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**To cite this article:** Kurtuluş, Şehmus, "Reassessment of Turkey's Objections to the  
Exclusion of Terrorism from the Rome Statute", *Uluslararası İlişkiler*, Vol. 16, No. 64, 2019,  
pp. 145-161, DOI: [10.33458/uidergisi.653027](https://doi.org/10.33458/uidergisi.653027)

**To link to this article:** <https://dx.doi.org/10.33458/uidergisi.653027>

Submitted: 05 March 2018  
Last Revision: 13 June 2019  
Published Online: 01 December 2019  
Printed Version: 01 December 2019

Uluslararası İlişkiler Konseyi Derneği | International Relations Council of Turkey  
Uluslararası İlişkiler – Journal of International Relations  
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# Reassessment of Turkey's Objections to the Exclusion of Terrorism from the Rome Statute\*

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## ABSTRACT

Criminal justice response to terrorism and to the support for terrorism is still a hot topic in Turkey due to ongoing American military support for the PYD, which is Syrian wing of the internationally designated terrorist organization PKK whose indiscriminate attacks in Turkey has claimed lives of thousands of civilians. This article first discusses, in light of recent developments, whether exclusion of a separate crime of terrorism from the Rome Statute of the International Criminal Court can be a valid argument against Turkey's accession to it. After discovering some of the possible contributions of Turkey's Rome Statute accession to its decades-long struggle against terrorism, this study concludes that Turkey's all other concerns regarding the accession should be periodically reevaluated.

**Keywords:** ICC, Turkey, PKK, Terrorism, Rome Statute of the International Criminal Court

## Terörizmin Uluslararası Ceza Divanının Yargı Yetkisi Dışında Bırakılmış Olmasına Dair Türkiye'nin İtirazlarının Yeniden Değerlendirilmesi

## ÖZET

Türkiye'de binlerce sivilin ölümünden sorumlu olan ve Amerika Birleşik Devletleri'nin bizzat kendisinin de terör örgütü olarak tanıdığı PKK'nın Suriye kolu olan PYD'ye açıktan devam eden Amerikan askeri desteği, terörizm ve terörizme destek suçlarının Uluslararası Ceza Hukuku boyutlarını Türkiye'de yeniden sıcak gündem maddesi haline getirmiştir. Bu çalışmada, öncelikle, terörizm suçunun Uluslararası Ceza Divanının yargı yetkisi dışında bırakılmış olmasının, Türkiye'nin bu mahkemeyi kuran Roma Statüsüne katılmayışının gerekçelerinden biri olup olamayacağı güncel gelişmeler ışığında tartışılmıştır. Ardından, Türkiye'nin Roma Statüsüne katılmasının on yıllardır süren terörle mücadelesine sunacağı muhtemel katkılara dikkat çekilerek, Türkiye'nin mahkemeye üye olmama gerekçelerini belirli aralıklarla gözden geçirmesi gerektiği vurgulanmıştır.

**Anahtar Kelimeler:** UCD, Türkiye, PKK, Terörizm, Uluslararası Ceza Divanı Roma Statüsü

\* This study constitutes a part of the author's doctoral dissertation at Case Western Reserve University School of Law (USA), under the direction of Professor Michael P. Scharf.

## Introduction

Today, the International Criminal Court (ICC), the world's first and only permanent international criminal tribunal capable of trying individuals for grave crimes, enjoys as many as 122 states parties; almost two-thirds of the world's nations. Although Turkey participated vigorously in the Rome Diplomatic Conference of Plenipotentiaries (Rome Conference) where the Rome Statute of the International Criminal Court (Rome Statute) was drafted, it abstained from voting to adopt the final outcome of the conference. Exclusion of a separate crime of terrorism from the subject matter jurisdiction of the ICC was one of the greatest disappointments of the Turkish delegation to the Rome Conference, which "found itself obligated to abstain" from voting to adopt the Rome Statute as "the final outcome was not in keeping with its expectations."<sup>1</sup> Even at the Kampala Review Conference that took place in 2010, 12 years after the adoption of the Rome Statute, the first concern that the head of the Turkish delegation brought up was the exclusion of terrorism from the agenda of the conference.<sup>2</sup>

When the 1994 Draft Statute for an International Criminal Court was forwarded to the Rome Conference, the inclusion of the crime of terrorism in the Rome Statute was still a matter of dispute.<sup>3</sup> The head of the Turkish delegation, Mehmet Güney, voiced his strong support for listing terrorism as one of the crimes within the jurisdiction of the ICC throughout the conference.<sup>4</sup> The Turkish delegation's efforts to include terrorism in the Rome Statute were predicated on the belief that such inclusion could strengthen Turkey's fight against the Kurdistan Worker's Party (PKK), an armed group that is denounced as a terrorist organization by the European Union, NATO, and various countries including the United States, Canada, Australia, and New Zealand.<sup>5</sup> At the conclusion of the Rome Conference, however, terrorism *per se* was not included in the Rome Statute; jurisdiction of the ICC was limited to war crimes, crimes against humanity, genocide, and aggression.<sup>6</sup>

This article begins with a description of the Turkish efforts to include terrorism in the Rome Statute and the motives behind them. It then establishes that although the Turkish delegation to the Rome Conference was disappointed by the exclusion of the crime of terrorism from the Rome Statute, the lack of the reference to terrorism in the Statute was not, in fact, a loss for the delegation. First, current status of the Rome Statute already covers most of the PKK's terrorist acts, from which Turkey's efforts to include terrorism in the Rome Statute stemmed, because they usually amount to crimes against humanity. Second, irrespective of whether subject matter jurisdiction of the ICC would be satisfied, the situation with respect to the PKK would most likely be found inadmissible before the Court because of the ongoing national proceedings against the PKK perpetrators.

1 Official Records of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court [hereinafter Official Records of the Rome Conference], 7th plen. mtg., U.N. Doc. A/CONF.183/SR.7, p. 124, para. 41.

2 *Statement by Mr. Ismail Aramaz Head of Turkish Delegation*, International Criminal Court, 1 June 2010, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Statements/ICC-RC-gendeba-Turkey-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Turkey-ENG.pdf) (Accessed 1 February 2018).

3 While commentators from Turkey, Algeria, Kyrgyzstan, Costa Rica, Armenia, India, Tajikistan, Nigeria, Congo, Sri Lanka, Israel, Tunisia, Trinidad and Tobago, New Zealand, Cuba, Egypt, Benin, Comoros, Ethiopia, Jamaica, Thailand, Bolivia made statements in favor of the inclusion of terrorism in the Statute; most of the remaining countries opposed such inclusion.

4 See, e.g., statements made by Mr. Güney at the 7th plenary meeting of the Rome Conference on June 18, 1998: Official Records of the Rome Conference, p. 106, para. 11.

5 Jonathan R. White, *Terrorism and Homeland Security*, California, Wadsworth Publishing, 2012, p. 241.

6 Rome Statute of the International Criminal Court [hereinafter Rome Statute], Jul. 17, 1998, U.N. Doc. A/CONF.183/9, art. 5(1).

Third, regardless whether the PKK's acts would fall within the subject matter jurisdiction of the Rome Statute, such jurisdiction would most likely not be triggered by Turkey because it could lead the ICC to characterize the conflict between Turkey and the PKK as an armed conflict subject to humanitarian law norms. Because of the possibility that Turkey's fight against the PKK may be characterized, against Turkey's will, as an (internal) armed conflict subject to humanitarian law norms, Turkey would not be eager to trigger an ICC investigation into the crimes committed by the PKK. For the reasons listed above, exclusion of a separate crime of terrorism from the Rome Statute should no longer be regarded as one of the obstacles to Turkey's accession. The article also draws attention to the fact that staying outside the ICC does not provide any contribution to the efforts to include terrorism *per se* in the Rome Statute. By joining the ICC, however, Turkey would acquire the right to propose and vote on behalf of amendments to include terrorism *per se* as a crime within the jurisdiction of the Court and take the opportunity to sway other countries in this direction, if it still wishes so.

This article finally attempts to explain that joining the Court could, in fact, be conducive to Turkey's struggle against terrorism. First, Turkey, by acceding to the Rome Statute, could enjoy positive political impacts of being a State Party such as enhancing its reputation internationally. Adherence to the Rome Statute, as a demonstration of Turkey's commitment to further contribute to international peace and the rule of law, could help Turkey garner greater support from other State Parties in its war against terrorism. In this regard, Assembly of the State Parties could serve as a platform for Turkey to impact the international community's perception of the terrorist groups, against which Turkey is fighting, on its behalf. This is particularly important given the vigorous efforts within the EU to remove the PKK from the EU list of terrorist groups.<sup>7</sup> By acceding to the Rome Statute, Turkey could also accelerate its full membership negotiations with the European Union, whose members are all party to the ICC, and use its strengthened corporate dialogue with the European members of the Court to develop closer cooperation in combatting the funding networks of the PKK in European countries.

Second, Turkey could benefit from joining the ICC by acquiring the right to trigger a preliminary examination. While it is true that Turkey would not be eager to trigger such investigation for the reasons detailed in this article, its ability to trigger investigations could still have a deterrent effect on the PKK's senior members, their abettors, and the states that solicit, abet, or fund the crimes of the PKK, as they would fear of facing charges before the Court. Indeed, even in the small likelihood that a preliminary examination is launched against Turkey's will, the benefits that Turkey would gain would not decrease, because such examination would have to confirm the serious crimes committed by the PKK (before declaring them inadmissible under the complementarity principle). Confirmation of the PKK's most serious crimes in the Preliminary Examinations Reports by the Office of the Prosecutor would remind the neighboring and European countries of their responsibilities regarding the unlawful PKK activities taking place in their territory, and it would send a clear signal that the international community is watching.

Turkey has already acceded to a significant number of international human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, which imposes much more extensive burdens<sup>8</sup> on States Parties and which doesn't enjoy the kind

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<sup>7</sup> *EU Terrorism Situation and Trend Report 2015*, The Hague, European Police Office, 2015 p. 28.

<sup>8</sup> While the ICC has a limited subject matter jurisdiction over the most serious crimes of international concern, ECHR imposes much more extensive burdens on States Parties from freedom of expression to the right to form and join trade unions.

of procedural safeguards that the Rome Statute enjoys, such as ‘gravity’ or ‘serving the interests of justice’,<sup>9</sup> for the purpose of securing its image in the eyes of the international community and its ground among European countries. Indeed, Turkey’s policy to remain engaged with the international human rights mechanisms is instrumental in gaining further assistance and closer cooperation from other countries in its fight against the terrorist groups.

The particular importance that Turkey attaches to its struggle against terrorism is clearly seen in its cross-border military operation, dubbed *Fırat Kalkanı Harekatı* (Operation Euphrates Shield), which was launched to prevent empowerment of the Syrian offshoot of the PKK on its southeastern borders and to push the Islamic State (IS) from Turkish-Syrian border towns. The operation was launched only 40 days after the failed coup attempt on July 15, 2016, in the wake of which hundreds of military officers and pilots were suspended for suspected links to the attempt. As the recent tensions in the U.S.-Turkey affairs over the PYD has shown, the issues that Turkey relates to its fight against terrorism have not only been deemed vital by Turkey for more than three decades, but also it has strained Turkey’s affairs with its allies. For these reasons, Turkey’s concerns with regard to the accession to the Rome Statute should be re-evaluated if such accession could be conducive to its decades-long war against terrorism.

The purpose of this article is not to attempt to ally all of Turkey’s concerns with regard to joining the ICC, but to argue that if accession to the Rome Statute will be conducive to its struggle against terrorism, all of the other concerns should be re-evaluated. Each concern that could be presented against Turkey’s accession to the Rome Statute is worthy of its own examination. As the issue of terrorism is the focus of this article, detailed discussion is limited to Turkey’s objections the exclusion of terrorism from the Rome Statute.

## The Turkish Efforts for the Inclusion of Terrorism in the Rome Statute and the Motives Behind Them

After the dismissal of several proposals to include terrorism *per se* under Article 5 of the Rome Statute, Turkey, together with Sri Lanka, India, and Algeria, proposed to list terrorism under the acts amounting to crimes against humanity.<sup>10</sup> The Turkish delegation’s efforts to add terrorism to the list of punishable offenses were directly influenced by Turkey’s more than 30 years old fight against the terrorist PKK. At the seventh plenary meeting of the Diplomatic Conference, Mr. Güney reminded that international law requires states to “refrain from organizing or encouraging terrorist activities in the territory of other States and from tolerating activities in their own territory directed toward that end.”<sup>11</sup> Apparently, the delegation believed that inclusion of the crime of terrorism in the Rome Statute would not only make the terrorist attacks by the PKK prosecutable before the ICC but also it could serve as an extra incentive for the European countries to take decisive actions against the PKK activities within their territory or deter foreign countries from using the outlawed PKK to secure political ends.

9 Rome Statute, art. 53(1): “In deciding whether to initiate an investigation, the Prosecutor” of the ICC shall, “taking into account the gravity of the crime and the interests of victims,” “consider whether: ... there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”

10 Robert Kolb, “The Exercise of Criminal Jurisdiction over International Terrorists”, Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Oxford, Hart Publishing, 2004, p. 279.

11 Official Records of the Rome Conference, p. 106, para. 10.

The PKK “generates most of its revenue in Europe,” mainly from criminal activities such as drug trafficking, human trafficking, arms-smuggling, illegal immigration, extortion, illegal taxation etc.<sup>12</sup> EUROPOL’s most recent report in 2018 pointed out that the PKK “uses front organisations and charities in the EU” “to systematically and, if need be, forcibly collect funds in the EU to finance its activities.”<sup>13</sup> According to this report, “Austria, France, Romania and Switzerland reported activities of the annual *kampanya* to finance PKK and its armed branch *Hêzên Parastina Gel* ... France [alone] reports an estimate of EUR 6 million proceeds.”<sup>14</sup> The report also stated that “[t]he PKK is believed to use Europe as a base for logistics and procurement of weapons and recruitment ... France reported the process of recruitment of militants through the organisation *Komalen Ciwan*.”<sup>15</sup> Likewise, EUROPOL’s report in 2017 pointed out that “Belgium, France, Germany, Italy, Romania and Switzerland reported that the PKK continued its fundraising, propaganda and recruitment activities.”<sup>16</sup> The terrorist organization also obtains revenues from special events, sales of publications and commercial establishments in European countries.<sup>17</sup>

Turkey’s Ministry of Foreign Affairs complains in its official website that the PKK “continues its systematic recruitment activities of young persons living in European countries and trains them in various camps.”<sup>18</sup> Indeed, EUROPOL’s reports confirmed that “the PKK were maybe running a number of ideological training camps for its youth in remote pre-Alpine areas during the second half of 2016.”<sup>19</sup> A report of EUROPOL further revealed that some “[o]rganizations within the EU have been identified as providing logistical support to ... the PKK.”<sup>20</sup> An assessment of the EUROPOL’s reports suggests that no decisive actions are being taken against the PKK’s activities in Europe.

While several European countries are solely accused of turning a blind eye to PKK’s activities within their borders, some European countries such as Greece<sup>21</sup> have even been accused by the Turkish government of assisting “with fundraising campaigns and diplomatic support” and providing “political and military training to PKK militants.”<sup>22</sup> The United States is also accused by Turkey of “providing material and training support” to an offshoot of a terrorist organization against which Turkey has been fighting.<sup>23</sup> Indeed, it is not a secret that PYD and its military wing YPG “has turned into a key US ally in the struggle against ISIS” in northern Syria.<sup>24</sup> Though the United States’ Central Intelligence Agency (CIA) has officially listed PYD as Syrian wing of the U.S. designated terrorist group PKK

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12 Moyara Ruehsen, “Partiya Karkeren Kurdistan (PKK)”, Michael Freeman (ed.), *Financing Terrorism: Case Studies*, New York, Routledge, 2016, p. 65.

13 *EU Terrorism Situation and Trend Report 2018*, The Hague, European Police Office, 2018, p. 11.

14 *Ibid*, p. 46.

15 *Ibid*.

16 *EU Terrorism Situation and Trend Report 2017*, The Hague, European Police Office, 2017, p. 39.

17 Ruehsen, “Partiya Karkeren Kurdistan (PKK)”, p. 65.

18 PKK, Republic of Turkey Ministry of Foreign Affairs, [www.mfa.gov.tr/pkk.en.mfa](http://www.mfa.gov.tr/pkk.en.mfa) (Accessed 1 June 2018).

19 *EU Terrorism Situation and Trend Report 2017*, p. 39.

20 *EU Terrorism Situation and Trend Report 2013*, The Hague, European Police Office, 2013, p. 11.

21 Uğur Bayilloğlu, “Uluslararası Ceza Mahkemesi ve Türkiye”, *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Vol.56, No.1, 2007, p. 64.

22 Ruehsen, “Financing Terrorism: Case Studies”, p. 66.

23 Özlem Kayhan Pusane, “How to Profile PYD/YPG as an Actor in the Syrian Civil War: Policy Implications for the Region and Beyond”, Özden Zeynep Oktav, Emel Parlar Dal and Ali Murat Kurşun (eds.), *Violent Non-state Actors and the Syrian Civil War: The ISIS and YPG Cases*, Switzerland, Springer, 2018, p. 84.

24 *Ibid*.

under foreign-based terrorist groups,<sup>25</sup> in the eyes of US government, “the PYD is a different group than the PKK legally, under United States law.”<sup>26</sup> Turkey has long criticized the US, its NATO ally, for arming and training the YPG and the European countries for their reluctance to act against the PKK activities in their territory or to hand over members of this terrorist organization.<sup>27</sup>

Bearing in mind Turkey’s longstanding fight against the PKK and the statements made by the Turkish delegation at the Rome Conference, the delegation may have expected that inclusion of terrorism in the Rome Statute would help Turkey achieve three international cooperation objectives that it perceived as essential for the defeat of the PKK. The first expectation behind the delegation’s efforts to include terrorism in the Rome Statute may have been that foreign states, particularly the States Parties, would refrain from inducing, financing, or providing the means for the commission of the PKK’s acts in accordance with Articles 25(3)(b) and (c) of the Statute. While Article 25(3)(b) criminalizes the ordering, soliciting, or inducing the commission of any of the crimes covered in the Rome Statute, Article 25(3)(c) outlaws aiding and abetting the commission of such a crime “for the purpose of facilitating the commission” of it.<sup>28</sup>

The second motive behind the delegation’s efforts to include terrorism in the Rome Statute may have been that the States Parties would have the obligation to arrest the indicted senior PKK members who reside in their territory, and extradite them to the ICC in accordance with article 59 of the Statute, in case the Court tries the case and issues warrants of arrest.<sup>29</sup> Lastly, the Turkish delegation may have expected that inclusion of terrorism in the Rome Statute could serve as an incentive for the European countries not to tolerate the PKK activities in their territories in accordance with the preamble of the Statute, which states that the States Parties are “[d]etermined ... to contribute to the prevention of” the crimes covered in the Statute.<sup>30</sup> All these potential expectations will be addressed in the following sections of this article in the light of the assessment of Turkey’s objections to the exclusion of a separate crime of terrorism from the Rome Statute.

## The ICC’s Already Existing Jurisdiction Over the Terrorist Crimes of the PKK

The first reason why omission of the crime of terrorism from the Rome Statute is not a valid argument against Turkey’s ratification of it is that most of the crimes that the PKK has been committing already fall within the subject matter jurisdiction of the ICC as they usually comprise the elements of crimes

25 see Central Intelligence Agency, “The World Factbook”, where it states, under the heading “terrorism”, that “Salih MUSLIM Muhammad leads Kurdistan Workers Party’s Syrian wing, the Syrian Kurdish Democratic Union Party (PYD)...”, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html> (Accessed 1 April 2018); While testifying before a Senate panel at the U.S. Congress in 2016, U.S. Secretary of Defense Ashton Carter also confirmed that there are “substantial ties” between the PYD/YPG and the PKK: The Young Europeans, “PKK: US Defense Sec. Ashton Carter confirms ties with PYD, YPG, PKK TERROR Groups”, Online Video Clip, You Tube, 13 Jan. 2018, <https://www.youtube.com/watch?v=IkDssSVNz4k> (Accessed 1 Jun. 2018).

26 Ayşe Ömür Atmaca, “Turkey-US Relations (2009-2016): A Troubled Partnership in a Troubled World?”, in Pınar Gözen Ercan (ed.), *Turkish Foreign Policy: International Relations, Legality and Global Reach*, Switzerland, Springer, 2017, p. 73.

27 “PKK Terror Group Gets 30 Million Euros a Year from Its Foundations in Europe”, *Daily Sabah*, 15 January 2013, <https://www.dailysabah.com/war-on-terror/2016/12/11/pkk-terror-group-gets-30-million-euros-a-year-from-its-foundations-in-europe> (Accessed 1 Jun. 2018).

28 Rome Statute, art. 25(3)(b)-(c).

29 Bayılıoğlu, “Uluslararası Ceza Mahkemesi ve Türkiye”, p. 64.

30 Rome Statute, at *preamble*, para. 5.

against humanity; one of the four core crimes of the Rome Statute. Official records of the Turkish Ministry of Defense show that the PKK has so far killed more than 14,000 people, a big majority of whom are civilians.<sup>31</sup> Furthermore, this figure does not include the number of the PKK's executions of its own members. The fact that terrorism is not expressly listed as one of the crimes within the subject matter jurisdiction of the ICC would not prevent the Court from exercising its jurisdiction over the PKK's terrorist acts that constitute crimes against humanity as long as they meet high threshold criteria set out in the Rome Statute.

### **The PKK's Acts as Crimes Against Humanity**

The idea of prosecuting senior PKK officials in an international tribunal is not new. In 1998, following the crisis between Turkey and Italy over the extradition of the PKK leader to face a trial in Turkey,<sup>32</sup> Helsinki Watch, a U.S. based nongovernmental organization now named Human Rights Watch, called for his trial for crimes against humanity in an international tribunal.<sup>33</sup> However, the idea did not catch on, on the grounds that "such international court to try an individual" did not exist at the time.<sup>34</sup>

The PKK killed 5,390 civilians from 1984 to 1999, and 1,045 civilians from 2004 to 2010.<sup>35</sup> Even though the number of the civilian deaths decreased after 2004, as part of a tactical plan that aimed to convince Kurdish population to support its attacks, the PKK continued targeting civilians as well as security forces. Today, the total number of civilians killed in the terrorist acts for most of which PKK claimed responsibility, including suicide bomb attacks in metropolitan centers and mass killings in rural areas, exceeded 7,000.<sup>36</sup> Widespread killing of thousands of civilians by the PKK could amount to crimes against humanity under the Rome Statute because under paragraph 1 of the Article 7 of the Statute, murder, *inter alia*, is a crime against humanity "when committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."<sup>37</sup> In the ongoing ICC investigation into the situation in the Republic of Kenya, 1,133 deaths were enough to indict for a crime against humanity.<sup>38</sup>

An "attack directed against any civilian population", on the other hand, is defined in paragraph 2 of the Article 7 of the Rome Statute as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State

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31 Ali Sarihan, "The Two periods of the PKK Conflict: 1984-1999 and 2004-2010", Fevzi Bilgin and Ali Sarihan (eds.), *Understanding Turkey's Kurdish Question*, Maryland, Lexington Books, 2013, p. 94-95; "PKK 1984'ten Beri 7 Bin Sivili Katletti", *TRT Haber*, 27 August 2015, <http://www.trthaber.com/haber/turkiye/pkk-1984ten-beri-7-bin-sivili-katletti-200648.html> (Accessed 1 February 2018).

32 "World: Europe Rome Takes Ocalan Case to Moscow", *BBC*, 30 November 1998, [news.bbc.co.uk/2/hi/europe/225063.stm](http://news.bbc.co.uk/2/hi/europe/225063.stm) (Accessed 1 February 2018).

33 Kemal Kirisci, "The Kurdish Question and Turkish Foreign Policy," in Lenore G. Martin and Dimitris Keridis (eds.), *The Future of Turkish Foreign Policy*, Cambridge, The MIT Press, 2004, p. 278.

34 "World: Europe Rome Takes Ocalan Case to Moscow", *BBC*.

35 Sarihan, "The Two periods of the PKK Conflict: 1984-1999 and 2004-2010", p. 94-95.

36 "PKK 1984'ten Beri 7 Bin Sivili Katletti" (PKK Murdered 7,000 Civilians Since 1984), *TRT Haber*, 27 August 2015, <http://www.trthaber.com/haber/turkiye/pkk-1984ten-beri-7-bin-sivili-katletti-200648.html> (Accessed 1 February 2018).

37 Rome Statute, art. 7(1).

38 International Criminal Court - Pre-Trial Chamber II, "Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", 31 March 2010, p. 54, para. 131.

or organizational policy to commit such attack.”<sup>39</sup> The wording of this paragraph clearly shows that, for a crime to rise to the level of crimes against humanity, a State connection is not required, so long as an organizational policy exists. In other words, Article 7 (2) makes it clear that non-state entities as well as States could commit a crime against humanity so long as they have an organizational policy. Al-Qaeda, for example, has been described by many commentators as a non-State entity that has an organizational policy.<sup>40</sup> Professor Michael P. Scharf and Michael A. Newton explain why, according to commentators, Al-Qaeda’s attacks of September 11, 2001 could be deemed a crime against humanity: 1) they targeted civilians; 2) they resulted in the deaths of significant number of people; 3) they were part of a string of attacks 4) they constituted a systematic attack.<sup>41</sup>

Reports of the Office of the Prosecutor provide plentiful examples of situations and cases where non-State entities are accused of committing crimes against humanity. One of the recent examples of the consideration of the crimes committed by non-State actor as crimes against humanity can be seen in the Office of the Prosecutor’s preliminary examination into the situation in Colombia. The Office of the Prosecutor has determined in its Preliminary Examination Reports that “the information available provides a reasonable basis to believe that crimes against humanity under article 7 of the Statute have been committed in the situation in Colombia” by non-State entities (in this case rebel groups).<sup>42</sup> With respect to the situation in Afghanistan, the Office has determined that there is a reasonable basis to believe that crimes against humanity were committed by non-State armed groups, particularly the Taliban.<sup>43</sup> In addition, December 2017 Report of the Office of the Prosecutor made it public that the office is continuing its assessment of the allegations that demonstrators against the Gabonese Government have committed crimes against humanity against the State security forces of the Gabonese Republic.<sup>44</sup>

As will be detailed in the following sections, the PKK’s sustained use of force and repetitive acts are also carried out as part of a plan and policy. The PKK has a hierarchical structure, significant number of members and effective control over its members. The PKK’s “capacity to declare and hold ceasefires” with the instruction of its captured leader proves that the PKK is “under ‘responsible command.’”<sup>45</sup> Considering the criteria mentioned by Prof. Scharf and Newton, a large number of the attacks of the PKK could also be considered as crimes against humanity because they 1) targeted civilians; 2) resulted in the deaths of significant number of people; 3) were part of a string of attacks 4) constituted a systematic attack.

While an isolated, one-time attack does not rise to the level of a crime against humanity,<sup>46</sup> the PKK’s acts are carried out as part of a sustained campaign of terrorist organizational policy, and thus

39 Rome Statute, art. 7(2).

40 Michael P. Scharf and Michael A. Newton, “Terrorism and Crimes Against Humanity”, Leila Nadya Sadat (ed.), *Forging a Convention for Crimes against Humanity*, New York, Cambridge University Press, 2011, p. 274.

41 Ibid.

42 *Report on Preliminary Examination Activities 2017*, International Criminal Court - Office of the Prosecutor, 4 December 2017, p. 29, para 127.

43 Ibid, p. 53, para. 241.

44 Ibid, p. 9, para. 35.

45 William Abresch, “A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya”, *European Journal of International Law*, Vol. 16, 2005, p. 755.

46 Lucy Martinez, “Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems”, *Rutgers Law Journal*, Vol. 34, No 1, 2002, p. 18.

could be deemed 'widespread or systematic'. A wave of the PKK's terrorist attacks which result in hundreds of civilian deaths could therefore be classified as the crime against humanity of murder. The PKK's kidnappings could also be qualified as a crime against humanity under the Article 7(1)(k), which classifies "other inhumane acts of a similar character intentionally causing great suffering, or serious injury ... to mental ... health" as crimes against humanity.<sup>47</sup>

### **The PKK's Acts as War Crimes?**

It is important to note that acts of terrorism may also rise to the level of war crimes, if committed in the context of an armed conflict, either internal or international. The ICC has jurisdiction over the war crimes enumerated under Article 8 of the Rome Statute, including those committed as part of an armed conflict not of an international character.<sup>48</sup> Turkey does not characterize its fight against the PKK as an armed conflict within the meaning of humanitarian law, yet there is still a possibility that Turkey's struggle against this terrorist organization may be classified, by the Office of the Prosecutor, as an internal armed conflict. In such a case, the Court could consider some of the terrorist acts of the PKK as rising to the level of war crimes.

The 1977 Additional Protocol II to the four Geneva Conventions of 12 August 1949 ("Additional Protocol II") is considered to be "the first real legal instrument for the protection of victims of non-international armed conflicts."<sup>49</sup> Article 1(1) of the Additional Protocol II states that this protocol applies to the armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."<sup>50</sup> Accordingly, in order for an armed group to be considered a party to an internal armed conflict subject to humanitarian law norms (within the meaning of the Geneva Conventions), it should be an organized armed group and it should, under responsible command, have sufficient territorial control in the sense of being able "to carry out sustained and concerted military operations and to implement" the Additional Protocol II.<sup>51</sup>

Though the PKK could be considered as an organized armed group under responsible command, it does not exercise sufficient control over a part of Turkey's territory "to carry out sustained and concerted military operations."<sup>52</sup> Nor does the PKK have sufficient territorial control to implement Additional Protocol II. Turkey's struggle against the PKK, therefore, should not be classified as an armed conflict subject to humanitarian law norms. Yet, there is still a possibility that the Court may characterize this struggle against a terrorist organization as an armed conflict within the meaning of humanitarian law. Indeed, in the case of *Benzer and Others v. Turkey* in 2014, ECtHR surprisingly cited the Common Article 3 of the 1949 Geneva Conventions, which governs non-international armed

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47 Rome Statute, art. 7(1)(k).

48 Ibid, art. 8(2).

49 Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Leiden, Martinus Nijhoff Publishers, 1987, p. 1319.

50 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609, art. 1(1).

51 Ibid.

52 Abresch, "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya", p. 755.

conflicts, as one of the materials applicable to the conflict between the Turkish security forces and the terrorist PKK.<sup>53</sup> Likewise, the Office of the Prosecutor also could, against Turkey's will, cite Rome Statute's rules governing non-international armed conflicts as applicable law and conclude that some of the PKK's repeated acts may rise to the level of war crimes, as in the Uganda case.

Pre-Trial Chamber II of the ICC found, in 2005, that "there are reasonable grounds to believe that" the leader of the Lord's Resistance Army (LRA), a terrorist group that seeks to overthrow the Government of Uganda, "committed, ... ordered or induced the commission of crimes within the jurisdiction of the Court, namely, crimes against humanity and war crimes."<sup>54</sup> In a later (2016) decision, the Chamber draw attention to the fact that "LRA was an organised armed group with a sufficient degree of organisation to enable it to plan and carry out military operations for a prolonged period of time,"<sup>55</sup> but did not even address whether the sufficient territorial control requirement, as one of the conditions for the determination of an armed conflict, was satisfied. Thus, crimes allegedly committed by the LRA have been considered within the scope of the provisions that govern non-international armed conflicts.<sup>56</sup> Similarly, the Office of the Prosecutor concluded, in its 2013 report, that the Nigerian authorities' fight against the terrorist group named Boko Haram constitutes a non-international armed conflict.<sup>57</sup> Some of the violent crimes committed repeatedly by Boko Haram and LRA are at a level similar to the activities of the outlawed PKK, such as murder, intentionally directing an attack against a civilian population, or child recruitment.<sup>58</sup> From a subject matter jurisdiction standpoint, high-level members of the PKK, another terrorist group, could also be accused on similar grounds and the States Parties in which some of those senior members reside would be obligated to communicate evidence.<sup>59</sup> Yet, because of the possibility that Turkey's fight against the PKK may also be characterized, by the Office of the Prosecutor, as an (internal) armed conflict subject to humanitarian law norms, Turkey would not want to trigger an ICC investigation into the crimes committed by the PKK regardless whether the PKK's acts would fall within the subject matter jurisdiction of the Rome Statute. Exclusion of a separate crime of terrorism from the Rome Statute, therefore, should no longer be regarded as one of the obstacles to Turkey's accession.

The conclusion from the above discussion is that the ICC's existing jurisdiction over the PKK's repeated acts that might be qualified as crimes against humanity would be sufficient to empower the Court to exercise its jurisdiction over the senior PKK members and its abettors, if other thresholds of the Rome Statute, such as the issues of admissibility, were to be satisfied. Of course, not all the PKK's acts would be considered by the Court as satisfying the requirements of the crimes against humanity

53 European Court of Human Rights, *Benzer and Others v. Turkey*, Appl No 23502/06, "Judgment Final", 24 March 2014, para. 89, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-128036> (Accessed 1 February 2018).

54 International Criminal Court - Pre-Trial Chamber II, "Warrant Of Arrest For Joseph Kony Issued On 8 July 2005 As Amended On 27 September 2005", 27 September 2005, ICC-02/04-01/05, p. 12, para. 42.

55 International Criminal Court - Pre-Trial Chamber II, "Decision on the confirmation of charges against Dominic Ongwen", 23 March 2016, ICC-02/04-01/15, p. 72.

56 The Chamber stated that "[f]rom at least 1 July 2002 to 31 December 2005 a protracted armed conflict not of an international character between the LRA and armed forces of the government of Uganda together with associated local armed units existed in northern Uganda. The armed hostilities exceeded, in intensity, internal disturbances and tensions such as riots, isolated and sporadic acts of violence." Ibid, p. 71.

57 *Report on Preliminary Examination Activities 2013*, International Criminal Court - Office of the Prosecutor, November 2013, p. 6, para. 18.

58 Alhagi Marong, "Unlocking The Mysteriousness of Complementarity: In Search of a From Conveniens for Trial of the Leaders of the Lord's Resistance Army", *Georgia Journal Of International And Comparative Law*, Vol. 40, 2011, p. 73.

59 Rome Statute, art. 89(1).

under the Rome Statute. But in any event, the fact that terrorism is not featured as a separate offence in the Rome Statute should not be a concern for Turkey because most of the terrorist acts are already covered in the Statute. Some may argue that the PKK's crimes could fail to satisfy the high threshold criteria of the Rome Statute, such as gravity. However, such criteria would need to be met even if terrorism was expressly covered in the Statute. Therefore, what mattered at this stage was to show that most of the crimes committed by the PKK, from which Turkey's efforts to include terrorism in the Rome Statute stemmed, already fall within one of the already existing core crimes of the Statute.

## **The Issue of Admissibility**

Another reason why exclusion of the crime of terrorism from the Rome Statute should not be regarded as one of the obstacles to Turkey's accession is that, even if the subject matter requirement was satisfied, an ICC investigation against the PKK members would still be inadmissible because of the ongoing competent national proceedings. As will be elaborated below, the commission of a crime within the jurisdiction of the ICC is not sufficient for the initiation of an investigation by the Court. Complementarity and *ne bis in idem* principles are only two of the multifold limitations on the ICC's ability to consider a case.

While the principle of complementarity requires the ICC to defer to the national jurisdictions as long as they are able and willing genuinely to carry out the prosecutions in question, *ne bis in idem* principle of Article 20 of the Statute bars the proceedings against an accused for a crime for which he has already been tried. As such, even if we were to assume that all of the PKK's acts fall within the scope of the expressly covered crimes, it would then be necessary to consider the admissibility of the situation before the Court.

## **The Complementarity Principle**

Complementarity principle requires the ICC to ascertain whether national proceedings are covering the same case as the one before the Court and whether those proceedings are genuine within the meaning of Article 17.<sup>60</sup> Available information indicates that the Turkish authorities have been conducting a large number of proceedings against the members of the PKK for their activities that could be qualified as falling within the subject matter jurisdiction of the Rome Statute. Turkey's Ministry of Justice revealed that, as of 10 February 2018, 10,079 people are in jail because of their conviction of PKK related crimes, which is an indication for Turkish authorities' ability and willingness to prosecute those who are responsible.<sup>61</sup>

Moreover, on 5 October 2012, an İstanbul Court issued arrest warrants for 58 PKK members, including the acting leader Murat Karayılan and other senior members Cemil Bayık, Remzi Kartal, Mustafa Karasu, Duran Kalkan, Zübeyir Aydar.<sup>62</sup> It is also important that the most senior members of the PKK who are not in jail are sought with Interpol Red Notices because, in order for the ICC to find

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<sup>60</sup> Rome Statute, art. 17.

<sup>61</sup> "Adalet Bakanı Gül: Yargı, Terörle Mücadeleyi Çok Etkin Şekilde Sürdürmektedir" (Minister of Justice Gül: Judiciary continues its fight against terrorism very effectively), *T.C. Adalet Bakanlığı Basın Ve Halkla İlişkiler Müşavirliği*, 10 February 2018, <http://www.basin.adalet.gov.tr/Etkinlik/adalet-bakani-gul-yargi-terorle-mucadeleyi-cok-etkin-sekilde-surdurmektedir> (Accessed 1 February 2019).

<sup>62</sup> "PKK Yönetimine Yakalama Kararı" (Arrest Warrants for the PKK Leaders), *Cumhuriyet*, 9 Mayıs 2013, [http://www.cumhuriyet.com.tr/haber/diger/420546/PKK\\_yonetimine\\_yakalama\\_karari.html](http://www.cumhuriyet.com.tr/haber/diger/420546/PKK_yonetimine_yakalama_karari.html) (Accessed 1 February 2018).

a case inadmissible, existing proceedings must prioritize against those who appear to bear the greatest responsibility for the crimes in question.<sup>63</sup>

In its 2012 Preliminary Examinations Report, the Office of the Prosecutor stated that it had no reason to doubt the genuineness of convictions rendered *in absentia* by Colombian authorities against the leaders of the rebel armed groups who appear to bear the greatest responsibility for the most serious crimes committed in Colombia.<sup>64</sup> With the same reasoning, the Office of the Prosecutor would most likely defer to the proceedings by the competent Turkish authorities, including the convictions rendered *in absentia*.

### ***Ne Bis In Idem***

Another limitation on the ICC's ability to consider a case is the *ne bis in idem* principle, which bars an ICC trial if the accused has already been tried or is in the process of being tried by another court for the conduct in question, unless the proceedings in the other court were for the purpose of shielding the accused from accountability, or lacked impartiality or independence.<sup>65</sup> Abdullah Öcalan, the original leader of the PKK, is now serving life in prison on an island off the coast of Turkey for “founding an armed gang in order to destroy the integrity of the Turkish state and of instigating various terrorist acts that had resulted in loss of life”, which are also basis for most of the crimes committed by the PKK.<sup>66</sup> An ICC investigation against Öcalan with respect to the same conduct would not be permissible under *ne bis in idem* principal of the Rome Statute.

Öcalan appealed his conviction to the European Court of Human Rights (ECtHR), alleging he did not get a fair trial, which was guaranteed by the Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), a convention of which Turkey is a party.<sup>67</sup> The ECtHR found that the national proceedings against Öcalan had not complied with some of the requirements of Article 6 of the ECHR and that a retrial or a reopening of the case would be an appropriate way of addressing that.<sup>68</sup> After examining the execution of the ECtHR's judgment by the Ankara Assize Court, the İstanbul Assize Court found that no additional hearing was necessary because the applicant's sentence would be the same even without the violations found by the ECtHR. The Committee of Ministers of the Council of Europe, which has the task of supervising the execution of the judgments of the ECtHR, was asked by the counsel of the Öcalan to ensure that Turkey would reopen his case. The Committee, however, decided to close its examination over the case, concluding that Turkey had fulfilled its obligation in accordance with Article 46 of the ECHR because the proceedings carried out by İstanbul Assize Court to review the case were similar to the proceedings for the reopening of the

63 “Avrupa Sadece Adi Suçları İade Etmiş” (Europe Has Extradited Only for Ordinary Crimes), *Aktif Haber*, 15 January 2015, [www.aktifhaber.com/avrupa-sadece-adi-suclulari-iade-etmis-719910h.htm](http://www.aktifhaber.com/avrupa-sadece-adi-suclulari-iade-etmis-719910h.htm) (Accessed 1 February 2018).

64 “The Republic of Colombia has experienced almost 50 years of violent conflict between government forces and rebel armed groups, as well as between such armed groups” and the situation “has been under preliminary examination since June 2004.”; see *Report on Preliminary Examination Activities 2012*, International Criminal Court - Office of the Prosecutor, November 2012, p. 23, para. 97.

65 Rome Statute, art. 20.

66 European Court of Human Rights, *Ocalan v. Turkey*, Appl. No 46221/99, “Judgment”, 12 May 2005, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022#{“itemid”:\["001-69022"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022#{“itemid”:[) (Accessed 1 February 2018), para. 18.

67 *Ibid.*

68 *Ibid.*, para. 210.

case.<sup>69</sup> Given the conclusion came out of the Committee of Minister, the ICC proceedings against Öcalan and other PKK senior members who have been convicted by Turkish authorities under the supervision of the ECtHR system would be inadmissible under the *ne bis in idem* principle.

In addition, it should be noted that the purpose of Article 20 of the Rome Statute, which sets out the *ne bis in idem* principle, is not to protect the human rights of the defendants at national level. The likelihood that national proceedings were not “conducted independently or impartially in accordance with the norms of due process recognized by international law” can only be relevant to the ICC insofar as it is “inconsistent with an intent to bring the person concerned to justice.”<sup>70</sup> That is to say, the PKK members would not be able to seek a new trial before the ICC by arguing that Turkey did not offer them a fair one.

Examining the existing national proceedings and investigations against PKK members show that Turkey is able and willing to conduct effective prosecutions against terrorist crimes taking place in its territory. Thus, even if the crime of terrorism *per se* had been included in the Rome Statute in a way to cover the PKK's crimes that do not amount to any of the currently existing crimes, those acts would be found inadmissible before the ICC because of Turkey's ability and willingness to prosecute them. Thus, exclusion of the crime of terrorism from the Rome Statute was not, in fact, a loss for the Turkish delegation to the Rome Conference and should not have disappointed the delegation to the extent that it would abstain from voting to adopt the Statute.

## **Why Should Turkey Re-Assess Its Non-Party Status?**

The previous sections have shown that exclusion of a separate crime of terrorism from the Rome Statute should no longer be a concern for Turkey because many of the PKK's terrorist acts already fall within one of the existing crimes of the Statute and that in any case an ICC investigation against the PKK members would be inadmissible because of the ongoing competent national proceedings. This section will argue that accession to the Rome Statute could even be conducive to Turkey's decades-long fight against terrorism and hence, given the particular importance Turkey attaches to its struggle against terrorism, other concerns regarding the accession should be reevaluated.

### ***International Prestige and Political Implications***

Establishment of the world's first permanent international criminal tribunal has been described as a “great victory” for humanity in the fight against impunity for the gravest crimes.<sup>71</sup> Though Turkey was an active participant of the efforts to create an independent international court that would try the perpetrators of the most serious crimes, its decision in 2004 to shelve the issue of the Rome Statute ratification left its commitment to the pursuit of international criminal justice incomplete. Turkey's ratification of the Rome Statute, as a demonstration of its commitment to further contribute to international peace and the rule of law, could help Turkey garner greater support from other State Parties in its struggle against terrorism.

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69 European Court of Human Rights, *Ocalan v. Turkey*, Appl. No 5980/07, “Decision”, 7 July 2010, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022> (Accessed 1 February 2018).

70 Rome Statute, art. 20(3)(b).

71 Hakan Karakehya, “International Criminal Court And Turkey”, *Us-China Law Review*, Vol. 12, No 10, 2015, p. 781.

In this regard, ratification of the Rome Statute should be seen as an opportunity for Turkey to demonstrate its political will to fight against atrocities and to bring the perpetrators of the heinous crimes to justice. By acceding to the Rome Statute, Turkey would enjoy positive political impacts of being a State Party, such as enhancing its international prestige, and have the chance to call on the members of the Assembly of State Parties to side with Turkey in its war against terrorist groups. In addition, Assembly of State Parties could serve as a platform for Turkey to impact the international community's perception of the terrorist groups, against which Turkey is fighting, on its behalf. In other words, by acceding to the Rome Statute, Turkey would have the opportunity to influence the ICC as an insider and strengthen its counterterrorism dialogue with the States Parties.

By acceding to the Rome Statute, Turkey could also accelerate its full membership negotiations with the European Union, whose members are all party to the ICC, and use its strengthened corporate dialogue with the European members of the Court to develop closer cooperation in combatting the funding networks of the PKK in European countries. Among all EU members and membership candidates, Turkey is the only country that has not yet joined the ICC.<sup>72</sup> Turkey's accession to the founding treaty of the ICC, of which the European Commission and the European Parliament have been strong supporters, would have a very positive impact on the Turkey-EU full membership negotiations because accession to the Rome Statute is considered "as an essential component of the Union's democratic model and values."<sup>73</sup>

It is usually expected that most of the states that prefer to ratify the Rome Statute are intent to promote peace and the rule of law at the international level or that they have confidence in their national criminal system. Turkey's accession to the Rome Statute, as a demonstration of its confidence in its own national criminal justice system, could also help Turkey to speedily utilize international cooperation measures such as extradition. Securing the extradition of terror suspects from the European countries is of great importance for Turkey's fight against terrorism given the large number of the PKK members who reside there. European countries have so far granted less than 3% of the extradition requests by Turkey.<sup>74</sup> Any step that would enhance Turkey's reputation internationally, such as ratification of the Rome Statute, could serve as an extra incentive for European countries to arrest and extradite the indicted PKK members to Turkey.

### ***Deterrence of the Right to Trigger a Preliminary Examination***

A State Party's right to trigger a preliminary examination is another reason that makes the ICC membership a potential counterterrorism tool. Turkey's accession to the Rome Statute could be conducive to its fight against terrorism because such accession would also provide Turkey with the right to trigger a preliminary examination. While it is true that Turkey would not be eager to trigger such investigation for the reasons mentioned above, its ability to trigger investigations could still have a deterrent effect on the PKK's senior members, their abettors, and the states that solicit, abet, or fund the crimes of the PKK, as they would fear of facing charges before the ICC. Indeed, even in the small likelihood that a preliminary examination is launched against Turkey's will, the benefits that

72 Council of Europe: Parliamentary Assembly, *Documents: Working Papers*, Council of Europe, 2002, p. 196.

73 "Target Countries- Turkey", *Coalition for the International Criminal Court*, <http://www.iccnw.org/?mod=urc1006> (Accessed 1 April 2018).

74 "Europe Refuses To Extradite Terror Suspects To Turkey", *T-Vine*, 5 February 2017, [www.t-vine.com/europe-refuses-to-extradite-terror-suspects-to-turkey/](http://www.t-vine.com/europe-refuses-to-extradite-terror-suspects-to-turkey/) (Accessed 1 April 2018).

Turkey will gain will not decrease but increase, because such examination would have to confirm the serious crimes committed by the PKK before declaring them inadmissible under the complementarity principle. Confirmation of the PKK's most serious crimes in the Preliminary Examinations Reports by the Office of the Prosecutor would remind the neighboring and European countries of their responsibilities regarding the unlawful PKK activities taking place in their territory, and it would send a clear signal that the international community is watching.

Preliminary examinations are launched by Office of the Prosecutor with the purpose of determining whether a situation, in which the Office is interested, meets the legal criteria established by the Rome Statute to warrant investigation by the ICC.<sup>75</sup> The Office of the Prosecutor releases periodic reports on its preliminary examination activities where it provides information on its analysis and includes upgrades regarding the phases each particular examination reached. The preliminary examinations reports, particularly the ones that confirm the commission of the ICC crimes and move on to the next phase of the analysis in a given situation, have a significant deterrent effect on the perpetrators and their abettors because of the possibility of facing charges before the Court.<sup>76</sup> An unlikely preliminary examination on the PKK's activities could similarly serve as a warning to the states that allegedly solicit, fund, or abet the acts of the PKK; and deter them from doing so.

Article 53(1) of the Rome Statute requires the Prosecutor to consider three successive factors while conducting a preliminary examination. First, the Prosecutor must consider whether the jurisdiction requirement --temporal, material, and either territorial or personal— is satisfied. Second, the Prosecutor must decide whether the situation is admissible in light of the complementarity and gravity requirements. Finally, the Prosecutor must determine whether a formal ICC investigation into the situation “would not serve the interests of justice.”<sup>77</sup> At the conclusion of each preliminary examination, the Office decides whether there is a reasonable basis to proceed with an investigation.

Accordingly, before moving to the admissibility phase of its analysis in a given situation, the Office of the Prosecutor has to determine whether a crime within the jurisdiction of the ICC has been or is being committed. This means that even the situations that are most likely to be found inadmissible before the Court due to the complementarity and gravity requirements will be subject to the analysis of the Office of the Prosecutor with a view to assessing whether an ICC crime has been committed. This is especially important in the PKK context because, as discussed in the previous sections, while most of the PKK's acts are most likely to fall within the subject matter jurisdiction of the ICC, they are most likely to be found inadmissible due to the genuine national proceedings against the perpetrators. If Turkey accedes to the Rome Statute and the Office of the Prosecutor decides to open a preliminary examination into the situation with respect to the PKK, the commission of the most serious crimes by the terrorist organization would be confirmed in the jurisdictional phase of the analysis; before even moving to the admissibility phase of the examination.

In the small likelihood that a preliminary examination is launched against Turkey's will, confirmation of the PKK's most serious crimes in the Preliminary Examinations Reports could promote the aims that the representatives of Turkey at the Rome Conference intended to achieve

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75 *Report on Preliminary Examination Activities 2012*, p. 3, para. 1.

76 See “ICC: Course Correction”, *Human Rights Watch*, 16 June 2011, <http://www.hrw.org/news/2011/06/16/icc-course-correction> (Accessed 1 February 2018).

77 Rome Statute, art. 53(1)(c).

with their efforts to include terrorism in the Statute. First of all, a Preliminary Examinations Report that classifies some of the activities of the PKK as crimes against humanity could have a significant deterrent effect on the commission of the future PKK crimes. Second, such report could also deter neighboring and European countries from founding or facilitating the PKK's acts, by making clear that they could be subject to the ICC's jurisdiction once a formal investigation is opened. Confirmation of the PKK's crimes in the Preliminary Examinations Reports could also spur the states --especially the European countries where the PKK runs public campaigns, extorts money, and recruits new members-- to pursue their own investigations into the PKK activities in their territory. Lastly, confirmation of the most serious crimes committed by the PKK could provide a greater incentive for European countries to arrest and extradite the indicted PKK members to Turkey.

During the reporting periods, the Prosecutor reminds the parties to the conflict of their responsibilities under international law and the Rome Statute, and pushes them toward the fulfillment of their obligations to investigate. Thus, initiation of a preliminary examination process itself, even before confirmation of the commission of an ICC crime, would remind the concerned parties of their responsibilities regarding the unlawful PKK activities taking place in their territory, and would send a clear signal that the international community is watching.

## Conclusion

Given the possible contributions of Turkey's Rome Statute accession to its fight against terrorism, the concerns that lie at the bottom of Turkey's fears about joining the ICC should be periodically re-examined: if Turkey's understandable concerns do not outweigh the benefits covered in this article, Turkey should reconsider its non-Party status. When this reassessment done carefully, it will be seen that most of Turkey's concerns regarding the accession are either invalid or surmountable. For instance, it will be seen that allegations against the Turkish Armed Forces concern the incidents that occurred outside the time period over which the ICC can act.<sup>78</sup> The jurisdiction of the ICC is not retroactive, and thus the Court won't have jurisdiction over events took place before the entry into force of the Rome Statute on July 1, 2002.<sup>79</sup> Moreover, when Turkey accedes to the Rome Statute, the ICC will have jurisdiction only with respect to the allegations concerning the incidents occurred after the entry into force of the Statute for Turkey, unless Turkey accepts jurisdiction of the Court also for the acts took place prior to its ratification but after July 1, 2002.<sup>80</sup> In addition, the concerns that some of the acts Turkey carried out in Cyprus before 2002 could be considered as 'continuous crimes' and therefore could be subject to an ICC investigation cannot be a valid argument against Turkey's accession because Greek Administration of Southern Cyprus, which is recognized by the U.N. as the *de jure* government of the whole island, is already a party to the Court and thus it can already attempt to refer the case to the ICC regardless whether Turkey is a State Party or not.<sup>81</sup>

78 For example, village evacuations and resettlements of the displaced population, for which Turkey has been most severely criticized with respect to its internal fight against the PKK, took place between 1985 and 2001. See Joost Jongerden, *The Settlement Issue in Turkey and the Kurds: An Analysis of Spatial Policies, Modernity and War*, BRILL Han 1, 2007, p. 82.

79 Rome Statute, art. 11(1).

80 Ibid. art. 11(2).

81 Şehmus Kurtuluş, "Cyprus Question: An obstacle to Turkey's Long-Awaited Accession to the Rome Statute of the International Criminal Court?," *International Journal of Social Sciences and Humanities Research*, Vol. 3, No. 5, 2015, p. 48: "Cyprus is not a case the Prosecutor would be eager to take on not only because of political constraints and the

Another example of an invalid concern that is presented as an obstacle to Turkey's accession to the Rome Statute is the ICC's jurisdiction over the crime of aggression. Given the narrow applicability of the crime of aggression, which allows States Parties to decline to accept the jurisdiction of the ICC over that crime, such jurisdiction also should not hinder Turkey's consideration of accession. In contrast to the other three core crimes in the Rome Statute, the ICC can exercise its jurisdiction over the crime of aggression only if it is committed in the territory of a State Party and by the nationals of a State Party that have not previously opted out of the jurisdiction of the Court over the crime of aggression.<sup>82</sup> Though all of these concerns require their own examinations, most of them cannot be presented against Turkey's accession. The purpose of this article was not to attempt to ally all of Turkey's concerns with regard to joining the ICC, but to argue that if accession to the Rome Statute will be conducive to its struggle against terrorism, all of the other concerns should be reevaluated. As the issue of terrorism was the focus of this article, detailed discussion was limited to Turkey's concerns over the exclusion of terrorism from the Rome Statute.

After explaining why the lack of the reference to terrorism in the Rome Statute cannot be an obstacle to Turkey's accession, this article submitted that joining the ICC could, in fact, be conducive to Turkey's decades-long combat against terrorism. Turkey, by acceding to the Rome Statute, could enjoy positive political impacts of being a State Party, such as enhancing its reputation internationally, and garner greater support from other State Parties in its war against terrorism. Assembly of the State Parties could serve as a platform for Turkey to impact the international community's perception of the terrorist groups, against which Turkey is fighting, on its behalf. For the purpose of securing its image in the eyes of the international community and its ground among European countries, Turkey has already acceded to a significant number of international human rights instruments, including the ECHR, which imposes much more extensive burdens on States Parties and which doesn't enjoy the kind of procedural safeguards that the Rome Statute enjoys, such as 'serving the interests of justice'. Turkey's policy to remain engaged with the international human rights mechanisms is instrumental in gaining further assistance and closer cooperation from other countries in its fight against the PKK. Given the particular importance that Turkey attaches to its struggle against terrorism and the possible contributions of Turkey's Rome Statute accession to this struggle, Turkey's concerns regarding the accession should be periodically re-evaluated.

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statehood issues, but also because of the risk of obstructing the peace talks ... [I]n the highly unlikely event that the OTP opens a preliminary examination into the activities in northern Cyprus, the acts in question would most likely be found inadmissible before the ICC because of 1) the limited temporal jurisdiction of the Court; 2) the gravity of the alleged crimes; and 3) the remedies that have already been provided to the Greek Cypriots...Even if Turkey remains a non-party, the Court could still determine that it has territorial jurisdiction over Turkey's activities in the northern part of Cyprus, because the UN recognizes the Republic of Cyprus, a State Party to the Court, as the *de jure* government of the whole island. [(S.C. Res. 541, U.N. Doc. S/RES/541 (Nov. 18, 1983)] Therefore, Turkey's accession to the Rome Statute is not likely to increase its risk of being exposed to jurisdiction of the Court over the acts on the island."

82 Rome Statute, art. 15(4).