

# CRIMES AGAINST HUMANITY IN THE TURKISH CRIMINAL CODE: A CRITICAL REVIEW IN THE LIGHT OF INTERNATIONAL MECHANISMS

Volkan MAVİŞ\*

## ABSTRACT

*Crimes against humanity are as old as humanity itself. However, the expression can be traced dating back a century. After the birth of the concept, international criminal law has covered a long distance by courtesy of international tribunals. The definition of the crime has evolved and the practice has been modified. On the other hand, Turkish Criminal Code system has fallen outside the developments in the international area. Although, including of international crimes in the Code is an admirable enterprise, the definition of crimes against humanity must be restructured in the light of international standards. Firstly, the list of prohibited acts must be enhanced. Secondly, discriminatory intent and requirement for systematic attack must be excluded from the text.*

**Keywords:** *crimes against humanity, international criminal court, discriminatory intent, enforced disappearance, deportation*

## TÜRK CEZA KANUNU'NDA İNSANLIĞA KARŞI SUÇLAR: ULUSLARARASI MEKANİZMALAR IŞIĞINDA ELEŞTİREL BİR İNCELEME

## ÖZET

*İnsanlığa karşı suçlar, insanlığın kendisi kadar eski bir olgudur. Oysa ki, kavram ancak yüz yıllık bir tarihe sahiptir. Konseptin doğumundan bu yana uluslararası ceza hukuku, uluslararası mahkemelerin katkılarıyla uzun bir yol kat etmiştir. Suçun tanımı evrim geçirmiş ve uygulama değişim göstermiştir. Öte yandan, Türk Ceza Kanunu uluslararası alandaki bu gelişmelerin gerisinde kalmıştır. Her ne kadar kanunun uluslararası suçlara yer vermesi önemli bir gelişme olsa da insanlığa karşı suç tanımının uluslararası standartlar ışığında yeniden düzenlenmesi gerekmektedir. Öncelikle suç tanımındaki yasaklanmış fiillerin sayısı artırılmalıdır. İkinci olarak, fiilin ayrımcılık saikiyle ve sistemli olarak işlenmesi şartları madde metninden çıkarılmalıdır.*

**Anahtar Kelimeler:** *insanlığa karşı suçlar, uluslararası ceza mahkemesi, ayrımcılık saiki, zorla kaybetme, sürgün*

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\* Research Assistant, Faculty of Law, Inonu University, Ph.D Student at Ankara University, volkan.mavis@inonu.edu.tr

## I. Introduction

International criminal law has achieved significant progress since the beginning of the 20<sup>th</sup> century. The understanding of the concept of core crimes has changed on the account of heinous events in the past. The process, which substantially started by Nuremberg Tribunals in the aftermath of the World War II, gained momentum during 1990s by *ad hoc* tribunals. Today, the evolution is being pursued by a variety of international tribunals. In this sense, the notion of crimes against humanity is not an exception. The definition of such crimes has been influenced by circumstances related to other major crimes. In spite of the nature of the said crimes, it can be argued that international criminal law has relatively devised an advanced method. On the other hand, Turkey has failed to adjust its criminal code to international standards. In 2005, international crimes were introduced by new Turkish Criminal Code (TCC). However, the concept of the provisions is limited and the Turkish Lawmakers have not considered updating the Code according to the international standards as yet.

In the last 30 years, Turkey has witnessed inhumane crimes which were mostly committed by government officials. First of all, the military coup staged on 12 September 1980 was the main reason for many violations of human rights. Indeed, the Turkish society has suffered from human rights violations even many years after the coup. The state brutality also revealed itself in the southeast part of the country. During 1990s, the region was the subject of forced disappearances, vacated villages and persecution. Moreover, today, the lawmakers in Turkey should pay more attention to core values of human rights. For instance, Human Rights Association reported that 843 inmates were inflicted torture and inhumane treatment in 2013 in Turkey.<sup>1</sup> Thus, a country such as Turkey in which human rights does not stand at the forefront of the political discourse, there is always a threat of victimization. In this respect, the present author argues that modernisation of the TCC is crucial in order to redress the past injustices and avoid possible violations in the future.

This paper aims to deal with inadequacy of provisions of the TCC for crimes against humanity. Firstly, the roots of crimes against humanity and the definitions in international law will be elucidated. Secondly, the paper will focus on the specific provisions of the TCC. Lastly, the shortcomings of the approach adopted by the TCC will be reviewed according to international

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<sup>1</sup> İnsan Hakları Derneği, “2013 Türkiye İnsan Hakları İhlalleri Bilançosu”, [www.ihd.org.tr/images/2014/2013\\_bilano.doc](http://www.ihd.org.tr/images/2014/2013_bilano.doc), (Accessed 5 September 2015).

documents. The TCC limits the nature of attacks which cause crimes against humanity. On the contrary to the TCC, international documents generally have broader perspective. Another significant point is that, under the TCC, crimes against humanity may be committed only if the perpetrator has discriminatory intent. However, nowadays, general belief is that crimes against humanity may be perpetrated whether discriminatory motive exist or not. Furthermore, the TCC has adopted a narrower approach to the acts which may embody crimes against humanity. This is in light of the fact that the tendency in international law is to have a much wider category of acts.

## **II. The Origin of the Approach to Crimes against Humanity**

The notion of crimes against humanity has evolved by the international community in the last century.<sup>2</sup> Many authors state that the emergence of the concept dates back to the First World War.<sup>3</sup> The alleged mass killing of the Armenians in 1915 by the Ottoman Empire is considered as the very first example of this unwelcome phenomenon. The Allies used different descriptions to explain the nature of such heinous acts as “crimes against Christianity” and “crimes against civilization”.<sup>4</sup> The approach of the Allies illustrates that the accusatory enterprise was nothing but an effort on solving a short-term political challenge.<sup>5</sup> In 1920, Turkey reluctantly signed the Treaty of Sevres and accepted to investigate the events which occurred during the First World War.<sup>6</sup> Fortunately, after the war of independence, Turkey abandoned the Treaty of Sevres and the legitimacy of Turkey was recognized with the ratification of the Treaty of Lausanne.<sup>7</sup>

In the intervening period between the two world wars, there was stagnation on development in the notion of the crimes against humanity. However, at the end of World War II, in which international community had witnessed brutal crimes committed by the Nazis in Europe and the Japanese in the Far East, the Allies came to the conclusion that such horrendous and

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<sup>2</sup> Aksar, Y., *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court*, London 2004: Routledge Press, at 79.

<sup>3</sup> Bassiouni M. Cherif, *International Criminal Law: Source, Subjects and Contents - Vol. I*, Leiden 2008: Brill Press, at 440.

<sup>4</sup> Sarafian, A. / Avebury, E., *British Parliamentary Debates on the Armenian Genocide, 1915-1918*, Reading 2003: Taderon Press, at 60.

<sup>5</sup> Cassese, A., *International Criminal Law*, Oxford 2008: Oxford University Press, at 102.

<sup>6</sup> Treaty of Peace with Turkey, Sevres, 10 August 1920, article 142.

<sup>7</sup> Park, B., *Modern Turkey: People, State and Foreign Policy in a Globalized World*, New York 2013: Routledge Press, at 52.

far-reaching crimes cannot be prosecuted properly by national courts. Hence, there was a need for international tribunals to deal with such crimes. As a result, on 8 August 1945, the Charter of the International Military Tribunal (Nuremberg Tribunal) was signed by the Allied powers to prosecute Nazi war criminals. The Tribunal had jurisdiction over crimes against peace, war crimes and crimes against humanity.<sup>8</sup> Although, the Nuremberg Charter has been criticised for acting in the interests of Allied Powers, the understanding of the Charter was significant since, for the first time an international court was given the authority to try people who had committed crimes against humanity.<sup>9</sup> By doing so, the Allies created such a concept since some crimes committed by the Nazis (for instance, mass killings of people who were not enemy nationals) did not previously satisfy the criterion of war crimes.<sup>10</sup> The said Charter described crimes against humanity as:

*“namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”<sup>11</sup>*

In the same vein on 3 May 1946 five months before the delivery of verdict at the Nuremberg Tribunal, the International Military Tribunal for the Far East (Tokyo Tribunal) began in Tokyo. It was considered as “a natural and unavoidable consequence of the Nuremberg Trial”.<sup>12</sup> While the Nuremberg Trials were held to prosecute the war criminals of Europe, the Tokyo Trials were held to prosecute the war crimes committed by Japan in the Far East.<sup>13</sup> According to the Tokyo Charter, the acts constitute crimes against humanity:

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<sup>8</sup> The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 59 Stat. 1544, 82 U.N.T.S 279, E.A.S. No. 472, article 6.

<sup>9</sup> Schabas, William A., “State Policy as an Element of International Crimes”, *Journal of Criminal Law and Criminology*, Vol. 98, Iss. 3, at 961.

<sup>10</sup> Robinson, D., “Defining ‘Crimes against Humanity’ at the Rome Conference”, *The American Journal of International Law*, Vol. 93, Iss. 1, at 44.

<sup>11</sup> *Supra* note 8, article 6(a).

<sup>12</sup> Bert V.A. Röling, “The Nuremberg and Tokyo Trials in Retrospect”, in Bassiouni, M.C. and Nanda, V. (ed.), *A Treatise on International Criminal Law*, Springfield 1973: Thomas Press, at 596.

<sup>13</sup> *Generally see* Butow, Robert J.C., *Tojo and the Coming of the War*, Stanford 1970: Stanford University Press.

*“Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”*<sup>14</sup>

Although, both of the charters had the same conclusion, the Tokyo Charter excluded the acts committed on religious grounds.<sup>15</sup> The main reason was that the Nazis perpetrated most of the crimes on religious grounds mainly against the Jewish Population of Europe, whereas religious values played an insignificant role in the conflict in the Far East.

In the aftermath of the above mentioned tribunals, there was no significant improvement in the attitude of the international community towards crimes against humanity for the following 50 years mainly due to the bipolar hegemony of the Cold War.<sup>16</sup> However, at the end of the Cold War, the United Nations had to react to the heinous crimes which occurred in the Balkan and Rwanda. Although, international community had failed to put an end to these venomous acts, the action was taken to bring justice to the victims by establishing two international tribunals. These *ad hoc* tribunals have played significant role in shaping the overall system of international criminal law.<sup>17</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by resolution 827 of the United Nations Security Council (UNSC) in order to prosecute perpetrators of crimes which took place during the Yugoslav conflict. The ICTY statute defines crimes against humanity as:

*“The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:*

*(a) murder; (b) extermination; (c) enslavement; (d) deportation; (e)*

<sup>14</sup> Charter of the International Military Tribunal for the Far East, 19 January 1946, T.I.A.S. No. 1589, article 5(c).

<sup>15</sup> Fujita, H., “The Tokyo Trials Revisited”, in Doria, J., Gasser, H.P. and Bassiouni, M. Cherif (ed.), *The Legal Regime of The International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Leiden - Boston 2008: Martinus Nijhoff Publishers, at 44.

<sup>16</sup> Baars, G., “Making ICL History: On the Need to Move Beyond Pre-fab Critiques of ICL”, in Schwöbel, C. (ed.), *Critical Approach to International Criminal Law: An Introduction*, Oxon 2014: Routledge Press, at 201.

<sup>17</sup> *Generally see* Mettraux, G., *International Crimes and Ad Hoc Tribunals*, Oxford 2005: Oxford University Press, at 12.

*imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.*"<sup>18</sup>

As can be seen, the ICTY Statute made substantial changes in the context of such crimes. First of all, the Statute extended the list of acts of crimes against humanity. For instance, some acts such as rape that were not recognized by the Nuremberg Charter were included in the ICTY Statute.<sup>19</sup> Hence, dealing with sinful part of conflict against women had been taken into account. Secondly, the Statute considered it necessary to create a nexus between crimes against humanity and an armed conflict whether it is international or non-international. The nexus was seen necessary since the UNSC had intended to narrow the jurisdiction of the ICTY. On the other hand, in *Tadic* case, the Appeals Chamber rightly emphasized that "*A nexus with the accused's acts is required, however, only for the attack on any civilian population. A nexus between the accused's acts and the armed conflict is not required, as is instead suggested by the Judgement. The armed conflict requirement is satisfied by proof that there was an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law*".<sup>20</sup> The ICTY stressed that the Statute only requires the existence of an armed conflict to determine the time of the crime.<sup>21</sup> However, the acts which are not connected to an armed conflict also may comprise crimes against humanity. Otherwise, most of the acts fall within article 5 of the ICTY statute, which would also constitute war crimes.<sup>22</sup> Today, it is widely acknowledged that states may commit war crimes even against their own citizens in the course of a civil war or civil disturbers.<sup>23</sup> Therefore, distinguishing the difference between the two crimes is a complicated task to achieve.

One year after the establishment of the ICTY, the UNSC adopted Resolution 955 to establish the International Criminal Tribunal for Rwanda

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<sup>18</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 217th mtg., U.N. Doc. S/RES/827, article 5.

<sup>19</sup> *Id.*, article 5(g).

<sup>20</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, 15 July 1999, at paragraph 251.

<sup>21</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, at paragraph 57.

<sup>22</sup> Badar, Mohamed E., "From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity", *San Diego International Law Journal*, Vol. 5, at 95.

<sup>23</sup> Simbeye, Y., *Immunity and International Criminal Law*, Aldershot 2004: Ashgate Publication, at 56.

(ICTR). The Tribunal was given the authority to prosecute those responsible for the Rwandan Genocide. The Statute of the ICTR states that:

*“The International Tribunal for Rwanda 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:*

*a) Murder; b) Extermination; c) Enslavement; d) Deportation; e) Imprisonment; f) Torture; g) Rape; h) Persecutions on political, racial and religious; i) Other inhumane acts”<sup>24</sup>*

The ICTR Statute adopts a different attitude compare to the ICTY Statute. Firstly, there is no mention of the war nexus throughout its text. It could be argued that the UNSC changed its viewpoint and recognized that crimes against humanity can be committed during peacetime as the ICTY Appeals Chamber had previously stressed.<sup>25</sup> Secondly, the ICTR Statute emphasizes that only criminal acts which are carried out against any civilian population on national, political, ethnic, racial or religious grounds are punishable.

By establishing the two above mentioned *ad hoc* tribunals, the UNSC attempted to bring justice to the victims of massive crimes committed in those conflicts. International community has also presided over other similar tribunals such as the Special Court for Sierra Leone (SCSL). The relative success of the aforementioned tribunals and the apparent unanimity within the international community as a result of the end of the Cold War prompted international actors to establish a permanent international criminal court. Therefore, the International Criminal Court (ICC) was created by the Rome Statute which entered into force on 1 July 2002.<sup>26</sup> The Court has jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression.<sup>27</sup> According to the Rome Statute:

*“For the purpose of this Statute, ‘crime against humanity’ means 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:*

<sup>24</sup> Statute of the International Criminal Tribunal For Rwanda, 8 November 1994, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess. 3453th mtg., U.N Doc. S/RES/955, article 3.

<sup>25</sup> *Supra* note 20.

<sup>26</sup> Rome Statute of the International Criminal Court, 17 July 1998. UN Doc. A/CONF. 183/9.

<sup>27</sup> *Id.* article 5.

*(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*"<sup>28</sup>

The definition in the Statute indicates that the outcome of the two *ad hoc* tribunals have contributed to the developing process of the definition of crimes against humanity. The ICC Statute reflects existing customary international law and relies heavily on accepted historical precedents.<sup>29</sup> Additionally, the Rome Statute extended the list of other acts which also would be considered as crimes against humanity. These innovations which were facilitated by the Rome Statute must be taken into account by the future international conventions and more importantly national criminal codes, since the Statute is the most contemporary document of international criminal law.<sup>30</sup> Similarly, some of the Turkish authors have emphasized that the TCC should have already considered the understanding of the Rome Statute since it is the most contemporary document of international criminal law.<sup>31</sup> It is significant to point out that major powers such as the United States, Russia and China have firmly remained outside the ICC regime. Turkey is another major regional power that is a non-party to the ICC. Turkey remains a candidate country to join the European Union (EU), and its refusal to sign the Rome Statute has

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<sup>28</sup> *Id.* article7(1).

<sup>29</sup> *Generally see* Dörmann, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge 2003: Cambridge University Press.

<sup>30</sup> Schaack, Beth V., "The Definition of Crimes against Humanity: Resolving the Incoherence", *Columbia Journal of Transitional Justice*, Vol. 37, at 845.

<sup>31</sup> Tezcan, D. / Erdem, Mustafa R. / Önok, Rıfat M., *Teorik ve Pratik Ceza Özel Hukuku*, Ankara 2013: Seçkin Press, at 73; also see Aksar, Y., "Uluslararası Suçlar, Uluslararası Ceza Mahkemesi ve Yeni Türk Ceza Kanunu", *Uluslararası Hukuk ve Politika*, Vol. 1, Iss. 1, at 54.

been cited as hindering its accession into the EU.<sup>32</sup> By the same token, this paper will mainly focus on to review of the definition of the crimes against humanity in the Rome Statute within the TCC.

### III. Crimes against Humanity under the Turkish Criminal Code

The concept of international crimes is a new phenomenon in Turkish criminal system. It is worth noting that the previous TCC numbered 765 had no provision for international crimes. On the other hand, current TCC numbered 5237 introduces new type of crimes in the Turkish criminal law regime. According to this, genocide and crimes against humanity are the core offences which are punishable by the TCC whether the perpetrators are convicted in Turkey or abroad.<sup>33</sup> The Turkish Legislators in the new TCC also devoted a chapter under international offences.<sup>34</sup> It is worth noting that the understanding of the lawmakers on structuring of the Code has caused arguments among lawyers. Some believe that the appreciation of the lawmakers would contribute greatly to and emphasize the importance of issues such as the unlawful transfer of immigrants to a country and human trade.<sup>35</sup> On the other hand, opponents argue that the Code should not have place together crimes against individuals in the same category as international crimes which concern all international actors.<sup>36</sup> It is submitted that the most important thing is the approach adopted by the political executive to fight against core crimes consistently instead of being stuck in the task of classifying crimes.

The TCC identifies crimes against humanity as:

*“Execution of any one of the following acts systematically under a plan against a sector of a community for political, philosophical, racial or religious reasons creates the legal consequence of an offense against humanity.*

*a) Voluntary manslaughter, b) To act with the intension of giving injury to another person, c) Torturing, infliction of severe suffering, or forcing a person to live as a slave, d) To restrict freedom, e) To make a person to be*

<sup>32</sup> Novak, A., *The International Criminal Court: An Introduction*, Switzerland 2015: Springer International Publishing, at 35.

<sup>33</sup> Turkish Criminal Code, No. 5237, passed on 26 September 2004 (Official Gazette No.25611, dated 12 October 2004), article 76, 77.

<sup>34</sup> *Id.* article 79, 80.

<sup>35</sup> Değirmenci, O., “Mukayeseli Hukukta ve Türk Hukukunda İnsan Ticareti Suçu”, *Türkiye Barolar Birliği Dergisi*, Vol. 67, at 95.

<sup>36</sup> Hafizoğulları, Z. / Güngör, D., “Türk Ceza Hukukunda Suçların Tasnifi”, *Türkiye Barolar Birliği Dergisi*, Vol. 69, at 29.

subject to scientific researches/tests f) Sexual harassment, child molestation, g) Forced pregnancy, h) Forced prostitution”<sup>37</sup>

It seems that the definition in the TCC basically consists of all of the descriptions in international law. For instance, the TCC asks for systematic act which is also required under the Rome Statute. Another example is that the TCC requires discriminatory ground, although only the Statute of the ICTR considered such a base necessary.

#### **IV. The Definition in the Turkish Criminal Code**

The concept of crimes against humanity in international law and Turkish law has been explained so far. As stated above, the TCC does not adhere to a particular definition of crimes against humanity. It is fair to say that the Code was inspired by archaic instruments instead of following the latest and modern evolutions.<sup>38</sup> In the opinion of the present author, the TCC would have been much better off to have referred to core crimes directly from the Rome Statute of 1998. In this regard, the following section will critically analyse the understanding of the TCC which fall behind the contemporary international legal standards. For the crime to be committed both the *actus reus* and the *mens rea* must exist. In this respect, the review of the TCC will be done under two main chapters.

##### **A. Acts of Crimes against Humanity (*Actus Reus*)**

*Actus Reus* is the physical part of a crime; there must be an act to commit a crime. In the case of crimes against humanity, *actus reus* (acts) is defined differently under different statutes. The acts which constitute crimes against humanity have expanded from Nuremberg experience.<sup>39</sup> The Nuremberg and Tokyo Charters had a short list consisting of murder, extermination, enslavement, deportation, and other inhumane acts. Nevertheless, the general approach has changed, so that the Rome Statute includes various acts in eleven categories. Some of them are relatively new in the concept of crimes against humanity such as apartheid.<sup>40</sup> But it is not possible to say the same for

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<sup>37</sup> *Supra* note 33, article 77(1).

<sup>38</sup> The official commission records show that there was no remarkable deliberation on the elements of the crime. The commissioners only focused on the necessity of a plan and policy. See T.C. Adalet Bakanlığı Yayın İşleri Daire Başkanlığı, *Tutanaklarla Türk Ceza Kanunu*, Ankara 2005, at 278, 279.

<sup>39</sup> Cryer, R. / Friman, H. / Robinson, D. / Wilmschurst, E., *An Introduction to International Criminal Law and Procedure*, Cambridge 2010: Cambridge University Press, at 245.

<sup>40</sup> *Supra* note 26, article 7(1)(j).

the Turkish criminal system. Whereas international law has made progress in relation to the concept of crimes against humanity, the TCC has not adopted new developments in that field. The Code only involves the acts of customary international law instead of accepting modern understanding of them. In this section, the acts which must be included in the TCC will be reviewed by explaining the past events and future possibilities.

**Extermination** is one of the acts which were excluded from the TCC, although it has been most widely-accepted since Nuremberg. Extermination can be explained as murder on a massive scale. There is no certain number of victims which would mean what constitutes a massive scale. However, in *Stakic* case, the ICTY Appeal Chamber found that conditions must be examined case by case to identify murders are committed on large scale or not.<sup>41</sup> The question that arises is why therefore the TCC needs the act of extermination even though murder was already included in the text. The act of extermination needs the element of mass destruction which is not a factor of murder. On the other hand, even single killing may constitute extermination if it is a part of massive killing event. For instance,

*“if numerous officers fire into a crowd killing everyone, and Officer X is a poor shot and kills only a single person, whereas Officer Y kills sixteen people, both will be guilty of extermination because they participated in the mass killing and were both aware that their actions formed part of the mass killing event.”<sup>42</sup>*

Thus, an offender may be liable for the crime of extermination by killing a single person. Similarly, some Turkish Lawyers emphasizes that the important element of participation as an accomplice is gaining ascendancy over the commission of the crime.<sup>43</sup> It is also claimed that the accused would be culpable for the crime even he/she could not succeeded to kill even a single person providing there is a collaborative decision to join the act of extermination.<sup>44</sup> Moreover, extermination may be committed by depriving from food and medicine with the intent of the destruction of a part of the population.<sup>45</sup>

<sup>41</sup> *Prosecutor v. Stakic*, Case No. IT-97-24-A, Judgement, 22 March 2006, at paragraph 260-261.

<sup>42</sup> United Nations Interregional Crime and Justice Research Institute, “Crimes against Humanity”, [wcjpr.unicri.it/deliverables/docs/Module\\_7\\_Crimes\\_against\\_humanity.pdf](http://wcjpr.unicri.it/deliverables/docs/Module_7_Crimes_against_humanity.pdf) (Accessed 25 September 2014), at 20.

<sup>43</sup> İçel, K., *Ceza Hukuku Genel Hükümler*, İstanbul 2014: Beta Press, at 495.

<sup>44</sup> Özgenç, İ., *Türk Ceza Hukuku Genel Hükümler*, Ankara 2014: Seçkin Press, at 486-498.

<sup>45</sup> *Supra* note 26, article 7(2)(c).

In short, even a single murder can be interpreted as extermination. According to the TCC, if a person commits murder as a crime against humanity is sentenced to life imprisonment. Thus, it can be said that such an act is already severely punishable under the TCC. On the other hand, holding an offender responsible for extermination does not tantamount to be punished for murder. It is a fact that sentencing an offender for extermination will not change the period of imprisonment. However, holding these offenders liable for extermination may emotionally satisfy the survivors. In the case of extermination, the offender acts to kill as many people as he/she can. In this sense, a criminal, who has such a mind, should not be responsible for only one murder.

**Enforced Sterilization** is placed in the category of sexual acts in the Rome Statute. No international court statute has adopted this prohibited act before. On the other hand, Nazi doctors were prosecuted because of such inhumane experiments they conducted such as sterilization.<sup>46</sup> The TCC did not include enforced sterilization in article 77, whereas other forms of sexual violence have been adopted by the Code. In the early attempts by international law, even the crime of rape was not considered as a form of crimes against humanity. However, it was seen that sexual violence is a significant part of crimes against humanity whether during peacetime and wartime. For instance, the *ad hoc* tribunals have not ignored enforced sterilization and punished these acts on the basis that the Courts are empowered to prosecute other inhumane acts as well.<sup>47</sup> Today, all forms of sexual violence are condemned and punished by the international community. Turkey and its legislators cannot lag behind regarding this very vital issue since serious violations of sexual inviolability are being reported worldwide. For instance, Human Rights Watch reported that Ukraine Laws requires transgender people to undergo enforced sterilization.<sup>48</sup> There is no such law in Turkey, but enforced sterilization may occur in other ways. Losing of fertility is one of the possible consequences

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<sup>46</sup> Generally see Marks, Stephen P., "Medical Experimentation", in Shelton, Dinah L. (ed.), *Encyclopedia of Genocide and Crimes against Humanity* 2, Farmington Hills 2005: Thomson Gale, at 672.

<sup>47</sup> Banks, Angela M., *Sexual Violence and International Law: An Analysis of the Ad Hoc Tribunal's Jurisprudence & the International Criminal Court's Elements of Crimes*, Hague 2005: Faculty Publications, paper 305, [scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1326&context=facpubs](http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1326&context=facpubs), at 8.

<sup>48</sup> Human Rights Watch, "World Report 2014", [www.hrw.org/sites/default/files/wr2014\\_web\\_0.pdf](http://www.hrw.org/sites/default/files/wr2014_web_0.pdf) (Accessed 18 August 2015), at 514.

of sexual assault since some survivors (rape victims) are injured severely.<sup>49</sup> Therefore, widespread rape and sexual assault may also result in the act of enforced sterilization.

**Deportation and Forcible Transfer** are the two common violations of human rights. For instance, the ICTY Trial Chamber found that thousands of Bosnian Muslims were forcibly bussed outside the enclave of Srebrenica formed the basis of three counts in the indictment, which included the count of crime against humanity.<sup>50</sup> Although, these two offences share the same mentality, the characteristic of them are different. The difference between deportation and forcible transfer is the possible destination of the displaced. The term deportation means the expulsion of people from internationally accepted boundaries. In contrast, forcible transfer of population occurs in the case of forcing people to displace within a state. It is important to stress that the transfer of people may constitute crimes against humanity only if the transfer is prohibited under international law.<sup>51</sup> Thus, for example, the policy of displacement carried out by a state which is as a result of disease or natural disasters would not cause crimes against humanity.<sup>52</sup> Similarly, Protocol II Additional to the Geneva Convention article 17 makes it clear that the displacement of civilian population is possible for security of civilians or imperative military reasons.<sup>53</sup>

Although, deportation and forcible transfer are strictly limited by international treaties, Turkey has not seriously considered the requirement of displacement. Countless number of examples prove that thousands of people were subjected to forcible transfer in Turkey in the past. Reports show that many villages were moved along by security forces without any court decision, especially during 1990s.<sup>54</sup> Deportation and transfer of the people do

<sup>49</sup> Chinkin, C., "Rape and Sexual Abuse of Women in International Law", European Journal of International Law, Vol. 5, Iss. 1, at 330.

<sup>50</sup> *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001, at paragraph 519.

<sup>51</sup> Robinson, D. / von Hebel H., "War Crimes in Internal Armed Conflict: Article 8 of the ICC Statute", in Fischer, H. (ed.), *Yearbook of International Humanitarian Law – Vol. 2*, Hague 1999: Asser Press, at 203.

<sup>52</sup> Byron, C., *War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court*, Manchester 2009: Manchester University Press, at 220.

<sup>53</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to Protection of Victims of International Armed Conflicts, 7 December 1978, 1125 U.N.T.S.3, article 17(1).

<sup>54</sup> Kurban, D. / Yeğen, M., *Adaletin Kısıyında: Zorunlu Göç Sonrasında Devlet ve Kürtler / 5233 Sayılı Tazminat Yasasının Bir Değerlendirmesi – Van Örneği*, İstanbul 2012: TESEV

not emanate from acts of the government in every case. People had to leave their homeland in an effort to save their lives occasionally due to the conflicts between the security forces and PKK terrorists. On the other hand, there are many witnesses who claim that state officials threaten local people whether they were leaving their homeland or joining the security forces.<sup>55</sup> It may be claimed that security officers may be ordered by superiors to do so. In this sense, according to the TCC, acting under a superior instruction makes the action of a government official lawful as long as the instructions are lawful.<sup>56</sup> An order constituting an offense should never be fulfilled. Otherwise, the person fulfilling the order and the person giving the order are held responsible at the same time. It is a fact that the government is liable to follow violations of law and take serious precautions. However, these serious violations of right to settlement have been ignored by the authorities in Turkey. Possible future infringements cannot be avoided without facing the fact that justice may not be served. Thus, accepting deportation and forcible transfer as a crime against humanity may raise the confidence of citizens in the legal system.

*Enforced Disappearance* is also another common human rights violation which people have faced.<sup>57</sup> Experience shows that the crime of enforced disappearance has been mostly carried out on the basis of national security to eliminate people who oppose the incumbent governments that cannot tolerate dissent. After Adolf Hitler passed “*Nacht und Nebel Erlass*” (the Night and Fog) Decree, the notion of enforced disappearance became visible universally.<sup>58</sup> The Decree was widely used against people who were seen politically problematic by German authorities. In addition, 50 years later, the offence was committed commonly in Latin America. Thousands of people from different backgrounds such as political opponents and journalists disappeared without a trace.<sup>59</sup> Vital rights of people such as the right to life,

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Publication, at 93-95.

<sup>55</sup> *Id.*

<sup>56</sup> *Supra* note 33, article 24(2).

<sup>57</sup> In 2006, the crime of forced disappearance received its own specific convention, the U.N. International Convention on the Protection of All Persons from Enforced Disappearance, 12 January 2007, G.A. Res. 61/177, U.N. Doc. A/RES/61/177,.

<sup>58</sup> This infamous decree was issued by Hitler on 12 December 1941, and according to which a “lasting deterrent can be achieved only by the death penalty or taking measures that will leave the family and the population uncertain as to the fate of the offender.” cited in Scovazzi, T. / Citroni, G., *The Struggle Against Enforced Disappearance and the 2007 United Nations Convention*, Leiden - Boston 2007: Martinus Nijhoff Publisher, at 4, 5.

<sup>59</sup> *Id.* at 7.

right to liberty and security, and the right to a fair trial were systematically violated. Fortunately, international community has taken action and passed significant legislations, such as the Declaration on the Protection of all Persons from Enforced Disappearances adopted by the General Assembly in 1992, in order to prevent such crimes in the future.<sup>60</sup> Two years later, Inter-American Convention on the Forced Disappearance of Persons came into force.<sup>61</sup> Finally, the Rome Statute has listed the act of enforced disappearance as a crime against humanity. Thus, today, enforced disappearance is a universally punishable crime.

Enforced disappearance of people is not an unknown phenomenon for the Turkish society. Turkey has witnessed serious violations of basic rights since 1980s. Human rights reports show that a systematic policy had been operated by the Turkish Government during 1990s<sup>62</sup>, insomuch that a group of women who call themselves “Saturday Mothers” and stand guard at the Galatasaray Square every Saturday in memory of their disappeared children. The European Court of Human Rights (ECtHR) emphasizes the reality of forced disappearance in Turkey. In the past, the ECtHR has condemned Turkey for neglectful acts of enforcement officers in relation to forced disappearance. In *Kurt v Turkey* case, the ECtHR stated that the Turkish Authorities had failed to provide explanation for the disappearance of victim on logical reasons.<sup>63</sup> Thus, Turkey is able to make progress by taking precautionary steps to avoid future disappearances. It must be kept in mind that the failure to prevent enforced disappearance violates a vital and indispensable right and would ultimately show Turkey in a bad light within the international arena.

*Other inhumane acts* have been considered as a fundamental part of the concept of crimes against humanity since the emergence of the concept in international law. Not only Nuremberg Charter but also the statutes of the ICTY and the ICTR have embraced other inhumane acts which may embody crimes against humanity. The category of “other inhumane acts” causes anxiety on possible violations of defendant’s rights. According to the legal

<sup>60</sup> General Assembly Resolution (GA Res.) 47/133, 18 December 1992.

<sup>61</sup> Inter-American Convention on the Forced Disappearance of Persons, 9 June 1994, OAS Treaty Series No. 68, 33 ILM 1429.

<sup>62</sup> Human Rights Watch, “Adalet Vakti: Türkiye’de Doksanlarda Gerçekleşen Faili Meçhul Cinayetler ve Kayıplar İçin Cezasızlığın Sona Erdirilmesi”, [www.hrw.org/sites/default/files/reports/turkey0912tuwebwcover.pdf](http://www.hrw.org/sites/default/files/reports/turkey0912tuwebwcover.pdf), (Accessed 5 September 2015), at 56.

<sup>63</sup> *Kurt v Turkey*, ECtHR, Application No. 24276/94, Judgement, 25 May 1998, at paragraph 128.

principle of “*Nulla crimen sine lege*”, penal laws must definitely define the criminal act and the penalty. In this sense, the international lawyers are right to be sceptical about the regulations of the international instruments. *Bassiouni* considers “other inhumane acts” as the biggest question in terms of ensuring the principle of legality.<sup>64</sup> However, the Rome Statute clearly states the criteria which show whether the act is inhumane or not. The Statute clarifies that only the acts of a similar character which intentionally cause great suffering or serious injury to physical and mental health can be assessed as inhumane.<sup>65</sup> The provision shows that not only physical damage but also mental damage of victim may create crimes against humanity. In this sense, as found by the ICTR, physiological coercion such as forced nudity in front of a crowd should be viewed under other inhumane acts.<sup>66</sup> It is submitted that, the ICC must benefit from the framework of human rights law to determine these kinds of inhumane acts.<sup>67</sup> Therefore, the acts, which do not match the acts on the list of crimes against humanity, fall under the heading of “other inhumane acts”.

As mentioned above, the notion of “other inhumane acts” affords the opportunity to prosecute vicious crimes as crimes against humanity. In *Brima* case, the SCSL Appeals Chamber held that forced marriage suits the requirements of the elements of other inhumane acts.<sup>68</sup> According to the Chamber “acts of forced marriage were of similar gravity to several enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery and sexual violence”.<sup>69</sup> It is a fact that the Chamber was aware that “forced marriage” causes serious harm to victims mentally and physically. It is hoped that the understanding of the Chamber may affect the criminal law perspectives of states such as Turkey.<sup>70</sup>

<sup>64</sup> Bassiouni, M. Cherif, *Crimes against Humanity: Historical Evolution and Contemporary Application*, New York 2011: Cambridge University Press, at 411.

<sup>65</sup> *Supra* note 26, article 7(1)(k).

<sup>66</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, at paragraph 688.

<sup>67</sup> Haenen, I., “Classifying Acts as Crimes against Humanity in the Rome Statute of the International Criminal Court”, *German Law Journal*, Vol. 14, Iss. 7, at 818.

<sup>68</sup> *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-A, Judgment, 22 February 2008, [AFRC Appeals Judgment], at paragraph 197-203.

<sup>69</sup> *Id.*

<sup>70</sup> According to the statistics, the rate of ‘forced marriage’ is extremely high in Turkey. Hacettepe University reported that 26% of women get married under the age of 18 which is the legal marrying age. Most of these marriages consummate as a result of pressure of parents. Moreover, sometimes parents are paid for their permission to get married with their daughter. Today, the reality of child brides is seen as a cultural and social problem. However, thanks

## B. Mental Element (*Mens Rea*)

*Mens rea* is the mental part of a crime which is required to be criminally liable. Mental element is one of the essential parts of a crime. Therefore, it is a consequence that a crime cannot exist without the mental link between the accused and the act.<sup>71</sup> The accused mostly possesses general intent which means that the only intent required to constitute the crime. In the case of crimes against humanity, under the TCC, the accused must be aware that his act is a part of systematic attack under a plan against a section of the community for political, philosophical, racial or religious reasons. Thus, the accused must have specific intent.<sup>72</sup> In other words, there must be a specific intent attending the purpose for the commission of the act. However, in terms of the Rome Statute, general intent of the accused is sufficient to constitute the crime.<sup>73</sup> Thus, the necessity of limitations of the TCC on mental elements will be examined in the following section.

### 1. The Nature of the Acts “Widespread or Systematic”

Widespread or systematic nature of the act is one of the most important features of crimes against humanity which distinguishes it from common crimes.<sup>74</sup> The approach adopted by the international community in the necessity of “a widespread or systematic attack” against a civilian population to amount to a war crime appeared in the 1990s.<sup>75</sup> Although, the concept has existed for more than 30 years, the TCC and international instruments have different approach on the nature of the acts. According to the TCC, crimes against humanity takes place, only if one of the acts specifically mentioned on the list of crimes in Article 77 is committed systematically.<sup>76</sup> However, as a prerequisite to the Rome Statute “a widespread or systematic attack against

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to developments in international criminal law, the widespread application of forced marriage may be prosecuted in the future. Hacettepe Üniversitesi Nüfus Etütleri Enstitüsü, “2013 Türkiye Nüfus ve Sağlık Araştırması”, [www.hips.hacettepe.edu.tr/TNSA\\_2013\\_ana\\_rapor.pdf](http://www.hips.hacettepe.edu.tr/TNSA_2013_ana_rapor.pdf), (Accessed 20 August 2015), at 107; Unicef, “Türkiye’de Çocukların Durumu Raporu 2011”, [www.izmiriplanliyorum.org/static/upload/file/turkiye%27de\\_cocuklarin\\_durumu\\_raporu\\_%282011%29.pdf](http://www.izmiriplanliyorum.org/static/upload/file/turkiye%27de_cocuklarin_durumu_raporu_%282011%29.pdf), (Accessed 20 August 2015), at 106.

<sup>71</sup> *Supra* note 44, at 227.

<sup>72</sup> *Supra* note 31, at 83.

<sup>73</sup> Topal, Ahmet H., *Uluslararası Ceza Yargılamalarında Cinsel Suçlar*, İstanbul 2009: On İki Levha Press, at 167.

<sup>74</sup> *Supra* note 22, at 109.

<sup>75</sup> *Supra* note 39, at 236.

<sup>76</sup> *Supra* note 33, article 77.

any civilian population” should take place. Similarly, the ICTR Statute had the same requirement. On the other hand, the ICTY Statute does not include such a criterion. However, in *Tadic* case, the ICTY Trial Chamber found that the acts must occur on a widespread or systematic basis.<sup>77</sup> As a result, all these developments in the field show that there is an international recognition on the nature of the acts. The terms of widespread and systematic were discussed by the ICTR as:

*“The concept of ‘widespread’ may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of systematic may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.”*<sup>78</sup>

The findings of the ICTR clearly illustrates that the term “widespread” is related to the number of victims, whereas the term “systematic”, indicates existence of a strategy adopted by the perpetrator.<sup>79</sup> Although, the ICTR made an effort to clarify the meaning of the terms, there is still uncertainty regarding the content of them. Firstly, the threshold of widespread is not possible to be determined. In other words, a numerical limit on number of victims which meet the requirement of widespread cannot be set. As stated by *deGuzman*, such a line would be morally inferior.<sup>80</sup> Thus, the widespread nature of the attack can be stated according to the facts of the case in hand.<sup>81</sup> Secondly, the term of systematic need to be clarified. In *Blaskic* case, the ICTY Trial Chamber set out four key elements to illustrate the systematic character of the attack: 1) the existence of a political objective, 2) the perpetration of a criminal act on a very large scale, 3) the preparation and use of significant public or private resources, 4) the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.<sup>82</sup>

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<sup>77</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997, at paragraph 644.

<sup>78</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, at paragraph 580.

<sup>79</sup> Chesterman, S., “An Altogether Different Order: Defining The Elements of Crimes Against Humanity”, *Duke Journal of Comparative & International Law*, Vol. 10, Iss. 2, at 314.

<sup>80</sup> deGuzman, Margaret M., “Crimes Against Humanity”, in Schabas, William A., Bernaz, N. (ed.), *Routledge Handbook of International Criminal Law*, Abingdon 2011: Routledge, at 130.

<sup>81</sup> *Supra* note 39, at 236.

<sup>82</sup> *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgement, 3 March 2000, at paragraph 203.

In many cases, attacks against civilian populations are widespread and systematic at the same time. Crimes against humanity are mostly perpetrated on a systematic pattern since it is hard to commit these crimes without the benefit of the power of a state or a non-state organisation. Historically, most of the crimes against humanity have been committed with the participation of states.<sup>83</sup> Moreover, offenders generally follow a systematic way to victimize as many people as possible.<sup>84</sup> On the other hand, crimes against humanity may be carried out on only widespread or systematic basis. It has been argued that the execution of Hungarian politician by the Soviet authorities in the Hungarian uprising of 1956 constituted a crime against humanity, in spite of the fact that the attack was not large scale.<sup>85</sup> The idea is that killing of a political leader can be seen as a systematic attack. Thus, it can be argued that the terms of widespread and systematic are alternative requirements.

Crimes against humanity can be perpetrated on widespread scale as well. *Stewart* rightly points out that an attack which is widespread but not systematic is difficult (not impossible) to occur.<sup>86</sup> The assessment is realistic since most of the time states or non-state organisations lead a campaign against civilian victims.<sup>87</sup> However, the TCC does not have any solution in the case of an attack which is just based on widespread nature. For example, Turkey has recently witnessed minor offences against Syrian immigrants in the different parts of the country. Fortunately, no serious consequences have ensued. Most of them have been based on conservative religious tendencies of the local people.<sup>88</sup> It is clear that there is no systematic campaign of the government

<sup>83</sup> *Supra* note 73, at 129.

<sup>84</sup> For example, according to official KGB numbers, approximately 700.000 people were executed between 1937 and 1938. At the beginning of 1940s, this number reached to 4 million. For more information on these historical facts MacKinnon, E., "Joseph Stalin", in Shelton, Dinah L. (ed.), *Encyclopedia of Genocide and Crimes Against Humanity 2*, Farmington Hills 2005: Thomson Gale, at 997.

<sup>85</sup> Ratner, Steven R. / Abrams, Jason S. / Bischoff, James L., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, New York 2009: Oxford University Press, at 62.

<sup>86</sup> Stewart, David P. "The International Criminal Court" in Giorgetti, C. (ed.), *International Litigation in Practice: The Rules, Practice and Jurisprudence of International Courts and Tribunals*, Leiden - Boston 2012: Martinus Nijhoff Publishers, at 203.

<sup>87</sup> During the Rwandan Genocide, radio was commonly used to target victims since most of the population were not able to read and write. Radio-Television Libre des Milles Collines (RTL) especially took a big part to direct the offenders. For more information on these historical facts Forges, Alison D., "Call to Genocide: Radio in Rwanda, 1994", in Thompson, A. (ed.), *The Media and The Rwandan Genocide*, London 2007: Pluto Press, pp. 41-54.

<sup>88</sup> Hurriyet Daily News, "Syrian Car Hits Family in Gaziantep, Raising Racial Tensions",

or any other organisation. If widespread offences were to occur in the future, the Turkish Courts will probably punish perpetrators for common crimes such as murder or plunder. In sum, the choice of the Turkish lawmakers is hard to explain since pioneering international instruments have included the term of widespread for a long time.<sup>89</sup>

## **2. Discriminatory Intent**

International instruments have had different approaches on considering discriminatory grounds for crimes against humanity. The Nuremberg Charter, as stated before, included only crime of persecution on political, racial and religious grounds. On the other hand, as stated above, the Tokyo Charter narrowed the definition of the crime and did not take into account any aspect of religious grounds. Similarly, the ICTY Statute had the same approach and adopted the discriminatory intents for only the crime of persecution. However, the ICTR Statute changed this approach of international criminal law. According to the ICTR Statute, any of the crimes on the list can be committed on political, ethnic, racial or religious grounds. Although, the ICTR had different approach to narrow its jurisdiction, the Appeal Chamber interpreted the Statute to remove any doubt in this regard. The Chamber pointed out that:

*“The meaning to be collected from Article 3 of the Statute is that even if the accused did not have a discriminatory intent when he committed the act charged against a particular victim, he nevertheless knew that his act could further a discriminatory attack against a civilian population; the attack could even be perpetrated by other persons and the accused could even object to it. As a result, where it is shown that the accused had knowledge of such objective nexus, the Prosecutor is under no obligation to go forward with a showing that the crime charged was committed against a particular victim with a discriminatory intent. In this connection, the only known exception in customary international law relates to cases of persecutions.”<sup>90</sup>*

Thus, it can be said that discriminatory grounds is not a requirement for crimes against humanity. Therefore, the Rome Statute did not adopt discriminatory grounds for crimes against humanity.

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[www.hurriyetdailynews.com/syrian-car-hits-family-in-gaziantep-raising-racial-tensions.aspx?pageID=238&nID=69203&NewsCatID=341](http://www.hurriyetdailynews.com/syrian-car-hits-family-in-gaziantep-raising-racial-tensions.aspx?pageID=238&nID=69203&NewsCatID=341) (Accessed 17 August 2015).

<sup>89</sup> *Supra* note 31, at 81.

<sup>90</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-4, Judgement, 1 June 2001, at paragraph 467.

Although, there is an undivided opinion on excluding discriminatory grounds, the crime of persecution has been seen as an exception in customary international law. Today, all of the main sources of international law recognize this fact. The agreement on persecution is logical since the nature of the crime distinguishes it from other inhumane acts. It has to be stated that the crime of persecution gains its distinct character from the specific intent of the perpetrator.<sup>91</sup> Offenders must deliberately have discriminatory intentions. The discriminatory ground is mandatory since a person would have been victimized because of his link with any political, religious or ethnic groups. Moreover, today, not only individuals but also groups are under the protection of international law. The Rome Statute prohibits persecution against any identifiable group.<sup>92</sup> Therefore, the people who are not members of that group but supporter of the group can be protected by international law too.<sup>93</sup>

The provision in the TCC reverses the acceptance of international criminal law instruments. Article 77 of the TCC states, that execution of any of the crimes in the list may be committed only for political, philosophical, racial or religious reasons. According to the TCC, besides crime of persecution, other acts which are listed in the provision must be perpetrated for discriminatory intent which also includes the crime of persecution.<sup>94</sup> However, past experiences show that inhumane acts may be committed against people from all different walks of life. For instance, the Nazis did not commit crimes on only racial and religious grounds. After the Second World War, it was proved that other minority groups such as the physically or mentally handicapped, Roma gypsies or homosexuals were also exterminated by the Nazis.<sup>95</sup> Moreover, inhumane crimes targeted different groups even in the recent past. In 2000, U.S. Department of State reported that 16500 disabled women were sterilized without consulting them by the Japanese Government between 1949 and 1992.<sup>96</sup>

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<sup>91</sup> *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002, at paragraph 435.

<sup>92</sup> *Supra* note 26, article 7(1)(h).

<sup>93</sup> Kittichaisaree, K., *International Criminal Law*, Oxford 2001: Oxford University Press, at 121.

<sup>94</sup> *Supra* note 33, article 77(1)(c).

<sup>95</sup> *Generally see* Proctor, Robert N., "The Destruction of 'Lives Not Worth Living'" in Terry, J. and Urla, J. (ed.), *Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture*, Indiana 1995: Indiana University Press, at 186, 187.

<sup>96</sup> U.S. Department of State, [www.state.gov/j/drl/rls/hrrpt/2000/eap/709.htm](http://www.state.gov/j/drl/rls/hrrpt/2000/eap/709.htm), (Accessed 17 August 2014).

Therefore, it can be said that the international community has taken on board lessons from the past events and introduced necessary modifications to prevent future calamities. Thus, the discriminatory grounds are not required by international documents.<sup>97</sup> In addition, recently, the prosecution of rape and other forms of sexual violence against women has often been based on the crime of persecution. On the other hand, the TCC has failed to adjust to contemporary requirements of international law. Moreover, the TCC has entrapped itself into contradicting itself, since according to the Code, any person who discriminates between individuals because of their racial, lingual, national, colour, disability, religious, sexual, political, philosophical belief or opinion, or for being supporters of different sects and therefore commits one of the crimes in the list is prosecuted for hate crime.<sup>98</sup> Although, the Code considers that hate crimes can be prosecuted on more than ten different grounds, crimes against humanity, which are the most serious crimes in the human history, may be committed for only four different motives.<sup>99</sup>

## **V. Conclusion**

There is no question that Turkey as being a member of the Council of Europe and signatory to the European Convention Human Rights, has a functioning democracy albeit with its unique challenges. However, in today's modern world the question of transparency and accountability especially regarding the criminal system of a democratic state is of paramount importance. To sum up, in the past, every international document has a different approach

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<sup>97</sup> For example, majority of the delegates of Preparatory Committee opposed the idea of adopting discriminatory grounds for crimes against humanity accept the crime of persecution. It was argued that such a criteria might complicate the work of prosecution since crimes against humanity can be prosecuted against other groups such as intellectuals. See Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22, at 22, U.N. Doc. A/51/22 (1996).

<sup>98</sup> *Supra* note 33, article 122.

<sup>99</sup> Today, systematic violence against different groups is a reality of Turkish society. In this sense, for example, LGBT citizens are not under the protection of the TCC. According to Amnesty International, 89% of trans-women have faced with physical abuse in police custody. It can be said that police forces enforce a systematic policy to use inhumane acts based on sexual orientation. As a result, the discriminatory grounds must be excluded from the concept of crimes against humanity. It seems that a future change is the only possible solution to right the irrational comprehension of the TCC. See Amnesty International, "Ne Bir Hastalık Ne Bir Suç" Türkiye'de Lezbiyen, Gey, Biseksüel, ve Trans Bireyler Eşitlik İstiyor", www.amnesty.org.tr/uploads/Docs/lgbt-raporu-tr240.pdf, (Accessed 17 August 2015), at 12.

on defining crimes against humanity. These transnational instruments came about mainly as a reaction of heinous criminal acts in the past. However, contemporary international law has extended the scope of crimes against humanity. The Rome Statute has tried to create a universal concept of what entails crimes against humanity. Undoubtedly, the Rome Statute specifically broadens the scope and perception of the international community in relation to what constitutes crimes against humanity. It is a fact that such satisfactory developments have become visible in the international area. Nonetheless, there are strong disapproval in certain quarters, especially by the powerful nations, such as the US, Russia, China and significantly Turkey. This paper has argued that the TCC has failed to update its old-fashioned provisions. But then again it can be said that the new TCC took a big step forward by addressing the core crimes. Notwithstanding the fact that the Turkish lawmakers must improve their understanding by being open to innovations implemented by international instruments especially the ones which are considered to be of customary value.

In particular, article 77 of the TCC, suffers from some erroneous aspects. First of all, the TCC must adopt the unshakeable approach of not tolerating any crimes against humanity to be committed on widespread scale. Crimes against humanity are not only committed on systematic pattern, though the offences are mostly perpetrated according to a strategy by a state or increasingly by non-state actors too. Secondly, the requirement for discriminatory intent must be excluded from the TCC since general acceptance is that discriminatory motive is not necessary to accept the crime of persecution. Lastly, the list of criminal acts of crimes against humanity in the TCC is highly limited compare to international instruments. Even the basic forms of crimes against humanity such as extermination or forcible transfer are not addressed by the TCC. All the signs indicate that the TCC needs to sharpen its innovation. Otherwise, there will be no justice if Turkey were to face similar horrible events which regrettably occurred in the past.

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#### **ABBREVIATIONS**

<b>ECtHR</b>	: European Court of Human Rights
<b>ICC</b>	: International Criminal Court
<b>ICTR</b>	: International Criminal Tribunal for Rwanda
<b>ICTY</b> Yugoslavia	: International Criminal Tribunal for Former
<b>TCC</b>	: Turkish Criminal Code
<b>UNSC</b>	: United Nations Security Council