CORE INTERNATIONAL CRIMES IN TURKISH CRIMINAL LAW AND THE ROME STATUTE

A Comparative Analysis in the Light of International Jurisprudence

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ABSTRACT

By virtue of the Europeanisation process, Turkey has carried out some legal reforms to its domestic law with the aim of fulfilling the requirements to join the European Union (EU). The Turkish Penal Code (TPC) includes the crime of genocide, as well as crimes against humanity, since 2004. Nonetheless, Turkey has not incorporated all the crimes listed in the Rome Statute into domestic law. Thus, this paper will be looking at the inconsistencies between the TPC and the Rome Statute from a state interest point of view by scrutinising the constitutive effect of the EU and the International Criminal Court (ICC) on Turkey. Within the scope of this focus, it will be shown how the constitutive effects of the ICC and the EU have influenced Turkey. The second focus will be to shed light on the question of how Turkey's self-interest was reflected in forming the new TPC and during the negotiation process for the Rome Statute. Although the TPC was adopted after the Rome Statute, the question remains as to why Turkey did not embrace all international crimes as defined in the Rome Statute.

Keywords: *Turkish penal code, Rome Statute, comparative analysis, state interest, Europeanisation process.*

TÜRK CEZA KANUNU VE ROMA STATÜSÜNDE DÜZENLENEN ULUSLARARASI SUÇLARA YÖNELİK ULUSLARARASI YARGI ORGANLARININ KARARLARI IŞIĞINDA KARŞILAŞTIRMALI ANALİZ

ÖZ

Türkiye, Avrupa Birliğine katılma sürecinin bir sonucu olarak, iç hukukunda bazı reformlar yapmıştır. Avrupa Birliğine uyum süreci ile birlikte, soykırım suçu ve insanlığa karşı suçlar, 2004 yılı itibariyle Türk Ceza Kanunu kapsamına alınmıştır. Bu çalışma, Türk Ceza Kanunu ile Roma Statüsü'nde düzenlenen uluslararası suçlar

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

Yayın Kuruluna Ulaştığı Tarih **:** 13/02/2018

Yayınlanmasının Uygun Görüldüğü Tarih: 19/07/2018

arasındaki farkları, Avrupa birliğine ve mahkemeye taraf olma sürecinin Türkiye üzerindeki etkilerini temel alarak analiz etmektedir. Farlılıklara yönelik yapılan karşılaştırmalı analizde, Uluslararası yargı organlarının bu suçları yorumlama biçimi detaylı bir biçimde gözden geçirilmektedir. Bu süreçte yapılan iç hukuk düzenlemelerine ve Roma Statüsünün oluşum sürecindeki tartışmalara, Türkiye'nin çıkarları olgusunun ne yönde etki ettiği tartışılmaktadır. Sonuç olarak, Türkiye'nin neden Roma Statüsünde yer alan tüm suçlara yer vermediği ve yer verdiği suçları neden farklı şekilde düzenlediği analiz edilmektedir.

Anahtar Kelimeler: *Türk Ceza Kanunu, Roma Statüsü, karşılaştırmalı analiz, devlet çıkarları, Avrupa Birliğine uyum süreci.*

INTRODUCTION

At the Helsinki summit in December 1999,[1] the EU decided to designate Turkey as a candidate country for full European Union membership. It was declared that the EU could start the accession process once Turkey had met the essential requirements for membership.[2] Its candidacy status vis-à-vis the EU encouraged Turkey to initiate reforms to its domestic law.[3] The EU emphasised its sensitivity with regard to Turkey's accession to the Rome Statute in the EU Commission's Progress Reports on Turkey. The report published in 2005 noted that 'Turkey has still not signed the Statute of the ICC.'[4]

A new working group was established in February 2005 'with the aim of elaborating and structuring the articles related to war crimes in Turkish civil and military legislation in light of the Rome Statute'.[5] Following this report, in 2008, the Turkish government agreed on a third National Programme for Adoption of the EU *acquis*.[6] In this national programme, the government

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1 European Commission Enlargement, EU-Turkey Relations. (http://ec.europa.eu/enlargement/candidate-countries/turkey/eu_turkey_relations_en.htm) Date accessed:14.6.2016)

2 Michael J BAUN, **A wider Europe: The process and politics of European Union enlargement**, Rowman & Littlefield Publishers, Lanham, Boulder, New York and Oxford, 2000, p. xviii

3 For further information, see Edel HUGHES, **Turkey's Accession to the European Union: The Politics of Exclusion?**, Routledge, London & New York, 2010.

4 European Commission, Turkey 2005 Progress Report, SEC (2005) 1426, Brussels 9 November 2005, p.130. See others until 2011.

5 European Commission, Turkey 2005 Progress Report, SEC (2005) 1426, Brussels 9 November 2005, p.130.

6 Republic of Turkey, Ministry for EU Affairs, National Programme for the Adoption of the Acquis (NPAA), (2008), Chapter 31, Foreign, Security and Defence Policy, p.394. (http://

referred to its efforts in terms of fulfilling the key regulations for membership of the ICC.[7]

Though this process has not resulted in membership of the EU thus far, Turkey has carried out some legal reforms to its domestic law with the aim of fulfilling the requirements to join the Union. The TPC currently includes the crime of genocide, as well as crimes against humanity, since 2004.[8] Nonetheless, Turkey has not incorporated all the crimes listed in the Rome Statute into domestic law. I will be looking at the inconsistencies between the TPC and the Rome Statute from a state interest point of view by scrutinising the constitutive effect of the EU and the ICC on Turkey.

It will be also elaborated how Turkey contributed to the negotiation process of the Rome Statute. During negotiations, Turkey suggested that war crimes committed in non-international armed conflicts should not be included in the Rome Statute. Presumably the reason was the existence of clashes within its territory. The conflict in Turkey has been defined as a war against terrorism, but the Rome Statute reduces the threshold for an armed conflict. Thus, the definition of a non-international armed conflict in the Rome Statute may concern Turkey regarding the armed clashes between the terrorist group PKK and the Turkish government.

War crimes committed during international armed conflicts[9] have been covered to a limited extent in the Turkish Military Penal Code (TMPC) since 1930,[10] but war crimes committed in non-international armed conflict have not been covered in the new TPC. The new TPC also failed to include the crime of aggression. As for recently recognised crimes, those of genocide and crimes against humanity, these show significant differences from those set out in the Rome Statute.

Based on the differences in the TPC outlined above, the first focus of this section will be on explaining the differences between the Turkish Criminal

www.ab.gov.tr/?p=194&l=2) Date accessed: 14.6.2016)

7 Republic of Turkey, Ministry for EU Affairs, National Programme for the Adoption of the Acquis (NPAA), (2008), Chapter 31, Foreign, Security and Defence Policy, p.394. (http://www.ab.gov.tr/?p=194&l=2) Date accessed: 14.6.2016)

8 The new Turkish Penal Code, Code No. 5237, The Turkish Official Gazette No. 26611, 12 October 2004. It came into force on June 1, 2005.

9 The Turkish Military Penal Code, Articles 124, 125, 126, 127.

10 The Turkish Military Penal Code was promulgated on the 15.6.1930.

Code, the Turkish Military Penal Code and the Rome Statute[11] in the light of international jurisprudence. Within the scope of this focus, it will be shown how the constitutive effects of the ICC and the EU have influenced Turkey. The second focus will be to shed light on the question of how Turkey's self-interest was reflected in forming the new TPC and during the negotiation process for the Rome Statute. Although the TPC was adopted after the Rome Statute, the question remains as to why Turkey did not embrace all international crimes as defined in the Rome Statute.

CRIME OF GENOCIDE

By virtue of the Europeanisation process, which also embraced the idea of being party to the Rome Statute, the crime of genocide was incorporated into domestic law for the first time. As asserted by Koca, Turkey had to regulate the crime of genocide under domestic law in order to fulfil its obligations under the 1948 Genocide Convention, as the treaty was ratified by Turkey in 1950.[12] The crime of genocide has been incorporated into Article 76 of the TPC. Its definition in the TPC is in accordance with Article 6 of the Rome Statute because, while the crime was being included, Turkish legislators followed the definition of the crime as laid out in Article 2 of the Genocide Convention.[13] The definition of the crime of genocide as specified in the Genocide Convention was also adopted literally, without any revisions by the Rome Statute, in Article 6.[14] Thus, as will be clarified, both the TPC and the Rome Statute employ similar definitions of the crime of genocide.

If we look at the context of both articles, it will be seen that protected groups are the same in each case. Article 76 of the TPC states that 'the commission of any of the following acts against any member of any national, ethnic, racial, or religious group with the intent to destroy such group, in whole or in part, through the execution of a plan shall constitute Genocide.'[15] In the same vein, Article 6 of the Rome Statute states that 'for the purpose of

[11] See also detailed study of Ali Emrah BOZBAYINDIR, **Turkey and the International Criminal Court**, Nomos Verlagsgesellschaft, Köln, 2013.

[12] Published in the Official Gazette dated 29 March 1950 and numbered 7469. Mahmut KOCA, "The Crime of Genocide in the New Turkish Penal Code", In **Annales de la Faculté de Droit d'Istanbul,** Vol. 42, No. 59, 2010, p.260.

[13] The official comment on Article 77, see Vahit BIÇAK / Edward GRIEVES, **Turkish Penal Code**, Seçkin Yayıncılık, Ankara, 2007, p.222.

[14] KOCA, p.261.

[15] BIÇAK / GRIEVES, p.220.

this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group [...]'. In both definitions, in order to commit the crime of genocide, victim(s) of the crime must be targeted due to being members of a particular national, ethnical, racial or religious group. As Koca remarks, 'this aspect makes the crime of genocide, a peculiar crime in respect of its victims'.[16]

As can be seen from the two contexts, however, a significant difference between these definitions hinges on the term 'plan', which is a chapeau element of the TPC's definition.[17] The term 'plan' does indeed underpin the crime of genocide in the TPC.[18] Therefore, someone who commits this crime must know that he/she is acting pursuant to a genocidal plan. As Bozbayındır explains it, the TPC introduces two tests: 'one is an objective test about the existence of a plan, and the perpetrator's knowledge of it, and a subjective test asserts that a perpetrator must have acted with special intent to destroy a protected group, in part or in whole'.[19] In both definitions, the common feature is *dolus specialis* or special intent; however, the definition of the Rome Statute does not require a 'plan' in order to commit the crime of genocide.

Yet, interpretation of the crime of genocide should be explored under international jurisprudence in order to see how the terms plan and policy have been perceived by international courts. For instance, in the *Jelisić* Appeal Judgment, the Appeal Chamber concluded that 'the existence of a plan or policy is not a legal ingredient of the crime'.[20] Following this conclusion, the

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[16] KOCA, p.265.

Neither definition includes the meaning of national, ethnical, racial or religious groups. Stanton defines these groups as follow, 'A national group means a set of individuals whose identity is defined by a common country of nationality or national origin. An ethnical group is a set of individuals whose identity is defined by common cultural traditions, language or heritage. A racial group means a set of individuals whose identity is defined by physical characteristics. A religious group is a set of individuals whose identity is defined by common religious creeds, beliefs, doctrines, practices, or rituals' Gregory H. STANTON, "What is Genocide?", **Genocide Watch,** 2002.

[17] See also BOZBAYINDIR.

[18] Murat ÖNOK, Uluslararasi Ceza Divani'ni Kuran Roma Statüsü ileTürk Ulusal Mevzuatinin Maddi Ceza Hukuku Kurallari Yönünden Uyumuna Dair Rapor, 2011. (Report concerning the Inconsistencies between the Turkish Penal Code and the Rome Statute; available only in Turkish, so translated by the author).

(http://www.ucmk.org.tr/dosya/Yayin/UCM_rapor-web.pdf) Date accessed: 16.12.2015)

[19] BOZBAYINDIR, p.60.

[20] *Prosecutor v. Goran Jelisić*, (Appeals Judgement) IT-95-10-A (5 July 2001), para. 48;

Appeal Chamber implied that the presence of a plan or policy can be seen as an indication of the intent to destroy.[21] The Appeal Chamber reached a very similar conclusion in the *Kayishema and Ruzindana* case, as it was reaffirmed that a genocidal plan is necessary for evidential purposes.[22] In that case, the Trial Chamber concluded that '[...] it is not easy to carry out genocide without a plan or organization',[23] and thus 'the existence of a plan would be strong evidence of the specific intent requirement for the crime of genocide'.[24] Based on these decisions, it could be said that although the ICTR rejects the existence of a plan as a legal ingredient of the crime, its jurisprudence reveals the probative value of such a plan,[25] as it clearly argues that 'proof of the objective context in which genocidal acts are committed with requisite intent is an integral part of the proof of a genocide case'.[26]

The International Court of Justice (ICJ) also arrived at a significant decision concerning the mental element of the crime of genocide. For instance, regarding the claim filed by Bosnia and Herzegovina against Serbia and Montenegro pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide, the ICJ focused on the policy of Serbia in order to decide whether the impugned acts constituted ethnic cleansing or genocide.[27] To this end, the Court looked for evidence of a state plan or policy. Due to the lack of such evidence, the court concluded that genocide was not committed.[28]

Prosecutor v. Clement Kayishema and Obed Ruzindana, (Appeals Judgement) ICTR-95-1-T (21 May 1999), para. 138.

[21] *Prosecutor v. Goran Jelisić*, (Appeals Judgement) IT-95-10-A (5 July 2001), para. 48; *Prosecutor v. Clement Kayishema and Obed Ruzindana*, (Appeals Judgement) ICTR-95-1-T (21 May 1999), para. 138.

[22] *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment, (21 May 1998).

[23] *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment, (21 May 1998). para. 94.

[24] *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment, (21 May 1998). para. 276.

[25] *Prosecutor v. Goran Jelisić*, (Appeals Judgement) IT-95-10-A (5 July 2001), para. 48; *Prosecutor v. Clement Kayishema and Obed Ruzindana,* (Appeals Judgement) ICTR-95-1-T (21 May 1999), para. 138.

[26] *Prosecutor v. Jelisić,* Case No. IT-95-10-A, *Prosecution's Appeal Brief* (Redacted Version) (14 July 2000), para. 64.

[27] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 2007 I.C.J. 70, paras 277 and 190.

[28] William A. SCHABAS, "Whither genocide? The International Court of Justice finally pronounces", **Journal of Genocide Research**, Vol. 9, No. 2, pp. 183–192, 2007, p.189.

According to Schabas, 'the Court did not focus its inquiry on the nature of acts committed by individuals that could be attributed to the Federal Republic of Yugoslavia, but on the existence of a state plan to commit such acts that apparently considered it a formal element of the crime of genocide'.[29]

If we look at recent ICC jurisprudence, it can be seen that the ICC's interpretation of Article 6 of the Rome Statute is explicit. In his application for the issue of a warrant for the arrest of Omar Al Bashir, the Prosecutor refers to the existence of a state or organisational genocidal plan or policy.[30] In this decision, it is made clear that although the term plan is not involved in the context of the crime, it amounts to a formal element of the crime.[31] Based on the Prosecutor's interpretation it can be said that the Prosecutor adopts the notion that 'a plan is an indispensable element of the crime of genocide'.[32] It means that a genocidal plan or policy is a necessary element of the offence.[33]

Very similar to the Court's interpretation, Schabas states that the existence of a plan in order to commit the crime of genocide should be accepted as an element of the crime.[34] As he explains, 'it is [almost] impossible to imagine genocide that is not planned or organized either by the State itself or a state-like entity or by some clique associated with it'.[35] Based on the interpretations of Schabas and the ICC, it can be said that although the term 'plan' is not

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[29] William A. SCHABAS, "State policy as an element of international crimes", **The Journal of Criminal Law and Criminology**, Vol. 98, No. 3, pp. 953–982, 2008, p. 968.

[30] *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Case No. ICC-02/05-01/09, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (4 March 2009), para. 121, footnote 142.

[31] Stylianos MALLIARIS, "Assessing the ICTY Jurisprudence in Defining the Elements of the Crime of Genocide: The Need for Plan", **Review of International Law Politics,** Vol. 5, No: 20, pp. 105–128, 2009, p.110.

Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (4 March 2009), para. 121, footnote 142.

[32] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05, *Summary of Prosecutor' s Application under Article 58* (14 July 2008), paras 49–52.

[33] MALLIARIS, (2009). p.157.

Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (4 March 2009), para. 121, footnote 142.

[34] William A. SCHABAS, "Developments in the law of genocide", **Yearbook of International Humanitarian Law,** Vol.5, pp. 131–165, 2002, p. 156.

[35] SCHABAS, (2002), p. 156.

included in the content of Article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide and Article 6 of the Rome Statute, there is a wide consensus for the necessity of the presence of a genocidal plan as a formal element of the crime of genocide.[36]

On this basis, it can be asserted that the TPC's definition of the crime of genocide does not narrow down the scope of the crime because international judicial bodies interpret a genocidal plan as an element of the crime. Nevertheless, as pointed out by Malliaris, 'the TPC's definition is still narrower than the explicit language of the relevant texts of international law, since it subscribes explicitly to the position of this article that a plan must exist to affirm both the *actus reus* and *mens rea* of the crime'.[37] Thus, in order to bring the TPC into compliance with the Rome Statute, the requirement for the 'execution of a plan' should be removed from the context of the definition.

CRIMES AGAINST HUMANITY

Crimes against humanity were introduced into domestic law in 2004, in Article 77 of the TPC. Yet, the definition of the TPC is a significant departure from the definition set out in Article 7 of the Rome Statute.[38] If both articles are briefly examined, the main differences can be listed as follows: i) the contextual elements of the two definitions, ii) the definition of the protected groups iii) and the catalogues of crimes in Article 7 of the Rome Statute and Article 77 of the TPC.[39] As will be elaborated later, the TPC narrows the concept of crimes against humanity when compared to the Rome Statute.

Crimes against humanity are defined in Article 7 of the ICC Statute as '…any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack…'.[40] The article then lists a catalogue of crimes categorised as crimes against humanity. Article 77 of the TPC, however, establishes that 'the systematic performance an act, described below, against a part of

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[36] Stylianos MALLIARIS, "Assessing the ICTY Jurisprudence in Defining the Elements of the Crime of Genocide: the Need for a 'Plan'", **USAK Yearbook of Politics and International Relations,** Vol. 3, pp. 145–170, 2010, p.162.

[37] MALLIARIS, (2010), p.166.

[38] Leila Nadya SADAT, "Crimes against humanity in the modern age", **American Journal of International Law,** Vol. 107, No. 2, pp. 334–377, 2013, p.352.

[39] See also BOZBAYINDIR.

[40] Article 7 of the Rome Statute.

society and in accordance with a plan with a political, philosophical, racial or religious motive shall constitute a crime against humanity.'[41] It is not easy to make a fair comparison between these two articles because the terms in Article 7, such as 'civilian population', 'widespread', 'systematic attacks' and 'organization' are not defined in either the Rome Statute or in the elements of the crime.[42] The most significant reason for the vagueness of the terms is the contextual complexity of the phrases. As Von Hebel and Robinson state, '[m]ost delegations quickly agreed that this was too complex a subject and an evolving area in the law, better left for resolution in case-law'.[43] For this reason, the Prosecutor and the Court have defined or interpreted how these terms should be understood.

The first remarkable difference hinges on the term 'widespread or systematic attack' in the Rome Statute.[44] The conjunction between these two is 'or', not 'and'. This means that the requirements of 'widespread' and 'systematic' are established in a discrete manner.[45] Hence, it can be said that if an attack is systematic it does not have to be widespread, or vice versa.[46] As noted above, neither the term 'widespread' nor the term 'systematic' is described in the Court's Statute. Yet, in terms of the meaning of 'widespread', Pre-Trial Chamber I concluded that 'widespread' refers to the 'large-scale nature of an attack, as well as to the number of victims'.[47] An attack is considered to be widespread if it 'affected hundreds of thousands of individuals and took place across large swathes of the territory of the Darfur region'.[48] The Court

41 BIÇAK / GRIEVES, p.222.

42 SADAT, p.355.

43 Herman VON HEBEL / Darryl ROBINSON, "Crimes within the Jurisdiction of the Court". In Roy S. K. LEE, (Ed.) **The International Criminal Court. The Making of the Rome Statute**, pp.78–126, Kluwer Law International, The Hague, 1999, p.78.

44 For further information, see Volkan MAVİŞ, "Crimes Against Humanity in the Turkish Criminal Code: A Critical Review in the Light of International Mechanisms", **Gazi Üniversitesi Hukuk Fakültesi Dergisi**, Vol. XX, No. 2, 2016, p.695.

45 William A. SCHABAS, ***The International Criminal Court: a commentary on the Rome statute***, Oxford University Press, 2010, p.147.

46 *Bemba* (ICC-01/05-01/08), Decision Pursuant to Articles 67(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 82.

47 *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hasan Al Bashir, 4 March 2009, para. 81; Katangaet al. (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, paras 394–397.

48 *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of

determined that an attack must be 'massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims'.[49]

The other term, 'systematic', relates to 'the organised nature of acts of violence and to the improbability of their random occurrence'.[50] For instance, in the application for a warrant of arrest against Omer Hassan Al Bashir, it was concluded that the attack in question was to be considered 'systematic' since 'it lasted for well over five years and the acts of violence of which it was comprised followed, to a considerable extent, a similar pattern'.[51] An attack's systematic pattern can 'often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis'.[52] Based on interpretations of both terms, it could be concluded that these two requirements have different meanings,[53] and in order to commit crimes against humanity, the inclusion of one facet of the acts, either 'widespread' or 'systematic', would be satisfactory to confirm the offence.[54]

The definition adopted in the TPC, however, contends that the crime must be committed systematically, through the 'execution of a plan'. In the

Arrest against Omar Hasan Al Bashir, 4 March 2009, para. 84.

[49] *Bemba* (ICC-01/05-01/08), Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 83.

[50] *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omer Hassan Al Bashir, 4 March 2009, para. 81; Katanga et al. (ICC-04/04-01/07), Decision on the Confirmation of Charges, 30 September, paras 394–397. ICC-01/09-19-Corr, para. 96. Pre-Trial Chamber referred to ICC-01/04-01/07-717, para. 394; ICC-02/05-01/07-1-Corr, para. 62. See also ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, 7 May 1997, para. 648; ICTY, *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Appeal Judgment, 17 December 2004, para. 94; ICTY, *Prosecutor v. Blaskic,* Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, para. 101.

[51] *Bashir* (ICC-02/05-01-09), Decision on the Prosecution's Application for a Warrant of Arrest against Omer Hassan Ahmad Al Bashir, 4 March 2009, para. 85.

[52] ICC-01/09-19-Corr, para. 96, Pre-Trial Chamber II referred to ICC-01/04-01/07-717, para. 397. It also cited ICTY, *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 94; *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Judgment, 17 January 2005, para. 545.

[53] However, the Pre-Trial Chamber III, regarding the situation in the Republic of *Côte d'Ivoire* implies that all attacks must be widespread *and* systematic, quite a contrary reading of Article 7's text. This formulation was most recently reiterated by Pre-trial Chamber III in the decision pursuant to Article15 authorizing the investigation in *Côte d'Ivoire*. *See* Situation in *Côte d'Ivoire*, ICC-02/11, para. 43.

[54] For further information, see *Prosecutor v. Katanga,* Case No: ICC-01/04-01/07, Confirmation of the Charges, 30 September 2008.

TPC's formulation, the elements 'execution of a plan' and 'in a systematic manner' complement each other.[55] The definition provided in the TPC does not contain the term 'widespread'. It states that if a crime is committed 'systematically', according to a plan, it does not have to be widespread. Thus, it could be argued that the absence of the 'widespread' element in the TPC narrows its scope of application, as national courts may categorise crimes against humanity as ordinary crimes if they just consist of widespread attacks which are not systematic.[56]

The second difference is the requirement for a 'plan' to commit a crime against humanity in the TPC. Article 77 states that crimes against humanity must be committed via the 'execution of a plan', and on political, philosophical, racial or religious grounds.[57] Based on this definition, it could be said that the 'execution of a plan' and 'discriminatory animus' are contextual elements of crimes against humanity in the TPC.[58] On the other hand, Article 7(2)(a) of the Rome Statute establishes that 'crimes against humanity are preconditioned on the existence of an attack on a civilian population pursuant to or in furtherance of a State or organizational policy to commit such an attack'.[59] Article 7 of the Rome Statute refers to 'a State or organizational policy' as a chapeau element for crimes against humanity.[60] It seems that both articles serve to narrow the concept of such crimes. But in order to clarify whether Article 77 of the TPC is more restrictive than Article 7 of the Rome Statute, the current interpretation of Article 7(2)(a) by the Prosecutor and Pre-Trial Chambers should be reviewed.

Regarding the situation in *Kenya,*[61] former Prosecutor Ocampo concluded that '[the existence of a State or organisational policy is] an element from

[55] The Turkish Penal Code, Article 77.

[56] BOZBAYINDIR, p.73.

[57] The official comment on Article 77, see BIÇAK / GRIEVES, p.222

[58] BOZBAYINDIR, pp.66–67.

[59] Thomas Obel HANSEN, "The policy requirement in crimes against humanity: lessons from and for the case of Kenya", **The George Washington International Law Review***,* Vol. 43, No. 1, pp. 1–42, 2011, p.1.

[60] For further information, see HANSEN, pp.1–42. Gerhard WERLE / Burghardt BORIS, "Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?", **Journal of International Criminal Justice,** Vol.10, No. 5, 2012, pp. 1151–1170.

[61] For the background of the case see: Situation in the Republic of Kenya, (https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.aspx) Date accessed: 11.12.2015)

which the systematic nature of an attack may be inferred'.[62] Yet, regarding the decision of the Prosecutor, Pre-Trial Chamber II (the Chamber that authorized an investigation of the Situation in the Republic of Kenya) stated that the prosecutor must prove the following chapeau and contextual requirements of the offence: '(i) an attack directed against any civilian population, (ii) a State or organizational policy, (iii) the widespread or systematic nature of the attack, (iv) a nexus between the individual act and the attack, and (v) knowledge of the attack'.[63] According to this list, a State or organizational policy appears to be a separate requirement in order to commit an offence.

In its interpretation, however, Pre-Trial Chamber II states that the Statute does not establish definitions of the terms 'policy' or 'State' or 'organizational'. Due to a lack of definitions in policy requirements, Pre-Trial Chamber II highlights the decision of Pre-Trial Chamber I in the case against *Katanga* and *Ngudjolo Chui:*

[...] ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.[64]

According to the decision of Pre-Trial Chamber I, an attack which is organised, directed or planned will be considered as evidence of the existence

[62] International Criminal Court, Office of the Prosecutor, Situation in the Republic of Kenya: Request for Authorisation of an Investigation Pursuant to Article 15, para. 106, ICC Doc. ICC- 01/09 (26 Nov. 2009), para. 79.

[63] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, Pre-Trial Chamber II Decision, para. 93.

[64] Pre-Trial Chamber II, Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against *Jean-Pierre Bemba Gombo,* ICC-01/05-01/08-424, para. 8. See also ICTY, *Prosecutor v. Tadic,* Case No. IT-94-1-T, Judgment, 7 May 1997, para. 653.

of a state or organisational policy.[65] As summarised by Hansen, by endorsing the views taken on other occasions by the ICC pre-trial chambers, 'the threshold for a policy adopted by the majority seems simply to be that the attack must be something more than spontaneous or isolated acts of violence'.[66]

In parallel to the interpretation of Pre-Trial Chamber I, the majority of judges in Pre-Trial Chamber II 'link[ed] the existence of a state or organisational policy to the requirement of systematic attack',[67] as they opined that the requirement for 'a state or organisational policy' is one of the relevant criteria to be taken into consideration when deciding whether a group qualifies as an organisation under Article 7(2)(a), and 'whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population'.[68] Thus, considering these interpretations, it can be said that a state or organizational policy is not a separate requirement.

In order to make a clear comparison, how the term has been interpreted by Turkish national courts should be reviewed. Yet, there have been no decisions by Turkish domestic courts on such crimes; thus, to arrive at a concrete conclusion as to whether there is a substantial difference between the requirement for a 'plan' in the TPC and the requirement for a 'state or organisational policy' is highly challenging. But, as Bozbayındır explains, the difference between these two terms is based on the fact that 'a plan is more concrete than the notion of policy'.[69] He further implies that Turkish domestic courts may consider the term 'plan' in accordance with the Rome Statute.[70] Thus, in their interpretation of the term 'plan', Turkish judges may apply the standards of international jurisprudence raised above.

Another difference between the TPC and the Rome Statute is based on protected groups. In the Rome Statute, an attack must be conducted against 'any civilian population', but in the TPC, the crime must be committed against

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65 *See Tadic*, Case No. IT-94-1-T, para. 653.

66 HANSEN, p.12.

67 Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19,31 March 2010, Pre-Trial Chamber II Decision, para. 93.

68 Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19,31 March 2010, Pre-Trial Chamber II Decision, para. 93.

69 BOZBAYINDIR, p.72.

70 BOZBAYINDIR, p.72

a sector of the community for political, philosophical, racial or religious reasons.[71] With these terms, the TPC attaches a discriminatory ground to crimes against humanity. This feature of crimes against humanity in the TPC, compared to the definition of the Rome Statute, narrows the norm's scope of application. In terms of this discriminatory ground, Turkey partially copies the definition settled in Article 3 of the Statute of the International Tribunal for Rwanda, rather than the Rome Statute. According to Article 3, the Court 'shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'.[72] However, different from this definition, Turkey excludes 'ethnic' and 'national' grounds for committing a crime.

Another significant difference between the TPC and the Rome Statute is the catalogues of listed crimes; many of the crimes listed in the Rome Statute do not exist in the TPC, for instance 'the crime of apartheid, some sexual crimes, persecution, [extermination] and other inhuman acts of a similar character intentionally causing great suffering, or serious injury to the body or to physical health',[73] the deportation or forcible transfer of a population and enforced disappearances of persons. These crimes will thus be covered by other ordinary crimes that have been regulated in the TPC.[74] But, we should bear in mind that the punishment of ordinary crimes can never act as a deterrent to crimes against humanity.

Due to the aforementioned differences, it can be said that when the Turkish legislator was defining crimes against humanity under the new TPC, the Rome Statute was not carefully taken into consideration. Yet, in order to fulfil the expectations of the Rome Statute, Turkey should comprehensively revise its notion of crimes against humanity under the TPC.

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[71] For further information, see Ayşen SEYMEN ÇAKAR, "İnsanlığa Karşı Suçlar" ("Crimes Against Humanity"), **Türkiye Barolar Birliği Dergisi**, Vol.103, 2012, p. 192.

[72] Article 3 of the Statute of the International Tribunal for Rwanda. Although no officially recognized definition of the four protected groups has been agreed upon, the ICTR has attempted to define each in its judgments. For the definitions, see *Akayesu,* (Trial Chamber), 2 September 1998, paras 512-513-514-515.

[73] BOZBAYINDIR, p.64.

[74] For further information, see also BOZBAYINDIR.

WAR CRIMES

The TPC does not include any provisions on war crimes. The Turkish Military Penal Code does, however, contain some war crimes, which are only applicable to international armed conflicts. The Rome Statute, on the other hand, has two categories of war crimes that are applicable to both international and non-international armed conflicts. During the negotiation process, Turkey suggested that war crimes committed in non-international armed conflicts should not be covered by the Rome Statute. Turkey suggested that the crime of terrorism should be included in the Rome Statute instead of war crimes committed in non-international armed conflicts. According to Güney, a Turkish delegate to the Rome Conference, one of the main reasons for Turkey remaining outside the Court's jurisdiction relates to war crimes committed in non-international armed conflicts. In his words:

Article 8, paragraphs (2) and (d), on war crimes, were not satisfactory. The Court should have competence to take cognizance of war crimes only in the context of policies or as part of series of analogous large-scale crimes. The future court should have nothing to do with internal troubles, including measures designed to maintain national security or root out terrorism.[75]

From my standpoint, Turkey's main reluctance regarding the inclusion of non-international armed conflicts under the ICC's jurisdiction is based on any possible 'political abuse' regarding Turkey's war against terrorism.[76] For instance, Bayıllıoğlu asserts that the conflict between the terrorist group PKK and the Turkish government is still ongoing; thus, Turkey's war against terrorism, given the ICC's jurisdiction over non-international armed conflicts,

[75] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/13, Official Records, Vol. II, 124.

[76] See also, BAYILLIOĞLU, "Uluslararası Ceza Mahkemesi ve Türkiye", ("Turkey and the International Criminal Court"). **Ankara Üniversitesi Hukuk Fakültesi Dergisi,** Vol. 56, No. 1, 2007, pp.51–121. Elif UZUN, "Milletlerarası Ceza Mahkemesi Düşüncesinin Tarihsel Gelişimi ve Roma Statüsü", ("The Development of International Justice and the Rome Statute"), 2003. Cemalettin KARADAŞ, "Türkiye'in Uluslararası Ceza Mahkemesi'ne Yaklaşımı: Mahkemeyi Kuran Roma Statüsü'ne Taraf Olacak mı?", (Turkey's Attitude towards the International Criminal Court), **Uluslararası Hukuk ve Politika,** Vol.5, No.20, 2009, pp.33–57. Orçun ULUSOY / Utku KILINÇ, **Uluslararası ceza mahkemesi (International Criminal Court)**, İnsan Hakları Gündemi Derneği, 2008., Hakan KARAKEHYA, "Uluslararasi Ceza Mahkemesi Ve Uygulanabilir Hukuk", ("International Criminal Court and Applicable Law"), **Ankara Üniversitesi Hukuk Fakültesi Dergisi,** pp. 133–164.

is open to misuse.[77] That situation may result in unexpected political and legal costs for Turkey and may go against Turkey's self-interest.

This perception regarding war crimes committed in non-international armed conflicts is reflected in domestic regulations. As previously mentioned, the Turkish Military Penal Code adopted a limited list of war crimes only applicable in international armed conflicts; however, compared to the Rome Statute, the TMPC remains very dubious. The TMPC was established in 1930; thus, it is rather inadequate in relation to improvements to international law on war crimes. The TMPC provides a list of war crimes that aims to protect legal assets with regard to people and property.[78] In terms of protecting the value of property, the TMPC regulates war crimes covering booty, plunder and the destruction of property.[79] Pertaining to crimes against people, the TMPC includes the crime of torture against wounded persons.[80] But Article 8 of the Rome Statute, one of the most substantial provisions, is more emphatic when compared to the relatively laconic text of the TMPC. For this reason, war crimes prohibited under the Rome Statute should be included in the TPC.

CRIME OF AGGRESSION

Turkish legislators also did not regulate the crime of aggression in 2004 under the new TPC. Compared to other crimes listed in the Rome Statute, the absence of this crime from the TPC is comprehensible, because the definition of 'aggression' was unclear under the Rome Statute in 2004. In 1998, at the end of the negotiations for the Rome Statute, the crime of aggression was listed along with war crimes, crimes against humanity and genocide; however, different from those three defined crimes, the ICC could not exercise jurisdiction over the crime of aggression, because a definition could not be provided at that time. Thus, the vagueness of the crime of aggression would contradict the principle of clarity.[81]

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77 BAYILLIOĞLU, pp.106–107.

78 BOZBAYINDIR, p.98.

79 Turkish Military Penal Code Arts 125 and 127.

80 Turkish Military Penal Code Arts127 (2) and 127 (3).

81 For further information, see Alexandre FLÜCKIGER, "The ambiguous principle of the clarity of law". In Anne WAGNER / Sophie CACCIAGUIDI-FAHY, **Obscurity and Clarity in the Law,** Ashgate, Aldershot, 2008, pp.100-133.

At the Review Conference in Kampala in June 2010, a definition which partly reflects General Assembly Resolution 3314 (XXIX) was agreed upon.[82] Hence, as a consequence of the conference, a list of acts constituting aggression and the conditions under which the Court would exercise jurisdiction in respect of that crime were provided.[83] For the ICC to actively exercise its jurisdiction over the crime of aggression, the amendments stipulate two additional conditions. According to Article 15*bis* (2), the Court 'may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty state parties'. And Article 15*bis* (3) states: '[t]he Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute'.[84] With this decision, the concrete exercising of ICC jurisdiction over the crime of aggression had been postponed until 2017.[85] On December 14, 2017, the Assembly of State Parties to the International Criminal Court decided to activate Court's jurisdiction over the crime of aggression as of July 17, 2018.[86] Although the crime of aggression is not included in the TPC, Turkey's argument during the Kampala Conference should be reviewed so as to comprehend Turkey's perspective regarding this particular crime.

The jurisdictional conditions for the crime of aggression presented in Kampala are far more restrictive than for other crimes under the Statute.[87] The crime of aggression differs from crimes of genocide, war crimes and crimes against humanity in certain respects. First, the former three crimes can be committed by anyone; however, regarding perpetrators of the crime of

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[82] General Assembly Resolution, 3314 (XXIX), 14 December 1974, 29 U.N. GAOR, 29th Sess., Supp. No. 31, UN Doc. A/9631, p.142.

[83] Victor KATTAN, Review of **The Crime of Aggression under the Rome Statute of the International Criminal Court** by Carrie MCDOUGALL, **Journal of Conflict and Security Law,** Vol. 20, No. 3, 2015, p.1.

[84] On December 14, 2017, the Assembly of State Parties to the International Criminal Court decided to activate Court's jurisdiction over the crime of aggression as of July 17, 2018.

[85] Drew KOSTIC, "Whose Crime is it Anyway – The International Criminal Court and the Crime of Aggression", **Duke Journal of Comparative & International Law,** Vol. 22, No. 1, pp.109-142, 2011, p.109.

[86] International Criminal Court, Assembly activates Court's Jurisdiction over Crime of Aggression, (https://www.icc-cpi.int/Pages/item.aspx?name=pr1350) Date accessed: 29.03.2018)

[87] BOZBAYINDIR, p.104.

aggression, a restrictive view has been adopted. Article 8*bis* limits individual responsibility to people in command or leadership positions, as submitted in 8*bis* (1): '[those] in a position effectively to exercise control over or to direct the political or military action of a State'.[88] This regulation restricts those who can be investigated for aggression to 'presidents, prime ministers, and top military leaders such as minister of defence and commanding generals'.[89] For this reason, the crime has been referred to as a 'leadership crime',[90] and therefore different from other offences within the ICC's jurisdiction.

Another crucial point for this crime is the issue of trigger mechanisms.[91] A highly controversial discussion was based on the *proprio motu* competence of the prosecutor and the role of the Security Council.[92] Some state delegates referred to the Security Council's exclusive right under Article 39 of the Charter of the United Nations when deciding whether an act of aggression took place.[93] As Article 39 of the Charter states: '[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression'.[94] State delegates, mainly from permanent members of the Security Council,[95] requested the Security Council's approval as a precondition for the investigation of aggression; on the other hand, most of the other representatives suggested this role be given to the Court's Pre-Trial Division.[96]

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88 Article 8*bis* of the Rome Statute.

89 Michael P. SCHARF, "Universal Jurisdiction and the Crime of Aggression", **Harvard International Law Journal**, Vol. 53, No. 2, pp.357–388, 2012, p.362.

90 SCHARF, p.362.

91 For further information about trigger mechanisms of the Court, see Vahit BIÇAK, **Suç Muhakemesi Hukuku** (**Penal Procedure Law**), Polis Akademisi Yayınları, Ankara, 2013, p. 834.

92 See Claus KREß / Leonie VON HOLTZENDORFF, "The Kampala compromise on the crime of aggression", **Journal of International Criminal Justice**, Vol. 8, No. 5, 2010, pp.1179–1217.

93 For further information, see KREß / VON HOLTZENDORFF. Jennifer TRAHAN, "The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference", **International Criminal Law Review**, Vol. 11, No. 1, 2011, pp.49–104. Christian WENAWESER, "Reaching the Kampala Compromise on Aggression: The Chair's Perspective", **Leiden Journal of International Law,** Vol. 23, No. 4, 2010, pp. 883–887.

94 Article 39 of the UN Charter.

95 State parties France and the United Kingdom, and observer delegations China, Russia and the United States. For further information, see TRAHAN and KREß / VON HOLTZENDORFF.

96 SCHARF, p.363.

Regarding trigger mechanisms, Turkey referred to the Security Council's exclusive right to decide on the existence of acts of aggression. Within this scope, Turkey supported the idea that 'an investigation into an alleged case of aggression should be initiated only where the UN Security Council has determined that an act of aggression has taken place'.[97] Mr. Aramaz, the head of the Turkish delegation, asserted that 'the Prosecutor should launch an investigation in respect of an alleged act of aggression only if a prior affirmative determination has been made by the Security Council'.[98] This conclusion does, however, have some drawbacks with regard to the independence of the Court. This perspective implies that the Court can only prosecute a crime of aggression if the Council makes a decision on such acts. As pointed out by Schabas, 'such a view seems an incredible encroachment upon the independence of the Court, and would almost certainly mean, for starters, that no permanent member of the Security Council would ever be subject to prosecution for aggression'.[99] Thus, considering the Council to be an arbiter of situations of aggression may affect the reliability of the Court.

Therefore, the majority of the representatives deftly 'rejected the idea of leaving the criminal conduct issue to what is essentially a political body'.[100] It was then concluded under Article 15*bis* and 15*ter* that:

…the ICC can exercise jurisdiction over the crime of aggression committed by any state when the Security Council refers a situation to the Court. The Court can also exercise jurisdiction over the crime of aggression committed by state parties when either the Security Council has made a determination that an act of aggression has been committed or, where no determination is rendered by the Council within six months of an incident, the ICC's Pre-Trial Division authorizes the Prosecutor to proceed with an investigation.[101]

Under this article, the Security Council still plays a crucial role in deciding whether an act of aggression has taken place; however, under the

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97 Statement by Mr. Ismail Aramaz, Head of the Turkish Delegation, ICC Review Conference, Kampala, 1 June 2010.

98 Statement by Mr. Ismail Aramaz, Head of the Turkish Delegation, ICC Review Conference, Kampala, 1 June 2010.

99 William A. SCHABAS, **An Introduction to the International Criminal Court.** 3rd edition. Cambridge University Press, 2007, p.137.

100 SCHABAS, (2007), p.152.

101 SCHARF, p.362.

adopted articles, the Council does not have exclusive authorization to do so, because the prosecutor of the Court can take action *proprio motu* if the conditions submitted in Article 15*bis* are invoked.[102]

CONCLUSION

It has been argued here that the TPC does not cover the crime of aggression or war crimes. Also, the definitions of the crime of genocide and crimes against humanity do not correspond to those included in the Rome Statute. Hence Turkey, considering the inconsistencies between the Rome Statute and the TPC, must review and revise its domestic law in a comprehensive way in order to authorize its domestic courts to prosecute the crimes listed in the Rome Statute. As for substantive law, war crimes and the crime of aggression should be incorporated into Turkey's criminal law. Moreover, in terms of the crime of genocide and war crimes, the TPC should be expanded to bring it into line with the Rome Statute.

In the interest of conducting a comparative analysis, it has been argued here that the Europeanisation process, which obliged Turkey to join the ICC, had a constitutive effect on Turkey regarding restructuring its penal code in 2004. During the legislative drafting process in Turkey, the Rome Statute represented a set of concerns, and thus lawmakers aimed to introduce the crimes listed in the Statute into this process of legal reforms.

Turkey as an individual state before the Court should transform itself into one which can make a full commitment to this human rights regime. The amendment of the TPC was one of the domestic requisites for joining the ICC; and more significantly, it was a membership condition of the EU, which therefore had a significant effect on the amendment of the TPC. However, due to differences between the TPC and the Rome Statute, it has been suggested that states are guided not only by the legal norms provided in the Statute, but also by their national interest.

Thus, many significant gaps remain between international standards and the Turkish law governing criminal matters and procedures. As has already been noted, this is a concept of national interest, which includes national security,[103] and this was prioritised when the new TPC was introduced by

[102] BOZBAYINDIR, p.104.

[103] For further information, see Betül URHAN / Seydi ÇELİK, "Perceptions of 'National Security' in Turkey and Their Impacts on the Labor Movement and Trade Union Activities",

Turkish lawmakers in 2004. Although the Europeanisation process and the idea of joining the ICC have affected the Turkish authorities, Turkish parliament could not bring domestic legislation in line with the Rome Statute. Thus, it can be said that the differences between the Rome Statute and Turkish domestic law constitute an obstacle for Turkey's accession to the Rome Statute.

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