

THE INTERNATIONAL CRIMINAL COURT'S JURISDICTION OVER WAR CRIMES COMMITTED AS PART OF A NON-INTERNATIONAL ARMED CONFLICT: AN OBSTACLE TO TURKEY'S ACCESSION?

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Abstract

Although the Turkish delegation to the Rome Diplomatic Conference of Plenipotentiaries (Rome Conference) agreed that inclusion of war crimes in the Rome Statute of the International Criminal Court (Rome Statute or "the Statute") was essential,¹ it drew attention to the necessity of a very high threshold for the prosecution of those crimes.² The delegation opposed the inclusion of Article 8(2)(c) and (d),³ which deals with the crimes committed within the context of an internal armed conflict, stating that "[t]he future Court should have nothing to do with internal troubles, including measures designed to maintain national security or root out terrorism."⁴

Predictably, representatives of Turkey at the Rome Conference were concerned that high-level decision-makers of the Turkish Armed Forces could be tried before the International Criminal Court (hereinafter ICC or "the Court") because of their involvement in the crimes allegedly committed as part of Turkey's prolonged fight against the Kurdistan Workers Party (PKK), the deadliest terrorist organization in Europe.⁵ In this regard, Turkey is concerned that ICC accession could "undermine" its internal fight against terrorism.⁶

Despite Turkey's serious reservations, however, the war crimes committed during the course of an internal armed conflict were included in the Rome Statute. This inclusion has been one of the most compelling arguments for the opponents of the ICC in Turkey. This paper explains that the ICC's jurisdiction over internal armed conflicts should not hinder Turkey's consideration of accession to the Rome Statute because joining the ICC would not weaken Turkey's fight against the PKK. First of all, Turkey could, as a State Party to the Court, continue its lawful fight against terrorism in compliance with the humanitarian law principles reiterated in the Rome Statute. Strict compliance with the established international law standards is, in fact, conducive to the effectiveness of the counter-terrorism measures.

Second, most of the allegations against the Turkish security forces concern the incidents that occurred prior to entry into force of the Rome Statute, and thus they are outside the temporal jurisdiction of the Court. Third, even if the temporal jurisdiction requirement was satisfied, allegations against Turkish nationals would most likely be inadmissible before the ICC because of the efficiency and operability of the Turkish criminal

¹ Official Records of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, A/CONF.183/13 (VOL. II), (Rome, 15 June-17 July 1998), at 276,35, [hereinafter Official Records of the Rome Conference].

² *Id.* at 330, 48.

³ *Id.* at 169, 107.

⁴ *Id.* at 124, 43.

⁵ The PKK is denounced as a terrorist organization by the European Union, NATO, and various countries; including the United States, Canada, Australia, and New Zealand. See Jonathan R. White, *Terrorism and Homeland Security* 241 (Wadsworth 2012). See also Today's Zaman, *US Says PKK Deadliest Terrorist Organization in Europe*, http://www.todayszaman.com/latest-news_us-says-pkk-deadliest-terrorist-organization-in-europe_316992.html (May 31, 2013).

⁶ Sunday's Zaman, *Turkey's Planned Ratification of Rome Statute Stirs Debate*, <http://www.todayszaman.com/news-150927-turkeys-planned-ratification-of-rome-statute-stirs-debate.html> (Aug. 22, 2008).

justice or due to gravity threshold of the Rome Statute. Lastly, most of the allegations against the Turkish Armed Forces do not satisfy *actus reus* of war crimes enumerated in the Rome Statute. Therefore, the ICC's jurisdiction over internal armed conflicts should not hinder Turkey's consideration of acceding to the Rome Statute.

Keywords: ICC, International Criminal Court, International Criminal Law, Non-international Armed Conflict, War Crimes, Turkey, PKK

I. BACKGROUND

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."⁷ Besides including several war crimes applicable to internal armed conflicts from the Additional Protocol II, the Rome Statute lowered the threshold for situations amounting to a non-international armed conflict, and added new crimes to the list of war crimes.⁸

While Turkey is a party to the four Geneva Conventions of 1949, it has not signed nor ratified any of the Additional Protocols I, II, and III.⁹ Thus, Additional Protocol II does not apply in the case of the PKK conflict except for its provisions that overlap with the customary rules of international humanitarian law. The only Geneva Conventions-based law applicable to the non-international armed conflict between the PKK and Turkey is Article 3 common to each of the four Geneva Conventions of 1949 ("common Article 3"). ICC accession, however, would extend the concept of war crimes to the war related acts that Turkey carried out as part of its internal armed conflict against the PKK.

II. FIGHTING AGAINST TERRORISM IN COMPLIANCE WITH INTERNATIONAL LAW

Article 8 (3) of the Rome Statute states that the provisions applicable to war crimes in internal armed conflicts shall not "affect the responsibility of a government to maintain or re-establish law and order in the state, or to defend the unity and territorial integrity of the State, by all legitimate means."¹⁰ This indicates that, contrary to concerns raised by the opponents of the Rome Statute, the ICC will not weaken Turkey's 'lawful' efforts against terrorism. Turkey can continue its effective fight against terrorism "by all legitimate means."¹¹ In fact, fighting against terrorism without committing abuses and without victimizing indigenous civilians has been complementary to Turkey's efforts to reduce the ability of the PKK to recruit new members, and to resolve the decades-long conflict.

Turkey is already a party to a significant number of international human rights instruments, including the Convention Against Torture, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights, as part of its policy to remain engaged with the international human rights mechanisms. A number of United Nations experts who visited Turkey after 2001 praised Turkey's deep engagement with the European regional human rights system and constructive cooperation with United Nations mechanisms since 2001.¹² Although the fight against the PKK has admittedly been the main challenge for Turkey's compliance with international humanitarian law standards,¹³ Turkey's reform experience shows that eradication of the kind of abuses that occurred in the 1990s and adherence to human rights treaties "are not obstacles to the effectiveness of counter-terrorism measures."¹⁴

Turkey's efforts to comply strictly with the established international humanitarian law principles even enhances the effectiveness of the measures designed to root out terrorism in Turkey. First, Turkey's long-standing efforts to take counter-terrorism measures that respect the law of war and do not victimize the local civilians reduce both the ability of the PKK to recruit new members and the number of enraged population who sympathize with this terrorist organization. Turkey has learnt from the fact that the kind of abuses

⁷ Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Martinus Nijhoff, 1987) 1319.

⁸ Guan Jing, *The ICC's Jurisdiction over War Crimes in Internal Armed Conflicts: An Insurmountable Obstacle for China's Accession?*, 28 PENN ST. INT'L L. REV. 703, 721 (2010).

⁹ Geneva-Academy, *Turkey - International Treaties Adherence*, www.geneva-academy.ch/RULAC/international_treaties.php?id_state=226 (accessed Apr. 1, 2015).

¹⁰ *Rome Statute of the International Criminal Court*, Jul. 17, 1998, U.N. Doc. A/CONF.183/9, art. 8(3) [hereinafter *Rome Statute*].

¹¹ *Id.*

¹² See, e.g., Christof Heyns, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, P. 3, ¶ 5, U.N. Doc. A/HRC/23/47/Add.2, (Mar. 18, 2013).

¹³ *Id.* at 4, 9.

¹⁴ Martin Scheinin, Preliminary Note by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, p. 3, U.N. Doc. E/CN.4/2006/98/Add.2, (Mar. 24, 2006).

committed in the 1990s, such as inhuman treatment and enforced disappearance of persons, had made it easier for the PKK to recruit new members and to earn more local sympathy and support.

Second, Turkey's strict compliance with the international human rights standards, such as elimination of the abuses constituting inhuman treatment and strengthening of procedural safeguards available to terror suspects, encourages more PKK militants to give up arms. In this regard, judicial reform packages passed into law by the Turkish Parliament serve, *inter alia*, the purpose of encouraging more PKK militants to lay down their arms. For example, a law called "Law to End Terrorism and Strengthen National Togetherness", adopted by the Turkish Parliament in July 10, 2014, outlined the measures "to encourage PKK militants who lay down their arms to return to Turkey and reintegrate into social life."¹⁵

Third, Turkey's efforts to bring its counter-terrorism laws and practices in line with the international standards are also instrumental in gaining further assistance and closer cooperation from other countries in its fight against the PKK. For example, Turkey's adoption of zero-tolerance policy on torture has been instrumental in preventing the PKK from using the torture claims to earn international sympathy and to block extradition of its senior members from European countries to Turkey. Although some European states have used the "ill-treatment argument" as justification for their unwillingness to cooperate with the Turkish government,¹⁶ adherence to international treaties and to the zero-tolerance policy on torture have allowed Turkey to allay, at least, the genuine fears. In this regard, adherence to international law is essential if Turkey wants to rally greater support of the international community in its fight against terrorism.

III. TEMPORAL JURISDICTION OF THE ICC

Most of the allegations against the Turkish Armed Forces concern the incidents that occurred outside the time period over which the ICC can act. For example, village evacuations and resettlements of the displaced population, for which Turkey has been severely criticized with respect to its internal fight against the PKK, took place between 1985 and 2001.¹⁷ The jurisdiction of the Court, however, is not retroactive, and thus the Court won't have jurisdiction over the crimes committed before the entry into force of the Statute on July 1, 2002.¹⁸ Moreover, when Turkey accedes to the Rome Statute, the Court 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, 2002.¹⁹

In 2006, Martin Scheinin, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, noted with great satisfaction that Turkey had, at the time of reporting, already pursued a high pace of reform in the area of international humanitarian law and human rights since 2001.²⁰ The Rapporteur, who visited Turkey to gather first-hand information about how counter-terrorism measures affect the protection and promotion of human rights, commended Turkey's zero-tolerance policy on torture since its announcement in 2003 and the steps taken by the Government to prevent any kind of ill-treatment.²¹ An examination of the reports by various UN Special Rapporteurs, such as Christof Heyns and Martin Scheinin, reveal that serious human rights violations like ill-treatment, extrajudicial killings, and missing persons were committed by JITEM, an illegal counter-terrorism and intelligence unit nested within the Turkish gendarmerie in 1980s and 1990s.²² Due to the evolution of the Turkish counter-terrorism measures and Turkey's commitment to reforms, however, those incidents had virtually come to an end after 2001.

ICC's debatable jurisdiction over the crimes that began prior to the entry into force of the Rome Statute but have continued afterwards (so-called "continuing crimes") should not be a concern for Turkey because of

¹⁵ Fehim Tastekin, *AKP Seeks to 'Legalize' PKK Peace Talks*, www.al-monitor.com/pulse/originals/2014/06/tastekin-legal-turkey-peace-process-kurds-pkk-akp-erdogan.html# (Jun. 27, 2014).

Ayrica: 20 ayda 485 pkk li teslim oldu: <http://www.haberturk.com/gundem/haber/1010034-20-ayda-485-pkkli-teslim-oldu>

¹⁶ See, e.g., Devorah Lauter, *Turkey Demands Answers Over Kurdish Activist's life in Paris*, www.telegraph.co.uk/news/worldnews/europe/turkey/9798830/Turkey-demands-answers-over-Kurdish-activists-life-in-Paris.html (Jan. 13, 2013) ("Sakine Cansiz, a founding member of the PKK,..was arrested in Germany in 2007, and then let go, despite requests for her extradition to Turkey").

¹⁷ Joost Jongerden, *The Settlement Issue in Turkey and the Kurds-An Analysis of Spatial Policies, Modernity and War* 82 (BRILL, Han 1, 2007).

¹⁸ Rome Statute, *supra* n. 10, art. 11(1).

¹⁹ *Id.* art. 11(2).

²⁰ Scheinin, *supra* note 14, at 2, 5.

²¹ *Id.* at 3, 9.

²² Sunday's Zaman, Retired Colonel: Jitem has 10,000 members, http://www.todayszaman.com/national_retired-colonel-jitem-has-10000-members_331587.html (Nov. 15, 2013).

the laws enacted by Turkey to redress those incidents and compensate the victims of the counter-terrorism measures.²³ For example, "Law on the Compensation of Losses Resulting from Terrorist Acts and the Measures Taken Against Terrorism," which entered into force on July 27, 2004, provides remedies to the displaced people and supports their return on a voluntary basis.²⁴ Special Rapporteur Martin Scheinin praised the law as being "an example of 'best practice' to be studied by other States."²⁵ The Special Rapporteur also praised adoption of "Measures on the issue of internally displaced persons and the return to village and rehabilitation project in Turkey" on August 17, 2005.²⁶

There are also European Court of Human Rights (ECtHR) decisions that confirm the efficiency and operability of the Turkish domestic remedies available to the victims of counter terrorism practices. In *Aydin Icyer v. Turkey*, for example, the ECtHR has unanimously found that the remedies available to Aydin Icyer, whose house was evacuated by Turkish armed forces in 1994 "on account of intense terrorist activities in the region and threats issued by the PKK," were "not only in theory but also in practice," and that they are capable of providing adequate redress.²⁷ The ECtHR also noted that "there was no obstacle preventing [Aydin Icyer and other] villagers from returning to their homes."²⁸ These restitutions would prevent the incidents of the 1980s and 1990s from being classified as continuing acts.

It should also be noted that, under international humanitarian law and the Rome Statute, not all kinds of displacements of the civilian population constitute a war crime. According to Article 8 (2) (e) (viii) of the Rome Statute, "ordering the displacement of the civilian population" is not a war crime when "the security of the civilians involved or imperative military reasons so demand."²⁹ The resettlements in Turkey aimed, in compliance with the Rome Statute, to gain concrete and direct military advantage, deprive the PKK of its environment, and at the same time maintain the safety of the inhabitants.³⁰ Turkey's village evacuations, therefore, do not constitute one of enumerated war crimes of the Rome Statute and would not be found admissible before the Court even if the temporal jurisdiction requirement was satisfied.

Turkey could also, upon ratification, declare that it does not accept the Court's jurisdiction over war crimes for a seven years period in accordance with Article 124, which would give Turkey even more time to reassure its counter-terrorism measures are completely aligned with the provisions of the Rome Statute. Such transition period is also important for Turkey to perfect its criminal code so as to meet the needs of investigating and prosecuting persons who committed war crimes. Although the latest version of the Turkish Criminal Code that was adopted in 2005 regulates crimes against humanity and the crime of genocide, it does not define war crimes. Adopting a legislation that would allow its domestic courts to have jurisdiction over internal war crimes is of great importance in order to invoke the principle of complementary, which grants the primary responsibility to prosecute to the national courts.

Given the importance of combating the PKK in accordance with the established principles of international law for the speedy and final elimination of terrorism in Turkey, it is highly unlikely (and unwise) for Turkey to violate the laws of war in the future. The peace talks that the Turkish government launched in late 2012 to end the fighting makes this possibility even more unlikely.³¹ In this regard, Turkey's accession to the Rome Statute, as a demonstration of Turkey's commitment to justice, could also enhance Turkey's efforts to find a peaceful solution to the more than three decades old fighting.

IV. HIGH THRESHOLD OF THE ROME STATUTE

Unlike the ECtHR, the ICC is not a human rights court, and thus the human rights violations that do not meet the high threshold of the Rome Statute will not be prosecuted by the Court. While most of the acts that are basis for the war crimes allegations against the Turkish security forces do not, in fact, violate the law of war, the rest simply are human rights violations that either do not satisfy war crimes requirements of the Rome Statute or fail to be grave enough to trigger a formal ICC investigation. Even where the the Office of the

²³ Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 MICH. J. INT'L L. 653, 687 (2004).

²⁴ Republic of Turkey Ministry of Foreign Affairs, Internally Displaced Persons (IDPs) and the "Return to Village and Rehabilitation Program" in Turkey, www.mfa.gov.tr/internally-displaced-persons-_idps_-and-the-_return-to-village-and-rehabilitation-program_-in-turkey.en.mfa (accessed Apr. 1, 2015).

²⁵ Scheinin, *supra* note 14, at 2, 12.

²⁶ *Id.*

²⁷ *Aydin Icyer v. Turkey*, Appl. No 18888/02, Third Section Decision As To the Admissibility, (ECtHR, Jan. 12, 2006), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72123>.

²⁸ *Id.*

²⁹ Rome Statute, *supra* note. 10, art. 8(2)(e)(viii).

³⁰ Jongerden, *supra* note 17, at 82.

³¹ Turkish Weekly, *More PKK Militants Surrender As Peace Process Continues*, www.turkishweekly.net/news/182113/more-pkk-militants-surrender-as-peace-process-continues.html (Mar. 22, 2015).

Prosecutor (OTP or “the Office”) decides that there is a reasonable basis to believe that a Rome Statute crime has been committed, it will then be necessary to consider admissibility of the case before the Court in light of the “complementarity” and “gravity;” two overall safeguards of the Statute.

A. Complementarity

The ICC is complementary to the national courts and it will only act when the domestic authorities are “unable” or “unwilling” to do so.³² Given Turkey’s long-standing and successful efforts to perfect its national criminal justice and to ensure accountability for the serious crimes, it is highly unlikely that Turkish national courts would be deemed “unwilling” or “unable” to prosecute perpetrators of grave crimes.

Most of the crimes allegedly committed by Turkish security forces against the PKK militants and the terror suspects within the scope of the struggle against the PKK terrorism were committed by JITEM.³³ This clandestine gang, which consisted of military personnel, former PKK militants, and village guards, used to be a major perpetrator of torture and ill-treatment, and is believed to be behind dozens of murders, bombings, and assassinations. Turkey has taken many steps not only to prevent the kind of crimes that JITEM committed in 1990s, but also to bring the perpetrators to justice. In this regard, 11 special prosecution offices in different regions in Turkey was assigned to investigate systematic and political killings of 1990s, the dark period in country’s history.³⁴

There exist a range of investigative bodies for human rights violations in Turkey, such as Gendarmerie Human Rights Violations Investigation and Examination Centre (JIHIDEM), Parliamentary Human Rights Inquiry Commission, and the Human Rights Presidency. In addition to these mechanisms that aim to investigate serious or minor human rights violations in Turkey, a Turkish Human Rights Institution (THRI) was established in June 2012 to receive complaints against public officials at every level.³⁵ The UN Special Rapporteur Christof Heyns viewed the creation of this institution as “an important step in strengthening the protection of human rights, including the right to life, in Turkey, in particular in terms of efforts to ensure accountability and redress in cases of violations.”³⁶

Turkey’s improvements in the fight against impunity are also confirmed by the European Commission’s annual progress reports for Turkey. For example, the Commission’s 2014 report commended the decision of the Turkish Court of Cassation to uphold “the convictions of 11 public officials, following the death in custody of Engin Çeber in 2008,” in which “[a] prison director and two prison guards received life sentences.”³⁷ The 2010 constitutional amendment, which allowed the Turkish nationals who claim that any of their rights under the European Convention on Human Rights (ECHR) have been violated to file an individual complaint with the Constitutional Court, is another positive step that demonstrates Turkey’s willingness and ability to address violations by public authorities.

B. The Gravity Threshold

The OTP stresses that “while, in a general sense, any crime within the jurisdiction of the Court is ‘grave’,” “the Statute clearly foresees and requires an additional consideration of ‘gravity’ whereby the Office must determine that a case is of sufficient gravity to justify further action by the Court.”³⁸ This gravity threshold that the OTP seeks to find before starting a formal investigation is not satisfied in the incidents, for which Turkey has been accused of committing one of the ICC crimes.

The ICC’s jurisdiction is limited to “the most serious crimes of concern to international community as a whole.”³⁹ The Rome Statute refers to these crimes as “unimaginable atrocities that deeply shock the conscience of humanity”⁴⁰ and “threaten the peace, security and well-being of the world.”⁴¹ The court will not

³² Rome Statute, *supra* note. 10, art. 17(1)(a).

³³ See Sunday’s Zaman, *supra* note 22, at http://www.todayszaman.com/national_retired-colonel-jitem-has-10000-members_331587.html.

³⁴ Today’s Zaman, *Three Major Jitem Cases to Cast Light on Dark Crimes in Southeast*, www.todayszaman.com/national_three-major-jitem-cases-to-cast-light-on-dark-crimes-in-southeast_181642.html (Jul. 22, 2009).

³⁵ Heyns, *supra* note 12, at 16 82

³⁶ *Id.* at 16, 83.

³⁷ European Commission, *Turkey Progress Report*, (Oct. 2014),

ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf. at 50.

³⁸ International Criminal Court-The Office of the Prosecutor, *Annexe 10*, p. 8 (Mar. 16, 2010), available at www.icc-cpi.int/iccdocs/doc/doc844043.pdf.

³⁹ Rome Statute, *supra* note. 10, at *preamble*, 4.

⁴⁰ *Id.* at *preamble*, 2.

⁴¹ *Id.* at *preamble*, 3.

exercise its jurisdiction over the crimes that are below this gravity threshold.

The Court has jurisdiction over the war crimes enumerated under Article 8 of the Rome Statute, “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”⁴² Although the words “in particular” suggest that “plan or policy” or “large scale commission” thresholds are not prerequisite, Article 17 (1) (d) of the Statute brings an additional threshold of gravity for all the crimes over which the Court has jurisdiction.⁴³

In order to assess the gravity in a given situation, the OTP considers various factors, such as the number of the victims of serious crimes, manner of commission of the crimes, and their impact.⁴⁴ The situations that have been found admissible before the ICC involves “thousands of willful killings as well as intentional and large-scale sexual violence and abductions.”⁴⁵ An examination of the EU and UN reports on Turkey reveal that the number of the allegations against the Turkish security forces remained very low after 2002 as compared to cases found admissible by the OTP. Thus, alleged crimes committed by the Turkish Armed Forces as part of the prolonged armed conflict against the PKK would not be of sufficient gravity to justify a formal investigation.

The OTP has declined to open an investigation into the crimes committed on the flotilla of vessels carrying humanitarian assistance for Gaza Strip (Humanitarian Aid Flotilla) by Israeli Defence Forces (IDF) and the crimes committed in Iraq by British soldiers on the grounds that the crimes committed were not sufficiently grave.⁴⁶ Similarly, in the Uganda case, the OTP has indicted Joseph Kony and other leaders of the terrorist LRA, but has not started a formal investigation into the crimes committed by the Ugandan government agencies and military (UPDF) because of the relative gravity of the crimes.⁴⁷ Despite the accusations by different groups and organizations, like Human rights Watch, that Ugandan government and military has committed serious atrocities such as extrajudicial executions, rape, children recruitment, and torture, the Office has only brought charges against the rebel leaders of the LRA on the grounds that “crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF.”⁴⁸

V. ALLEGATIONS CONCERNING THE EXCESSIVE USE OF FORCE

Allegations over disproportionate use of force should also not be a concern for Turkey because, as the 2013 OTP Preliminary Examinations Report stressed, “in the context of a non-international armed conflict, the Rome Statute does not contain a provision for the war crime of intentionally launching a disproportionate attack.”⁴⁹ The Rome Statute’s war crime provision that criminalizes the use of force that is “clearly excessive in relation to the concrete and direct overall military advantage anticipated” applies only to international armed conflicts.⁵⁰

It should also be noted that civilian deaths occurred during the military operations as part of either internal or international armed conflicts do not “in itself constitute a war crime” under international humanitarian law.⁵¹ As the ICC prosecutor pointed out, it is permissible, under the international humanitarian law and the Rome Statute, “to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur.”⁵² A war crime is established when the attack is “clearly excessive” as compared to the “military advantage anticipated.”⁵³

⁴² Rome Statute, *supra* note. 10, art. 8(1).

⁴³ Rome Statute, *supra* note. 10, art. 17(1)(d).

⁴⁴ International Criminal Court, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, reg. 29, 2, (Apr. 23, 2009).

⁴⁵ *Prosecutor v. Charles Ble Goude*, Case No. ICC-02/11-02/11-181, *Prosecution’s Response to the Defence Application Pursuant to Articles 19(4) and 17(1)(d) of the Rome Statute* 30 (Oct. 20, 2014). <http://www.icc-cpi.int/iccdocs/doc/doc1853270.pdf>.

⁴⁶ International Criminal Court - Office of the Prosecutor, *Report on Preliminary Examination Activities 2014*, (Dec. 2014), at 62, 262, <http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>.

⁴⁷ Alana Tiemessen, *Defying Gravity: Seeking Political Balance in ICC Prosecutions*, justiceinconflict.org/2013/04/22/defying-gravity-seeking-political-balance-in-icc-prosecutions/ (Apr. 22, 2013).

⁴⁸ Michael A. Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT’L L. 115, 158 (2010).

⁴⁹ International Criminal Court - Office of the Prosecutor, *Report on Preliminary Examination Activities 2013*, (Nov. 2013), at 12 47, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20%20Report%20%20C20Preliminary%20Examination%20Activities%202013.pdf.

⁵⁰ Rome Statute, *supra* note. 10, art. 8(2)(b)(iv).

⁵¹ *Annexe 10*, *supra* note 38, p. 5, at www.icc-cpi.int/iccdocs/doc/doc844043.pdf.

⁵² *Id.*

⁵³ Rome Statute, *supra* note. 10, art. 8(2)(b)(iv).

VI. ULUDERE INCIDENT: AN EXAMPLE TO STUDY

While most of the serious allegations against Turkish Armed Forces concern the incidents that occurred before the entry into force of the Rome Statute, some allegations concern the acts that occurred after 2002. Most notable among those is the “Uludere incident,” one of the most controversial acts by the Turkish Armed Forces. The incident has been the subject of serious allegations against the Turkish Armed Forces concerning the targeting of civilians. Although the ICC would not have jurisdiction with respect to the allegations that concern the incidents that occurred before the entry into force of the Rome Statute for Turkey, a brief analysis of the Uludere incident may be helpful in understanding the possibility that senior Turkish officials could be tried in the ICC, for the crimes committed as part of its internal fight against PKK.

In the Uludere incident, 34 civilians, a group of smugglers who were mistakenly believed to be PKK members in the preparation of an attack, were killed in a military airstrike near the Turkish-Iraqi border in December 2011.⁵⁴ The incident is the most tragic incident caused by the operations of the Turkish Armed Forces since the beginning of the conflict and one of the greatest challenges the Turkish government has ever faced in its efforts to normalize the situation in the southeastern Turkey. The incident was caused by false intelligence that “a group of armed terrorists was set to stage an attack on Turkish military posts”, which led to the bombardment of the group that turned out to be smugglers crossing the Iraqi border into Turkey.⁵⁵

A regional commander was removed from his post and several investigations were conducted into the incident. The government also offered TL 4 Million state compensation to the families of the victims for the deadly mistake.⁵⁶ Domestic authorities are obliged, under international and domestic law, to complete the ongoing judicial investigations into the situation and prosecute those who are responsible for providing the false intelligence and those who neglected their duty. Lawyers representing the families have already indicated their intention to take the case to the ECtHR. If the Turkish authorities fail to carry out effective investigations into the incident, the ECtHR will most likely find Turkey guilty of violating Article 2 of the ECHR, which protects the right to life, and of inadequate investigation into the incident.

Available information and the report of the parliamentary Uludere commission indicate that the Uludere attack did not intentionally target civilians. Therefore, the Uludere incident *per se*, no matter how grave and regrettable, does not constitute the ICC crime of “intentionally directing attack against civilians” because it is lacking the ‘intention’ element.⁵⁷ The ECtHR points out that Article 2 of the ECHR “covers not only intentional killings but also situations where it is permitted to ‘use force’ which may result, as an unintended outcome, in the deprivation of life.”⁵⁸ Article 8(2)(e)(ii) of the Rome Statute, however, only applies to intentional attacks directed against civilians. Furthermore, unlike ECtHR, the ICC has jurisdiction over individuals rather than states, and it only prosecutes senior officials who bear the greatest responsibility intentionally. It would not likely open a formal investigation for a crime characterized as neglect of duty by a non-senior official, and it cannot try states for their inadequate investigations into such incidents.

⁵⁴ Gulden Ustundag, *Uludere Victim's Families Look to Top Court As Anniversary Looms*, www.todayszaman.com/anasayfa_uludere-victims-families-look-to-top-court-as-anniversary-looms_364083.html (Nov. 11, 2014).

⁵⁵ *Id.*

⁵⁶ Ahmet, Gorum, *TL \$ Million Returned to Ankara As Uludere Victim Families Reject Compensation*, [ww.todayszaman.com/national_tl-4-million-returned-to-ankara-as-uludere-victim-families-reject-compensation_335134.html](http://www.todayszaman.com/national_tl-4-million-returned-to-ankara-as-uludere-victim-families-reject-compensation_335134.html) (Dec. 27, 2013).

⁵⁷ Rome Statute, *supra* note. 10, art. 8(2)(e)(i)

⁵⁸ *Benzer and Others v. Turkey*, Appl No 23502/06, Judgment Final 89 (ECtHR, Mar. 24, 2014), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-128036..>