC concerning the core crimes, namely by becoming a Party to the Rome Statute."⁷ Article 12(2) requires either the territorial State or the Nationality State to be among the State Parties. The last provision is that Article 12(3) Rome Statute "provides for territorial and nationality non-State Parties to *ad hoc* accept the exercise of jurisdiction by the ICC."⁸

Regarding the jurisdiction of the ICC, the Rome Statute is predicated upon the term 'state'.⁹ In Article 12 the jurisdiction of the ICC mainly revolves around 'state parties'. The court was designed as a treaty-based institution and thus its jurisdiction comes from states' consent. For this reason, it is accepted that the ICC does not have a universal jurisdiction. Its jurisdiction could not be broadened to all violations of humanitarian law throughout the world.¹⁰

In light of this brief argument, it is apparent that the statehood issue of the TRNC must be discussed and analyzed as a preliminary issue. On these foundations, the question as to whether the TRNC is 'the territory of a state party' or the land of the TRNC is a non-state party territory, should be decided. The question therefore would be the extent to which the ICC's jurisdiction over the RoC would involve the TRNC, a non-party state.

6 Malcolm N. Shaw, "In the Matter of the Jurisdiction of the International Criminal Court with regard to the Declaration of the Palestinian Authority," *Supplementary Opinion*, 2010, p. 3.

7 Article 12 of the Rome Statute, *Commentary on the Law of the International Criminal Court, Commentary Rome Statute: Part 2, Articles 11-21*, <http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/> (Accessed 6 March 2020).

8 *Ibid.*

9 William Thomas Worster, "The Exercise of Jurisdiction by the International Criminal Court over Palestine," *American University International Law Review*, Vol.26, No 5, 2012, p.1153–1209.

10 Eugene Kontorovich, "Israel/Palestine—The ICC's Uncharted Territory," *Journal of International Criminal Justice*, Vol, 11, No 5, 2013, p. 987.

Statehood of the Turkish Republic of Northern Cyprus

Regarding the statehood issue of the TRNC, instead of following the mechanical application of the Montevideo Convention, the Prosecutor's decision on Palestinian statehood should be assessed because some scholars claim that both territories, the TRNC and Palestine, have been occupied respectively by Turkey and Israel.¹¹ Thus, both situations have common grounds regarding territorial and temporal jurisdiction of the ICC. Moreover, the current practices of the ICC signal that the UN's perception of 'statehood' has much more importance than other criteria.

In January 2009, the Palestinian National Authority submitted a declaration to the ICC under Article 12(3) of the Rome Statute. As already pointed out, Article 12(3) of the Statute provides for territorial and nationality non-State Parties to *ad hoc* accept the exercise of jurisdiction by the ICC. With this declaration, Palestine (non-state party in 2009) allowed the Court to practice its jurisdiction for the crimes committed within its own territory since 1 July 2002. However, the prosecutor (previous prosecutor Luis Moreno-Ocampo) rejected the Palestinian request three years later on 3 April 2012, drawing the following conclusion:

competence for determining the term 'State' within the meaning of Article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of the General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter.

This conclusion was justified pursuant to Article 125 of the Rome Statute, which regulates that "[t]his Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations." Article 125(3) also concludes that "[t]his Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations." Relying on Article 125, it was decided that the Secretary-General of the United Nations would decide on this matter as the depository power of the Rome Statute.¹²

Article 125 undoubtedly says that only 'states' can be party to the statute. The term 'state' exists many times in the Rome Statute yet remains undefined.¹³ Thus, the question exists whether Palestine is a state and who will decide on this matter. It is clear under the Rome Statute that being a party state is the main precondition for the Court's jurisdiction. As a natural consequence, this precondition relies on a further precondition that concerns the legal existence of an entity as a 'state' in the international arena. In other words, a 'legal personality' (as a state) must exist to assume responsibility under international law.

11 Kevin Jon Heller, "Are Israel and Turkey's Settlements Comparable?," *Opinio Juris*, 2013, <http://opiniojuris.org/2013/01/06/are-israel-and-turkeys-colonizations-comparable/> (Accessed 12 June 2019); Eugene Kontorovich, "Turkey's Settlements, the ICC, and European Vacation-makers," *The Volokh Conspiracy*, 6 January 2013, <https://volokh.com/2013/01/06/turkeys-settlements-the-icc-and-european-vacation-makers/> (Accessed 16 May 2020).

12 Liron Libman, "The ICC's Prosecutor Decision to Investigate the 'Situation in Palestine' and Palestinian Statehood," *Lawfare*, 15 January 2020, <https://www.lawfareblog.com/iccs-prosecutor-decision-investigate-situation-palestine-and-palestinian-statehood> (Accessed 14 May 2020).

13 Hyeoung Lee, "Defining State for the Purpose of the International Criminal Court: The Problem ahead after the Palestine Decision," *University of Pittsburgh Law Review*, Vol. 77, No 3, 2016, p. 348.

For the previous Prosecutor Luis Moreno-Ocampo, the Statute of the Court does not give him authority to decide on the statehood of Palestine.¹⁴ Thus, the Prosecutor did not decide on whether Palestine was a state under the Rome Statute to accede to the ICC. As a matter of fact, it was implied that making a decision on the statehood of Palestine would not fall within the jurisdiction of the ICC. Without a decision from the Prosecutor, answering the question of Palestinian statehood was left to the UN General Assembly, which is a political body, and the ICC Assembly of State Parties.

On 29 November 2012, the General Assembly adopted a resolution on the status of Palestine in the UN.¹⁵ Palestine was granted the status of ‘non-member observer state’, and thus the legal issue regarding the statehood of Palestine was arguably solved. On 1 April 2015, Palestine officially became a member of the ICC. Moreover, the Prosecutor also concluded that the Assembly of States Parties of the Rome Statute could also decide on the issue of Palestinian statehood. Only a few member states declared that “the designation “State of Palestine” should not be construed as recognition of a state of Palestine..[.]”¹⁶ and there was no concrete objection from other member states. Thus, the Assembly of States Parties welcomed Palestine as a new state party on 7 January 2015.¹⁷

On 16 March 2020, the Pre-Trial Chamber I rendered a decision on the Court’s territorial jurisdiction in Palestine. The Court examined mainly two different dynamics in order to decide its territorial jurisdiction in Palestine. Firstly, it noted that ‘the Depository’s acceptance of Palestine is official recognition of statehood’.¹⁸ In this sense it was concluded that Palestine is a state under the decision of the UN Secretary-General, which is a depository power of the Rome Statute. Secondly, and surprisingly, the Court applied the Montevideo Convention rules and concluded that Palestine is a state under that Convention.¹⁹ However, the Court did not focus on normative criteria of statehood under international law. The Court only determined its territorial boundaries in Palestine, which covers the West Bank including East Jerusalem and Gaza. It was decided, however, that statehood issue should be decided in order to open an investigation:

[T]he Court is not required to make a pronouncement with respect to or resolve Palestine’s Statehood under public international law more generally. While the Rome Statute undoubtedly cannot be interpreted in isolation from public international law, and while the Court should address questions of international law when necessary to exercise its functions and mandate, in this case, the Prosecution considers that resolution of broader questions regarding Palestinian Statehood is unnecessary.²⁰

As a matter of fact, Palestine was regarded as a state when it officially declared its statehood in 1988. The UN did not declare the invalidity of this entity. Yet, when the TRNC declared its in-

14 Situation in Palestine, Office of the Prosecutor, <https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> (Accessed 13 May 2010).

15 Resolution adopted by the General Assembly, 67/19. Status of Palestine in the United Nations, A/RES/67/19, 4 December 2012.

16 Libman, “The ICC’s Prosecutor Decision.”

17 The State of Palestine accedes to the Rome Statute, ICC-ASP-20150107-PR1082, https://www.icc-cpi.int/pages/item.aspx?name=pr1082_2 (Accessed 15 May 2020).

18 *Situation in the State of Palestine in the Case of the Prosecutor v.* (ICC-01/18-115 17-03-2020 1/22 NM PT), Court’s Territorial Jurisdiction in Palestine, 16 March 2020, p.22.

19 *Ibid.*

20 *Situation in the State of Palestine*, OTP, Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, (ICC-01/18-12 22-01-2020 1/112 RH PT), 22 January 2020, para. 42.

dependence on 15 November 1983, the UNSC invalidated the establishment of the TRNC with its Resolutions 541 (of 18 November 1983) and 550 (of 11 May 1984).²¹ It was concluded in the UNSC Resolution 541 (1983) that the declaration of independence ‘is incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee.’ This is because the Article of the 1960 Treaty of Guarantee prohibits ‘any activity likely to promote, directly or indirectly, either union with any other State or partition of the Island.’ For this reason, when the TRNC was established in 1983, the UNSC declared that attempts to create the TRNC were invalid, deplored the “purported secession”, and called upon states to respect the sovereignty, independence, territorial integrity and non-alignment of the RoC, while at the same time also urged them not to recognize any Cypriot state other than the RoC.²² The UN General Assembly also affirmed “the right of the Republic of Cyprus and its people to full and effective sovereignty and control over the entire territory of Cyprus.”²³

As is clear from the above discussion, both Palestine and the TRNC are contested states in the eyes of international community, and this perception has importance when the cases come before the ICC. In relation to the case at hand, although the TRNC achieved *de facto* independence in 1983, it suffers from a lack of international recognition (except from the Republic of Turkey). On the other hand, the majority of UN member states recognize the State of Palestine. This proves that under the current practices of the international community, ‘recognition’ is the criterion. More significantly, it seems that recognition by the international community ‘or’ approval of the international community is essential to have statehood under international law. Thus, regarding the statehood of the TRNC, it would not be surprising if the prosecutor were to justify his/her conclusion under the authority of UN decisions and the perceptions of the international community.

Jurisdiction *Ratione-Temporis* and the Case of Cyprus

Jurisdiction *ratione temporis* (temporal jurisdiction), which can be defined as a temporal restriction of a court’s jurisdiction, is regulated in Article 11 of the Rome Statute. According to Article 11(1), the court has jurisdiction over crimes ‘committed’ within its temporal jurisdiction, which starts from the date when the Rome Statute came into force for the relevant member state. Article 11(2) further clarifies the matter as follows: “(i) f a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, *unless* that State has made a declaration under article 12, paragraph 3.” The main aim of Article 11(2) is to clarify jurisdiction *ratione temporis* for member states that have subsequently ratified the Rome Statute. This article proclaims that wherever there has been a prior Article 12(3) confirmation by a new member state, the jurisdiction of the court can be practiced retroactively, at least with regard to relevant crimes.

Article 11 seems clear in terms of temporal restriction; however, in order to cover all jurisdictional issues, the article should be taken into consideration within the context of the entirety of the

21 With its Resolution 550 of 11 May 1984, the UNSC reaffirmed its resolution 541 and insisted on a collective non-recognition process. The UNSC also characterized the declaration of independence legally invalid.

22 UN Doc. S/RES/541/83, 18 November 1983.

23 General Assembly, Resolution A/RES/37/253, on 16 May 1983.

jurisdiction provisions of the Rome Statute. Article 11 of the Statute covers the notion of *lex praevia*,²⁴ or the prohibition of retroactive punishment,²⁵ which demonstrates that “Articles 24 and 11 are in fact quite closely related.”²⁶ It seems as if the statute of the court repeatedly revisits the matter of temporal jurisdiction, e.g. in Article 24, which states that “no person shall be criminally responsible for conduct prior to the entry into force of the statute.” At the Rome Conference, temporal jurisdiction and non-retroactivity were considered to be established under one article.²⁷ However, the effect of the statute on states which become party to the Rome Statute after its entry into force had to be dealt with as a separate issue,²⁸ at which point “it was therefore decided to retain Article 11.”²⁹

The second reason for referring to other jurisdictional provisions along with Article 11 is a certain amount of vagueness and uncertainty that exists in this article regarding ongoing crimes, as a continuing crime implies ongoing criminal activity. In relation to the temporal dimensions of continuing crimes, Article 11 remains unclear. In fact, it could be reasoned that Article 11 provides the court with jurisdiction only in respect to crimes committed after this statute has entered into effect. This provision could be interpreted as an exclusion of the Court’s jurisdiction over continuous crimes that began before the statute was established in a given member state. This assessment leads to the conclusion that the Court cannot extend or exercise its jurisdiction over conduct that began prior to the entry into force of the Rome Statute, only to conduct that has continued thereafter.

However, this conclusion would rely on Article 11, which remains an insufficient framework in terms of the evaluation of ongoing criminal activity. For this reason, it seems difficult to make a clear argument on the issue of ongoing crimes without applying other jurisdictional provisions. The matter of continuous crimes – namely settlement activities of Turkey – is one of the main focal points in the case of the TRNC. This is because uncertainty over enforcement against ongoing crimes under the Rome Statute would affect the so-called criminal responsibility of Turkish officials regarding war crimes in Cyprus.

Interpretation of Continuous Crimes by the International Criminal Court

The issue of continuous crimes and its relation to the principle of non-retroactivity was considered under Article 24.³⁰ The issues considered in the discussion were reflected by the drafting committee by appending a footnote to paragraph 1 of Article 24, which states that ‘the question has been raised as regards to a conduct which started before the entry into force and continues after the entry into force.’³¹ For Schabas, “it was an extremely unusual step for the Drafting Committee to insert a

24 It means that the law cannot be applied in cases that existed before the law.

25 Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Antwerpen, Intersentia nv., 2002, p. 369.

26 William Schabas, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2011, p. 70.

27 UN Doc. A/CONF.183/C.1/SR.8, para.74; UN Doc. A/CONF.183/C.1/SR.35, para.28; UN Doc. A/CONF.183/C.1/SR.39, para. 4.

28 Per Saland, “International Criminal Law Principles,” Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, p. 197.

29 Ibid.

30 Alan Nissel, “Continuing Crimes in the Rome Statute,” *Michigan Journal of International Law*, Vol. 25, No 3, 2004, p. 664.

31 UN Doc. A/CONF.183/C.1/L.65/Rev.1, p.2. There was no footnote in the final version adopted by the Conference: UN Doc. A/CONF.183/C.1/L.76/Add.3, p. 1–2.

footnote.”³² Schabas interprets this step as a “late-night compromise aimed at appeasing a handful of delegates who were obsessed with the question of continuous offences.”³³

Thereafter, the preparatory committee dealt with the issue of continuing crimes in relation to enforced disappearance with a footnote in the Elements of Crimes, Article 7(1)(i): “This crime falls under the jurisdiction of the Court only if the ‘attack’ referred to in elements 7 and 8 occurs after entry into force of the Statute.”³⁴ Thus, retroactive judgment in relation to the concept of ‘enforced disappearance’, which is by its nature a continuing crime, is excluded from the ICC’s jurisdiction,³⁵ so long as the attack in question was carried out before the Rome Statute entered into force. However, it remains unclear why the drafters clarified the issue of continuous crimes only with regard to enforced disappearance.

According to Schabas, the issue of continuous crimes is clear in regard to the concept of enforced disappearance; however, the issue relating to war crimes by transferring populations into occupied territories,³⁶ and other continuing crimes under the Rome Statute, is still a contentious issue. With regard to this situation, Nissel concludes that “the text of the Rome Statute is ambiguous as to the effect that the continuing character of a crime will have on the jurisdiction of the ICC.”³⁷ Saland also arrives at a simple conclusion when saying that “the issue of continuous crimes remains undecided and [it] will be for the court to determine how it should be handled.”³⁸

In conjunction with Saland’s conclusion, the ICC in its first judgment referred to continuous crimes and clarified its approach. In the case of *Lubanga*, Pre-Trial Chamber I concluded that the crime of enlisting or conscripting children under the age of 15 qualifies as a continuous crime, which continues to be committed until the children who have been recruited into the armed group have reached the age of 15.³⁹ It can then be assumed that both the pre-trial chamber and the trial chamber reasoned that the crime of conscription or the enlistment of children under 15 years is one such crime that occurs ‘every day’, in that children continue to be illegally recruited.⁴⁰ This is also confirmed by the ICC Pre-Trial Chamber and Trial Chamber.⁴¹ In this sense, it is arguable that the Court may be able to apply this to recruitment that occurred before the entry into force of the ICC Statute, provided that the commission of the crime continued after 1 July 2002.

As pointed out before, a slightly different question relates to the jurisdiction of the Court to consider those offences which began before the entry into force of the ICC Statute, those which continue thereafter, as well as where all obligatory elements can be considered as committed within the

32 Schabas, *An Introduction*, p.71.

33 Ibid.

34 Elements of Crimes, Crimes Against Humanity, Article 7(1)(i), Crimes against Humanity of enforced Disappearance of Persons.

35 Boot, *Genocide, Crimes Against Humanity, War Crimes*, p. 42.

36 Schabas, *An Introduction*, p. 75-76.

37 Nissel, “Continuing Crimes,” p. 663.

38 Per Saland, “International Criminal Law Principles,” Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, The Hague, Kluwer Law International, 1999, cited in Schabas, *An Introduction*, p. 75.

39 *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC- 01/04-01/06-2842, TCh. I, 14 March 2012.

40 Carsten Stahn, *The Law and Practice of the International Criminal Court*, Oxford, Oxford University Press, 2014, p. 172.

41 *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-803- tEN, para. 248; *Lubanga*, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/04-01/06-2842, 14 March 2012, paras 618, 759.

temporal jurisdiction of the court. In this sense, as asserted in the case of *Lubanga*, the Lord's Resistance Army (LRA) was involved in conduct prior to 1 July 2002 and such conduct continues to be committed.⁴² The court would be able to examine the situation since 1 July 2002 on the grounds that if a crime that is classically associated with continuing crimes does not allow retroactive application beyond the scope of Article 11, the same interpretation could reasonably be extended to other crimes. As such, the court classified the offence as continuous in nature and declared its jurisdiction over continuous crimes. This is a highly significant point that is relevant to continuous offences and provides the most informative explanation of the nature of these crimes.

The crucial point is that the offence is continuous in nature, thus the *actus reus* (physical elements of a crime) of the crime is still ongoing. The Chamber observed that satisfactory proof to establish substantial grounds that: "Lubanga is criminally responsible as a co-perpetrator for the charges made against him for the period beginning September 2002, when the *Forces Patriotiques pour la Libération du Congo (FPLC)* were founded, and ending 13 August 2003."⁴³ The Court made it clear that the subject matter of the offence was considered to be continuous; however, it limited its jurisdiction from September 2002 to August 2003, a timespan which is clearly under the temporal jurisdiction of the court. The court referred to the *actus reus* of this related continuous crime, which occurred or continued to happen after September 2002. In this sense, it is quite difficult to conclude that the court has made a retroactive judgement because the subject matter of the offence was still within the temporal jurisdiction of the court. The interpretation of the court seems logical in this sense, owing to the fact that if the crime is treated as continuous, it then continues to happen after the Rome Statute entered into force.

Considering the interpretation of the court, it should be analyzed whether Article 8(2)(b) (viii) is a continuous crime. The condition proposed here for the exercise of jurisdiction over continuous crimes is the *actus reus* of this related crime. This condition is based on the 'nature' of this crime. With regard to the case at hand, the question that arises is whether transfers of Turkish settlers into Cyprus territory and the presence of settlers in the island constitute continuing violations of Article 8(2)(b)(viii) of the ICC's Statute.

Article 8(2)(b)(viii) of the ICC's Statute: Is it continuous?

The main feature of the continuous crime is that 'it repeats itself every day', and thus a new offence is committed 'each day'.⁴⁴ This varies from an instantaneous offence, as the existence of a continuing offence is based on at least some minimum continuation of the act or omission, or the *actus reus* of the offence.⁴⁵ The significance of highlighting these features of continuous crimes stems from the fact that the Rome Statute does not prescribe which crimes are continuous in nature and what the minimum measure of time is for the establishment of their consummation. According to Feller, the continuous

42 Mohamed M. El Zeidy, "The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC," *International Criminal Law Review*, Vol. 5, No 1, 2005, p. 98.

43 Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Public Document Submission of the Prosecution's Updated Summary of Presentation of Evidence, Case No. ICC-01/04-01/06, 30 May 2008, para. 173.

44 *Parry v. Forest of Dean District Council*, Queen's Bench Division – Divisional Court, 34P&CR 209, 241 EG 387, (1977) EGD 856, 12 October 1976, p. 212; see also *Anderton v. Cooper*, Queen's Bench Divisional Court, 72 Cr App Rep 232, 145 JP 128, 17 November 1980, p. 235.

45 Shneur-Zalman Feller, "The Classification of Crimes in Respect of Continuity," *Israel Law Review*, Vol. 2, No 2, 1967, p. 234.

feature of an offence is sometimes “revealed by the operative words (*verbum regens*) of the statutory provision which defines the crime, and always by an analysis of the nature of the act in the light of the features mentioned.”⁴⁶

One may consider the main points as the *actus reus* of related crimes. The nature of the crime, namely whether it is continuous or not, would be readily apparent in the text of articles that define the crime itself and its elements. In relation to the case at hand, it should be considered whether war crimes were set out in Article 8(2)(b)(viii) as continuous crimes. According to the text of Article 8, the main element of this crime is ‘transfer’, an element which requires exhaustive analysis. For instance, Hulme explains that “the term transfer appears to indicate a permanent movement.”⁴⁷ Zimmerman applies a strict interpretation while considering the term ‘transfer’ in the context of the relevant article. Zimmerman explains the term transfer as follows: “the very term ‘transfer’ denotes a physical displacement of the persons to take residence in the respective occupied territories which transfer, once it has taken place, has come to an end, even if the respective settlers then remain in such territory.”⁴⁸

It is clear that ‘settlement activity’ was excluded from the context of the article. This is a crucial point because the settlement activity also affects the nature of this crime, namely whether it is to be considered continuous or not. Zimmermann asserts that the main *actus reus* of the crime is ‘transfer’, and due to the exclusion of settlement activity from the text of the article, he rejects the continuous nature of this related crime.⁴⁹ He questions whether providing “incentives, subsidies, exoneration of taxes and permits in favour of settlers” could attribute a continuing character to this action.⁵⁰ In his argument these acts are “only covered by the definition provided they lead to a transfer, which term constitutes the core of the *actus reus*, [but] not if they are being applied to settlers who have already previously been transferred into such occupied territories.”⁵¹ Thus, within the context of Zimmermann’s argument, it could be said that crime in Article 8(2)(b)(viii) is an instantaneous crime with permanent wrongful effects because the settlers’ transfer would have been completed when the settlers were settled in an occupied territory.⁵²

According to Kearney, Zimmermann’s argument is unconvincing because “a review of the drafting records shows no reference to the matter of continuing crimes in this regard.”⁵³ As explained before, there exists an explicit provision for the concept of ‘enforced disappearance’, which allows the court to conduct an investigation of such an enforced disappearance, though only if the attack occurs after the Statute’s entry into force. No special provision exists to limit the court’s jurisdiction over other such continuous crimes. On these grounds, it could be said that in relation to continuous crimes, there is only a specific exclusion for crimes against humanity, such as enforced disappearance, which has been regulated under the Elements of Crimes Article 7(1)(i).

46 Ibid., p. 234-235.

47 Karen Hulme, “Armed Conflict and the Displaced,” *International Journal of Refugee Law*, Vol. 17, No 1, 2005, p. 101.

48 Andreas Zimmermann, “Palestine and the International Criminal Court Quo Vadis? Reach and Limits of Declarations under Article 12 (3),” *Journal of International Criminal Justice*, Vol. 11, No 2, 2013, p. 324.

49 Ibid.

50 Ibid.

51 Ibid.

52 Ibid.

53 Michael Kearney, “The War Crime of Transfer of Civilians into Occupied Territory,” Manuscript submitted for publication, p. 2.

However, there was no clear intention under the Rome Statute to apply a similar exclusion to the transferring of populations into occupied territory. For Kearney, this crime was committed when civilians were transferred, and it will only end when the settlers vacate the occupied territory, thus for him the transfer of populations into occupied territory constitutes a continuous war crime.⁵⁴ Thus the court may interpret the term transfer as involving ‘settlement activity’. Jon Heller also explains that “the many documented cases of forcible transfer or displacement of civilians were identified as continuing crimes, as they could be regarded as continuing until the civilians are allowed to return.”⁵⁵

If the court interprets the term transfer as involving ‘settlement activity’, the gravity of so-called Turkey’s resettlement activity should be assessed in relation to its magnitude. A gravity test in this case is important for the Court when taking the case under its jurisdiction, because the gravity of the crime that was allegedly committed by Turkish officials is not just an issue in terms of admissibility, it is also important in terms of sentencing.⁵⁶ Regarding the gravity of a crime, Article 17(1)(d) of the Rome Statute states that ‘the Court shall determine that a case is inadmissible where, the case is not of sufficient gravity to justify further action by the Court’. It has been called a ‘gravity threshold’, and it can play a crucial role in directing the Prosecutor’s selection of both situations and cases. The ICC was not established to deal with every single incidence of war crimes, only the most awful and systematic ones. Although the gravity threshold is established in Article 17, the meaning of ‘gravity’ is still not well defined under the Rome Statute. Thus, assessment of the term in relation to crimes committed remains an issue of substantial dispute.⁵⁷

In evaluating the gravity of a situation or case, the prosecutor has established some criteria in order to determine how grave each situation or case is.⁵⁸ The Office of the Prosecutor has considered a number of criteria, which include: “the scale of the crimes, the severity of the crimes, and the systematic nature of the crimes, the manner in which they were committed, and the impact on victims.”⁵⁹ Referring to Article 49(6), Kontorovich claims that “the deport-or-transfer provision, is not a grave breach, and is not treated as such by the Rome Statute.”⁶⁰ The justification for Kontorovich’s point of view in terms of not treating this settlement activity as a grave breach appears to be the lack of direct victims. According to Kontorovich, the reason might be that the prosecutor has already said that the key criterion is the ‘number of victims’, especially the number who have been gravely harmed.⁶¹ Mostly, this method “measures gravity by the number of victims of violence, including injured, raped and

54 Ibid.

55 Kevin Jon Heller et al., “Milestones in International Criminal Justice: The ICC and Palestine,” *International Law Programme Meeting Summary*, 2014, p. 3,

http://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20141202ICCPalestine.pdf (Accessed 10 July 2020).

56 The statute does not specify the components of gravity in a sentencing context.

57 Susana SáCouto and Cleary Katherine, “The Gravity Threshold of the International Criminal Court,” *American University International Law Review*, Vol. 23, No 5, 2007, p. 807.

58 Eugene Kontorovich, “Israeli Settlements and International Criminal Court Jurisdiction,” https://www.researchgate.net/publication/256051672_Jurisdiction_over_Israeli_Settlement_Activity_in_the_International_Criminal_Court, 2013, p. 21, (Accessed 23 August 2021).

59 SáCouto and Katherine, “The Gravity Threshold,” p. 809-810.

60 Kontorovich, “Israeli Settlements,” p.26.

61 Ibid., p.21.

tortured.”⁶² This raises the question of how the prosecutor evaluates ‘victims’ of resettlement.⁶³ The offence of deportation or transfers of populations into occupied territory offers a notable challenge for the classic definition of the term ‘victim’. Thus, due to the lack of deaths or violence during this activity, the resettlement would not appear to constitute a ‘grave’ crime. If the prosecutor’s gravity test is applied, due to the lack of individual victims and slaughter, the settlement activity may be treated as less atrocious in the case of Cyprus.

Conclusion

It has been commonly assumed that an international court is an inherently legal institution and a symbol of the international rule of law; thus its decisions should be purely judicial. But due to the *sui generis* character of the Cyprus issue, the potential judgment of Turkish citizens in this case may have both legal and political outcomes.⁶⁴ Yet, apparently, due to the political nature of the main issue, the distinction between judicial and political grounds would not be clear. Thus, the *sui generis* existence of the TRNC makes it difficult to obtain a logical and legal decision that is beyond dispute.

In this study, firstly, the general pre-conditions for the practice of jurisdiction have been scrutinized. The statehood of the TRNC as a pre-condition has been examined. The issue has been discussed with respect to the previous practice of the Court in the case of Palestine. Relying on decisions made by various international bodies, it has been argued that the Prosecutor may follow the decisions of the UN concerning the statehood of the TRNC. Considering the related resolutions of the UN, which refer to the universal non-recognition of the TRNC, the Prosecutor will likely follow the decisions of the UN. In this regard, the alleged offences would be arguably committed in the territory of a state party, the RoC.⁶⁵

Regarding the Court’s temporal jurisdiction, the focus was the *actus reus* of the offence, which was analyzed whether it is a continuous crime or not. It was argued that the transfer activity happened within a limited timeframe, which remains outside the court’s temporal jurisdiction if it is not a continuous crime. The RoC joined the ICC in 2002; thus the court may prosecute incidents, if they took place after 2002 because, as has been widely accepted, the ICC lacks temporal jurisdiction over any act that occurred before the Rome Statute entered into force.⁶⁶ In the case at hand, it can be said that the transfer activity was mainly completed in the 1970s. Thus, even if the crimes were accepted as continuous crimes, the ICC would only investigate those crimes that were allegedly committed after 2002. The statistics indicate that the scope of the action – the transfer of populations into Cyprus – has remained too weak⁶⁷ since then to establish such an action. Yet, it would not be weak for the case

62 Ibid., p.21.

63 Ibid., p.24.

64 There is the critical question of individual responsibility. The problem lies in the fact that the ICC is mandated to prosecute individuals, not groups or states. In the Cyprus case, the decision to intervene in Cyprus was taken by Bülent Ecevit (Prime Minister, who was also the leader of the Democratic Left Party) and Necmettin Erbakan (Vice Prime minister, who was also the leader of the Welfare Party) who are no longer alive. Therefore, a prosecution would confront the problem of identifying the individuals responsible for the so-called crimes in question.

65 Şehmus Kurtuluş, “Reassessment of Turkey’s Objections to the Exclusion of Terrorism from the Rome Statute,” *Uluslararası İlişkiler Dergisi*, Vol. 16, No 64, 2019, p.160.

66 Uganda ratified the Statute on 14 June 2002, <https://www.iccnw.org/?mod=country&iduct=181> (Accessed 3 June 2019.)

67 Ayla Gürel, *Displacement in Cyprus Consequences of Civil and Military Strife, Turkish Cypriot Legal Framework*, Oslo, Peace Research Institute Oslo, 2012, p.10.

of Palestine because, as a state policy, mass forced displacement of Palestinians by the Israeli government has increased since 2002. Thus, the scale of transfer activity in the case of Palestine would likely be sufficient to pass the gravity test.

If the Court attaches 'settlement activity' to their interpretation of Article 8(2)(b)(viii), it should be decided whether Turkish settlements fall under the ICC's definition of war crimes. As previously analyzed, due to the lack of individual victims and slaughter, the settlement activity would not be sufficient to pass the gravity test. Under the prosecutor's gravity test, not only can the settlement activity not meet the requirements of the gravity threshold, but neither can the population transfers into so-called occupied territories. This is because it is quite difficult to establish direct victims of these actions since 2002 in our case. Thus, once again, it seems to be that, in the case of Cyprus, the so-called population transfers and the so-called settlement activity since 2002 may not reach the criminal urgency threshold necessary in order to become a case that is justiciable before the ICC.

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