

Organized Crime-Related Legislation in the Turkish Criminal Law*

Rahime ERBAŞ**

Abstract

The issue of organized crime has different dimensions in criminal law because of the dangers it presents to society, the commitment of those involved to engage in criminal conduct, and the complexity and transnational character of the criminal organizations. To put it differently, the cases linked to criminal organizations must be handled differently than crimes not committed by a criminal organization. On one hand, fighting against organized crime has to be conducted in an effective way to protect public order and individuals and, on the other hand, the fundamental principles of law have to be ensured. To that point, it is important for the lawmaker to decide between politics and criminal law. First, the study will focus on what should be considered an illicit act punishable by criminal law and what the range of punishment should be. Next, whether or not the

* This is revised version of the paper previously presented at the Bosphorus Seminar-Comparative Law Criminal Law Workshop (Turkish, German and Hungarian Criminal Law), 20-27 June 2014, at University of Istanbul, Faculty of Law. The study therefore provides insights into law in force in 2014. The author expresses her deepest grateful thanks to *Prof. Michael K. Steenson*, from William Mitchell College of Law, St. Paul, Minnesota, United States, for his reviews, valuable comments, and encouragement. Also, the author is highly thankful to *Jessica Poarch Hernandez, Esq.*, from South Texas, United States, for her useful suggestions and encouraging comments, and feedbacks.

** *Rahime Erbaş*, Ph.D. candidate, works as a research assistant at the University of Istanbul, Faculty of Law, The Chair of Criminal Law & Criminal Procedure Law, Turkey.

lawmaker may deviate from the prerequisites of criminal procedure by arguing that they fail to adequately deal with organized crime will be discussed. Last, the study will consider other issues such as, do we need a specific execution system. This study aims to show an outlook of legislation related to organized crime in Turkish criminal law by presenting the key statutes through the core analyses.

Key words: Organized crime, criminal organization, public peace, public order, forming and managing criminal organization, aiding, making propaganda, criminal coercive measures, active remorse, execution, conditional release, witness protection program

I. Introduction

The cases in which a group of people gets organized for the purpose of committing crimes differ from cases involving an immediate commission of a single crime and, therefore, requires a different criminal law approach. In other words, the continuing dangerousness of these sorts of groups to the society, their commitment to commit crimes and the complexity of cases as multiple people get involved with various motivations such as political or monetary, and its transnational character render this type of criminal activity both difficult and different¹. This is often called “*organized crime*” which refers mostly to the criminological perceptions and approaches².

The reflection of criminal law on the issues of “*organized crime*” has different dimensions. First, a substantive law aspect is crucial to decide which acts have to be criminalized and to what extent should they be punished. In the proper sense of application of criminal law, the components of crimes related criminal organizations play a significant role so that international agreement such as United Nations Convention against Transnational Organized Crime called also Palermo convention³ or regional provision such as Recommendation Rec (2011) 11 of Council of Europe tried to put across some certain criteria

¹ See also Adem Sözüer, “Organize Suçlulukla İlgili Kovuşturma Yöntemleri (İletişimin Denetlenmesi)”, *Legal Hukuk Dergisi*, no.10, October 2003, p. 2495.

² İzzet Özgenç, *Suç Örgütleri*, 6th edn, Seçkin Yayıncılık, Ankara, 2013, p.11.

³ In Turkey, the Palermo Convention was put into effect by the Code Nr. 4804/2003.

and standards such as having *at least three members* or coming together to commit a crime *for a period of time* in order to settle for the existing of crimes related to organized crime. Correspondingly, the most important questions to be answered regarding substantive criminal law are what justifies the intervention of criminal law in organized crime and which legal interest criminal law should protect. Secondly, a procedural point of view asks what kind of criminal law measures can be imposed through investigation and prosecution of crimes related organized crime. The core point concerning criminal procedure is what justifies deviating from a traditional application of criminal procedures, such as holding the suspect in custody for a longer period of time than in other cases.

It is noticeable that the nature and complexity of organized crime causes dispersed and complex statutes and a variant case law that changes from time to time, which breach the general principles of criminal law such as respect to human dignity, legality principle, presumption of innocence, right to fair trial, principle of *nemo tenetur*, the principle of equality of arms, the rule of law and right to privacy, etc. In that respect, what is significantly important is to create a legal structure which is able to deal with the issue of organized crime efficiently and protect public order while keeping in line with the fundamental principles of criminal law. This is emphasized by *Claus Roxin*, a German criminal law scholar, who wrote that on the one hand a state under the rule of law has to protect the individuals through criminal law but on the other hand, it has to protect individuals from criminal law⁴. In that respect, the countervailing legal interest is the core concept of public peace, which justifies the criminalization of organized crime. In this context, this study's main purpose is to introduce an outlook of Turkish legislation on the issue of organized crime by unveiling legislation history and dividing the current statutes of criminal law into three main parts- substantive, procedural and execution.

⁴ Claus Roxin, *Strafrecht: allgemeiner Teil Band I, Grundlagen, der Aufbau der Verbrechenlehre*, 4th edn, Beck, München 2006, § 5. Das Gesetzlichkeitsprinzip, p. 138, Rn:1.

II. Backdrop

The first regulation regarding organized crime is found in the last period of Ottoman Empire⁵. The Ottoman Criminal Code of 1858 which was codified from the French Criminal Code of 1810⁶ addressed the issue of organized crime in Art. 55, 56, 57 and 58 under the title of *crimes (two types of crime as Jinayets and Junhas) against Security of Ottoman Empire*⁷. These provisions referred mostly to *the riotous acts*, which show that the reason to punish the organized criminal activity was based on the idea that organizing with the purpose of committing crime was against the State⁸. Subsequently, arming people was criminalized as well.⁹ To illustrate, Art. 56 says “*Whosoever dares, make the people of the Ottoman dominions arm themselves against each other, to*

⁵ At the last period of Ottomans called as *Tanzimat*, main codes were regulated by taking codes of the European States as model. The Criminal Code was one of them and codified from French Penal Code of 1810. Regarding *Tanzimat Period* see Halil İnalçık, “Tanzimat Nedir?” *Tarih Araştırmaları*, no. 1, 1941, pp. 258- 260, <http://www.inalcik.com/images/pdfs/89230630TANZiMATNEDiR.pdf> (last accessed: 07. 08. 2014).

⁶ Mehmet Gayretli, “1858 Osmanlı Ceza Kanununun Kaynağı Üzerindeki Tartışmalar ve Bu Kanuna Ait Bir Taslak Metninin Bir Kısmıyla ilgili Değerlendirmeler”, p.2, <http://www.e-akademi.org/makaleler/mgayretli-2.pdf> (last accessed: 06. 08. 2014).

⁷ John Strachey Bucknill & Haig Apisoghom S. Utidjian (translators), *The Imperial Ottoman Penal Code*, Humphrey Milford/Oxford University Press, 1913, pp. 45- 54; See also Mustafa Şentop, *Tanzimat Dönemi Osmanlı Ceza Hukuku, Kanunlar- Tadiller- Layihalar- Uygulama*, 1st edn, Yaylacık Matbaası, İstanbul, October 2014, pp.44- 46.

⁸ For example see Art. 58 of the Criminal Code of 1858 reads as “*Where a conspiracy is formed amongst some persons with the design of carrying out one of the riotous acts set forth in Arts. 55 and 56 and apart from the deliberation and decision for the carrying out of the riotous act resolved upon in such conspiracy some acts or measures for preparing the means of carrying it out have been also begun the persons included in such conspiracy are punished with the punishment of perpetual exile if the matter of sedition has not yet come to the stage of actually carrying out; and if no act or measure for preparing the means of the carrying out of the riotous act as aforesaid is proved to have been attempted in any such conspiracy and all that has taken place consists only of a deliberation and decision for carrying it out, in that case the persons included in the conspiracy are temporarily confined in a fortress; and again if a proposal has taken place as to forming a conspiracy for the purpose of carrying out one of the riotous acts set forth in the two Articles above mentioned and it has not been accepted the person making that proposal is imprisoned for from one year to three years”*. (Bucknill/ Utidjian, pp. 49- 50).

⁹ Bucknill & Utidjian, p.48.

instigate or incite them to engage in mutual slaughter, or to bring about acts of rapine, pillage, devastation of country or homicide in divers places is, if the matter of disorder comes into effect entirely or if a commencement of the matter of the disorder has been made, likewise put to death"¹⁰. The Ottoman Criminal Code of 1858 was in force until 1926 when a new criminal code codified from the Italian Criminal Code of Zanerdelli¹¹ was enacted as the first criminal code of the new state, Republic of Turkey. The first criminal code of Turkey which was in force between 1926 and 2005 dealt with the issue of organized crime in Art. 313¹² and 314¹³, entitled "*those forming an organization to commit crime*".

¹⁰ Bucknill & Utidjian, p.48.

¹¹ Durmuş Tezcan, "Cezai Konularda Türk-İtalyan İlişkileri", *Ankara Barosu Dergisi*, vol. 49, no.1, 1994, p.365, <http://dergiler.ankara.edu.tr/dergiler/42/462/5291.pdf> (last accessed: 07. 08. 2014).

¹² Art. 313 of the Criminal Code of 1926 reads as "*(1) Anyone who forming an organization to commit crimes or to participate in these organization shall be punished from a year up to two years imprisonment.*

(2) If this organization is formed to create fear, anxiety and panic in the public or with a purpose arising from a political or social opinion or to commit crimes against public order, murder, robbery, interception and abduction, the punishment will be given from a year up to three years imprisonment.

(3) If at least two or more participants of organization walk around by carrying arm in the mountains and in the countryside or on the public roads or in the residential areas or store guns in the meeting place or in a safe place, the punishment will be given from a year up to three years imprisonment in the cases of the subsection 1 and two years up to four years imprisonment in the cases of the subsection 2.

(4) The punishment for the managers of organization pursuant to the previous subsections shall be increased by one third to half.

(5) If the participants of organization commit the targeted crimes, the amount of punishment shall not be exceed the maximum amount of punishment of the heaviest crime in that.

(6) The organization stipulated in this article come into being with unification of two or more persons with the purpose of committing crimes.

(7) Special provisions in this law and in the other laws are preserved."

¹³ Art. 314 of the Criminal Code of 1926 reads as "*Anyone knowingly and willingly showing shelter or providing with food or arms and ammunition or helping those who are the participants of the organization formed according to the previous article shall be punished from six months up to one years imprisonment. If this help is conducted within associations, political parties, labor and professional organizations or in the buildings, locals or extensions belonging to their subsidiaries in education institutions or in a student dormitories, punishment of this subsection shall be doubled. The punishment for those who sheltering or providing food and drink to her or his relatives from her or his ascendants and descendants shall be reduced by half to two-thirds*".

Politically motivated criminal organizations became an issue for Turkey's lawmakers while the Criminal Code of 1926 was in force. In fact, at that time, the prevailing incident of organized crime was terror organizations, especially the terrorist organization *PKK*. Yet, it was not until the 1990s when Turkey, facing the most serious forms of terror activities,¹⁴ enacted the Anti-Terror Code of 1991 which defines what a terror organization is, what activities are terroristic and who the criminals involved in terror are. Although it has been amended many times, the Code is still in force¹⁵.

At the end of the 1990s, monetarily motivated criminal organizations began to be considered as organizations which necessitated special provisions. Hence, in the year of 1999, Turkish lawmakers pushed for a separate code to tackle the issue of *profit-oriented criminal organizations*. The Code created a system to regulate every aspect of profit-oriented criminal organizations, including criminal procedure¹⁶. More concretely, it defined what a profit-oriented criminal organization was and stipulated some acceptable criminal procedure measures such as wiretapping and recording of telecommunication, appointing a confidential investigator, and accessing and analyzing personal data¹⁷. There were also some provisions regarding the protection of witnesses. Additionally, the

¹⁴ Abdulkadir Baharççek, "Etnik Terör ve Etnik Terörle Mücadele Sorunu", *Fırat University Journal of Social Science*, vol. 10, no.1, 2000, p. 12, <http://web.firat.edu.tr/sosyalbil/dergi/arsiv/cilt10/sayii/011-028.pdf> (last accessed: 14. 08. 2014).

¹⁵ Regarding criticts on the Anti-Terror Code see Bülent Tanör, "Terörle Mücadele Kanunu Üzerine İlk Düşünceler", *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni (MHB)*, vol. 10, no. 1-2, 1990, pp. 165- 166; Also see Zeki Hafızoğulları & Günal Kurşun, "Türk Ceza Hukukunda Örgütlü Suçluluk", *TBB Dergisi*, no. 71, 2007, pp. 55-57, <http://tbbdergisi.barobirlik.org.tr/m2007-71-334> (last accessed: 14. 08. 2014).

¹⁶ As to provisions of this code on wiretapping and recording of telecommunication see Adem Sözüer, "Türkiye'de Karşılaştırmalı Hukukta Telefon, Teleks, Faks ve Benzeri Araçlarla Yapılan Özel Haberleşmenin Bir Ceza Yargılaması Önlemi Olarak Denetlenmesi", *Prof. Dr. Türkan Rado'ya Armağan Sayısı, İÜHFEM*, vol. 55, no. 3, 1997, pp. 83- 85.

¹⁷ See Sözüer, "Organize Suçlulukla İlgili Kovuşturma Yöntemleri (İletişimin Denetlenmesi)", pp. 2497-2498.

Code stated that crimes linked to the profit-oriented criminal organizations shall be investigated and prosecuted in State Security Court (shortly referred as DGM), which consisted of three Judges, one being a soldier. This Code was repealed in 2005 by the Code of 5320 which regulates the enforcement and application of the new Turkish Criminal Procedure Code of 2005. Regarding profit-oriented criminal organizations, there was the Anti-Smuggling Code of 2003, which punished forming and managing a criminal organization that committed crimes linked to smuggling activities listed in the Code. This Code was repealed in 2007. As opposed to the former Code, the New Anti-Smuggling Code of 2007 stipulates only that committing crimes linked to smuggling activities listed by the Code within a criminal organization requires heavier punishment.

It can be concluded from these provisions that this organized crime legislation was dispersed and not unified in Turkish criminal law. These special Codes were intended to address specific problems based on the shifting motivations behind organized crime. They were a product of their times. Each legislative act was specific to organized crime, but the acts encompassed all aspects of criminal law, including substantive and procedural. This may lead to a breach of the principle of equality granted in Art. 10 of the Turkish Constitution. The difficulty is that, although the cases linked to organized crime are complex and vary in motivation (e.g., political or monetary etc.), it is necessary to set up a legislative system for organized crime issue which is unified and well-structured.

This outlook, today, seems to have been changed in key respects through the reforms of 2003¹⁸. First, the new Criminal Code defines crimes related to organized crime in Art. 78, 220 and 313. Second, procedural reflection of criminal law, such as coercive measures or

¹⁸ This was a result from the reform process in terms of law that was launched in the year 2003 and main codes such as the Criminal Code, the Procedure Code, the Execution Code, the Anti-Smuggling Code, the Code Regarding Administrative Crimes, and Child Protection Code etc. were taken in force in this period. Regarding the reform process see Adem Sözüer, "Reform of the Turkish Criminal Law", in Adem Sözüer (Eds.), *Dünyada ve Türkiye'de Ceza Hukuku Reformları Kongresi*, Vol: I, On İki Levha, İstanbul 2013, pp. 109- 112.

witness protection, are regulated in the general part of the Procedural Code, with exceptions for organized crime. Similarly, regulations for execution are placed in the Execution Code. The anti- terror code is in force for terror organizations.

III. The Terms and Scope

Crimes committed within a criminal organization are often referred to as “*organized crime*”, which reflects mostly the criminological perceptions and approaches¹⁹, of which there is no definition in Turkish legislative acts. The lawmaker decides which acts within the organized crime should be focus of criminal law. As a consequence, criminal law includes certain types of crime committed within the criminal organization, as well as forming, managing and being a member of a criminal organization. In doing so, the limits of criminal law intervention have to be identified in the area of organized crime which do not only consist of law, but also the sociological, psychological, economical and criminological aspects of organized crime. In this way, it requires adopting both a multi- and intra-disciplinary approach²⁰. Hence, the field of interest of criminology is much broader than criminal law. This study takes its source from criminal law and focuses on only the crime types regulated in Art. 220 of the Turkish Criminal Code of 2005 regarding criminal organization. The main purpose is to show the reflection of the Turkish criminal law in the issue of “*organized crime*”.

The Turkish criminal statutes do not explicitly define in a sentence what a criminal organization is, but the Turkish Criminal Code in Art. 6/j defines *criminal involved in criminal organizations* as a person who forms, manages, is a member of the criminal organization or commits a crime for the criminal organization²¹. Furthermore, regarding the terror activities, the lawmakers specified the targeted criminals by providing

¹⁹ Özgenç, p. 11.

²⁰ Chris Hale, Keith Hayward, Azrini Wahidin & Emma Wincup, *Criminology*, 2nd edn, Oxford University Press, United States, 2009, p.324.

²¹ See also Veli Özer Özbek, *İnfaz Hukuku*, 5th edn, Seçkin Yayıncılık, Ankara, 2014, p.388.

a definition in the Anti-Terror Code. In this direction, Art. 2 of the Anti-Terror Code defines *criminal involved in terror* as a person who is participant in a criminal organization formed to reach the targets stipulated in the 1st Art²² and who commits the crime for these purposes either on her/his own or in company with others or who becomes a member of that organization even if she or he does not commit the targeted crimes. Those who commit crime for the terror organization are treated as a criminal involved in terror, even if they are not members of the organization.

IV. What is a Criminal Organization under the Turkish Criminal Law?

The Turkish Criminal Code specifies what the components of a criminal organization are in the definition of crimes considered as criminal organization-related crimes (e.g., forming or managing a criminal organization with the purpose of committing crimes, being a member or aiding or making propaganda of these sort of organizations). These components can be listed as below;

A. The Size of the Group

Organization ensures that the participants can more easily achieve their goals that is to commit crime²³. This requirement is widely accepted²⁴. What varies in legal systems in the world is the number of people involved in the organization needed to establish the existence of a criminal organization. For purposes of uniformity, the Palermo Convention stipulates explicitly that "*organized criminal*

²² The 1st Art. reads as "*Terror means all kinds of criminal acts which is/are performed by this or those being member of terror organization that shuffling the qualifications of the Republic specified in the Constitution, political, legal, social, secular and economic system, breaking the unitary integrity of the State and nation, endangering the existence of the Turkish State and Republic, weakening, destroying or overtaking the authority of the State, annihilating the fundamental rights and freedoms and disrupting internal and external security of the State, rupturing the public order or public health by using force and violence and through the methods of pressure, frightening, intimidation, suppression and threat.*"

²³ Özgenç, p.15.

²⁴ Hale, Hayward, Wahidin & Wincup, p.325.

group shall mean a structured group of three or more persons”²⁵ which is of a verbatim acceptance by Recommendation Rec (2011) 11 of Council of Europe²⁶. As for Turkish law, subsection 1 of Art. 220 of the Code says “...the amount of member of a group has to be at least three in order to be considered as an organization.” A criminal organization means a group of people which is composed of three or more persons under the current Criminal Code as opposed to the former code, which required two persons for the existence of an organization²⁷.

Whether the person becoming the member of the organization must have legal capacity or not is controversial among the scholars²⁸. It should be pointed out that their lack of legal capacity is not taken into account in determining the amount of members of the organization. However, it can be important to decide if the organization is efficient to commit the targeted crimes or not²⁹.

These criteria were not stipulated in the draft of the new Code when it was first introduced to the Parliament, but it was added later to be consistent with the United Nations Convention, Palermo Convention, when it came into the force in 2005³⁰.

²⁵ “(a) “Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;...” (United Nations, United Nations Convention against Transnational Organized Crime and The Protocols Thereto, New York, 2004, p.5, <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> (last accessed: 11. 07. 2014)).

²⁶ *The Council of Europe, Recommendation (2011) 11 of Committee of Ministers to member states concerning guiding principles on the fighting against organized crime*, http://www.coe.int/t/dlapil/codexter/2_Adopted_Texts/CM%20Rec%20%282001%29%2011%20E.pdf (last accessed: 28. 04. 2015).

²⁷ Özgenç, pp.18-19; See also Doğan Soyaslan, *Ceza Hukuku Özel Hükümler*, 8th edn, Yetkin Yayıncılık, Ankara, 2010, p.532.

²⁸ Fora discussion see Soyaslan, p. 532; Nevzat Toroslu, *Ceza Hukuku Özel Kısım*, 5th edn, Savaş Yayınevi, Ankara, 2010, pp. 260- 261; also see Hafizoğulları & Kurşun, p. 36.

²⁹ It is pointed out that three people cannot be efficient to commit a crime against security of State, whereas it can be efficient for the crimes against property. See the legislative history of Art. 220.

³⁰ See the legislative history of Art. 220.

B. Hierarchical Structure

Whether a criminal organization must have a hierarchical structure is debated in the Turkish criminal law doctrine, because the Criminal Code does not state explicitly that a criminal organization has to have such an internal structure. Some scholars argue that there is no need for this sort of structure³¹; others take the position that it is required³². Supportive views are based on the crime called *aiding the criminal organization* which are regulated in the subsection 7 of Art. 220 of the Code reads as “.. any person who aids a criminal organization although he or she does not take part in the hierarchical structure of the organization shall be punished as if he or she was a member of that organization”. This definition shows that a criminal organization has to have its own hierarchical structure. In addition to this, it was stated in the legislative intent of Art. 220 that a criminal organization implies a hierarchical structure in its composition since a criminal organization differs from a simple participation in commission of crime in terms of its way of being a union which dominates over its members. Therefore, there must be either a loose or a strict hierarchical structure³³.

C. Continuity

To gather to commit a certain crime as a way or a form of committing a crime implies participation in the crime which is

³¹ Soyaslan, p.529; Toroslu, p. 261.

³² Özgenç, p. 15; Bahri Öztürk, Durmuş Tezcan, Mustafa Ruhan Erdem, Özge Sırma, Yasemin F. Saygılar Kırıt, Özdem Özyayın, Esra Alan Akcan & Efser Erden, *Nazari ve Uygulamalı Ceza Muhakemesi Hukuku*, 6th.edn, Seçkin Yayıncılık, Ankara, 2013, p.798; A. Caner Yenidünya & Zafer İçer, “Suç İşlemek Amacıyla Örgüt Kurma Suçu”, in *Prof. Dr. Nur Centel’e Armağan*, vol. 19, no. 2, 2013, p.802, http://dosya.marmara.edu.tr/huk/fak%C3%BClitedergisi/nurcentel/caneryenid_nya.pdf (last accessed: 14. 08. 2014); see also Vesile Sonay Evik, “Suç İşlemek Amacıyla Örgütlenme Suçu”, in *Prof. Dr. Nur Centel’e Armağan*, vol. 19, no. 2, 2013, pp. 677-678, <http://dosya.marmara.edu.tr/huk/fak%C3%BClitedergisi/nurcentel/vesilesonayevik.pdf> (last accessed: 14. 08. 2014).

³³ See the legislative history of Art. 220; Also some scholars argue that hierarchical structure within the organization should be formed in an illegally way due to the fact that an ordinary public institution has also a hierarchical structure, but it is formed and performed legal way. For this opinion see Özgenç, p.17.

regulated in the general part of the Criminal Code³⁴. What makes criminal organization different from simple participation in a crime is the continuity³⁵. Even if the Code does not stipulate explicitly that a criminal organization has to be formed for continuity, it is admitted that this sort of organization is neither formed nor managed for immediate commission of a single crime³⁶. Upon closer examination, it does not include the random agreement for the immediate commission of a single crime. Therefore, forming and managing an organization are considered as continuous crimes³⁷.

D. Efficiency/ Suitability to Commit Targeted Crimes

A criminal organization is established to commit crimes, although the motivation for the organization varies. For example, a politically motivated criminal organization may be considered a terror organization. And, it can be formed for monetary profit. As to the targeted crimes, unlike the legislation in other countries, there is no explicit expression in the Turkish Code saying that organization commits *an intentional crime*. Indeed, there is no need to express it in a statute because participation to commit a negligent crime is not possible at all. Also pursuant to the Turkish Criminal Code, there is no certain type of crime (e.g., crimes against life or property) which the criminal organization aims to commit that are not determined by the Code as well. Therefore, they can be organized for commission of every kind of crime types defined by law³⁸.

Criminal organizations engaging in organized crime seek efficiency in structure, membership, and equipment to facilitate the criminal conduct, which plays a significant role in the criminalization of organized crime by the law. To illustrate, three members for a criminal organization may not be enough to be efficient to commit a crime against state security³⁹.

³⁴ See Özgenç, p.16.

³⁵ Öztürk et al., p. 801.

³⁶ Özgenç, p. 16; Soyaslan, p. 529; Yenidünya & İçer, p.800; Sonay Evik, p. 682.

³⁷ Toroslu, p. 261; Özgenç, p. 21.

³⁸ See also Sonay Evik, p. 675.

³⁹ See the legislative history of Art. 220.

It is also stated in Turkish doctrine that the time and place at which the crime is committed must be considered in determining the efficiency as well⁴⁰. However, a problem arises in determining efficiency because it is the judge who ascertains efficiency by taking into account an organization's structure, the number of its members and their equipment, whether the organization is efficient to commit the crimes the organization intends⁴¹, and this in turn can lead to arbitrariness. In some cases, the evidence is clear on the efficiency issue. For example, three people with no gun cannot commit a crime against state security. Yet, this is not so clear in many cases, which necessitates an assessment by a judge. However, it is important to note that the same analysis applies to the issue of *attempt to commit a crime*, as Art. 35 of the Turkish Criminal Code criminalizes the attempt only if it is directly performed through *an efficient act* by the perpetrator and cannot be completed due to the reasons external to the perpetrator. The core point here is that codifying every single human behavior defined by place, time, tools and ways to perform the act which constitutes a crime defined by law, is almost impossible. Therefore, a judge will always exercise some discretion in deciding the issue within the context of a specific crime.

V. What is the legal interest protected through the regulation of organized crime?

The concept that everyone has a right to live in society based on security and peace⁴² is reflected in the criminal law on the issue of organized crime. In that respect, public security and peace are ambiguous concepts as they relate to each other. They also have no recognized definition in Turkish law so far, either in the Code or in the doctrine, but the reason is that these concepts are covered in the

⁴⁰ Soyaslan, p. 531, the author also argues that the concept of clear and present danger existing in common law systems should have been sougheed out and situated in the Code.

⁴¹ Özgenç, p.19; Yenidünya & İçer, pp.803-804; Sonay Evik, p. 682.

⁴² See the legislative history of Art. 220.

core of acts of criminalization of criminal organization. In fact, every type of crime does violate the public security and peace in various forms; however, some of them - within the criminal organization-breach the public peace to such an extreme that they undermine public peace in essence and hence is directly related to the public peace. In that regard, these types of crimes are considered as a threat of “*prospective crime*”⁴³. Therefore, the criminal liability has been shifted to an earlier stage by criminalizing preparatory activity⁴⁴. Organizations with the purpose of committing crime and having enough power and commitment to violate the law, and acting continuously, are mainly seen as a threat of *public security and peace*. To that effect, Turkish law makers have regulated crimes regarding criminal organization as *crimes against public peace*⁴⁵ in the Fifth Section of the Criminal Code which falls in *crimes against community* in the Third Chapter⁴⁶. In Turkish doctrine, public peace is defined as social order which is shaped by the legal norms regulating the social life relationships and herewith covers *social tranquility, peace and security*⁴⁷.

VI. The Regulations Related Organized Crime

Dealing with the issue of organized crime though the criminal law may create different outcomes. Firstly, it should be decided which acts are going to constitute a crime and what punishment should be imposed by law, which concerns, the criminal code. Therefore, **the first group of legislation** regarding organized crime is primarily in the specific part of the Turkish Criminal Code

⁴³ Toroslu, p. 249;

⁴⁴ Özgenç, pp.12-13; Yenidünya & İçer, p. 799.

⁴⁵ The crimes listed in this section as crimes against public peace follows: threats to create fear and panic among people (Art. 213), incitement to commit a crime (Art. 214), glorifying crime and criminal (Art. 215), incitement of people to hate and hostility or humiliating the public (Art. 216), Incitement to disobey the law (Art. 217), the abuse of religious services in the course of duty (Art. 219) and the forming an organization with the purpose of committing crime (Art. 220, 221).

⁴⁶ Özgenç, p.13; Yenidünya & İçer, p. 799; See also Sonay Evik, pp. 670- 671.

⁴⁷ Toroslu, p. 249.

covering types of crime. These are primarily forming or managing a criminal organization with the purpose of committing crime, being a member or aiding or making propaganda of this sort of organization in Art. 220 of the Turkish Criminal Code. It identifies five main types of organized crime with seven subsections which are classified as general organized crime types. Also, there are some specific organized crime types along with the Art. 220, 78 and 314 of the Code.

Art. 78 punishes the formation and management of a criminal organization whose focus is commission of certain crimes listed in Art. 76 and 77 of the Code. These crimes are classified as international crimes, which are crimes of genocide (in Art. 76) and crimes against humanity (in Art. 77). Due to the gravity of these types of crimes, law makers intended to punish these crimes more severely than the crimes defined in Art. 220. That is to say, Art. 78 imposes punishment from ten to fifteen years, whereas Art. 220/1 stipulates that the punishment is from two years up to six years. There is also no time limit for enforcement under the Art. 78 as opposed to Art. 220. As for Art. 314, entitled as "*armed criminal organization*", it punishes the forming, managing an armed criminal organization targeted to commit certain crimes which are against security of the State listed in the fourth section and those crimes against constitutional order and functioning of constitutional order listed in the fifth section of the fourth chapter of the Criminal Code. This article imposes sentences of ten to fifteen years imprisonment. Furthermore, regarding terror activity, the Anti-Terror Code also defines the crime called "*forming terrorist organization*" in Art. 7, stating that those who form and manage a terror organization or become a member of it to commit the crimes listed in Art. 1 of the Anti-Terror Code by using force and violence and through the methods of pressure, frightening, intimidation, suppression and threat, shall be punished pursuant to Art. 314 of the Criminal Code. Indeed, the crimes listed in Art. 1 of Anti-Terror Code are against security of the State and against constitutional order and functioning of constitutional order, which are defined by Criminal Code, just as in Art. 314 of the Criminal

Code⁴⁸. This study aims to give a brief overview of the organized crime types regulated in Art. 220 of the Criminal Code entitled as “forming criminal organization with the purpose of committing crime”.

The second group is related to special provisions that aggravate the punishment. Committing some crimes defined by law through or within a criminal organization is considered an aggravating circumstance in terms of the punishment in Turkish criminal law. However, there is no general rule in the Code to aggravate the punishment for all crimes committed in criminal organization; rather this is prescribed as an aggravating reason in certain specific crime types. To illustrate, migrant smuggling within a criminal organization requires more severe punishment than the basic form of the crime of migrant smuggling in Art. 79. Another example is forcing a person into prostitution within a criminal organization. That crime also requires more severe punishment.

Defining crimes concerning organized crime in the criminal code is not adequate, however. It is necessary to have some specific procedural structure to tackle on the issue of organized crime which is emerged by the nature of these crime types such as complexity, dangerousness to public and its transnational character. Hence, **the third group of legislation** is to be found in Turkish Criminal Procedure Code. Because of the complexity of organized crime, the crimes committed within a criminal organization are investigated and prosecuted with some different measures. For example, pursuant to Art. 91 of the Procedural Code, the time limit of custody for a suspect cannot be over 24 hours, but this limit can be expanded until 3 days when it comes to organized crime.

⁴⁸ Art. 1 of Anti-Terror Code reads as “*Terror means all kinds of criminal acts which is/are performed by this or those being member of terror organization that shuffling the qualifications of the Republic specified in the Constitution, political, legal, social, secular and economic system, breaking the unitary integrity of the State and nation, endangering the existence of the Turkish State and Republic, weakening, destroying or overtaking the authority of the State, annihilating the fundamental rights and freedoms and disrupting internal and external security of the State, rupturing the public order or public health by using force and violence and through the methods of pressure, frightening, intimidation, suppression and threat.*”

It is important to note that the approach to the punishment of those involved in criminal organizations must necessarily be different in order to achieve the main goals of the punishment. For example, criminals involved in organized crime shall be placed in high security prison and they cannot be placed in the same place (cell) with terror criminals in prisons. For these reasons, **the last group of legislation** can be tracked on the Execution Code. The Code stipulates different execution systems for convicts involved in criminal organization. To illustrate, punishment will be imposed in high security prison. Besides, for these convicts, the possibility of not being placed in prison such as postponement of the execution of a sentence by the public prosecutor cannot be applied. As for conditional release, there are some limitations as well. Furthermore, there can be restrictions for them in terms of using rights such as using communication means, phone, letter, fax and telegraphs etc.

In a nutshell, regulations related to organized crime has many different dimensions in the Turkish criminal law, which are classified in four main groups in this study.

A. Substantive Criminal Law Provisions

The crime types regarding criminal organization are regulated as *crimes against public peace* as a general crime type in the Fifth Section of the Criminal Code, which falls within *crimes against community* in the Third Chapter, “forming criminal organization with the purpose of committing crime,” in Art. 220 of the Criminal Code. The title of the provision is subjected to objection by arguing that this provision does include not only forming a criminal organization with the purpose of committing crimes, but also it regulates managing a criminal organization, being a member or aiding or making propaganda of this sort of organization as well⁴⁹. Art. 220 of the Criminal Code reads as below;

“(1) Any person forming or managing a criminal organization with the purpose of committing crime defined by law shall be punished from two

⁴⁹ For critics see Soyaslan, p. 534; Sonay Evik, p.667.

years up to six years imprisonment, if the organization is efficient in terms of its structure, the amount of member or its equipment to commit the crimes which the organization aims to commit.

(2) Any person becoming a member of a criminal organization which is formed to commit a crime shall be punished from one year up to three years imprisonment.

(3) If the organization is armed, the punishment stipulated previous sentences shall be increased from one-quarter to half.

(4) If the targeted crimes are committed within the organization, the punishment shall be also inflicted for these crimes.

(5) The managers of criminal organization shall be also punished as perpetrator for every crime committed within the organization

(6) Any person who commits a crime for the favor of a criminal organization although he or she is not a member of the organization shall be also punished for the crime, being a member of a criminal organization. The punishment given for being a member of a criminal organization can be reduced to one half. (Extension sentence: 11/4/2013-the Code Nr. 6459 and Art.11.) This subsection shall be applied to the only armed criminal organizations.

(7) Any person who aids a criminal organization although he or she does not take part in the hierarchical structure of the organization shall be punished as if he or she was a member of that organization."

(8) Any person who makes propaganda in order to justify or praise or encourage applying of the methods of a criminal organization which include coercion, violence and threatening shall be punished from one year up to three years imprisonment. If this crime is committed through media and press, the punishment shall be increased to one half."

1. Forming and Managing a Criminal Organization (Art. 220/1)

Forming and managing an organization with the purpose of committing crimes itself is a crime even if the targeted crimes by the organization are not committed yet. This is mainly because the formation or management of this sort of union creates a significant

risk to society, and is thus seen as a threat against public peace⁵⁰. To put it another way, this is one of the few cases in which criminal law punishes the potential for harm, rather than punishing the crime after the commission of the criminal act. The relevant provision is in the Criminal Code, in the subsection 1 of Art. 220, which reads as “*Any person forming or managing a criminal organization with the purpose of committing crime defined by law shall be punished from two years up to six years imprisonment, if the organization is efficient in terms of its structure, the amount of member or its equipment to commit the crimes which the organization aims to commit*”.

The regulation defines the crimes of forming and managing criminal organization; in doing so it defines what a criminal organization is under Turkish criminal law. In line with this, as aforementioned, the organization has to be efficient in terms of its structure, have at least three people, be equipped to commit the crimes which the organization aims to commit.⁵¹

Upon closer look at the requirement of having at least three people, the persons coming together to establish a criminal organization may not have legal capacity.⁵² That may come into play in deciding if the organization is efficient enough to commit the targeted crimes. Also this can be taken into account in terms of the blameworthiness/culpability of the perpetrators. Ultimately, if one of these three components fails, the act does not constitute a crime. In that regard, *forming an organization* means composing a union which includes these features. It should also be pointed out that the founder has to have a determining role in that way. The term *managing an organization* indicates the acts within the organization that establish the organization’s aims.⁵³ The managing element requires the person to have more power than every single member has. Also as opposed to the act of forming, the act of managing takes time⁵⁴. Lawmakers have determined that forming and managing are equal, so that they

⁵⁰ Toroslu, p. 260; See also Sonay Evik, p.673.

⁵¹ See also Yenidünya & İçer, p.800

⁵² Hafızoğulları & Kurşun, p. 36.

⁵³ See also Sonay Evik, p.684; See also Yenidünya & İçer, p.806.

⁵⁴ Yenidünya & İçer, p.806.

are stipulated as alternative acts in the Code with the same punishment⁵⁵. Hence, it is enough to perform one of them for crime to occur, but if a perpetrator conducts both⁵⁶ it will be taken into account in determining the amount of punishment in terms of the intensity of the illegal act pursuant to Art. 61 of the Criminal Code.

Forming and managing a criminal organization must include specific intent as *a purpose of committing crime*. In this sense, the intent of the perpetrator has to explicitly be a purpose defined by law as the commission of a crime⁵⁷.

These acts could have been considered as preparatory activities, but lawmaker preferred to move the criminal law liability to the earlier stage. In other words, the Code punishes the preparatory activity in that crime⁵⁸. Therefore, attempt to this crime is not possible. As a consequence, even if the organization's members do not get involved in any criminal activities, the person who establishes or manages the organization or performs both of them will be punished.

It is important to note that an organization may initially be formed according to law, but may be later converted into an illegal organization⁵⁹. If the organization is *armed*⁶⁰, forming or managing this organization requires more punishment than its basic form

⁵⁵ Toroslu, p. 262.

⁵⁶ It is also pointed out that those forming the organization takes the management of the organization. See Özgüç, p.21.

⁵⁷ Özgüç, p.22; this purpose is considered as *specific intent* which is a type of intent, by some authors. See Toroslu, p. 263; See also Soyaslan, p.533.

⁵⁸ Özgüç, p.21.

⁵⁹ See also Toroslu, p. 263; Özgüç, p.20.

⁶⁰ What is understood by an arm is defined by the Criminal Code in Art. 6 as firearms, explosive substances, all kinds of sharp and stab tools and tools making bruise which are made to be used for attack and defense, other tools suitable to be used for attack and defense, even if they are not made for this targets and caustic, abrasive, hurtful, suffocating, toxic, nuclear, radioactive, chemical and biological substances which is causative for persistent disease. Regarding definition of arms in Turkish criminal law see more Selman Dursun & Sebastian Hoffmanns, "Der waffenbegriff im türkischen und deutschen Strafrecht", in Walter Gropp, Bahri Öztürk, Adem Sözüer & Liane Wörner (Eds.), *Die Entwicklung von Rechtssystemen in ihrer gesellschaftlichen Verankerung*, 1st edn., Gießener Schriften zum Strafrecht und zur Kriminologie, Band 45, Baden- Baden 2014, pp. 195-199.

owing to the fact that being armed becomes a distinctive feature for the organization⁶¹ and that the danger to society is increased.

If the targeted crimes are also committed by the founder, he or she will be punished for the crime of forming a criminal organization and the targeted crimes as well. Pursuant to Art. 220/5, the manager of an organization will be punished not only for the crime of managing a criminal organization, but also for all crimes committed within the organization by other persons. This provision has been harshly criticized for being inconsistent with the concept of individualized criminal responsibility⁶².

2. Being a Member of a Criminal Organization (Art. 220/2)

The Turkish Criminal Code punishes being part of a hierarchical structure of a criminal organization in any way⁶³. Pursuant to subsection 2 of Art. 220, *“Any person becoming a member of a criminal organization which is formed to commit a crime shall be punished from one year up to three years imprisonment”*. As a consequence, being a member of a criminal organization constitutes a crime. However, for this subsection to apply, there must be an organization which has been already founded. A person’s role as a member of an organization must be determined at the time the organization is established. Membership is possible if the organization consists of at least three persons at the time the person joins as a member⁶⁴. Being a member of an organization necessitates a person to be admitted to membership by the managers of the organization⁶⁵ on the ground of the fact that Art. 220/7 dictates the hierarchical structure within the organization among members. In other words, the article states that a person who is not part of a hierarchical structure shall be punished as if he or she was a member of the organization. However, there are other opinions in Turkish doctrine which argue that unilateral (one-

⁶¹ Özgenç, p.20.

⁶² See also Toroslu, p. 262; Soyaslan, p.531.

⁶³ Toroslu, p. 265.

⁶⁴ Sonay Evik, p.685.

⁶⁵ Sonay Evik, p.685; Yenidünya & İçer, p.807.

sided) willingness is enough so that there is no need to be admitted by managers of the organization⁶⁶.

Being part of a criminal organization should not be understood as meeting formal requirements such as filling a form; rather factual-*de facto*- participation is sufficient⁶⁷. It should be noted that the very fact of membership in a criminal organization may contribute to the strengthening and survival of the organization for members who know the character and purpose of the organization and are at the disposal of the organization, even if the member does not perform any acts within the organization⁶⁸. By doing so, this person puts across his or her will in terms of being part of an organization for a period of time⁶⁹. Herewith, membership requires the continuity just as the managing of criminal organization. For these reasons, being a member of organization mandates punishment.

3. Commission of a Crime for a Criminal Organization (Art. 220/6)

Committing a crime for the favor of a criminal organization without being a member of it constitutes a crime if it is an armed criminal organization. To illustrate, it is the case in which the organization makes a general call for everyone to act illegally and then people commit crimes by following these calls⁷⁰. Subsection 6 of Art. 220 states that “.. *any person who commits a crime for the favor of a criminal organization although he or she is not the member of the organization shall be also punished for the crime, being member of a criminal organization. The punishment given for being a member of a criminal organization can be reduced to one half. (Extension sentence: 11/4/2013-the Code Nr. 6459 and Art.11.) This subsection shall be applied to the only armed Criminal Organizations*”.

⁶⁶ Özgenç, p.22.

⁶⁷ Özgenç, p.22.

⁶⁸ For this opinion see Sonay Evik, p.685.

⁶⁹ Yenidünya/İçer, p.807.

⁷⁰ Hasan Tahsin Gökcan, Mustafa Artuç & Osman Yaşar, *Yorumlu Uygulamalı Türk Ceza Kanunu*, Vol: 5, 2nd edn, Adalet, Ankara, 2014, s.6643.

This provision shows that committing a crime for the benefit of a criminal organization without being a member of it is equivalent to being a member. This equality of treatment can be accounted for because of the necessity of enabling an effective fight against crimes against public peace. Indeed, commission of a crime contributes to the organization⁷¹. However, this equality of treatment by lawmakers cannot justify imposing the same amount of punishment for those committing crime for a criminal organization as being member and as without being member of it. This has been objected as being inconsistent with the Turkish doctrine⁷². Because of the critics, a new provision stipulating that the punishment can be reduced to one half for crimes committed for the favor of a criminal organization without being a member of it are added to the article in 2012⁷³.

4. Aiding a Criminal Organization (Art. 220/7)

Aiding an armed criminal organization is defined as a separate crime. In doing so, the Turkish lawmaker aims to fill every single space linked to the organized crime by considering the fact that people who are not a member of any criminal organization may conduct something which is in favor of a criminal organization⁷⁴. For this reason, aiding a criminal organization without being a member of it is considered equal to being a member. But this crime type differs from being a member because it does not require to act continuously in favor of a criminal organization as opposed to being member of it⁷⁵. Therefore, both of them cannot be assessed in the same way in terms of punishment. This was harshly criticized and as a result changed in 2012. Punishment can now be reduced up to one-third by taking into account the quality of aid. The subsection 7 of Art. 220 of the Code reads as *".. any person who aids a criminal organization although he or she does not take part in the hierarchical structure of the organization shall be punished as if he or she was a member*

⁷¹ Yenidünya/İçer, pp.808; See also Sonay Evik, p.689.

⁷² For critics see Sonay Evik, p.691.

⁷³ See Yenidünya/İçer, pp.808-809.

⁷⁴ See also Sonay Evik, p.689.

⁷⁵ Yenidünya & İçer, p.810.

of that organization". Under the former Criminal Code, there was a crime type called aiding and abetting a criminal organization.

5. Making Propaganda of methods of a Criminal Organization which include coercion, violence and threatening (Art. 220/8)

Making propaganda for a criminal organization is defined as criminal activity which is conducted in order to have an idea or a belief adopted and transmitted, and based on a method to gain new supporters⁷⁶. If this act are performed in favor of a criminal organization, it may constitute a crime punished from one year up to three years. However, it was amended in 2013 in order to make the definition of crime more concrete. Due to this amendment, what makes a criminal organization's propaganda a crime is its use for the purposes of justifying or praising or encouraging others to apply the methods of a criminal organization, which include coercion, violence and threatening. The Turkish lawmaker considered that because this type of propaganda is made by using the media and the press, the intensity of unlawfulness can be broader. Hence, if this crime is committed through these means, punishment shall be increased by one half. The relevant article reads as follows;

"Any person who makes propaganda in order to justify or praise or encourage to apply of the methods of a criminal organization which include coercion, violence and threatening shall be punished from one year up to three years imprisonment. If this crime is committed through media and press, the punishment shall be increased to one half."

In parallel with this article, the Anti-Terror Code also defined making propaganda of a terror organization and was similarly changed in 2013. However, the acts of propaganda are further presented in detail in the Anti- Terror Code (e.g., hanging or transport of emblem, picture or signs of the organization, chanting slogans or wearing of uniform which has emblem, pictures or signs of the

⁷⁶ Aytaç Tombak, "Ceza Hukuku Açısından Propaganda Kavramı", Ankara Barosu Dergisi, no. 6, 1969, p. 1043, <http://www.ankarabarusu.org.tr/siteler/ankarabarusu/tekmakale/1969-6/7.pdf> (last accessed: 06. 08. 2014).

organization etc.)⁷⁷. This specific regulation will be imposed when it comes to a terror organization.

It is important to note that the Turkish Criminal Code also criminalizes glorifying or praising crime (Art. 215) and incitement to disobey the law (Art. 217), which may include making propaganda of criminal methods used by the criminal organization such as coercion, violence, and threats as well promoting the formation of criminal organizations. However, law makers have preferred to articulate separately a criminal organization's propaganda as a criminal act by taking into account the significant danger that it poses to the public peace.

B. Criminal Procedural Law Provisions

What was in the spotlight in Turkey when it comes to organized crime concerned the method of the trial of crimes regarding criminal

⁷⁷ Art. 7 of the Anti- Terror Code reads as "...(2) Any person who makes propaganda in order to justify or praise or encourage to apply of the methods of a terror organization which include coercion, violence and threatening shall be punished from one year up to five years. If this crime is committed through media and press, the punishment shall be increased to one half. Regarding chief editors of press and media not participated in the commission of these crimes shall be punished with fine from a thousand days up to five thousand days as well. The following acts and behavior shall be punished according to the provisions of this paragraph;

a) Closing of face completely or partially with the purpose of concealing identity in meetings and demonstrations which are converted into a propaganda for a terrorist organization,

b) Even if it does not take place during the meetings and demonstrations, (1) hanging or transport of emblem, picture or signs of the organization, (2) chanting slogans, (3) making broadcasts with audio devices and

(4) Wearing of uniform which has emblem, pictures or signs of the organization in an obvious manner of that she or he is member or supporter of terrorist organizations in a manner.

If the crimes defined in subsection 2 of this article are committed in the associations, foundations, political parties, labor and professional organizations or their subsidiaries belonging to the premises, or add-in desk or in educational institutions or in student residences or their add-ons, the punishment shall be doubled stipulated in this subsection.

(a) Those who committing (a) the crime defined in subsection 2 of this article for the favor of a terror organization without being member shall be not punished for Art. 220/6 (committing a crime for the favor of a criminal organization without being member) as well.

organization, because under the former Turkish Criminal Procedural Code, crimes related to terror organizations and crimes against the security of the State were investigated and prosecuted in a different court called *State Security Court*. As that court included a military judge as one of the three judges in session the ECHR found as the violation of Art. 3, right to fair trial, in various cases⁷⁸. In 1999 the military judge was excluded from the court by amending Art. 143 of the Constitution which regulated "*State Security Court*"⁷⁹. In 2004, this type of court was abolished and their files were transferred to the Assize Court which deals with serious crimes and consists of three judges. After enacting the new Procedure Code, special courts were established in Art. 250 of the Code to try criminal activities linked to organized crime because of the need for specialization in light of the complexity of organized crime. However, having special courts for certain crimes was criticized for violating the Constitution, which guarantees lawful judgement and equality before the court⁸⁰. Because of the critics, special courts were abolished in 2014. These crimes are now investigated and prosecuted in the Assize Court.

1. Criminal Coercive Measures

Criminal law measures (e.g., arrest, detention, seizure of property or wiretapping and recording communications etc.) taken by the authorities, such as public prosecutors, judges or courts and in some cases police officers, restrict the fundamental rights of person. Therefore, there are certain requirements and conditions to

⁷⁸ For example, see *Case of Kezer and Others v. Turkey* (Application no. 58058/00) and *Case of Haci Özen v. Turkey* (Application no. 46286/99). Also see *Case of Öcalan v. Turkey* (Application no. 46221/99).

⁷⁹ For these amendments see *Mevzuatı Geliştirme ve Yayın Genel Müdürlüğü*, Türkiye Cumhuriyeti Anayasası' nın Yürürlükten Kaldırılmış Hükümleri, at <http://www.mevzuat.gov.tr/mevzuatmetin/5.5.2709.pdf> (last accessed: 01. 12. 2014).

⁸⁰ Art. 37. of the Constitution reads as "*No one may be tried by any judicial authority other than the legally designated court. Extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court shall not be established*", TBMM, Constitution of the Republic of Turkey, p.17, http://global.tbmm.gov.tr/docs/constitution_en.pdf (last accessed: 01. 12. 2014).

implement these sort of measures. However, there are some nuances, when it comes to the criminal organization. To illustrate, whereas the time period for custody can be maximum 24 hours under the Art. 91 of the Procedure Code, The public prosecutor may decide to extent it one additional day three times because of the difficulties in collecting evidence or the large number of persons involved in collectively committed crimes, but the extensions cannot exceed four days.

Pursuant to Art. 100 of the Procedure Code, a *detention measure* can be imposed by a judge (in the investigation phase) or by the court (in the trial phase) if there is concrete evidence of a strong suspicion that a crime has been committed and if there are reasons for detention⁸¹. If there is a strong suspicion that some crime types listed in Art. 100/3 are committed, it can be considered as a reason for detention. Some of these crime types are forming and managing an organization with the purpose of committing crime (220/1), commission of a crime for a criminal organization (Art. 220/6), forming, managing and being member of an armed criminal organization (Art. 314). If there is concrete evidence of a strong suspicion that a crime that is being investigated and prosecuted has been committed, seizure of property, rights and claims of the suspected and accused can be ordered by the unanimous decision of the Assize Court. This coercive measure can be applied only for crimes catalogued in Art. 128 of the Procedure Code, which includes forming, managing and being a member of an armed criminal organization, (Art. 314) and providing arms for an armed criminal organization (Art. 315). Also, when it comes to these crime types, *judicial guardianship for a company*, regulated in Art. 133, can be imposed by the unanimous decision of the Assize Court, along with *wiretapping and recording communications*, which are regulated in Art. 135. It is also important to note that there was no time limitation to perform wiretapping and recording communications until 2014. Today, however, there is a time restriction in Art. 135, which was established by the Code Nr. 6526 in 2014. Accordingly, the maximum time period is six months.

⁸¹ These are listed as the existence of concrete facts showing that suspect or accused escapes or the existence of strong suspicions that attitudes of suspect or accused destroys, concealing or modify the evidences and attempts to pressure on witness, victim and other people in Art. 100/2.

Some typical criminal measures such as detention or arrest may fail to combat criminal organization⁸². New types of measures are therefore necessary to deal with criminal organizations which present a profound threat to the public peace by committing serious crimes. For example, drug trafficking organizations prevent the authorities from obtaining information about crimes by disguising their activities.⁸³. One method is the use of a *confidential investigator* who is obliged to search for all information about organization and collect all evidence regarding crimes being committed within the organization. In Turkish criminal law, under Art. 139 of the Procedure Code, a public officer can be appointed as a confidential investigator by the unanimous decision of the Assize Court if there is reason for strong suspicion based on concrete evidence that the crime being investigated and prosecuted is committed exists and if the evidence cannot be obtained in any other ways. This applies only to crimes listed in Art. 139. The forming and managing an organization with the purpose of committing crime (Art. 220/1), commission of a crime for a criminal organization (Art. 220/6) and forming, managing and being member of an armed criminal organization (Art. 314) and providing arms for an armed criminal organization (Art. 315) are in this catalogue. The same condition applies to *monitoring through the use of technical devices* by the unanimous decision of the Assize Court as a criminal coercive measure under the Art. 140 of the Procedure Code, which allows monitoring of the activities of the suspected and the accused in public and their work place and recording their voice and picturing their image, which can be applied for listed crimes defined in the same article including forming, managing and being member of an armed criminal organization (Art. 314) and providing arms for armed criminal organization (Art. 315).

In order to ensure the appearance of the accused in court, the property, rights and assets of the fugitive can be seized by the decision of the court and, if necessary, a judicial guardian can be appointed to manage them pursuant to the Art. 248 of the Procedure Code, if the

⁸² Öztürk et al., p. 796.

⁸³ Adem Sözüer, *Panel - Organize Suçluluk Yolsuzluk ve Kara Parayla Mücadelede Türkiye'nin Konumu*, Türkiye Barolar Birliği Yayını Çanakkale 6 October 2001, p. 10, <http://tbb.yayinlari.barobirlik.org.tr/TBBBooks/os-2001-328.pdf> (last accessed: 06. 08. 2014).

crimes which he or she has committed are the following acts: forming, managing and being member of an armed criminal organization (Art. 314) and providing arms for armed criminal organizations (Art. 315).

2. Witness Protection Program

The threat posed by criminal organizations becomes apparent when people are required to testify as to their knowledge of the criminal activities of the organizations. Because the witnesses are at risk in presenting their testimony, the Turkish Criminal Procedure Code adopts witness protection measures regulated in a separate code, the Witness Protection Code of 2007 and Nr. 5726. It lists the crimes which justify witness protection measures as crimes committed within the criminal organization that call for a minimum punishment from 2 years and crimes committed within the terror organization pursuant to Art. 3.

The Criminal Procedure Code in Art. 58 provides that if the disclosure of the identity of witnesses may create a significant danger for them or their relatives (people around them), essential measures are taken in order to keep their identity information secret. Witnesses' information is retained by the public prosecutor, judge or the court. Yet, a witness whose identity is kept as confidential is under obligation to explain how he or she discovered the facts which she or he states as a witness under Art. 58/2. If the hearing of the witness in the courtroom poses a significant danger for the witness and if this danger cannot otherwise be eliminated or may prevent discovering the so-called material truth in criminal procedure, the judge can hear the witness in camera, but the voice and the image recording have to be performed during the presentation of the witness's testimony. The right to raise the question is preserved (under Art. 58/3). After fulfilling the obligation to testify, the measures to keep the identity of the witness secret and provide her or him with security adopted by Witness Protection Code of 2007 and Code Nr. 5726 apply⁸⁴.

⁸⁴ These measures, are for example, keeping their identity and address information and determining another address for court correspondence as secret, ensuring physical protection, changing identity and other documents including personal

3. Active Remorse

A perpetrator's remorse before the justice authorities regarding certain crime types, including crimes committed within the criminal organization, is acknowledged as a reason for a reduction or preclusion of punishment in Turkish criminal law⁸⁵. Indeed, the first introduction of active remorse in the Turkish criminal law was because of the fighting against criminal organization. Through the new Criminal Code, the applicability of active remorse to fight against criminal organization are expanded. The provision regarding active remorse for criminal organization are stipulated in detail in Art. 221 of the Criminal Code.

The Code first distinguishes between founders and managers of the organization and its members. A second distinction depends on whether the person shows remorse after or before he or she is arrested by police officer. The third distinction depends on what perpetrators do, such as breaking down the organization or providing information about the organization. After this explanation, it can be concluded that if the founder or manager of the organization breaks down the organization or causes it to be broken down by providing information about the organization before the investigation commences and before the targeted crimes are not yet committed, he or she will not be punished under Art. 221/1. If the founder or manager provides information regarding the structure of the organization and crimes committed within the organization by surrendering her or himself to the justice authorities, he or she will not be punished because of being the founder or the manager of criminal organization; but he or she will be punished for other crimes which he or she took part in for the criminal organization. If these occur after the investigation has already started, he or she will receive reduced punishment pursuant to Art. 221/4. As for the members of the organization, their taking part in the

information such as issuing a new identity card, driver's license, diplomas or social insurance cards, providing financial aid as for livelihood, providing a new home and a new job or changing the physical appearance through cosmetic surgery etc. under Art. 5 of the Witness Protection Code.

⁸⁵ It is considered as a personal circumstance because only those who shows remorse can benefit from it.

commission of crime will be considered. If a member did not commit a crime and informs the authorities willingly and leaves the groups, he or she will be not punished under Art. 220/2. If the member of the organization who did not yet commit crimes within the organization is captured and gives information which is sufficient to break down the organization and capture other participants of the organization, he or she will be not punished under Art. 220/3. If the member or other person aiding or committing crimes for a criminal organization provide information regarding the structure of the organization and crimes committed within the organization by surrendering to the justice authorities, he or she will be punished because of being a member of the criminal organization, but not for other crimes which he or she took part in for the criminal organization.

C. Legislations for the Execution of Criminal Sanctions

The Code on the Execution of Sentences and Measures of 2004 and the Code Nr. 5275 (hereinafter shortly referred as the Execution Code) regulate procedures and general principles relating to the execution of sentences and security measures. The Execution Code categorizes all convicts based on the type or types of crime committed, their age, whether they are recidivists or first-time offenders, or are professional criminals or criminals who have committed terroristic acts, in order to determine the appropriate punishment⁸⁶. Being a member of a criminal organization is one of these classifications pursuant to Art. 24.

The first difference lies in the type of prison in which the criminals involved in crime organization are placed. Hereunder, regardless of the amount of the penalty, punishment of the convicts

⁸⁶ For example, convicts are placed in different prisons by taking into account convicts' personal characteristics, physical, mental and health status, his or her life prior to committing crime, social entourage and relations, artistic and professional activities, moral trends, perspectives on crime, the length of imprisonment under Art. 23 of the Execution Code. Another example, women convicts with men, child convicts with adult, criminals involved in organized crime with terror criminals cannot be placed in the same place (cell) in prisons pursuant to Art. 63/3 of the same code.

for forming or managing a criminal organization and for certain crimes committed within the criminal organization shall be imposed *in maximum security prison* pursuant to Art. 9 of the Execution Code. These certain crimes follow as crimes against humanity (in Art. 76 and 77), murder (in Art. 81 and 82), crimes of producing and trafficking of narcotic or stimulant substances (Art. 188), crimes against security of the State and crimes against constitutional order and functioning of constitutional order (in Art. 302, 303, 304, 307 and 308) that are defined in the Criminal Code. Another regulation regarding placement in prison in Art. 63/3 of the same Code states that criminals involved in organized crime cannot be placed in the same place (cell) in prisons with terror criminals.

The other important difference comes out of *rights of convicts in prison* such as the right to communicate, to benefit from radio, television broadcasts and internet facilities, to send and receive letter, faxes and telegrams. Pursuant to Art. 66, the right to communicate by phone within the prison can be restricted for the convicts involved in criminal organization if they present dangerousness. The same restriction in terms of the right to benefit from radio, television broadcasts and internet facilities applies to convicts involved in organized crime under Art. 67/4. As for the right to send and receive letter, faxes and telegrams, some restrictions can be imposed on the convicts. If a letter, fax or telegram includes lies and false information which lead to fear of a person or organization, threats and insults, which endanger order and security of the institution, target public officials and enable communication of the members of criminal organizations, the convicts can neither send nor receive them pursuant to Art. 68/3.

The means for convicts not to be placed in prison exist in the Execution Code. First, there is a possibility for convicts, who would be sentenced for intentional crime up to 3 years or negligent crimes up to 5 years, to demand from the public prosecutor postponement of the execution of a sentence under the Execution Code, Art. 17. This is inapplicable for convicts involved in criminal organization however. Second, there is the possibility of a conditional release. If a convict serves his or her time through good behavior in prison for a certain

time, which is thirty years for aggravated life imprisonment, twenty four years for life imprisonment and two-thirds of the length of imprisonment for term imprisonment, he or she can be released. Yet, for persons who are convicted of crimes such as forming or managing criminal organization or crimes committed within criminal organization, this time requirement is higher than it is for other convicts: thirty six years for aggravated life imprisonment, thirty years for life imprisonment and three fourths of the length of imprisonment for term imprisonment, before he or she can be released. This exception cannot be applied for child convicts pursuant to Art. 107/4. If the crimes against security of the State (listed in the fourth section of the Code) and constitutional order and functioning of constitutional order (listed in fifth section), and crimes against national defense (listed in sixth section of the fourth chapter of the Criminal Code) are committed within a criminal organization and the court inflicts aggravated life imprisonment on the perpetrator, conditional release cannot be imposed pursuant to the Art. 107/16⁸⁷.

VII. Conclusive Remarks

This study ultimately concludes that the main problems raised in the Turkish Criminal Law occur mainly in practice. Seeing that criminal procedure measures (e.g., detention or wiretapping and

⁸⁷ This article excludes the conditional release for the convicts sentenced to aggravated life imprisonment for crimes against security of the State and against constitutional order and functioning of constitutional order and against national defense. In the case of *Öcalan v. Turkey* before the ECHR, in which Öcalan who were identified by the Turkish courts as the founder of the terror organization called PKK, had initially been sentenced to death penalty for serious crimes particularly crime against State security. After the abolition of the death penalty in Turkey, his sentence was then changed into the “aggravated” life imprisonment. In this concrete case, the ECHR criticized and unanimously found violation by saying “*that there had been a violation of Article 3 as regards applicant sentence to life imprisonment without any possibility of conditional release*”. ECHR, *Öcalan v. Turkey* (application no. 24069/03, 197/04,6201/06 and 10464/07), The Court delivers its Chamber judgment in the case of *Öcalan v. Turkey*, <http://hudoc.echr.coe.int/webservices/content/pdf/003-4703714-5709561> (last accessed: 14. 08. 2014).

recording communications etc.) can be easily imposed if the crimes committed are related to a criminal organization, it leads to the potential abuse of these tools, which are highly invasive of human rights and therefore must be a last resort. Even if it is not certain at the beginning of an investigation whether three people have come together for purposes of commission of a crime or whether they have sufficient equipment to commit the targeted crimes, these measures, which have a tendency to invade human rights, are nonetheless imposed.

The Turkish Criminal Code imposes strict conditions on the proof necessary to establish the existence of a criminal organization, including the existence of a hierarchical structure or the number of members of a group, the continuity of the group, or whether the group is suitable for the commission of the targeted crimes of the organization. However, these conditions are not properly examined in the application of the provisions within the law. By doing so, mostly *the principle of innocence* is being violated. A remarkable number of cases involving criminal organizations are brought to the courts, but because of the strictness in providing the existence of a criminal organization, perpetrators are punished primarily for their part in the commission of crimes apart from any connection with the criminal organization⁸⁸.

REFERENCES

- Baharçiçek, Abdulkadir: "Etnik Terör ve Etnik Terörle Mücadele Sorunu", *Firat University Journal of Social Science*, vol. 10, no.1, 2000, pp. 11- 27, <http://web.firat.edu.tr/sosyalbil/dergi/arsiv/cilt10/sayi1/011-028.pdf> (last accessed: 14. 08. 2014).
- Bucknill, John Strachey & Utidjian, Haig Apisoghom S. (translators), *The Imperial Ottoman Penal Code*, Humphrey Milford/Oxford University Press, 1913.
- Dursun, Selman & Hoffmanns, Sebastian: "Der waffenbegriff im türkischen und deutschen Strafrecht", in Walter Gropp, Bahri Öztürk, Adem Sözüer & Liane Wörner (Eds.), *Die Entwicklung von Rechtssystemen in*

⁸⁸ Özgenç, p.47.

- ihrer gesellschaftlichen Verankerung*, 1st edn, Gießener Schriften zum Strafrecht und zur Kriminologie, Band 45, Baden- Baden 2014, pp. 193-224.
- ECHR, Judgment Öcalan v. Turkey the Court delivers its Chamber judgment, <http://hudoc.echr.coe.int/webservices/content/pdf/003-4703714-5709561> (last accessed: 02. 08. 2014).
- Gayretli, Mehmet, "1858 Osmanlı Ceza Kanununun Kaynağı Üzerindeki Tartışmalar ve Bu Kanuna Ait Bir Taslak Metninin Bir Kısmıyla ilgili Değerlendirmeler", pp.1-15, <http://www.e-akademi.org/makaleler/mgayretli-2.pdf> (last accessed: 06. 08. 2014).
- Gökcan, Hasan Tahsin/ Artuç, Mustafa/ Yaşar, Osman: *Yorumlu Uygulamalı Türk Ceza Kanunu*, Vol: 5, 2nd edn, Adalet, Ankara, 2014.
- Hafızoğulları, Zeki & Kurşun, Günel: "Türk Ceza Hukukunda Örgütlü Suçluluk", *TBB Dergisi*, no. 71, 2007, pp. 25-80, <http://tbbdergisi.barobirlik.org.tr/m2007-71-334> (last accessed: 14. 08. 2014).
- Hale, Chris/ Hayward, Keith/ Wahidin, Azrini/Wincup, Emma: *Criminology*, 2nd Edition, Oxford University Press, United States, 2009.
- İnalçık, Halil: *Tanzimat Nedir? Tarih Araştırmaları*, no.1, 1941, pp. 237- 263, <http://www.inalcik.com/images/pdfs/89230630TANZiMATNEDiR.pdf> (last accessed: 07. 08. 2014).
- Mevzuatı Geliştirme ve Yayın Genel Müdürlüğü*, Türkiye Cumhuriyeti Anayasası'nın Yürürlükten Kaldırılmış Hükümleri, at <http://www.mevzuat.gov.tr/mevzuatmetin/5.5.2709.pdf> (last accessed: 01. 12. 2014).
- Özbek, Veli Özer, *İnfaz Hukuku*, 5th edn, Seçkin Yayıncılık, Ankara, 2014.
- Özgenç, İzzet, *Suç Örgütleri*, 6th edn, Seçkin Yayıncılık, Ankara, 2013.
- Öztürk, Bahri/ Tezcan, Durmuş/ Erdem, Mustafa Ruhan/ Sırma, Özge/ Saygılar Kırıt, Yasemin F./ Özyaydın, Özdem / Alan Akcan, Esra & Erden, Efser: *Nazari ve Uygulamalı Ceza Muhakemesi Hukuku*, 6.ed., Seçkin Yayıncılık, Ankara, 2013.
- Roxin, Claus: *Strafrecht: allgemeiner Teil Band I, Grundlagen, der Aufbau der Verbrechenslehre*, 4th edn, Beck, München 2006.
- Sonay Evik, Vesile: "Suç İşlemek Amacıyla Örgütlenme Suçu", in *Prof. Dr. Nur Centel'e Armağan*, vol. 19, no. 2, 2013, pp. 667- 697,

- <http://dosya.marmara.edu.tr/huk/fak%C3%BCitedergisi/nurcentel/v esilesonayevik.pdf> (last accessed: 14. 08. 2014).
- Soyaslan, Doğan: *Ceza Hukuku Özel Hükümler*, 8th edn., Yetkin Yayıncılık, Ankara, 2010.
- Sözüer, Adem: “Türkiye’de Karşılaştırmalı Hukukta Telefon, Teleks, Faks ve Benzeri Araçlarla Yapılan Özel Haberleşmenin Bir Ceza Yargılaması Önlemi Olarak Denetlenmesi”, *Prof. Dr. Türkan Rado’ya Armağan Sayısı, İÜHFİM*, vol. 55, no. 3, 1997, pp. 65-110.
- Sözüer, Adem: *Panel - Organize Suçluluk Yolsuzluk ve Kara Parayla Mücadelede Türkiye’ nin Konumu*, Türkiye Barolar Birliği Yayını, Çanakkale 6 Ekim 2001, <http://tbbyayinlari.barobirlik.org.tr/TBBBooks/os-2001-328.pdf> (last accessed: 06. 08. 2014).
- Sözüer, Adem: “Organize Suçlulukla İlgili Kovuşturma Yöntemleri (İletişimin Denetlenmesi)”, *Legal Hukuk Dergisi*, no.10, October 2003, pp. 2495-2512.
- Sözüer, Adem: “Reform of the Turkish Criminal Law”, in Adem Sözüer (Eds.), *Dünyada ve Türkiye’de Ceza Hukuku Reformları Kongresi*, Vol: I, On İki Levha, İstanbul 2013, pp.107- 140.
- Şentop, Mustafa: *Tanzimat Dönemi Osmanlı Ceza Hukuku, Kanunlar- Tadiller- Layihalar- Uygulama*, 1st edn, Yaylacık Matbaası, İstanbul, October 2014.
- Tanör, Bülent: “Terörle Mücadele Kanunu Üzerine İlk Düşünceler”, *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni (MHB)* 1990, vol. 10, no. 1-2, pp. 165- 173.
- TBMM, Constitution of the Republic of Turkey, http://global.tbmm.gov.tr/docs/constitution_en.pdf (last accessed: 01. 12. 2014).
- Tezcan, Durmuş: “Cezai Konularda Türk-İtalyan İlişkileri”, *Ankara Barosu Dergisi*, vol. 49, no.1, 1994, pp. 365, 371, <http://dergiler.ankara.edu.tr/dergiler/42/462/5291.pdf> (last accessed: 07. 08. 2014).
- The Council of Europe*, Recommendation (2011) 11 of Committee of Ministers to member states concerning guiding principles on the fighting against organized crime, http://www.coe.int/t/dlapil/codexter/2_Adopted_Texts/CM%20Rec%20%282001%29%2011%20E.pdf (last accessed: 28. 04. 2015).

- Tombak, Aytaç: "Ceza Hukuku Açısından Propaganda Kavramı", *Anakara Barosu Dergisi* 1969, no. 6, pp. 1043-150, <http://www.ankarabarusu.org.tr/siteler/ankarabarusu/tekmakale/1969-6/7.pdf> (last accessed: 06. 08. 2014).
- Toroslu, Nevzat: *Ceza Hukuku Özel Kısım*, 5. edn, Savaş Yayınevi, Ankara, 2010.
- United Nations*, United Nations Convention against Transnational Organized Crime and The Protocols Thereto, New York, 2004, <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> (last accessed: 11. 07. 2014).
- Yenidünya, A. Caner & İçer, Zafer: "Suç İşlemek Amacıyla Örgüt Kurma Suçu", in *Prof. Dr. Nur Centel'e Armağan*, vol. 19, no. 2, 2013, pp. 797-828, http://dosya.marmara.edu.tr/huk/fak%C3%BClitedergisi/nurcentel/canyenid_nya.pdf (last accessed: 14. 08. 2014).