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BM Faliyetleri Işığında Kadına Karşı Şiddetle Mücadelede Adalet Sektörünün Yeri

Dr. Kutlay TELLİ *

ABSTRACT

There is a widespread consensus that violence against women is the most pervasive infringement of human rights across the world. Such crime has a discouraging impact on reinforcing the position of women. Internationally recognized norms put directly States in charge of the promotion of women's right to live free from violence. The challenges faced by women, along with the achievements made through the UN actors for the advancement of women is analyzed in this article. In connection with cross-cutting sectors, it must be stressed that the improvement of criminal justice systems is of paramount importance in establishing safe environments for women. The present study basically focuses on the output of the most chronic failures of judiciaries and immediate impact of the judicial rehabilitation activities in the legal empowerment of women. The potential contribution of mapping and reforming justice components to the protection of women are also discussed.

Key Words: violence against women, advancement of women, robust justice mechanisms, ending impunity, enhancement of criminal accountability, UN action.

ÖZET

Kadına karşı şiddetin, dünyadaki en yaygın insan hakkı ihlali olduğu konusunda genel bir görüş birliği vardır. Bu türden bir suç, kadının konumunun güçlendirilmesi üzerinde yıldırıcı bir etkiye sahiptir. Uluslararası kabul görmüş kurallar, kadının şiddetten uzak yaşama hakkı konusunda devletleri doğrudan sorumlu tutmaktadır. Bu makalede, Birleşmiş Milletler aktörlerince kadınların gelişimi konusunda kaydedilen gelişmelerin yanında kadınların karşılaştığı temel sıkıntılar incelenecektir. Kesişen sektörlerle ilintili olarak, ceza adaleti sistemlerinin gelişiminin, kadınlar için güvenli

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bir ortam kurulmasında çok önemli olduğunun vurgulanması gerekir. Mevcut çalışma, yargı kurumlarının en kronik başarısızlıklarının sonuçları ile adli rehabilitasyon faaliyetlerinin, kadınların hukuki olarak güçlendirilmesindeki etkisi üzerinde yoğunlaşmaktadır. Adalet bileşenlerinin reforma tabi tutulmasının ve haritalama (planlama) çalışmasının potensiyel katkısı da tartışılacaktır.

Anahtar Kelimeler: kadına karşı şiddet, kadının gelişimi, güçlü adli mekanizmalar, dokunulmazlığın kaldırılması, cezai sorumluluğun geliştirilmesi, BM çalışmaları.

I. Introduction

Most states have faced many difficulties in violence against women over the years. International community, particularly under the framework of the UN, has undertaken numerous activities and initiatives in combating sexual violence. Indeed leading UN agencies have played a vital role in the articulation of international principles and the adoption of proper national laws, policies, and programmes with regard to tackling persistence of violence against women. What is remarkable is that such violation of human rights obliges states among others, to facilitate national initiatives in all sectors including justice chain. In this connection, the present work basically aims at developing an integrated judicial perspective and highlighting the role of justice chain towards the elimination of violence against women on the basis of the UN principles. In achieving its objective, this work initially provides a brief outline of daunting challenges and gaps concerning the elimination of violent acts against women. Then, it outlines landmark UN instruments, agencies, and mechanisms engaging in better protection of women. Finally, the present article identifies the role of the national judicial measures to ensure full implementation of relevant UN norms and benchmarks.

1. Terminology

Evaluation of the definition of "violence against women" is a significant starting point. The first thing to be considered about the scope of "violence against women" is that it enjoys various aspects of violence against women and girls. 1994 Declaration on the Elimination of Violence Against Women, having stressed the need for a clear and comprehensive definition of violence

against women, considers that 'the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'.[1] This description is retained and reaffirmed by several follow-up international instruments under the umbrella of the UN.[2] It cannot be forgotten that violence against women may also appear as economic violence. The General Assembly resolution 58/147 suggests that 'domestic violence can include economic deprivation and isolation and that such conduct may cause imminent harm to safety, health, or well-being of women'.[3] Furthermore, gender-based violence, as discussed below, has been recognized as a form of discrimination by a wide-ranging recommendation of the Committee on the Elimination of Discrimination against Women. Given the definition of violence against women, as set forth in the abovementioned materials, "violence against women and girls" contains many different forms, including physical, psychological, economic, sexual violence and gender-based violence as a form of discrimination for the purpose of this work.

2. Methodology and Scope of the Work

The UN documents provide an international legal framework and a comprehensive set of measures for the full elimination and prevention of violence against women. On the basis of information provided from a broad range of activities including events, briefings, meetings and other studies within the UN, the present article has been prepared. Accordingly, it is natural that the

1 Resolution adopted by the General Assembly on Declaration on the Elimination of Violence against Women (A/RES/48/104).

2 See e.g. Resolution adopted by the General Assembly on Intensification of Efforts to Eliminate All Forms of Violence against Women (A/RES/67/144), para. 1; Agreed Conclusions on the Elimination and Prevention of All Forms of Violence against Women and Girls adopted by the Commission on the Status of Women in its fifty-seventh session (E/2013/27-E/CN.6/2013/11), 4-15 March 2013, para.11; Resolution adopted by the Economic and Social Council on Taking Action against Gender-Related Killing of Women and Girls (E/RES/2013/36).

3 Resolution adopted by the General Assembly on Elimination of Domestic Violence against Women (A/RES/58/147).

UN instruments seeking the enrichment of women are primarily used as a key source for this work. It is beyond the scope of this article, however, to analyze every product of the UN agencies. That involves that the present study gives only an overview of the current framework addressing violence against women. Certain academic workings have been also examined for clarifying internationally recognized principles.

It is noteworthy to point out that girls may be subjected to all forms of physical or mental violence, injury or abuse, maltreatment or exploitation such as sexual abuse within the meaning of "violence against women". Accordingly, females of all ages including girls under the age of 18 are considered as falling within the ambit of the word "women" in this study. It necessarily means that the term "women" encompasses "girl children". On the basis of victim concerned, it has been already demonstrated that violent movements lead to an infringement of human rights of men and boys alongside women and girls.[4] Though, it is necessary to note that the word of "violence against women" does not cover gender-based violence facing men in the current study. The idea behind this mentality is that discussions regarding all forms of manifestations of violence against all human beings merit much longer work.

Furthermore, it should be put forward that this work purely concentrates on justice machineries performing judicial functions in the national or international context. The present study sheds light on the role of "formal judicial sector" to better deliver justice to women as a victim of serious crimes.

II. The Crisis Anatomy of Sexual Violence

1. Sexual Violence Towards Women is Everywhere

Regardless of the correct definition and coverage of "violence against women", it is fully affirmed that 'all forms of violence against women seriously violate and impair and nullify the enjoyment by women and girls of all human rights and fundamental freedoms and constitute a major impediment to the

[4] See inter alia Lara Stemple, 'Human Rights, Sex and Gender: Limits in Theory and Practice', *31 Pace Law Review 824*, Symposium Issue 2011.

ability of women to make use of their capabilities'.[5] Violent acts towards women, in the words of Goodman, are regarded as more serious breach than other violation types of human rights by international legal system.[6] In this connection, such violence, as underscored by the UN Secretary-General, may infringe a wide range of rights of women: 'the right to life, liberty and security of the person; to be free from torture and from cruel, inhuman or degrading treatment or punishment; to be free from slavery and servitude; to equal protection under the law; to equality in marriage and family relations; to an adequate standard of living; to just and favorable conditions of work; and to the highest attainable standard of physical and mental health'.[7]

Moreover, it is of course remarkable that gender-based violence is a means of discriminatory acts under the universally applicable principles, as already emphasized. Indeed UN Resolution 67/144 acknowledges that such violence 'is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.[8]

Additionally, such violation has a devastating impact on women, all individuals, and communities and also undermines economic growth and development. This offence negatively affects a woman's ability to participate fully in

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5 Resolution adopted by the General Assembly on Intensification of Efforts to Eliminate All Forms of Violence against Women (A/RES/67/144).

6 Jill Laurie Goodman, 'the Idea of Violence Against Women: Lessons From United States v. Jessica Lenahan, The Federal Civil Rights Remedy, and the New York State Anti-Trafficking Campaign', *36 New York University Review of Law and Social Change 593*, 2012, at 600.

7 *Ending violence against women: From words to action* (Study of the Secretary-General, Printed by the United Nations Entity for Gender Equality and the Empowerment of Women, 2013), at 85. Moreover, the Committee on the Elimination of Discrimination against Women shares similar idea in stressing that gender-based violence may breach following rights of women: the right to life; the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; the right to equal protection according to humanitarian norms in time of international or internal armed conflict; the right to liberty and security of person; the right to equal protection under the law; the right to equality in the family; the right to the highest standard attainable of physical and mental health; the right to just and favorable conditions of work: General Recommendation of the Committee on the Elimination of Discrimination against Women (No: 19, Eleventh Session, 1992), para. 7.

8 Resolution adopted by the General Assembly on Intensification of Efforts to Eliminate All Forms of Violence against Women (A/RES/67/144), para. 2.

reproductive and productive roles. Hence, the cost of violence against women gives rise to the cuts across in all areas, including legal, health, educational, social services, and labor sectors, as observed in 2011 report of Special Rapporteur on Violence against Women, Its Causes and Consequences.[9] It is a huge obstacle, as indicated in 1994 Declaration, to the achievement of equality, development, and peace.[10]

Regard being had to all the above, it is thus impossible to associate violence against women with any kind of idea, religion, society or civilization. States are obliged not to invoke any custom, tradition, or religious consideration to avoid their commitments described in international documents. There is a growing consensus that violent behavior against women 'is unacceptable, whether perpetrated by the State and its agents or by family members or strangers, in the public or private sphere, in peacetime or in times of conflict'.[11]

Nevertheless, it has been already apparent that violence against women in different forms and manifestations currently persists in every country despite of the increasing focus. The General Assembly resolutions express its growing concern with regard to the impact and level of trafficking in women and girls[12] and fundamental ingredients for a global action.[13] Moreover, violence towards women may be perpetrated in several ways alongside with trafficking in women and girls such as intimate partner violence, early and forced marriage, forced pregnancy, honor crimes, female genital mutilation, femicide, non-partner violence, sexual harassment.[14] The right to live a life without violence has been systematically breached. In accordance with one of the most recent surveys, 35% of women are reported to have been subjected to either physical and/or

9 Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Rashida Manjoo, (A/HRC/17/26), para. 48.

10 Resolution adopted by the General Assembly on Declaration on Elimination of Violence against Women (A/RES/48/104).

11 See e.g. *Ending violence against women: From words to action*, n: 7 above, at 1.

12 See generally e.g. resolution adopted by the General Assembly on Trafficking in Women and Girls (A/RES/57/176).

13 See inter alia resolution adopted by the General Assembly on Improving the Coordination of Efforts against Trafficking in Persons (A/RES/68/192).

14 Report of the Secretary-General to the Economic and Social Council on Prevention of Violence against Women and Girls (E/CN.6/2013/4), para. 9.

sexual intimate partner violence or non-partner violence.[15] That is also the case for developed countries such as United States of America.[16] Moreover, rule of violence worsens in countries affected by the crisis situations.[17] In respect of children, sexual violence against children, as stressed by the Special Representative of Secretary-General, presents one of the greatest problems in conflict settings.[18] Women and girls experience a wide variety of types of violence committed by not only the non-state but also state actors in conflict transitions. For instance, 49% of women in Liberia encounter acts of violence and 70% of women were raped in Luwera District of Uganda during the conflict.[19] What is unjustifiable is that sexual violence, as Resolution 1820 (2008) stresses, is used as a tactic of war in such areas; as a result of this, its potential does not only to threaten only individuals but also undermines peace and security on the international scene.[20]

2. Main Handicaps in the Pursuit of Justice

Evidence-based information highlights that women and girls face numerous obstacles in exercising their right to access to justice and relevant services including psychological, health-care and legal services, as analyzed in

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15 Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Violence (report by World Health Organization, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine and South African Medical Research Council, 2013 Italy), at 2. Note that the word "violence against women" can be characterized by the use of power first. Physical violence may contain any act 'such as slapping, kicking, fisting, bruising, bending an arm, choking, tying up, pulling hair, injuring with sharp or striking objects, burning with vitriol or boiling water, putting out cigarette on the body, pressing on the arms or feet, leaving handicapped, torturing, enforcing unhealthy living conditions, causing bodily damage': Handbook on Combating Violence Against Women (Ministry of Family and Social Policies of Turkey), at 7.

16 See e.g. about alarming percentage concerning violent attacks against women in United States, Hannah Branner, 'Transcending the Criminal Law's "One Size Fits All" Response to Domestic Violence', *19 William and Mary Journal of Women and the Law 301*, Winter 2013, at 311.

17 See e.g. generally, report of the Secretary-General on the Protection of Civilians in Armed Conflict (S/2013/689).

18 See report of the Special Representative of the Secretary-General for Children and Armed Conflict (A/68/267), para. 11.

19 *Ending violence against women: From words to action*, n: 7 above, at 54.

20 See generally Resolution adopted by the Security Council at its 5916th meeting on 19 June 2008 (S/RES/1820 (2008)), para. 4.

2014 UN report.[21] In the matter of complaints against perpetrators of violence, there are high levels of under-reporting and attrition at the prosecution and court stages across the world. Most reported complaints are dropped out of justice systems at the time of prosecution or many cases are disposed of by courts without reaching any judgment on the grounds that evidence was lost/ not obtained sufficiently or case was withdrawn directly by the victim.[22] This demonstrates that effective prosecution, conviction of violators and providing redress for women are very limited. It is also unfortunate that most grassroots women rely on traditional and community justice systems rather than legal and legitimate mechanisms while seeking justice.[23] Undoubtedly, a particular challenge at this point is the existence of social and institutional barriers such as the lack of complainants' knowledge of their rights, the complexity of criminal justice systems, high cost of litigation, virtual shortages of judicial capacity in relation to women's particular needs. Inadequate mechanisms for legal aid cause another matter of concern for survivors of violence to lodge a case with the domestic courts. In the light of these factors, it is fair to realize that women are deprived of the right to fair trial during the period of taking a legal action against wrongdoers. 2010 Updated Modal Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice are very valuable in defining the most important gaps and setting national goals or targets. The document describes aforementioned hardships as "secondary victimization". What is interesting is that "secondary victimization" does not happen not because of a type of criminal act; but due to the insufficient assistance of competent authorities to the survivors of violence.[24]

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21 See for instance, UN Trust Fund Effort, Report of the United Nations for Gender Equality and the Empowerment of Women on the Activities of the UN Trust Fund in Support of Actions to Eliminate Violence against Women (A/HRC/26/17-E/CN.6/2014/8).

22 *2011-2012 Progress of the World's Women: In Pursuit of Justice, United Nations Entity for Gender Equality and the Empowerment of Women* (UN Women, 2011), at 49 and 50. For instance, 17 percent of reported rapes reached court and just 4 percent ended in a conviction for rape in some countries: ibid.

23 Regina Pritchett, 'Engendering Bottom-Up Justice Reform: A Grassroots Women's Approach to Accessing Justice' (handout circulated in a side event organized on the occasion of 57th Session of the UN Commission on Status of Women, 2013).

24 Updated Modal Strategies and Practical Measures on the Elimination of Violence against

The judicial system is more weakened by the lack of capacity and the destruction of infrastructure in conflict zones. National authorities have several difficulties in bringing justice to victims and survivors of violent acts against women. Judges and prosecutors lack the requisite skills and experience in documenting, collecting, and preserving forensic evidence of that infringement. Under those circumstances this environment has a discouraging effect on victims to seek justice and civil remedy before formal justice actors established by law. As an example, in spite of very high level of sexual violence, only 7-10% of rape cases are reported on the account of possible reprisals and stigmatization.[25] The persisting culture of impunity is regarded as a dominant factor for the continued occurrence of sexual violence in conflict or post-conflict settings. Rule of impunity is seen as a growing and serious barrier for the peace and security on the international plane where especially conflict-related sexual violence is used as a tactic of war.[26] As an illustration of this, Banki Moon, Secretary-General of the UN pointed out that estimated 50.000 women were exposed to rape or other forms of sexual violence. Despite this, very limited prosecutions are being carried out in Bosnia and Herzegovina.[27] This easily proves that the impunity phenomenon undermines the restoration of rule of law, good governance, and democratic development.

III. UN Response to Violence against Women

Until the realization of effort of international organizations, violence against women had been seen as a private matter, rather than as a public or a human

Women in the Field of Crime Prevention and Criminal Justice, Annex to the Resolution adopted by the General Assembly on Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women (A/RES/65/228), para. 15-c.

25 *Rule of Law and Access to Justice in Eastern and Southern Africa: Showcasing Innovations and Good Practices* (United Nations Development Programme, Africa, April 2013), at 26.

26 In the matter of conflict-related gender-based violence, Wallström, former UN Special Representative on Sexual Violence in Conflict suggests that 'as long as perpetrators of sexual violence continue to walk free with almost complete impunity, while survivors lack access to justice and redress, lasting peace cannot be achieved': Marget Wallström, 'Introduction: Making the Link Between Transitional Justice and Conflict-Related Sexual Violence', *19 William and Marj Journal of Women and the Law 1*, Fall 2012, at 2.

27 Ban Ki-moon, Address to the Security Council for the Agenda Item "Women, Peace and Security" on its 6894th meeting, 24 June 2013.

rights issue requiring national or international action. The global community, within the framework of the UN, has made considerable progress in establishing an institutionalized international legal order dedicated to the eradication of such criminal act. Plus, UN entities have a crucial impact on building alliances, strengthening networks and accelerating the implementation of the current normative framework for handling violence against women.

In reference to normative framework, even though 1994 Declaration on the Elimination of Violence against Women is not a legally binding document, it constitutes a milestone in the codification of international law in favor of women.[28] Powerful call for countering violent attacks on women in the said Declaration is supplemented by next instruments. Members of international community have considerably moved forward with the Platform for Action of the 1995 Fourth World Conference on Women in Beijing. Indeed, the lack of respect for and inadequate protection of the human rights of women are considered as two of twelve critical areas of concern involving urgent action for the enhancement of equality, development, and international peace.[29] Besides, one of eight main goals of Millennium Development Declaration is to combat all forms of violence under pillar V (human rights, democracy, and good governance).[30] Additionally, 2005 World Summit Outcome, after reaffirming the international commitment on the complete implementation of the UN norms, condemns particularly the misuse of sexual violence against women in armed conflict context.[31]

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28 Javaid Rehman, *International Human Rights Law: A Practical Approach* (Pearson Education Limited, Essex 2003), at 372. Note that there are three main sources of international law according to Article 38 of the Statute of the International Court of Justice: international conventions, international custom and general principles of law. See regarding a lengthy discussion on how the international law is made through these three sources, Vaughan Lowe, *International Law* (Oxford University Press, 2007 Oxford), at 34-99.

29 The Beijing Platform for Action adopted at the Fourth World Conference on Women (Beijing, from 4 to 15 September 1995), para. 44.

30 Resolution adopted by the General Assembly United Nations on Millennium Development Declaration (A/RES/55/2), para. 25.

31 Resolution adopted by the General Assembly on 2005 World Summit Outcome (A/RES/60/1), para. 116.

The Commission on the Status of Women **(CSW)** is set up with the aim of submission of recommendations and reports to the Economic and Social Council **(ECOSOC)** on promoting women's rights in 1946. The CSW is also granted a function to make recommendations to the ECOSOC on urgent problems requiring immediate attention in the field of women's rights.[32] Reporting mechanism has been strengthened by individual complaints procedure in 1947 resolution.[33] Any individual, non-governmental organization, group, or network may submit communications or complaints covering information relating to alleged violations of human rights that affect the status of women in any country.[34] The CSW has an authority to appoint a working group consisting of its members to perform following actions: consideration of all communications including the replies of Governments thereon and preparation of a report based on analysis of the communications. The Commission considers such communications as to identify emerging trends, patterns of injustice and discriminatory practices against women.[35] The CSW is empowered to make recommendations to the ECOSOC on what action should be taken on such trends and patterns revealed by these communications.[36]

Representatives of Member States, UN entities, non-governmental organizations and other international institutions gather annually in New York for the

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32 Resolution adopted by the Economic and Social Council on the Commission on the Status of Women (E/RES/2/11), article 1. See for more detailed information about the Commission's history, Official Website of the Commission, 'Short History on the Commission on the Status of Women', *http://www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf,* accessed 4 February 2013.

33 Resolution adopted by the Economic and Social Council on Communications Concerning the Status of Women (E/RES/76 (V)).

34 Official Website of the UN Women, 'Communications Procedure of the Commission on the Status of Women', *http://www.unwomen.org/en/csw/communications-procedure*, accessed 30 May 2014. Note that the Commission's competence to consider confidential and non-confidential communications was reaffirmed by the resolution adopted by the Economic and Social Council on Communications Concerning the Status of Women (E/RES/1983/27).

35 See for comprehensive information about communication procedure, Official Website of the UN Women, 'Communications Procedure of the Commission on the Status of Women', *http://www.unwomen.org/en/csw/communications-procedure*, accessed 30 May 2014.

36 Resolution adopted by the Economic and Social Council on Communications Concerning the Status of Women (E/RES/1993/11).

annual session of the CSW. General discussions, round tables as well as several panels on review or priority themes and informal consultations for agreed conclusions are held. The annual sessions are quite beneficial in reviewing progress, highlighting challenges, and setting global standards and concrete policies for the enrichment of women. The core of the work at the fifty-seventh session was the priority theme on elimination and prevention of all forms of violence against women. In this context, even though 85 confidential communications, comprising 86 cases were lodged against 40 states, 55 replies from 19 governments were submitted.[37] The Working Group expressed its utmost concerns in following areas with regard to justice sector: existing forms of violence and discrimination against women and girls, the persisting climate of impunity concerning law enforcement officers who perpetrate sexual violence, the absence of effective prosecution, investigation, and punishment of wrongdoers.[38]

The adoption of the Convention on the Elimination of All forms of Discrimination against Women **(CEDAW)** in 1979 has made a historic contribution to the institutionalized women rights on the international scene. Plus the CEDAW Committee is entrusted with examining states reports and formulating general recommendations and suggestions based on its examination of states reports and information received from states parties. Under Article 1 of the Optional Protocol,[39] the Committee is entrusted with receiving and considering individual communications from individuals or groups of individuals and carrying out inquiries into situations of grave or systematic breaches of women's rights. Even though there is no explicit reference to violence in Article 1 of the Convention defining the discrimination of women,[40] the Committee has developed

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37 Report of the UN Commission on the Status of Women on the fifty-seventh session, 4-15 March 2013 (E/2013/27-E/CN.6/2013/11), Chapter III. Note that complaints were mainly related to, among others, sexual violence and other different forms of violence against women and girls, torture and inhuman or degrading treatment, serious and systematic violations of women rights, failure to ensure access to justice, arbitrary arrest and detention, degrading treatment and punishment, lack of implementation of legislation governing the promotion of women rights: ibid.

38 Ibid.

39 It was adopted by General Assembly on 6 October 1999.

40 According to the Article 1, the word "racial discrimination" means any distinction, exclu-

a leading standard by putting "violence" and "discrimination" against women into the same basket. Indeed, the Committee on the Elimination of Discrimination against Women, as underlined in general recommendation No: 19, considers as follows:

The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.[41]

Gender-based violence, thus, is accepted as coming within the ambit of the form of discrimination under the meaning of Article 1. What this necessarily follows is that all aforementioned implementation procedures of the Convention may be applied for violence against women.

Moreover, the foundation of Special Rapporteur on violence against women, its causes and consequences has made a significant contribution to the strengthening of UN mechanism since March 2006. Country visits, annual reports, and individual complaints are main tools in the hands of Special Rapporteur to make recommendations on dominant risk factors and key remedies.[42]

The UN Entity for Gender Equality and the Empowerment of Women, to be known as the UN-Women, was founded in 2010. In accordance with the Resolution 64/289, the UN-Women has a mandate to merge and consolidate

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sion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

41 General Recommendation of the Committee on the Elimination of Discrimination against Women (No: 19, Eleventh Session, 1992), para. 6. Note that this approach is followed by General Recommendation of the Committee on the Core Obligations of States Parties under Article 2 of the Convention (No: 28, Forty-Seventh Session, 2010), para. 19.

42 See generally Official Website of the Office of the High Commissioner for Human Rights, 'Special Rapporteur on Violence against Women, Its Causes and Consequences: Introduction', *http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx,* accessed 21 January 2014.

four previous actors, which engaged in gender equality and advancement of women.[43] The core competences of the UN-Women can be summarized as follows: to assist the inter-governmental bodies, such as the Commission on the Status of Women, in the formulation of policies and international standards; help member states implement these standards by delivering technical and financial support; to hold UN system accountable for its own commitments on gender equality.[44] It is considerable that since its foundation in 1996,[45] the UN Trust Fund facilitates the UN-Women by supporting local, national, regional, and cross-regional programmes seeking to tackle violence.[46]

In 2007, UN Action is endorsed by Secretary-General as a critical joint to 'guide advocacy, knowledge-building, resource mobilization, and joint programming around sexual violence in conflict'.[47] The Action network is also empowered to develop review, analysis and reporting arrangements on patterns and trends of conflict-related sexual violence, as well as a framework of early-warning indicators.[48] It is striking that the Action has three main pillars: supporting joint strategy development and programming by UN Country Teams and Peacekeeping Operations; increasing public awareness and generate political will to offer assistance to the campaign, mainly known "Stop Rape Now"; highlighting the scale of sexual violence in conflict and influential reaction by the UN.[49] What is more, the UN Special Representative of the Secre-

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43 Resolution adopted by the General Assembly on System-Wide Coherence (A/RES/64/289), para. 49. The UN Women replaced following actors: Office of the Special Adviser on Gender Issues and Advancement of Women and the Division for the Advancement of Women of the Secretariat, UN Development Fund for Women and the International Research and Training Institute for the Advancement of Women: ibid.

44 Official Website of UN Women, 'About UN Women', *http://www.unwomen.org/en/about-us/about-un-women/*, accessed 1 June 2014.

45 See Resolution adopted by the General Assembly on the Role of the United Nations Development Fund for Women in Eliminating Violence against Women (A/RES/50/166).

46 See for an analysis of the UN Trust Fund Effort, Report of the UN-Women on the Activities of the UN Trust Fund in Support of Actions to Eliminate Violence against Women (A/HRC/26/17-E/CN.6/2014/8).

47 Strategic Framework 2011/2012 of the UN Action (UN Action against Sexual Violence in Conflict, January 2011), at 3.

48 Ibid., at 3.

49 Official Website of UN Action, 'About UN Action', *http://www.stoprapenow.org/about/*, accessed 25 January 2013.

tary-General on Sexual Violence in Conflict who serves as the United Nation's spokesperson and political advocate on conflict-related sexual violence is chair of the UN Action network.[50]

We cannot ignore the dense work of the Security Council in conflict-related violence against women. In response to its severity, sexual violence in armed conflict or post-conflict situations is acknowledged as jeopardizing the restoration of peace and security within the national and international context by the Council.[51] Taking into account seriousness of such offence, it is well established under the Council legal norms that sexual violence constitutes a war crime, a crime against humanity, or a constitutive act with respect to genocide.[52] As an illustration of this approach, the Council resolutions 2106 (2013) and 2122 (2013) are concerned to draw importance to the women's growing vulnerability during conflict situations while urging member states to take responsive measures including legal and judicial steps.[53] What is more, the Security Council has been heavily involved in achieving the said principle through the innovation of new mechanisms such as ad hoc criminal tribunals.[54] Indeed the Council took a historic step by building up international judicial mechanisms with the purpose of imposing criminal responsibilities on perpetrators of serious crimes. In that context, the Council adopted resolution 827 founding the International Criminal Tribunal for the former Yugoslavia **(ICTY)** as a

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50 Official Website of the UN Action, 'Special Representative Sexual Violence on Conflict', *http://www.stoprapenow.org/page/specialrepresentativeonsexualviolenceinconflict*, accessed 25 January 2013.

51 See among others, resolution adopted by the Security Council at its 6984th meeting on 24 June 2013 (S/RES/2106 (2013)). UN actors further take the view that in post-crisis circumstances, sexual violence is used to 'terrorize, displace and control the population': see Annual Report 2011 of Team of Experts: Rule of Law/Sexual Violence in Conflict (Office of Special Representative of the Secretary General on Sexual Violence in Conflict), at 11.

52 See inter alia, resolution adopted by the Security Council at its 5916th meeting on 19 June 2008 (S/RES/1820 (2008)), para. 4.

53 Resolution adopted by the Security Council at its 6984th meeting on 24 June 2013 (S/RES/2106 (2013)); Resolution adopted by the Security Council at its 7044th meeting on 18 October 2013 (S/RES/2122 (2013)).

54 See for a whole list of different type of criminal tribunals founded under the auspices of the UN engaging in inter alia eliminating serious human rights breaches and bringing the perpetrators to the justice: Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616), para. 38.

rapid response to the reports of atrocity crimes including rape of women in 1993.[55] One of prominent features of the ICTY is that it is the first international war crimes court since the Nuremberg and Tokyo tribunals.[56] Referring again that to its concern about grave violations of international law and acting under Chapter VII of the UN Charter, the Council set up the International Criminal Tribunal for Rwanda (ICTR) through resolution 955 of 8 November 1994.[57] The ICTR is authorized to prosecute persons responsible for among others, crimes against humanity including murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions committed in armed conflict.[58]

It should be put forward that the UN agencies including Security Council also give a coordinated support to 1998 Rome Statute of the International Criminal Court **(ICC)**.[59] In accordance with Article 5 of the Rome Statute,[60] the ICC mechanism deals with the crime of genocide, crimes against humanity, war crimes and the crime of aggression as the most serious crimes of concern to the global community. Moreover, sexual violence including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence comes within the scope of crimes against hu-

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55 Resolution adopted by the Security Council at its 3217th meeting on 25 May 1993 (S/RES/827 (1993)). Note that the said document also contains the Statute of the ICTY. See also Official Website of the ICTY, 'The Statute of the Tribunal', *http://www.icty.org/sid/135*, accessed 21 March 2013, for all relevant Security Council resolutions concerning the Statute of the Tribunal.

56 Official Website of the ICTY, 'Establishment', *http://www.icty.org/sid/319*, accessed 20 March 2013.

57 Despite the fact that General Assembly resolutions are purely soft-law and thus non-binding products, Security Council resolutions adopted under Chapter VII of the Charter (with respect to peace and breaches of peace and acts of aggression) is considered as having legally binding nature: Alan Boyle and Christine Chinkin, *the Making of International Law* (Oxford University Press, New York, 2007), at 229-233. See also Malcolm N. Shaw, *International Law* (Sixth Edition, Cambridge University Press, 2008), at 403, who states that the decisions of the Security Council for the establishment of both Tribunals are purely binding upon all member states of the organization.

58 Resolution adopted by the Security Council at its 3453rd meeting on 8 November 1994 (S/RES/955 (1994)).

59 See generally among others, Statement by the President of the Security Council at its 7109th meeting on 12 February 2014 (S/PRST/2014/3).

60 The Statute was adopted on 17 July 1998 and came into force on 1 July 2002.

manity under Article 7 of the same Statute. The inclusion of a range of sexual violence offences in a founding treaty represents a breakthrough in providing accountability for conflict-related sexual violence.[61] One needs to realize that the Tribunals and ICC lie at the very core of promoting criminal responsibility by means of prosecuting, arresting, and punishing several wrongdoers of sexual violence in war-torn countries.[62] Accordingly, the concerned documents make a reference to the role of the ICC and other international tribunals in improving gender-based criminal justice system.[63]

Furthermore, Security Council unanimously adopted a resolution for the deployment of a Team of Experts **(TOE)** to situations of particular concern with respect to sexual violence in conflict-affected states.[64] The mission of the TOE mainly contains, inter alia: working in close partnership with national legal and judicial officials to address impunity; describing shortcomings in national response and enhancing criminal accountability in transitions.[65] The

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61 Note that having regard to the practice of international criminal tribunals and the text of the Rome Statute, most prestigious UN actors such as the Commission on the Status of Women welcomes the incorporation of gender-related crimes and crimes of sexual violence into the Rome Statute and the recognition of international criminal tribunals that rape and other forms of sexual violence can constitute a war crime, a crime against humanity or a constitutive act in relation to genocide or torture: Agreed Conclusions on the Elimination and Prevention of All Forms of Violence against Women and Girls, adopted by the Commission on the Status of Women in its fifty-seventh session (E/2013/27-E/CN.6/2013/11), 4-15 March 2013, para. 5.

62 See for a catalogue of completed cases by the ICTR, the Official Website of the Tribunal, 'Status of Cases', *http://www.unictr.org/Cases/tabid/204/Default.aspx,* accessed 23 November, 2013. Such catalogue is also available regarding the ICTY, Official Website of the ICTY, 'Completed Cases', *http://www.icty.org/action/cases/4*, accessed 23 December 2013. For instance in the case of the Prosecutor v. Bosco Ntaganda, former alleged deputy chief of the staff and commander of the operations of the Patriotic Forces for the Liberation of Congo is currently being held in the ICC custody. He was charged by the Prosecutor of the ICC of several war crimes and crimes against humanity including murder of civilians, rape of civilians, rape of child soldiers, sexual slavery of civilians at the time of armed conflict: Official website of the ICC, 'Situations and Cases', *http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx,* accessed 12 February 2014.

63 See among others, resolution adopted by the Security Council at its 6984th meeting on 24 June 2013 (S/RES/2106 (2013).

64 See resolution adopted by the Security Council at its 6195th meeting on 30 September 2009 (S/RES/1888 (2009)), operative paragraph 8.

65 See resolution adopted by the Security Council at its 6195th meeting on 30 September 2009

TOE, in its first year, especially concentrated on the following judicial fields: criminal investigations and prosecutions; collection, analysis, and use of forensic evidence; criminal and procedural law reform; witness, victim, and justice operator protection as well as justice and sector oversight institutions.[66] The Team offered assistance in its first year to national authorities in the area of, among others, technical and strategic assessments for the eradication of impunity; the rehabilitation of national investigative capacity for conflict-related sexual violence; technical and strategic advice for the definition of fundamental deficiencies; renewal of legal framework.[67]

In spite of its continued work, we cannot disregard strong criticisms as to make a considered opinion on measuring real performance of UN bodies. In this regard, the employment of low-level women representatives within its own system and failures about the criminal responsibility of its officers for alleged gender discrimination and sexual harassment cases severely damage the credibility of the whole organization.[68] In respect of institutional aspects, the absence of rigidity and weak enforcement procedures in most UN mechanisms dedicated to gender-based violence constitute another unfortunate handicap. The complex problem is that most of the abovementioned UN actors do not have any mechanism like a judicial institution. As a result of this, they can produce mostly "soft law products" such as recommendations and guidelines rather than pure binding obligations and decisions on the basis of judicial sanctions.[69] Thus, enforceability of groundbreaking UN instruments has still been a

(S/RES/1888 (2009)), operative paragraph 8.

66 Annual Report 2011 of Team of Experts: Rule of Law/Sexual Violence in Conflict (Office of Special Representative of the Secretary General on Sexual Violence in Conflict), at 6.

67 See generally Annual Report 2011 of Team of Experts: Rule of Law/Sexual Violence in Conflict (Office of Special Representative of the Secretary General on Sexual Violence in Conflict), at 6. Note that in its first year, the TOE gave a priority to the situation of eight countries: Bosnia and Herzegovina, Central African Republic, Columbia, Cote d'Ivoire, the Democratic Republic of Congo, Liberia, Sudan, South Sudan: ibid.

68 See inter alia, Jinn Winn Chong, 'The Politics of the Empowerment of Women: Mapping Enabling Environments within Narratives of Feminity and Power', *18 William and Mary Journal of Women and the Law 523*, Spring, 2012, at 563 and 564.

69 See e.g., Rebecca Adams, 'Violence Against Women and International Law: The Fundamental Right to State Protection From Domestic Violence', *20 New York International Law Review 57*, Winter 2007, at 121-126;

matter of concern.[70] It results from the foregoing that global community needs further intensified and more coercive efforts to increase the respect for women's rights under the umbrella of the UN.

IV. Key Judicial Measures

It is of course highly unlikely to get rid of violence towards women without political keen and national ownership. Governments thus have a positive obligation of not only protecting women but also preventing violent movements against them. In reminding underlying risk of impunity and particular role of the national authorities on that matter, a very well-known study of Secretary-General suggests as follows:

When the state fails to hold perpetrators accountable, impunity not only intensifies the subordination and powerlessness of the targets of violence, but also sends a message to society that male violence against women is both acceptable and inevitable. As a result, patterns of violent behavior are normalized.[71]

It is essential to understand at this point that improvement of robust national mechanisms is considered a key ingredient for the promotion of rule of law.[72] The paramount importance of judicial measures in including the protection of access to justice, the intensification of criminal accountability and the removal of impunity is recognized, as 2010 Summit on the Millennium Development Goals reaffirms.[73] Resolution 2122 (2013) also attaches particular emphasis to the value of justice sector interferences addressing the full range of abuses of women's rights and their negative impacts on women.[74] Indeed judicial mech-

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70 Andreea Vesa, 'International and Regional Standards for Protecting Victims of Domestic Violence', *12 American University Journal of Gender, Social Policy and the Law 309*, 2004, at 360.

71 *Ending violence against women: From words to action,* n: 7 above, at 30.

72 OHCHR Report 2012 (United Nations Human Rights Office of the High Commissioner, Geneva), at 30.

73 Resolution adopted by the General Assembly on Keeping the Promise: United to Achieve the Millennium Development Goals (A/RES/65/1), para. 72 (g).

74 Resolution adopted by the Security Council at its 7044th meeting on 18 October 2013 (S/RES/2122 (2013)).

anisms are capable of providing the best means in the hands of governments to target at atrocity crimes including violence against women. Having regard to these factors, it is fair to assume that national justice sectors need to be strengthened and restored as to cope with such offence. In that context, the present study recommends that following ground-breaking initiatives be undertaken step by step for entailing satisfactory results through the fortification of judicial actors.

First requirement is to identify fundamental drawbacks and handicaps of justice machineries in terms of responsiveness to the violent movements against women. Surveys and other relevant indicators are very beneficial for determining relevant data on types, prevalence, and incidence of violence. Accurate and specific data alongside the description of main deficiencies provide a significant step towards developing a roadmap and priority needs in the field of criminal justice sector.[75] In the light of urgent areas of focus, the development and adoption of strategic action plans is critical components of a far-reaching policy to combat violence against women. Referring the fact that there is a clear linkage between gender equality, women's advancement and violence against women, UN bodies note the requirements for reforms dedicated to legal empowerment of women.[76] Given that violence against women is rooted in historical, cultural, and structural reasons, referral to every judicial gap conducive to violence is the cornerstone of such strategic action plans.

As a next step, bottom-up judicial reforms should be adopted and applied for the intensification of relevant justice legislation and institutions. The articulation of a comprehensive legal and constitutional framework is a considerable part of the establishment of effectively functioning judicial mechanisms. The scope and coverage of current legislation, rules, and procedures must be monitored and reviewed in full-compliance with international legal instruments. States have a unique task at this juncture to review and where appropriate re-

[75] See more discussion on the role of such surveys, *Ending violence against women: From words to action*, n: 7 above, at 65-84.

[76] Report of the Secretary-General to the Economic and Social Council on Prevention of Violence against Women and Girls (E/CN.6/2013/4), para. 24.

vise, amend, abolish all legal framework that lead to violence against women under strategic action plans.[77] In the case of the absence of appropriate legislation, the adoption of new laws containing not only protective but also preventive measures is a powerful law enforcement device. It is necessary that all forms of violence against women be regarded as a crime as well as penalties based on the severity of offence and sanctions be ensured by criminal codes for an influent fight against violence.[78] Additionally, the Secretary-General pays attention to the meaning of a coherent legal order that not only prohibits and criminalizes violence against women but also offers guarantees for the prevention measures, support, and protection of survivors.[79] That is why states are committed to establishing a women-friendly legal system and follow-up criminal justice machineries. In that connection the General Assembly Resolution 67/144 encourages as follows:

the removal of all barriers to women's access to justice and ensuring that they all have access to effective legal assistance so that they can make informed decisions regarding, inter alia, legal proceedings and issues relating to family law, and also ensuring that they have access to just and effective remedies for the harm they have suffered, including through the adoption of national legislation where necessary.[80]

Apart from the legal arrangements related to tackling violence against women, full implementation of existing legal norms by judicial bodies is also obligatory. A judicial policy of zero tolerance on sexual exploitation, abuse, and violence is very central to accelerating existing legal framework. Restoration of national crime prevention and criminal justice capacities is an appropriate way of suppressing different types of violence. Strict rules are supposed to be in place to ensure criminal accountability and punish wrongdoers. Local justice machin-

77 See inter alia resolution adopted by the General Assembly on Intensification of Efforts to Eliminate All forms of Violence against Women (A/RES/67/144), para. 18/c.

78 Ibid., para. 18-r.

79 Report of the Secretary-General to the Economic and Social Council on Prevention of Violence against Women and Girls (E/CN.6/2013/4), para. 21.

80 Resolution adopted by the General Assembly on Intensification of Efforts to Eliminate All Forms of Violence against Women (A/RES/67/144), para. 18-t.

eries, as emphasized in UN resolutions, must be therefore redesigned to prevent, investigate, prosecute, and punish the perpetrators[81] and acts of violence.[82] In reiterating the same principle, the ECOSOC and General Assembly further underline the duties of states on more attentively doing so in terms of femicide.[83]

The reinforcement of the investigative capacity including proper evidence collection and data analysis as well as successful prosecution capable of leading to the identification and punishment of those responsible for sexual violence is an imperative avenue. It is undeniable that only credible criminal justice institutions may pave the way for concluding violence-related cases with conviction based on gravity of the crime.

Moreover, the full protection of women involves more than an efficient prosecution. The vulnerability of women and the particular risk of violence during the judicial proceedings, as already mentioned, is an existing phenomenon. While seeking justice and redress through lodging a complaint before courts, every woman, as a claimant, must be free from potential reprisal and threats. A clear policy aiming at protecting and assisting those victims who have been subjected to violence is a pre-requisite for the prevention of women's re-victimization.[84] In connection with redress procedures, UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power obligates States to set up expeditious, fair, inexpensive, and accessible mechanisms.[85] It is crucial that the right to a remedy covers a wide range of areas including 'access to justice; reparation for harm suffered; restitution; compensation; satisfaction; rehabilitation; and guarantees of non-repetition and pre-

81 See among others, resolution adopted by the General Assembly on Intensification of Efforts to Eliminate All Forms of Violence against Women (A/RES/67/144), para. 11.

82 See Resolution adopted by the Economic and Social Council on Taking Action against Gender-Related Killing of Women and Girls (E/RES/2013/36).

83 Ibid., para. 14; Resolution adopted General Assembly on Strengthening the United Nations Crime Prevention and Criminal Justice Programme, In Particular Its Technical Cooperation Capacity (A/RES/68/193), para. 16.

84 Resolution adopted by the General Assembly on Intensification of Efforts to Eliminate All Forms of Violence against Women (A/RES/67/144), para. 15.

85 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Annex to the Resolution adopted by the General Assembly on 29 November 1985 (A/RES/40/34), para. 5.

vention'.[86] Criminal justice processes based on gender-sensitive safeguards are very beneficial in entailing genuine safety for women facing violence. Such protective guarantees need to cover including restraining and expulsion orders against perpetrators as well as testimonial aids and additional measures for the rehabilitation and reintegration of victims into society.[87] In that connection, fragility of women requires the foundation of judicial proceedings which are very influential for different needs and the full protection of victims and witnesses.[88] The challenging question to be considered in each case is whether the needs of women and girls are properly met in relevant service provision.[89] What this also necessarily highlights is that law practitioners are under an obligation to act in close cooperation with all actors including social workers, psychologists, researchers and victims for the required criminal answer to disadvantaged women's all needs at this stage.[90] What is more, UN Resolution 67/144 stresses the need for appointing a focal point in the legal system for coordination of countering all acts of violence.[91]

Within the context of current human resources, training and legal education of judges and prosecutors as criminal justice officials are very instrumental in increasing the capacity of justice members against such violence. Awareness-raising campaigns and activities on the rights of women are quite useful through international, regional, and national conferences, seminars, training programmes, publications. Therefore, the role of regular and institutionalized training for judicial actors is reaffirmed by the UN agencies in several documents.[92] Furthermore, recognizing the role of training of justice sector profes-

86 *Ending violence against women: From words to action*, n: 7 above, at 93.

87 See for instance resolution adopted by the General Assembly on Intensification of Efforts to Eliminate All Forms of Violence against Women (A/RES/67/144), para. 18-s.

88 See e.g. resolution adopted by the Security Council at its 6984th meeting on 24 June 2013 (S/RES/2106 (2013)).

89 *Access to Justice (The Courts): Criminal Justice Assessment Toolkit 1*, (United Nations Office on Drugs and Crime, New York 2006), at 11.

90 Branner, n: 16 above, at 351.

91 Resolution adopted by the General Assembly on Intensification of Efforts to Eliminate All Forms of Violence against Women (A/RES/67/144), para. 18-f.

92 See for instance, Updated Modal Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, Annex to the Resolution adopted by the General Assembly on Strengthening Crime Prevention and

sionals, Security Council Resolution 2106 (2013) emphasizes the contribution of the inclusion of more women at senior levels.[93] There is a need to curb the persistent shortage of women in leadership positions.

V. Conclusion

In the final analysis, it is worth re-considering that violence against women is a form of discrimination, an infringement of human rights, and a major impediment to exercising them. What is regrettable is that high-profile incidence of violent behaviors remains widespread on the grounds of certain reasons contributing to violence, as indicated in Chapter II. It is clear that international instruments and review machineries have so far offered a historic opportunity for gaining momentum towards such crime. Chapter III was largely dedicated to assessing reliable standards, guidelines, and enforcement mechanisms as laid down in UN documents on stopping violence against women.

Keeping the concerned products of the UN in mind, the overall aim of this article is to develop a holistic judicial approach with the purpose of eradicating silence of women. It is of course easy to underscore positive results of the work carried out by the UN actors. Though, we cannot lose sight of the fact that despite the increasing attention, there has been limited progress in tackling such crime. Much work thus needs to be done in order for women to get rid of gender-based violence at the national and international level. In addition to the commitments of international community to maximize UN response such as the development of more hard-law norms and effective mechanisms, State's duty for the protection of women from violence necessitates four fundamental steps: prioritization, strategic planning, reforming, and action/or good practices. The basic reason is that the restoration of formal justice mechanisms is the keystone of achieving tangible results and offering workable solutions. In that connection, legislative changes and promising practices of magistrates and prosecutors through the realization of bottom-up judicial reforms are sig-

Criminal Justice Responses to Violence against Women (A/RES/65/228), para. 16-c.

93 See among others, resolution adopted by the Security Council at its 6984th meeting on 24 June 2013 (S/RES/2106 (2013)).

nificant avenues for making satisfactory progress. Credible prosecution and conviction of violators based on gravity of the crime is a paramount aspect of delivering justice. Emerging patterns of violence commits national justice components to discharge following functions strictly and timely, as demonstrated in Chapter IV: the prevention of re-victimization, the provision of redress and the full access to justice for victims of violence.

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POLITICS IN LAW PRACTICE: ECHR'S APPROACH TO THE DISSOLUTION OF POLITICAL PARTIES

Hukuk Uygulamasında Siyaset:
AİHM'in Siyasi Partilerin Kapatılmasına Yaklaşımı

Dr. Serkan KIZILYEL *

ABSTRACT

Law and politics are neighbouring concepts and social studies. There are two influential theories that examine relationship between them. The main stream theory, the legal paradigm in practice, strongly believes in independence of law and its efficient method, legal reasoning. In this theory jurists' role is strictly defined; objectivity and impartiality are main requirements for them during their profession. On the contrary, legal realism and Critical Legal Studies challenges to legal formalism itself, its neutrality of law and its distinction between law and politics. They try to show that law is a form of politics in practice. To them, the effort to cleanse law from politics by formalist is an absolute failure, because judicial decisions more or less contain politics. In this perspective, case law of the European Court of Human Rights on the dissolution of political parties in Turkey as a sample area is chosen and analysed to monitor politics in law.

Key Words: Politics in Law, Legal Formalism, Critical Legal Studies, European Court of Human Rights, Dissolution of Political Parties.

ÖZET

Hukuk ve siyaset iki komşu kavram ve sosyal çalışmadır. Onların birbirileriyle olan ilişkilerini inceleyen iki etkili teori vardır. Halen hukuk uygulamasına egemen olan ana akım teori, hukukun bağımsız ve hukuki muhakeme şeklinde kendisine ait etkin bir metoda sahip olduğuna inanır. Bu teoride hukukçuların rolleri açık bir şekilde belirlenmiştir; objektiflik ve tarafsızlık bu mesleğin icrasında onlar için ana gerekliliklerdir. Buna karşın, hukuki realizm ve Eleştirel Hukuk Çalışmaları, hukuki formalizmin kendisine, onun hukuksal tarafsızlığına ve hukuk ile siyaset ayrımına meydan okumuşlardır. Onlar, uygulamada hukukun siyasetin bir formu olduğunu göstermeye

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çalışmışlardır. Onlara göre, hukuku siyasetten arındırmaya çalışmak çok açık bir boş uğraşıdır; çünkü yargı kararları bünyesinde az veya çok siyaset barındırır. Bu kapsamda, Avrupa İnsan Hakları Mahkemesinin Türkiye'deki siyasi partilerin kapatılması konusundaki kararları örnek alan olarak seçilerek hukuktaki siyasete ayna tutması anlamında analize tabi tutulmuştur.

Anahtar Kelimeler: Hukukta Siyaset, Hukuki Formalizm, Eleştirel Hukuk Çalışmaları, Avrupa İnsan Hakları Mahkemesi, Siyasi Partilerin Kapatılması.

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1. Introduction

After modern economic, social and politic lifestyle had shaped, law began to be more independent from other set of social orders. Because of the influence of positivism, law was supposed to be one of the autonomous social sciences that have its own methodology and legal reasoning. Correspondingly, the education of law and the role of jurists[1] changed dramatically. Law started to use its own way of reasoning and it was begun to teach professionally in law schools.

According to this new concept, lawyers are basically obliged to search and to find general principles of law, mainly from statutes and court decisions, to solve issues and to implement them properly. To be able to reach correct legal results, a set of legal reasoning rules must be followed. The traditional legal model is based on a formalism of neutral principles in which jurists apply to the legal materials such as the Constitution, statutes or precedents to find correct resolutions.[2] In this model, jurists' role is strictly defined; objectivity and impartiality are main requirements for them during their profession.[3] They try to set distinguishable borders between law and moral, religion and other individual values. It is considered that their legitimacy comes from their neutrality, non-politics, independence and loyalty to law.[4]

1 In this paper, jurist means judges, lawyers and other law experts.

2 Frank B. Cross, 'Political Science and New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance' (1997-1998) 92 Nw. U. L. Rev. 251, 254.

3 Elizabeth Mensch, 'The History of Mainstream Legal Thought' in David Kairys (ed), *The Politics of Law: A Progressive Critique*, (3th edn, Basic Books 1998) 29.

4 Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization*, (1th edn, OUP 2002) 3.

Although this approach to law is the dominant paradigm, it naturally brought forth its critical doctrine. First, legal realism challenged to legal formalism itself, its neutrality of law and its distinction between law and politics. Then Critical Legal Studies (CLS) took the criticism forward and tried to show that law is a form of politics in practice.[5] CLS has an important relationship with legal realism.[6] However, to them, the effort to cleanse law from politics by formalist is an absolute failure, because every decision more or less contains politics.[7] Therefore, CLS is not solely a continuation of legal realism.

Political scientists always accept the role of politics in law practice; however, lawyers reject this position.[8] Therefore, this claim remained naive among jurists. It is mainly CLS that changed this presumption in legal society. Many empirical researches were done to show the existence of politics in law. The debate does not lose its currency and after the decision in the case of *Bush v. Gore* of US Supreme Court[9] that is claimed to be a clear political decision[10], the number of academic studies on the relation between law and politics increased again.

In this context, this article acknowledges that to some extent politics plays a pivotal role within law. Jurists are human, they study on social issues, they may have *a priori* convictions on some legal issues and they may convert some decisions in according to them. Considering this factuality, is it still enough to claim that law is a form of politics? In addition, is it possible to reflect some politically affected decisions of high courts on other decisions, courts and judges? Moreover, if the answer is yes and law-is-a-form-of-politics is widely accepted among jurists, what can stops intensification of politics in law, biased decisions, nihilism or judicial activism?

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5 Terrence L. Moore, 'Critical Legal Studies and Anglo-American Jurisprudence' (1990) 1 U.S. A. F. Acad. J. Legal Stud. 1, 2.

6 Anthony T. Kronman, *The Lost Lawyers: Failing Ideals of the Legal Profession*, (4th edn, HUP 1995) 240.

7 Mensch (n 3) 34.

8 see Shapiro and Sweet (n 4) 5.

9 121 S. Ct. 525 (2000).

10 see Jack M. Balkin, 'Bush v. Gore and the Boundary Between Law and Politics' (2000-2001) 110 Yale L. J. 1407.

Between these two paradigms, this essay will firstly examine the extent of determinacy of law to be able to define whether politics comes from the nature of law or not. Secondly, legal reasoning that is presumed to enlighten jurists when they apply to law will be analysed. Lastly, the discussion on relation between law and politics will be reviewed.

In this essay, the dissolution of political parties and the European Court of Human Rights (the Strasbourg Court) case law on this area are selected to support the following arguments. The selected cases are much contested and they may reflect the Court's political view. The examples are taken from the same country's political parties, from Turkey, to give a clearer comparison.

2. Intelligibility of Law

Law is conveyed by language. It is exactly what it is understood from words and sentences. The intention of lawmakers takes secondary position. Therefore, it is not wrong to claim that language is a keystone for law. Unfortunately legal language is ambiguous.[11] Although it is written by experts and professionals during legislative process and if it is a court decision in this case during judicial process, when it comes to application, its wording may become indeterminate and inconsistent.[12] Even constitutions, treaties and statutes are not clear enough.[13] Therefore, traditional legal thought pays attention to legal language.[14] It is claimed that because materials of law are not determinate enough to decide accordingly, jurists rely on their own personal references.[15] In other words, the ambiguity of legal language gives jurists discretionary power to refer to their political choices. In this case, many different and inconsistent decisions appear from the same legal base.

Singer upholds traditional legal thought against this attack and argues that

[11] David Kairys, 'Law and Politics' (1983-1984) 52 Geo. Wash. L. Rev. 243, 246.
[12] Duncan Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 J. Legal Educ. 518, 562.
[13] Richard J. Pierce, 'Is Standing Law or Politics?' (1998-1999) 77 N.C.L. Rev. 1741, 1785.
[14] Miro Cerar, 'The Relationship between Law and Politics' (2009) 15 Ann. Surv. Int'l.&-Comp. L. 19, 27.
[15] Emerson H. Tiller and Frank B. Cross, 'What is Legal Doctrine' (2006) 100 Nw. U. L. Rev. 517, 519.

a legal rule or theory is determinate, when it regulates what to do and leave no choice behind.[16] A relatively determinate theory or rule will more or less constrain choices. He goes on and said that it is not difficult to establish a determinate theory or rule in legal practice; however, such a system is not applicable, because it may not cover all problems appearing in individual cases. Therefore, discretionary power is the only way that allows jurists to seek for justice in flexibility.[17]

In fact, there could be many ways to rationalise decisions and jurists may select any of them in accordance with the culture, the language or other set of information.[18] It is not always because of the arbitrariness in courts, it is just because of the nature of law and it cannot be completely washed away. Legal language needs interpretation and judges do it in accordance with their legal knowledge that shaped by multifaceted factors. No doubt, one of the leading factors here is politics.

One of the notable examples of indeterminacy of legal materials is Article 11 of the European Convention on Human Rights (the Convention). It rules that everyone has the right to freedom of peaceful assembly and to freedom of association with others. The scope of assembly and association is not explicit; therefore, the Court interpreted them and defined the scope. It surprisingly takes political parties into the scope of 'association'.[19] It stated that political parties are a form of association for a functioning liberal democracy and rule of law.[20] Normally, political parties have their own legal status and could be excluded from the Article. And, if the Court did exclude the political party, no doubt that it would muster up support among jurists as well.

The second paragraph of the Article regulates limitations: No restrictions

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16 Joseph William Singer, 'The Players and the Cards: Nihilism and Legal Theory', (1984-1985) 94 Yale L. J. 1, 11.

17 Ibid 12.

18 Kairys (n 11) 245.

19 Robin C. A. White and Clare Ovey, *Jacobs, White and Ovey the European Convention on Human Rights* (5th edn, OUP 2010) 463-464.

20 *United Communist Party of Turkey and others v Turkey*, (App. 19392/92), 30 January 1998, (1998) 26 EHRR 121, ECHR 1998-1, para. 27.

shall be placed on the exercise of these rights other than such as are prescribed by law and necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. The terms used here in the paragraph are highly ambiguous, elastic and political. The answer to the question what law, necessary, democratic society, national security, public safety, disorder, health or morals are would probably reflect jurists political affiliation.

These key terms may change for every single judge in accordance with their background. For instance, if she is nationalist and statist, she probably enlarges the scope of national security, she will narrow down the scope, if she has libertarian tendency. Judges may not intentionally take different positions, but the result will be more or less the same in such a case in which implicitly worded rules appear.

3. Legal Reasoning

Because legal materials are not articulate enough, a mental effort called legal reasoning is needed to apply norms to facts. It is a way of thinking and analysing law[21] in particular cases to provide a legal bases and to reach a decision.[22] According to it, decisions are made on legal basis rather than on the political, social or moral ones.[23] Therefore, it is a convenient way or method to neutralise law from other neighbouring social studies.

Kairys gives three steps to implement traditional legal reasoning.[24] The first step is doctrinal analysis in which judicial decisions are interpreted to infer permanent rules and principles. In this method, general principles in decisions are tried to be collected and understood. When, it is not possible to find a rule or principle, second step, policy analysis, starts and assumptive general values

21 Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (HUP 2009) 6.
22 Kairys (n 11) 243.
23 Ibid.
24 Ibid 244.

and their validity are discussed.[25] The last step is to balance competing values, when interests are in conflict.[26] In these steps, the message is very simple: If jurists are objective, unbiased and reasoned and if they use correct legal methods and argumentation, the result will be legal and fair.[27] In other words, legal logic and reasoning safeguard the independence and neutrality of law.

According to the conventional legal academics, the language of judicial opinions represents the law itself.[28] Law is reasoned analysis of factors internal to law[29] free from any political and personal affiliations.[30] A distinction exists between opinions that are merely a matter of personal preference and opinions that are valid and expected for intelligent persons of good will.[31]

Nevertheless, realists and mainly CLS reject this understanding of traditional legal reasoning. To them, the distinction between law and politics is one of the main appearances of ideology in law professing.[32] It is compellingly thought to student that there is legal reasoning for law and law is differed from other social studies.[33] They refuse the assumption that law has an internal logic and special legal reasoning for the choices of substantive and procedural requirements, they contrarily conclude that jurists rely on extralegal considerations during law making courses.[34] Moreover, it is said that each set of these legal conceptions represents an indefinite social understanding.[35]

Indeed, it is not wholly rational to accept the absence of legal reasoning. First, legal reasoning is a strip map for lawyers to fallow. It helps lawyers to evaluate legal materials and to apply them to fact. To some extent, it gives

25 Ibid.
26 Ibid.
27 Ibid.
28 Tiller and Cross (n 14) 518.
29 Cross (n 2) 255.
30 Tiller and Cross (n 14) 518.
31 Singer (16) 30.
32 Duncan Kennedy, 'Legal Education as Training for Hierarcy' in David Kairys (ed), *The Politics of Law: A Progressive Critique*, (3th edn, Basic Books 1998) 60.
33 Ibid 60.
34 Kronman (n 6) 240,241.
35 Roberto Mangaberia Unger, 'The Critical Legal Studies Movement' (1982-1983) 96 Harv. L. Rev. 561, 579.

professional view to lawyers and makes law much more certain[36] and transparent in practice. On the other hand, legal reasoning constrains jurists from arbitrariness. It enforces them to follow rules, to be objective and to play as a neutral arbiter towards parties. If it is denied, it means jurists are much freer to play as political figures during trials. If one says they are already political figures and just the current situation is ignored, she probably exaggerates existing judiciary or generalises some politically effected high courts' decisions to all judiciary. The idea that there are no rational or objective criteria about how to make legal decisions may also raise the spectre of nihilism.[37] However, *Simon* opposes to this kind of judicial activism too. He states that CLS pays a great attention to democracy and rejects the possibility of judicial despotism.

Nevertheless, legal reasoning has same weakness that its neutrality heavily relies on jurists own conscience. It can be glossed over by saying it is necessary to give judges choices for a better, more down-to-earth and fairer outcome. Therefore, jurists should have broad competence to interpret the legal materials. However, when they do that, their experience or characteristics may affect their decision.[38] Indeed, they cannot be wholly objective and no judge is a machine that is washed away from its feel and thoughts.[39] Thus, there is an inescapable dilemma here and politically oriented decisions are not therefore surprising.

4. Politics in Law

If there is indeterminacy in law, judges have competence to interpret legal materials and legal reasoning cannot wholly constrain them, in this case, is it possible to say law is a form of politics?

According to dominant paradigm, law is autonomous and none of the features of it content politics.[40] Law and politics are different from each other. Each of them represents a power of modern states; however, they have some

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36 see Julius Stone, *Legal Systems and Lawyers' Reasoning* (Stevens&Sons 1964) 325.
37 Singer (16) 5.
38 Bryan D. Lammon, 'What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naive Legal Realism' (2009) 83 St. John's L. Rev. 231, 268.
39 Ibid 282.
40 Cerar (n 14) 25.

horizontal interaction: law needs politics to be enforced, while the former is based on ways and limitations generated by the latter.[41] The legitimacy of law comes from it objectivity, neutrality and autonomy. Judicial decision-making is not based upon reasoned judgment from legal materials rather upon each jurist's political ideology and the identity of the parties.[42] Although, jurists may have their own political affiliation as all people have, in their profession, they fallow a set of rules, they just apply law and they cannot act as a member of legislation. If somehow a political decision is given, it means this decision is not legally correct outcome.

On the contrary, *Realists* and *Crits* believe that judges are not those who simply discover law; they have legal space to study on and to select the correct option among many choices.[43] If judges have many options to select, they will probably select the one politically acceptable to them. The results of empirical research show that judicial ideology influences judicial decisions[44] and the separation between law and politics, therefore, is a myth.[45] To them, the standing of law is closer to a part of politics rather than to a part of legal system.[46] They symbolise that lawyers are actors in a romantic drama being played out on a political stage.[47]

Simmon bases this claim on two justifications.[48] One is the uniformity of techniques. The technique used to give decision in law and politics is the same. Because the methodology is the same, one must be a part of other. The other justification is outcome oriented. The decisions of judiciary include controversial social and political theories and to be able to understand these decisions to some extent these theories must be known.

41 Ibid 23-24.
42 Cross (n 2) 265.
43 Shapiro and Sweet (n 4) 20.
44 Tiller and Cross (n 15) 520.
45 Kairys (n 11) 248.
46 Pierce (n 13) 1786.
47 Allan C. Hutchinson and Patrick J. Monahan, 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36 Stan. L. Rev. 199, 201.
48 William H. Simon, 'Fear and Loathing of Politics in the Legal Academy' (2001) 51 J. Legal Educ. 175, 177.

At this stage, it should be kept in mind that it is politics that makes law. Hence law is sprung from politics. Apart from legal decisions, there is not any source of law that is not politics. Legal text are drafted and passed by politicians after political discussions on the political platform. In the case politics introduces law; distinction between these two elements disappears. In spite of many attempts to do so[49], law could not still become a science. Because, it is *a priori* knowledge and it requires interpretation, jurists may give political decisions.

These kinds of decisions are generally given by high courts that have to conclude contested new issues. One of those courts is the Strasbourg Court of Council of Europe consisted of 47 countries. The Court has to decide on very controversial topics regarding human rights. Awareness in human rights issue across the globe is remarkable and pleasing. In particular, civil and political rights are generally accepted human rights. Nevertheless, some issues have strong relationship with ethics, religion and other social virtues. In situation such as this, human rights may be related to personal convictions and some decisions are assumed to be political.

One contested group of cases of Strasbourg Court is its case law on the dissolution of political parties. Several striking and preceding cases from Turkey will be briefly explained to infer the Court's political position. Similar to *Pierce*[50], the understanding and reasoning of 'a politically naive lawyer' can be used to assess the possible political aspects of decisions. If the decisions seem odd and incomprehensible to her, law can, therefore, be politics.

The leading case in this field is *the United Communist Party of Turkey* (*TBKP*).[51] The *TBKP* as a political party was formed in 1990 in Turkey to introduce Communist political view among Turks. In the same year, when it was preparing to participate in general election, Principal State Counsel of Court of Cassation applied to the Constitutional Court for an order dissolv-

[49] see Hans Kelsen, *Pure Theory of Law* (Max Knight tr, first published 1934, University of California Press 1978).
[50] Pierce (n 13) 1756.
[51] *United Communist Party of Turkey* (n 20).

ing it. In 1991, the Constitutional Court correspondingly dissolved it. It was accused of having unpermitted word 'communist' into its name. Besides, it was alleged that its programme contained statements likely to undermine the territorial integrity of the State and the unity of the nation breached the Turkish Constitution and Law on Political Parties. The Constitutional Court noted that founding documents refer to two nations: the Kurdish nation and the Turkish nation. According to the Constitutional Court, it could not be accepted that there are two nations within the Republic of Turkey whose citizens, whatever their ethnic origins are, are assumed to be Turkish nationals.

The Strasbourg Court used the principle 'necessary in a democratic society' as a key criterion to undermine the dissolution of *TBKP*. The Court began to give some general explanation about what democratic society is. In this introductory part of the decision, the Court stressed the importance of political parties in view of their essential role to ensure pluralism and democracy in a democratic society.[52] It stated that free elections at reasonable intervals by secret ballot under conditions that will ensure the free expression of the opinion of the people in the choice of the legislature is a pillar of democratic society.[53] Besides, democracy is without doubt a fundamental feature of the European public order, realisation of human rights and common heritage.[54]

Democracy is regarded the best governmental regimes to meet public demands and to protect human rights. Still, the scope and pillars of democracy are hotly debated topics of political science. The Court played with political terms in political area as they are not contestable. One may claim that this point of view expresses just worldwide truth; nevertheless, it does not weaken elements of politics in the midst of sentences.

The Court considered that a political party's choice of name could not justify a measure as drastic as dissolution, in the absence of other relevant and sufficient circumstances. As for second reason, the Court said that one of the prin-

52 Ibid para. 43.
53 Ibid para. 44.
54 Ibid para. 45.

cipal characteristics of democracy is to offer remedies to country's problems through dialogue, without recourse to violence, even when they are irksome. From that point of view, there can be no justification for hindering a political group because it seeks to debate in public the situation of part of the State's population, in this case Kurdish, and to take part in the nation's political life in order to find solutions capable of satisfying everyone.[55] At the end, the Court unanimously found a violation of Article 11. This result pleased human rights jurists and defenders, because the Court explicitly gave preference to human rights and it did not take national security or public safety claims into account.

Later, the Court used the same reasoning and unanimously found violation of the Article in *Socialist Party*[56] and *Freedom and Democracy Party*[57] that were dissolved for being accused of undermining the territorial integrity of the State and the unity of the nation by focusing on Kurdish individual or collective human rights. To the Court, these political parties did not threat security of the State and did not implement a secret agenda in a way that ran counter to the Convention.[58]

Nevertheless, the tendency of the Court changed in *Refah Partisi and others*. *Refah Partisi (Welfare Party)* was founded in 1983. In 1997, while it was ruling the Country in a coalition as the major partner for one year, Principal State Counsel brought proceedings before the Constitutional Court to dissolve *Refah Partisi* that was accused of having become a centre of activities against the principle of secularism a primary pillar of Turkey. In the application, Counsel relied on various speeches by leaders and members, which indicated that among some of the party's objectives there were the introduction of sharia and theocratic regime. Before the Constitutional Court, it is defended that the prosecution relied on mere extracts from the speeches, distorting their meaning and taking them out of context. It also maintained that *Refah Partisi* had consistently observed the principle of secularism and respected all religious beliefs

55 *United Communist Party of Turkey* (n 19) para. 54-57.
56 (App.21237/93), 25 May 1998, (1999) 27 EHRR 51, 1998-III.
57 (App. 23885/94), 8 December 1999, (2001) 31 EHRR 674, ECHR 1999-VIII.
58 Patrick Macklem, 'Militant Democracy, Legal Pluralism and the Paradox of Self-Determination' (2006) 4 Int'l J. Const. L. 488, 507.

and consequently was not to be confused with political parties that sought the establishment of a totalitarian regime. However, in its judgment, the Constitutional Court dissolved the Party on the ground that it had become a centre of activities against the principle of secularism.

The decision of the Constitutional Court divided Turkish academics, media and public into two parts. It was absolute each sides tried to support their position by applying to political evidences. The Party applied to the Strasbourg Court to confirm violation of right to association.

The Strasbourg Court' Third Section at the first instance scrutinized the case.[59] The Court, as usual, reaffirmed the close relationship between democracy and the primordial role they play in a democratic regime. Then, despite their written statements, the Court said that the speeches of some members and leaders were imputable to the whole of the Party and those speeches showed Party's long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems. To the Court, these plans were incompatible with the concept of a democratic society. The Court ruled that Islamic rules and sharia are not democratic. In this context, penalty could be considered to meet this pressing social need emerged in Turkey. The Court therefore concluded that the interference could not be regarded as disproportionate in relation to such aims. There were thus convincing and compelling reasons justifying dissolution and the temporary forfeiture of certain political rights imposed on the other applicants. It followed that dissolution might be regarded as necessary in a democratic society within the meaning of Article 11.

The decision was accepted by majority votes and two judges had joint dissenting opinion. These two judges stated that there was nothing in its constitution or programme to indicate that *Refah Partisi* was other than democratic or that it was seeking to achieve its objectives by undemocratic means or that those objectives served to undermine or subvert the democratic and pluralistic and secular political system in Turkey. Besides, they stressed that the majority

[59] *Refah Partisi (The Welfare Party) and others v Turkey*, (App. 41340/98, 41342/98, 41343/98 and 41344/98) 31 July 2001, (2002) 35 EHRR 3.

decision is inconsistent with previous cases and introductory explanation in this decision too.

Before Grand Chamber gave its decision, a very tragic event happened: 9/11 terrorists attack to New York Twin Tower that brutally killed thousands of innocent people. After this terrorist attack, people became very sensitive about security, Islamic extremism and religious terrorism. Governments immediately took tough measures to secure their nationals against this new treat. Across Europe, attitude to Muslims changed very rapidly and dramatically.[60] National judges began to enlarge the margin of appreciation of governments and empower security forces to be able to succeed 'war on terrorism'.

In these circumstances, Grand Chamber unanimously found no violation and approved the Chamber decision. Unlike previous cases, the Court based its decision on the evidence derived from speeches, public statements and opinion poll rather than *Refah Partisi*'s official programme.[61] There are two descending opinion on details. The first one argued the way of writing of two paragraphs.[62] The other one did not accept some of the Court's terms related to religion and its values such as 'Islamic fundamentalism', 'totalitarian movements' and 'threat to the democratic regime'. The latter Judge said that an international human rights court should avoid using such political terms in its decisions.

Unlike *TBKP*, in *Refah Partisi* decision the Court ignored its previous case law and preferred security to democracy and human rights. It is said that despite naive evidences that *Refah Partisi* was undermining secularism, the Court arbitrarily played as a political actor. The decision broke naturally out an academic debate. Some approve the decision, while some found it an unfortunate, wrong and disproportionate step.[63] Besides, it is believed that the Grand Chamber decision that is assumed to be a radical intervention in the democratic

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60 Krassimir Kanev, 'Muslim Religious Freedom in the OSCE Area After September 11' (2004) 15 Helsinki Monitor 233.

61 Ibid 239.

62 *Refah Partisi (The Welfare Party) and others v Turkey*, (App. 41340/98, 41342/98, 41343/98 and 41344/98) 13 February 2003 [GC], (2003) 37 EHRR 1, ECHR 2003-II.

63 Kevin Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case' (2004) 1 Essex Human Rights Review 1, 3.

process was widely influenced by 9/11.[64] Moreover, it is claimed that this decision is a clear endorsement of militant democracy and gives this abnormal type of democracy an international legal base.[65] The result and the Court's decision can be personally supported; however, this is still a political stand.

5. Conclusion

The language of legal materials contains many political, social and moral terms. This is not a deliberate choice; it is an inevitable result of legislation and jurisdiction. These terms are certainly ambiguous. The ambiguity of legal texts requires interpretation by jurists. When they apply to these terms, to some extent their political affiliation activates. Thus, politics takes its place in court decisions.

This inference can be observed from the case law of the Strasbourg Court on dissolution of political parties. Not only when it protected communist and ethnic parties but also when it externalized Islamic party, it played a political role. Because it used the political terms such as democracy and pluralism, it defined politically contested issues and it selected one solution from others in accordance with dominant political paradigm.

Legal reasoning is an integral part of decision-making in law. It helps to reduce the possibility of political decision. It also improves objectivity, neutrality and predictability in law. Therefore, it is not wrong to claim that the refusal of legal reasoning is a barrier before a better judiciary.[66] Legal practice without its particular logic may result in judicial activism.[67] Moreover, it may collapse legal expertise and destruct legal profession in that not only jurists but also public could lost their trust in law and its practice.[68] Hence, it can be said that existence of politics is not a fault of legal formalism.

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64 Ibid 9.

65 Paul Harvey, 'Militant Democracy and the European Convention on Human Rights' (2004) 29 E. L. Rev. 407, 418.

66 Lammon (n 38) 298.

67 Neil Duxbury, 'The Theory and History of American Law and Politics' (1993) 13 Oxford J. Legal Stud.249, 250.

68 Kronman (n 6) 264.

Despite of this fact, it is not rationally proved that law is purely a form of politics. The empirical studies that support this thesis, as it is done in this essay, focused on high court's most controversial decisions. The other decisions of the same courts and lower courts are not examined. If law is a form of political, this thesis should be correctly applied to all courts as well. It is claimed that such decisions cannot be often found given in lower courts' decisions.[69] It might be better to admit political judging in courts, but such actions are exceptional rather than being a rule; otherwise, raison d'être of law could disappear.[70]

Politics in law is a result of the nature of law and it cannot be thoroughly removed. This outcome is not delinquency of jurists. They are not more political than other social scientists. Likewise, it is not rational to put the law-is-political theory into legal practice and to become hardened to this presumption. However, it cannot be ignored that some decisions of courts are exceptionally affiliated by politics.

In conclusion, the legal formalism or conventional legal reasoning should be sustained. This way prevents jurists from arbitrariness and nihilism. The separation of law from politics is aimed to prevent arbitrariness in judiciary and there is so little argument about its necessity.[71] Neutrality and autonomy of law represents the level of rule of law and improvement of democracy. The more democracy and rule of law is improved, the more law is independent and objective.

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69 Shapiro and Sweet (n 4) 34.
70 Cross (n 1) 263.
71 Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (HUP 1986) 111.

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CHAPTER 23, JUDICIARY AND FUNDAMENTAL RIGHTS; THE ENGINE FOR THE REFORM PROCESS IN TURKEY

23. Fasıl, Yargı ve Temel Haklar; Türkiye'de Reform Sürecinin Lokomotifi

Sıtkı Hasan SÖYLEMEZOĞLU *

ABSTRACT

The European Union accession process is an important motivation factor regarding the improvements on the rule of law and fundamental rights in Turkey. In order to launch the accession negotiations, Turkey had to satisfy the Copenhagen political criteria sufficiently. This target triggered a transformation process enhancing all the rights and freedoms and thus positively affecting all segments and individuals of the society. In this process the fundamental laws were rewritten and the Constitution of the Republic Turkey and all the legislation regarding the rule of law and fundamental rights were changed. More importantly, a mentality change started among the judges, prosecutors, law enforcement officials and public servants. Besides, Turkey resumed the reform process after the launch of accession negotiations irrespective of the slowness in the process.

In today's Turkey the human rights problems of fifteen years ago stemming from both the legislation and implementation no longer exist. However, there are still steps to be taken mainly in respect of better implementation of the legislation.

Key Words: judiciary, fundamental rights, Copenhagen political criteria, accession negotiations,

ÖZET

Avrupa Birliği'ne katılım süreci, Türkiye'de hukuk devleti ve temel hakların gelişiminde önemli bir motivativasyon unsurudur. Katılım müzakerelerini başlatabilmek bakımından Türkiye Kopenhag siyasi kriterlerini yeterince karşılamak durumundaydı. Bu hedef, tüm haklar ve özgürlükleri artıran ve bu nedenle toplumun tüm katmanlarını ve bireylerini olumlu olarak etkileyen bir dönüşüm sürecini tetikledi. Bu süreçte temel kanunlar yeniden yazıldı ve Türkiye Cumhuriyeti Anayasası ile hukuk devleti

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ve temel hakları ilgilendiren tüm mevzuat değişti. Daha önemlisi hakimler, savcılar, kolluk yetkilileri ve kamu görevlileri arasında bir zihniyet değişimi başladı. Bunun yanında, Türkiye katılım müzakereleri başladıktan sonra süreçteki yavaşlığı hesaba katmaksızın reform sürecine devam etti.

Bugünün Türkiye'sinde 15 yıl öncesinin mevzuat ve uygulamadan kaynaklanan insan hakları sorunları mevcut değildir. Bununla birlikte, büyük oranda mevzuatın daha iyi uygulanmasına ilişkin olarak, hala atılması gereken adımlar bulunmaktadır.

Anahtar kelimeler: yargı, temel haklar, Kopenhag siyasi kriterleri, katılım müzakereleri

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I. THE EFFECTS OF JUDICIARY AND FUNDAMENTAL RIGHTS TO THE REFORM PROCESS OF TURKEY BEFORE THE ACCESSION NEGOTIATIONS

A. Overview on the Reform Process after the Candidacy Status of Turkey

The judiciary and fundamental rights have always an important place and role in Turkey-EU relations. After Turkey's candidacy status was declared by the Leaders of the EU in the 1999 Helsinki European Council, Turkey entered to a transformation process slowly in the beginning between 1999 and 2000, but with an increased momentum after 2001[1].

In this transformation processs "meeting the Copenhagen Criteria" had become a priority for Turkey to launch accession negotiations for the membership to the EU. This phrase became to such an important degree that it constituted the political agenda and even entered into the daily life of the Turkish society for the era.

The change required both political will and public support of the society. In 16 December 2001 Bülent Ecevit the Prime Minister of the time stated that

[1] The Chapter of Judiciary and Fundamental Rights in the EU Accession Negotiation Process, The Project on Judiciary and Fundamental Rights for Lawyers, February 2013, Ankara, Publication of Ministry of EU Affairs with supports of the Ministry of Justice and Turkey Bar Association page 50.

"the will required for the reforms exists in our public and Parliament. We can meet the Copenhagen Criterion more rapidly than expected by most of the circuits"[2]. In another statement Mr. Ecevit said that "We are taking steps by our own towards the direction of the Copenhagen Criterion and will continue to do this"[3].

On 17 December 2002 as the Predident of Justice and Development Party of the time while his party was ruling the country, Recep Tayyip Erdoğan emphasized the importance of internalizing Copenhagen Criterion; "Our aim is to make Copenhagen Criterion as Ankara Criterion"[4].

As Prime Minister of Turkey, Recep Tayyip Erdoğan emphasized the significant role of meeting the Copenhagen Criterion for launching the EU negotiations; Accomplishing to fulfill the Copenhagen Criteria, Turkey wants to receive the date for the accession negotiations before 2004[5].

The opposition parties approach was also supportive to the EU process. The main opposition party leader at the time Deniz Baykal stated that "Accepted as a candidate country, if meets the 93 Copenhagen Criterion there is no reason for Turkey to start the membership negotiations"[6].

The EU Commissioner Gunther Verheugen responsible for Enlargement of the time also entered into the discussion of Turkey's meeting the Copenhagen Criterion; "we want Turkey to be a stable democracy, respecting the rule of law and human rights." In his speech the Commissioner outlined the expectations regarding the "political reform process" as revision of the Turkish Penal Code, a new Turkish Civil Code, enhancing independence of the judiciary, boosting the freedom of expression and freedom of association[7].

During the years between 1999 and 2005, there was suspicion about open-

2 Yeni Asır Daily, http://ya2001.yeniasir.com.tr/12/16/index.php3?kat=ana&sayfa=ilks2&bolum=gunluk

3 Hurriyet Daily, 20 March 2010 http://hurarsiv.hurriyet.com.tr/goster/printnews.aspx?DocID=-141273

4 Hurriyet Daily, http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=116209

5 Hurriyet Daily, May 21, 2003, http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=148162

6 http://www.mynet.com/haber/politika/ozel-neden-yok-17283-1

7 See the website of EU Commission, http://europa.eu/rapid/press-release_IP-00-246_en.htm

ing accession negotiatons for Turkey. There was a debate and concern in the Turkish society that regardless of the reforms achieved in Turkey the EU would apply double standards and even if Turkey fulfils the Copenhagen Criterion negotiations would never start. The EU Commission officials, as a response to overcome the suspicions in the Turkish society, announced in their public statements that Turkey would be acted fairly and in case that the conditions were met, negotiations would start without application of double standards.[8]

Remembering the sociopolitical ambience is useful to understand in which conditions Turkey achieved the reforms. In this regard the transformation process of Turkey has not been so easy.

B. The Copenhagen Political Criteria and the Importance of the Judiciary and Fundamental Rights

According to the Copenhagen Criterion[9] set up in the European Council in Copenhagen in 1993, a new Member State should meet three criteria:

"political: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;

economic: existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union;

acceptance of the Community *acquis*: ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union."

The European Council was competent to open negotiations, should the political criterion was satisfied.

The political criteria included three elements; democracy, the rule of law

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8 http://europa.eu/rapid/press-release_SPEECH-99-151_en.htm Gunther Verheugen Member of the Commission for Enlargement **Speed and Quality" at the conference "The Second Decade towards a New and Integrated Europe" Den Haag, 4 November 1999** "But I repeat: there can be no question of opening negotiations until Turkey has completed the reforms needed to satisfy the Copenhagen political criteria"

9 See the website of EU Commission http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria_en.htm

and human rights and respect for protection of minorities. Since this article is about the judiciary and fundamental rights we will focus on the rule of law and human rights and respect for protection of minorities. Thus, the other element of the political criteria and other Copenhagen Criterion will be skipped.

Among all the others, the rule of law (judiciary) and human rights and respect to minorities (fundamental rights) have always been the core issues for satisfying the Copenhagen Criterion according to the importance attached in Regular Reports on Turkey's Progress Towards Accession.

In line with the Copenhagen political criteria, from the very beginning of the publishing of the Regular Reports about Turkey, the issues concerning judiciary and fundamental rights were handled under the title of the political criteria in the section of Criteria for Membership.[10]

Starting from the 2002 Regular Report, the legislation adopted and developments regarding judiciary and fundamental rights were also mentioned briefly under "Chapter 24: Co-operation in the field of justice and home affairs" of "Section 3: Ability to assume the obligations of membership" with a reference to "political criteria" section. Therefore in order to understand the situation regarding the judiciary and fundamental rights in the Regular Reports on Turkey it became necessary to check both of the sections mentioned above. As from 2005, the issues regarding judiciary and fundamental rights were separated from the Chapter 24 with its new title *"Justice, Freedom and Security"* (in the section of "Ability to assume the obligations of membership") and a new chapter was appeared; Chapter 23, Judiciary and Fundamental Rights.[11]

The pages allocated to judiciary and fundamental rights, in the Regular

[10] See1999-2000-2001 Regular Reports. The section of "Criteria for membership" included "1. Political criteria" and sub titles of "1.1. Democracy and the rule of law" and "1.2 Human rights and the protection of minorities". In democracy and the rule of law; the improvements regarding the legislation and implementation of the Parliament, the executive, the judiciary, anti corruption measures and National Security Council were mentioned. Regarding the improvements on human rights and the protection of minorities; with the same approach, new legislation and implementation of civil and political rights, human rights protection instruments, economic, social and cultural rights and minority rights and protection of minorities were explained.

[11] See 2005 Regular Report on Turkey

Reports during the years is an indicator for the weight and prominence of the Chapter 23.[12] As an example, in 2010 Regular Report on Turkey, Political Criteria was 32 pages and Chapter 23 was 6 pages, while the total of the Report was 98 pages. In 2013 Progress Report, the Chapter 23 was 21 pages and the Political Criteria was 13 pages while the whole Report was 81 pages. So speaking about the 2013, nearly one fourth of the report was about progress on judiciary and fundamental rights.

Needless to say other items in the Copenhagen criterion were also important such as the standard of democracy in Turkey was also a core issue.[13] However, most of the reforms were expected in the fields of judiciary and fundamental rights according to reports and criticisms of the EU and after the start of accession negotiations between EU and Turkey the Chapter 23, Judiciary and fundamental rights remained to be a topical subject.

The gravity of the judiciary and fundamental rights in the accession negotiations was highlighted by the EU officials in their statements. The reform process was accepted as the engine behind the accession process of Turkey[14] by the EU Commissioner for Enlargement several times. The phrase "reform process" mostly meant the items under the scope of Chapter 23. The European Commissioner for Enlargement and European Neighbourhood Policy Stefan Füle defined the Chapter 23 as "perhaps the most important Chapter" on May 17, 2012 in the "Chapter 23 Kick-Off Meeting for the Positive Agenda" in Ankara[15].

C. Developments Related to Judiciary and Fundamental Rights before

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12 See Regular Reports on Turkey, Political Criteria and Chapter 23 sections.

13 The first democratic elections took place in 1946 in Turkey. However, 1960, 1971 and 1980 military interventions and 1997 post modern intervention caused the standard of democracy under question.

14 http://ec.europa.eu/commission_2010-2014/fule/headlines/news/2010/05/20100511_2_en.htm Commissioner Štefan FÜLE, at EU-Turkey Association Council press conference on 10 May 2010 in Brussels

15 See website of the EU Commission http://www.avrupa.info.tr/resource-centre/news-archive/news-single-view/article/stefan-fuele-european-commissioner-for-enlargement-and-european-neighbourhood-policybr-speech.html, Speech at the Chapter 23 Kick-Off Meeting with Turkey Launch of the Positive Agenda with Turkey

the Accession Negotiations

In the 1999 Helsinki European Council the Leaders of the EU decided that Turkey is an equal candidate country to EU. Afterwards, the reform process in Turkey was started with Constitutional and legislative amendments as well as efforts to improve the implementation. The legislative amendments were mostly targeted at strengthening the rule of law and improving fundamental rights in Turkey. As explained above, the main idea was to satisfy the Copenhagen political criteria to launch accession negotiations without delay.

The reform process before the negotiations can be separated to two time periods; the first time period is 1999 and 2000 and the latter is 2001 and 2005.

Between 1999 and 2000 the EU reforms were started but slowly. Minor changes could be achieved.

In the second time period, between 2001 and 2005, with the adoption of the "Accession Partnership with the Republic of Turkey" by the Council Decision on March 8, 2001[16], the reform process gained momentum. Simply, this was the guideline for Turkey on principles, priorities, intermediate objectives and conditions for the accession process of Turkey-[17]. As a response to that document Turkey adopted the "Turkish National Programme for the Adoption of The Acquis"[18] by a decision of the Council of Ministers on March 24, 2001. It was a commitment of Turkey declaring that the Turkish legislation would be harmonized with the EU Acquis in line with the Accession Partnership document.

Adoption of these two important documents by the EU and Turkey respectively contributed the pace of the reform process in Turkey. Between the adoption of the National Programme to the launch of the accession negotiations on October 3, 2005, four Constitutional amendments, eight Harmonization Pack-

16 See the website of the Commission http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001D0235&from=EN, The Accession Partnership document than revised in 2003, 2006 and 2008.

17 Supra note 1 page 44, the National Programme than revised in 2003 and 2008.

18 See website of the EU Affairs Ministry, http://www.abgs.gov.tr/index.php?p=195&l=2

ages and various Laws were adopted by the Turkish Parliament as explained below.

1. The Constitutional amendments:

a. October 3, 2001 Amendment[19]

After inauguration of the 1982 Constitution, this was the most comprehensive[20] and radical change with amending 31 articles and the preamble of the Constitution. The motivation of the change was the EU candidacy period and it was the first serious step towards accession negotiations.

The amendments occurred in Chapter Two, "Rights and Duties of the Individual", Chapter Three, "Social and Economic Rights and Duties" and Chapter Four, "Political Rights and Duties" were mainly focused on approximation of provisions in the Turkish Constitution with the European Convention on Human Rights (ECHR) as much as possible. However, some articles were amended again later in other amendments to achieve this purpose.

The titles of amended articles show the extent and significance of the reform;

1. The preamble,
2. In Chapter Two, Rights and Duties of the Individual; Restriction of fundamental rights and freedoms (Art.13), Prohibition of abuse of fundamental rights and freedoms (Art.14), Personal liberty and security (Art.19), Privacy of private life (Art. 20), Inviolability of the domicile (Art. 21) Freedom of communication (Art. 22), Freedom of residence and movement (Art. 23), Freedom of expression and dissemination of thought (Art. 26), Freedom of the press (Art. 28), Right to use media other than the press owned by public corporations (Art. 31), Freedom of association (Art. 33), Right to hold meetings and demonstration marches (Art. 34), Freedom to claim rights (Art. 36), Principles relating to

[19] Law No: 4709, (Official Gazzette: 17/10/2001- 24556-second)

[20] Levent Gönenç, The 2001 Amendments to the 1982 constitution of Turkey, Ankara Law Review, Vol: 1, No: 1, p 89

offences and penalties (Art. 38), Protection of fundamental rights and freedoms (Art. 40),

3. In Chapter Three, Social and Economic Rights and Duties; Protection of the family, and children's rights (Art. 41), Expropriation (Art. 46), Right and duty to work (Art. 49), Right to organize unions (Art. 51, Provision of fair wage (Art. 55), The extent of social and economic duties of the State (Art. 65),

4. In Chapter Four, Political Rights and Duties; Turkish citizenship (Art. 66), Right to vote, to be elected and to engage in political activity (Art. 67), Principles to be observed by political parties (Art. 69), Right of petition, right to information (Art. 74),

7 articles in other Chapters were also amended[21] and in general almost all fundamental freedoms were rearranged and strengthened in the Constitution.

b. December 27, 2002 Constitutional Amendment[22]

Two articles related to eligibility to be a deputy (Article 76) and deferment of elections for the Grand National Assembly of Turkey and by-election (Article 78) were amended in order to improve the conditions for being elected as a member of the Parliament.

c. May 7, 2004 Constitutional Amendment[23]

It was the eve[24] for the European Council to decide on starting negotiations with Turkey and in total ten articles of the Constitution were amended towards approaching the target of membership to the EU..

So, it was necessary for Turkey;

- to abolish the death penalty including war era (amendments in Articles 15, 17, 38 and 87)

21 Articles 87, 89, 94, 100, 118, 149 and provisional article 15 of the Constitution.
22 Law No: 4777, (Official Gazzette: 31/12/2002-24980-3.)
23 Law No: 5170, (Official Gazzette: 22/05/2004-25469)
24 The European Council decided to launch negotiations with Turkey on December 17, 2004.

- to abolish the State Security Courts, as a remnant of the 1982 Constitution of military intervention (amendment in Article 143)

- to provide equality of genders in Law and practice (amendment in Article 10)

- to introduce, international agreements duly put into effect have the force of law and in case of conflict between domestic law and international agreements regarding fundamental rights, international agreements will prevail that ensured a better protection of human rights[25] (amendment in Article 90).

- to improve freedom of media with the amendment of Protection of printing facilities (amendment in Art. 30)

Also, the provisions on Superior body of Higher Education (Article 131) and Court of Accounts (Article 160) were amended.

These amendments were utmost important since death penalty was abolished including war era and the amendment in Constitution article 90 provided accord with the democratic opening trend in the world to ensure judges to apply the international agreements regarding fundamental rights without hesitation where they deem there is discrepancy with the domestic law[26].

d. 21 June, 2005 Constitutional Amendment[27]

With the amendment Radio and Television High Council, institutions of radio and television, and public affiliated news agencies were rearranged (Article 133).

Nearly one third of the Constitution was amended in the candidacy period before the accession negotiations launched in 2005. Overall, the Constitutional amendment packages were a strong reflection of the public opinion[28] and

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25 Serap Yazici, A Guide to the Turkish Public Law Order and Legal Research, Published in May-June 2011 http://www.nyulawglobal.org/globalex/Turkey1.htm

26 Kemal Baslar, The Issue of Harmonizing Turkish Constitution in the European Union Accession Process http://www.turkishweekly.net/turkce/makale.php?id=51 (January 28, 2005), 5, pp 13-14

27 Law No: 5370, (Official Gazzette: 23/06/2005-25854)

28 Antonija PETRIČUŠIĆ, Ersin ERKAN, Constitutional Challenges Ahead the EU Acces-

"broad-based political will"[29] to join the EU.

2. The Harmonization Packages

When assessed together with the Constitutional packages and other legislation adopted, the harmonization packages created a very promising environment among the Turkish society that Turkey can reach the target of EU membership. The packages explained below is a good indicator of to what extent the political actors and society supported the EU process.

In total more than 220 articles were changed or abolished. Certain laws like the Law on Associations, the Law on Meetings and Demonstartion Marches and the Law on Press were amended partially again and again to widen the freedoms. Likewise, most of the articles of the Turkish Criminal Code and Criminal Procedure Code were also amended. All the cited Laws were re-written and adopted by the parliament before the European Council gave green signal to start the negotiations.

The harmonization packages were omnibus laws and therefore included changes in several provisions of different laws, however the target was the same; to fulfil the Copenhagen political criteria. The eight harmonization packages are explained as follows:

a) The First Harmonization Package[30] was entered into force on February 19, 2002

The Law amended various legislations; to improve the freedom of expression, the infamous Article 312 of the Turkish Criminal Code on praising crimes or encouraging public to disobedience or provoking the public to hatred on the basis of class, race, religion, sect or territory and the provisions of insulting

sion: Analysis of the Croatian and Turkish Constitutional Provisions that Require Harmonization with the Acquis Communautaire International Law and Politics (Uluslararası Hukuk ve Politika) Volume 6, Issue: 22 page133-151, 2010

29 Political Reforms in Turkey, Republic of Turkey, Ministry of Foreign Affairs, Secretariat General for the EU Affairs, Ankara, 2007, pages 4-5

30 Law No: 4744, (Official Gazzette: 19/02/2002- 24676)

the state and government[31]and propaganda of a terrorist organization[32] were amended to stipulate more difficult conditions for formation of the crime. The Law on State Security Courts and the Criminal Procedure Code[33] were changed to reduce the duration of incommunicado detention period.

b) The Second Harmonization Package[34] was entered into force on April 9, 2002.

With an overall view the package amended 23 articles in 8 Laws[35]. Shortly, the package aimed at strenghtening the exercise of certain fundamental rights namely the freedom of expression, freedom of association and freedom of peaceful assembly and the rule of law in Turkey.[36]

c) The Third harmonization Package[37] was entered into force on August 9, 2002.

The package was very comprehensive affecting 10 Laws[38] and 38 articles. The amendments in these Laws were crucially important for the launch of the negotiations since death sentence was abolished with several exceptions. Apart from this, 38 articles in various Laws were amended to harmonize the Turkish legislation with the ECHR and ECtHR standards. It is noteworthy that the package aimed at meeting the criticisms coming from the EU Commission and widened the context of the freedoms. Regarding the Law on Associations

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31 The former Turkish Criminal Code, Article 159

32 The Anti-terror Law Articles 7 and 8

33 Article 16 The Law on State Security Courts and article 128 of the Criminal Procedure Code

34 Law No: 4748, (Official Gazzette: 09/04/2002-24712)

35 These were; the Law on Press, the Law on Meetings and Demonstration Marches, Law on Political Parties, Law on State Security Courts, Law on Administration of Provinces, Law on Civil Servants, Law on Establishment, Duties and Competences of the Gendarmarie (Law No: 2803)

36 Political Reforms in Turkey, page 6

37 Law No: 4771, (Official Gazzette: 09/08/2002- 24841)

38 Turkish Criminal Code (Law No: 765), Law on Associations (Law No: 2908), Law on Meetings and Demonstration Marches (Law No: 2991), Law on Foundations (Law No: 2762), Civil Procedure Code (Law No: 1086), Criminal Procedure Code (Law No: 327/A), Law on Radio and television Broadcasting (Law No: 3984), Law on Press (Law No:5680), Law on Duties and Competences of Police (Law No: 2559) and Law on Foreign Language Training

11 articles, in the Law on Press 10 articles and in the Law on Duties and Competences of Police 6 articles were amended.

d) The Fourth Harmonization Package[39] was entered into force on January 11, 2003 and amended 39 articles in 17 Laws[40].

The very long list on amended Laws given in the footnote can be considered as a result on how much Turkey committed to the EU bid. As the amendments are on several fields and too detailed it is easier to sum up them as they targeted to enhance the freedoms in certain fields as well as "to strengthen the safeguards against torture and mistreatment".[41]

e) The Fifth Harmonization Package[42] was entered into force on February 4, 2003.

The amended provisions extended the scope of re-trail on the basis of the ECtHR judgments; in the Criminal Procedure Code and the Civil Procedure Code were amended to ensure that all court judgments can be subject to re-trial without exemption. Also, article 82 of the Law on Association replaced prison sentences with fines for certain offences.

f) The Sixth Harmonization Package[43] was entered into force on July 19, 2003.

The law amended 20 articles in 10 Laws[44] and abolished the articles regard-

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39 Law No: 4778, (Official Gazzette:11/01/2003-24990)

40 These were: Turkish Criminal Code (Article 245), Criminal Procedure Code (Article 316), Law on Foundations (Article 1), Law on Press (Article 15), Law on Stamp Tax (Annexed Article 1), law on Political Parties (Articles 8, 11, 66, 98, 100, 102, 104 and 111), Law on Parliamentary Elections (Article 7, 11 and 39), Law on Associations (Articles 5, 6, 11, 12, 16, 18 and 44), Law on Local Administrations (Article 8), Law on Usage of Right to Petition (Articles 1, 2, 3, 4, 7, 8) Law on Human Rights Examination Commission (Article 7), Law on Judicial Records (Articles 5 and 8), Turkish Civil Code (Articles 91 and 92), Law on State of Emergency Regional Governorship (Article 3), Law on Trial of Civil Servants and Public Officials (Article 2), Law on Establishment and Trial Procedures of State Security Courts (Article 16), Law on Establishment and Trial Procedures of the Juvenile Courts (Article 34).

41 Political Reforms in Turkey, page 11

42 Law No: 4793, (Official Gazzette:04/02/2003-25014)

43 Law No: 4928, (Official Gazzette: 19/07/2003-25173)

44 The Turkish Criminal Code (articles 453,462), the Law on Foundations (provisional

ing capital punishment with the exception of war era and state of imminent threat of war.

The package broadened the scope of the freedom of association and freedom of expression and media. The right to elect and to be elected was also enhanced with the new provisions and the definition of the terror became more concrete.

g) The Seventh Harmonization Package[45] entered into force on August 7, 2003

The Package amended 22 Articles in 8 Laws[46]. Several provisions on freedom of expression, freedom of association, freedom of peaceful assembly were amended to harmonize the Turkish law with the ECtHR and ECHR standards.

h) The Eighth Harmonization Package[47] entered into force on July 14, 2004.

In line with the 2004 Constitutional Amendment on abolishing the death penalty including the war era, the Law amended all remaining provisions to abolish the death penalty from the Laws.[48]

Along with the other amendments in the legislation and the Constitution, the eight harmonization packages contributed to Turkey to reach the standards of a modern democracy to a large extent. As seen above certain reforms like abolishing the death penalty could not be achieved in once but in several steps.

article 2), The Law on the Basic Provisions on Elections and Electoral Rolls (article 55/A, 149/A), the Law on Census (Article 16), the Law on Administrative Procedure (article 53, provisional article 5) , the Law on State Security Courts (article 16) the Law on Construction (Annexed article 2), the Law on Cinema, Video and Music Works (article 3, 6 and 9), The Law on Judicial Records (article 9), the Law on High Board for Radio and Televisions (articles 4, 15, 32) And the Anti-terror Law (articles 1, 8 and 10).

45 Law No:4963 (Official Gazzette:07/08/2003-25192)

46 Turkish Criminal Code (articles, 159, 169, 426 and 427) , Criminal Procedure Code (Annexed article 7), Establishment and trial Procedure of the Military Courts (article 11), Law on Court of Accounts (Annexed article 12) , Law on Establishment and Trial Procedures of the Juvenile Courts (article 6), Law on Associations (articles 1, 4, 8, 10, 16, 17, 31 and 38), Law on Meetings and Demonstration Marches and Law on Foreign Language Training (article 2)

47 Law No:5218 (Official Gazzette: 21/07/2004-25529)

48 The Law amended 67 Articles which included the phrase death sentence in various Laws including Turkish Criminal Code, Criminal Procedure Code.

This can be considered as a result of the level of readiness and assumption of the parliament and the society. Although there was reaction to some of the reforms from different segments, the majority of the society had vast expectations from the EU membership. Hence, the reforms required big efforts to convince the public.

3. The New Codes and Laws

After the foundation of the Republic of Turkey in 1923, the fundamental laws were adapted from various European countries in a few years. As an example, the Civil Code was adapted from the Switzerland and the Criminal Code was adapted from the Italy. However, these Codes became oldfashion in time and the EU candidacy period was a perfect opportunity for Turkey to change them.

The change in fundamental laws started with enactment of the Turkish Civil Code on November 22, 2001[49]. The new Code brought many new and modern institutions like gender-equality, protection of the children and vulnerable persons and a new perspective for freedom of association.[50] However, this time the Code were drafted by a Commission formed with participation of academicians, practitioners from the courts and bureucrats of the Ministry of Justice.

The Turkish Criminal Code[51] and the Criminal Procedure Code[52] were enacted respectively, September 26, 2004 and December 4, 2004. The Criminal Code was drafted to reflect the modern policy of punishment. It aimed at strenghtening of the rule of law and fundamental rights and freedoms in order to to meet the Copenhagen Political Criteria. The Criminal Procedure Code targeted to meet the European Court of Human Rights (ECtHR) standards and introduced new systems like return of indictment, judicial police, cross examination and conciliation.

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49 Law No: 4721 (Official Gazzette: 08/12/2001-24607)
50 Political Reforms in Turkey, page 6
51 Law No. 5237, (Official Gazette: 12/10/2004-25611)
52 Law No: 5271, (Official Gazette: 17/12/2004- 25673)

After several amendments in the previous laws, the new Law on Press[53] and the new Law on Associations[54] approximating the Turkish legislation with the ECHR and ECtHR standards and improving freedoms to meet the political criteria entered into force on June 24, 2004 and on November 23, 2004 respectively. The Law on the Protection of Children[55]and the Law on the Right to Information[56] were also substantial steps.

4. The Legislation Enhancing the Institutional Capacity

A number of new legislation was enacted by the Turkish Parliament to enhance the institutional capacity to undertake and implement the EU acquis and to satisfy the political criteria.

As an important step to show the decisiveness of Turkey, the General Secretariat for the EU Affairs was established by a decree of Council of Ministers on March 19, 2001 to coordinate the EU affairs among the public institutions.

To establish a new remedy for citizens and to form three tier trial system in the judiciary, the Law on the Regional Courts of Appeal[57] was enacted by the Parliament. The law entered into force in June 2005, with two years transition period foreseen in the Law. However, the Courts are not functional yet as of June 24, 2014.

To strenghten the standards in respect of penitentiary institutions three new mechanism were set up by the Laws; the criminal enforcement judges became functional[58] as a new judicial system, Monitoring Boards for Penitentiary Institutions were established[59] to follow the prisons as an outsider look of the civil society and Probation Centers were established to serve ex-prisoners to easy

53 Law No: 5680, (Official Gazette: 07/06/2007-26545)
54 Law No: 5253, (Official Gazette: 23/11/2004-25649)
55 Law No: 5395, (Official Gazette: 15/07/2005-25876)
56 Law No: 4982, (Official Gazette: 24/10/2003-25269)
57 Law No: 5235, the Law on Establishment, Duties and Jurisdictions of Judicial Courts of First Instance and Regional Judicial Courts, (Official Gazette: 07/10/2004-25606)
58 The Law on Enforcement Judges, Law No: 4675, (Official Gazette: 23/05/2001-24410)
59 The Law on Penal and Detention Houses Monitoring Boards, Law No: 4681, (Official Gazette: 21/06/2001-24439)

the process of gaining them into the society[60]. Additionally, Training Centres for the Prison staff were established to boost the standards in prisons.[61] The Law amending the Law on Execution of Sentences[62] was also entered into force in 2001.

The Turkey Justice Academy was established[63] to train judges, prosecutors as well as candidate judges, lawyers and notaries and by this way to increase the quality of the Turkish judiciary.

Family courts were established [64] in provinces with a population of more than 100.000 inhabitants. The Law on Establishment, Duties and Trial Procedures of Juvenile Courts was amended with the Law No, 5036 to enable establishment of juvenile courts. These were steps to cover the criticisms of the EU Commission, as specialized courts were encouraged in Regular Reports[65].

The Law amending the Law on Public Employees' Trade Unions, the Law on Social Insurance and the Law on the Social Insurance Institution was entered into force on 6 July 2004.

5. Other Legislation Strenghtening the Rule of Law and Fundamental Freedoms

The Law amending the Military Criminal Code and the Law on the Establishment and Trial Procedures of Military Courts were entered into force on 29 January 2004 to ensure alignment with the constitutional amendments of 2001. The State Security Courts were abolished[66] to end the proceedings contrary to ECHR and ECtHR standards. These courts were replaced by the Specially

60 The Law on Establishment of Probation Centers, Law No:5402 (Official Gazette: 20/07/2005-25881)

61 Law on Establishment of Prison Staff Training Centres, Law No: 4769, (Official Gazette: 02/08/2002- 24834)

62 Law No: 4786, (Official Gazzette: 15/01/2003- 24994- second)

63 Law No: 4954, The Law on Justice Academy of Turkey, (Official Gazette: 31/07/2003-25185)

64 The Law on Establishment, Duties and Trial Procedures of Family Courts Law No: 4787, (Official Gazzette: 18/01/2003-24997)

65 See Regular Reports 2002, 2003 and so on.…

66 Law No: 5190, (Official Gazzette: 30/04/2004-25508)

Authorized Courts[67] with partially new procedural rules.

The Law on Compensation of Losses Resulting from Acts of Terror and Measures Taken Against Terrorism[68] was adapted by the Parliament to compensate damages by way of reaching agreements with the victims of terror acts. A Strategy Document called "The Measures on Village Return and Rehabilitation Project" was issued by the Council of Ministers on August 17, 2005.

The Law on Establishment of Council of Ethics for Public Employees[69] was entered into force on 8 June 2004.

The Bylaw on broadcasting in different languages and dialects, traditionally used by Turkish citizens in their daily lives, by public and private radio and television corporations was published in the Official Gazette on 25 January 2004.

Turkey ratified very important Conventions and Protocols and as a step forward to accession negotiations between 2002 and 2004;

- The Council of Europe Criminal Law Convention on Corruption,[70]

- The1969 UN Convention on the Elimination ofAll Forms of Racial Discrimination,[71]

- The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,[72]

- The Protocol No: 6 to the European Convention on Human Rights concerning the abolition of the death penalty,[73]

- The Optional Protocol to the Convention on the Rights of the Child on the

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67 The Specially Authorized Courts were also abolished afterwards which will be mentioned below
68 Law No: 5233 (Official Gazzette: 27/07/2004- 25535)
69 Law No: 5176 (Official Gazzette: 08/06/2004- 25486)
70 Law No: 5065 (Official Gazzette: 20/01/2004- 25352)
71 Law No: 4750, (Official Gazzette: 09/04/2002-24721)
72 Law No: 4868, (Official Gazzette: 18/06/2003-25142)
73 Law No: 4913, (Official Gazzette: 01/07/2003-25155)

Involvement of Children in Armed Conflict.[74]

Several other Laws and By-Laws were also enacted towards meeting the Copenhagen political criteria, however since the list is very long, it is not possible to cite all of them in an academic article. So, only the remarkable ones are given here. The cited legislation above shows how much Turkey realized to achieve the EU bid and how much the country was committed. The EU accession negotiations was a historical opportunity and Turkey did not want to miss this chance.

The renovation process of laws on judiciary and fundamental rights continued after the launch of negotiations on October 3, 2005 and that will be mentioned below.

6. Improvements in the Field of Human Rights

As a step in the correct direction the Human Rights Presidency affiliated to the Prime Ministry was established on October 5, 2000 with a Decree having the force of Law. Then in 2001 the Law[75] entered into force. This Law mainly aimed at institutionalisation in human rights issues and coordination among the institutions. The Human Rights Presidency would follow the implementation of the legislation on human rights, to search and examine the applications on violation of human rights as well as to make coordination between the public institutions.

In the field of protection of women and family, two new Directorate Generals were established; the Directorate General on the Status of Women and the Directorate General of Family Affairs and Social Studies. These new DGs aimed at better protecting the women rights and to deal with family related issues with a new approach.[76]

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74 Law No: 4991, (Official Gazzette: 21/10/2003-25266

75 Law No: 4643 (Official Gazzette: 12.04.2001-24380)

76 Law No: 5251, The Law on the Organization and Duties of the Directorate General on the Status of Women, (Official Gazzette: 06/11/2004-25635
Law No: 5256, The Law on Organization and Duties of the Directorate General of Family Affairs and Social Studies was (Official Gazzette: 13/11/2004-25642)

It is also noteworthy to mention about the human rights projects of the Ministry of Justice and Ministry of Interior. The most remarkable activity of the Ministry of Justice was the EU funded Project on Human Rights Training of Judges and Prosecutors and implemented in cooperation with the Council of Europe. Within the project approximately 225 trainer judges were received training and these trainers than first time trained nearly thousands of judges and prosecutors on human rights throughout Turkey. This Project was the first to start the mentality change in the judiciary and was perhaps the most effective and timely one within all the projects.

D. Main Achievements of the Reforms

The main achievements with the reform laws mentioned above can be summarized as follows:

- The relevant legislation on torture and ill-treatment were amended in line with the zero tolerance to torture policy of the government.

- Freedom of association, freedom of expression and media, freedom of peaceful assembly widened and approximated to the ECHR standards.

- The conditions on closure of political parties became more difficult.

- Rights of the foundations of non-muslim communities were recognized.

- Capital punishment was abolished in all situations.

- Maximum custody in police or gendarmerie was reduced to 24 hours for individual crimes and four days in collectively committed crimes in harmony with the ECtHR judgments.

- Turkey introduced the possibility of retrial for criminal and civil cases to comply with the rulings of the ECtHR.

- State Security Courts were abolished and replaced by specially authorized courts.

- Human rights training was delivered to judges, prosecutors as well as law enforcement officials and other public servants.

- A Reform Monitoring Group, composed by the EU Minister, Justice Minister, Foreign Minister and Interior Minister, was established to follow and

direct the political reforms in Turkey in 2003.

II. THE ERA OF ACCESSION NEGOTIATIONS BETWEEN EU AND TURKEY

The goal of launching accession negotiations with the EU was a high important priority for the Turkish government. As a result of the outstanding achievements mentioned above, Turkey succeeded to sufficiently meet the Copenhagen Criteria according to the EU Commission[77] as Gunther Verheugen Member of the European Commission responsible for Enlargement stated on January 13, 2004 that "we (the European Union) cannot just ignore progress made by Turkey".[78]

The Presidency Conclusions of the Brussels European Council dated 16-17 December 2004, was an important stage to launch negotiations with Turkey. The European Council detected that "Turkey sufficiently fulfils the Copenhagen political criteria to open accession negotiations" with a pre-condition, "provided that Turkey brings into force the specific six pieces of legislation".[79] Therefore, it was requested from the Council to agree on that framework with a view to opening negotiations on October 3, 2005.

On October 3, 2005, with the approval of the Council, accession negotitations was launched with Turkey and a new era has been started in the EU-Turkey relations. The approval of the Council endorsed that Turkey has sufficiently met the Copenhagen Criterion. The Negotiating Framework[80] document was

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77 Communication From The Commission To The Council And The European Parliament - Recommendation of the European Commission on Turkey's progress towards accession, COM/2004/0656 final, October 6, 2004, "In view of the overall progress of reforms, and provided that Turkey brings into force the outstanding legislation mentioned above, the Commission considers that Turkey sufficiently fulfils the political criteria and recommends that accession negotiations be opened."

78 Gunther Verheugen, http://siteresources.worldbank.org/INTECA/Resources/CEJSTurkey.pdf

79 The Six Pieces of Legislation was; 1- The Law on Associations 2- The Turkish Criminal Code, 3- The Law on Establishment, Duties and Jurisdictions of Judicial Courts of First Instance and Regional Judicial Court (Law on Courts of Appeal) 4- Criminal Procedure Code 5- Law on Judicial Police 6- The Law on Execution of Punishments and Measures

80 See the website of the EU Commission, Negotiation Framework document http://ec.euro-

also adopted by the Council in the same date.

There were 3 main components in the Negotiating Framework document; to implement the Copenhagen political criteria without exemption and to deepen and internalize the political reforms, to undertake the EU Acquis and to strengthen civil society dialogue.[81] The Framework document included the principles governing the negotiations, the substance of negotiations, negotiating procedures and list of negotiation chapter headings.[82] The chapter headings of the Framework document also included the new Chapter 23, Judiciary and Fundamental Rights separating it from the Chapter 24, Justice Freedom and Security. Thereby, the negotiation Chapter 23 first applied to EU-Turkey as well as EU-Croatia accession negotiations.

A. Emergence of the Chapter 23, Judiciary and Fundamental Rights in the EU

The European Union was founded over principles instead of a model based on military power[83]. The Court of Justice (ECJ) had played a significant role on its foundation[84] and the case-law of the Court was the most effective power in the past decades in its progress through establishment of a law order[85]. In different judgments, the ECJ referred to human rights principles accepting the guarantees foreseen in the ECHR as minimum standards.[86]

pa.eu/enlargement/candidate-countries/turkey/key_documents_en.htm

81 The Negotiation Framework Document and The Ministry of EU Affairs website http://www.abgs.gov.tr/index.php?p=37

82 The Negotiation Framework Document and The Ministry of EU Affairs website

83 Supra note 1, page 4

84 Ayşe Füsun Arsava, Law-Making Capacity of the CJEC, Ankara University, Faculty of Political Science Journal, (Ankara Üniversitesi Siyal Bilimler Fakültesi Dergisi) 54-3 p 27

85 See ECJ judgments; Costa v Enel, 6/64 [1964] ECR 585 Community law takes precedence over the Member States own domestic law, Van Gend En Loos 26/62 [1963] ECR 1, "The [European Economic] Community constitutes a new legal order of international law for the benefit of which the [Member] States have limited their sovereign rights".

86 The relevant ECJ judgments, Stauder 29/69 [1969] ECR 419 "Fundamental rights [are] enshrined in the general principles of Community law and protected by the Court."; Internationale Handelsgesellschaft 11/70 [1970] ECR 1125, Fundamental rights are an integral part of the general principles of law the observance of which the Court ensures; Nold 4/73 [1974] ECR 491, §13; Carpenter C-60/00 [2002] ECR I-6279 see also Ayşe Füsun Arsava, Law-Making Capacity of the CJEC, Ankara University, Faculty of Political Science Journal, 54-3 p 16

The principles of the rule of law and respect for the fundamental rights were pre-conditions for accession negotiations with the EU according to the Copenhagen Criterion. However, there was no further explanation for these terms in the Treaties of the European Communities. More importantly the question of what must be the concrete meaning and importance of the rule of law and fundamental rights for the accession negotiations remained unresponded. The principles of the rule of law and human rights found their meaning with the evolution of the Treaty on European Union.

According to Article F paragraph 2 of the Treaty on European Union signed at Maastricht, "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." The paragraph 3 of the Article F added that "the Union shall provide itself with the means necessary to attain its objectives and carry through its policies." This was a stage for the EU.

The renewed EU Treaty (Amsterdam Treaty)[87] amended the ex article F with the new article 6. The new article 6 paragraph 1 was read as "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." The paragraph 2 of the article remained the same. With this amendment the rule of law was enshrined to the Article. The article 7 of the Amsterdam Treaty regulated that in case that the principles mentioned in Article 6 (1) is violated by a Member State persistently, the rights of the Member State will be suspended[88] with a qualified majority decision of the Council.

The article 6 remained the same in the Treaty of Nice, entered into force on February 1, 2003, while article 7 increased the ratio for the qualified majority on suspension of membership decision for a Member State.[89] As another im-

87 Treaty on EU 1997
88 Supra note 1, page 36-37
89 Supra note 1, page 36-37

portant development, the new article 49 transferred the political criteria of the Copenhagen to the Treaty. According to this provision, any European state in applying to become a member of the Union must respect to Article 6 paragraph 1, became a pre-condition[90]for starting accession negotiations.

In beetween Amsterdam and Nice treaties the Charter of Fundamental Rights of the European Union was written on December 7, 2000. This was than adapted at Strasbourg, on December 12, 2007 and became binding with the entry into force of the Lisbon Treaty in 2009.

In Article 6 paragraph 1 of the Lisbon Treaty the rights, freedoms and principles set out in the Charter of Fundamental Rights were recognized as having the same legal value as the Treaties.

The new article 2 of the Lisbon Treaty brought new elements to the definition of the values of the Union. Accordingly, "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."[91]

The binding Charter of Fundamental Rights of the European Union covered all the rights foreseen in the case law of the Court of Justice, the rights and freedoms in the ECHR and rights and principles resulting from the common constitutional traditions of EU countries and other international instruments.[92]

In the light of the above mentioned information the infrastructure and the content of the Chapter 23 has been accomplished with the Lisbon Treaty in the EU level, after it was accepted as a negotiation Chapter in Negotiating Framework Document of 2005.

B. The Screening Meetings on the Chapter 23, Judiciary and Fundamental Rights

1. The Explanatory Screening Meeting

90 Supra note 1, page 36-37.
91 Supra note 1, page 36-37.
92 The Charter of Fundamental Rights of the European Union See the website of the EU Commission http://www.europarl.europa.eu/charter/pdf/text_en.pdf

The EU acquis regarding the Chapter 23 was detected by the EU Commission and was composed of some EU instruments but mostly international documents[93]. The relevant acquis was explained to Turkish and Croatian sides by the EU Commission in the explanatory screening meeting on September 7-8, 2006. Accordingly, the Chapter 23 included four main titles: judiciary, corruption policy, fundamental rights and the EU citizen's rights.

a. Judiciary

The independence, impartiality, professionalism and efficiency of the judiciary, and the judicial reform were the subjects of that title. The European Convention of Human Rights, the Council of Europe Recommendations and Opinions and the UN principles related to judiciary were the relevant EU Acquis[94] in this field.

According to the documents accepted as the EU Acquis, the Courts must be established by law and the recruitment and appointment procedures of judges should provide independence and impartiality. The tenure of judges must be guaranteed by law. The judicial ethic rules must be defined clearly to provide impartiality. Efficiency of the judiciary was a fundamental requirement for the functioning of the rule of law.[95]

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93 Not the EU but the EU Member States was party to these documents like ECHR. However, the Article 6 paragraph 2 of the Lisbon Treaty, entered into force on December 1 2009, foresees that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

94 European Convention of Human Rights; UN Basic Principles on the Independence of the Judiciary, 29 November 1985, A/RES/40/32; European Guidelines on Ethics and conduct for public prosecutors (the Budapest guidelines) adopted by the Conference of Prosecutors General of Europe on 31/5/2005; Bangalore Principles of Judicial Conduct" ("Bangalore Principles"), adopted by the UN Human Rights Commission on 23 April 2003; Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies; Opinion No 2 (2001) of the Consultative Committee of European Judges on the Funding and Management of Courts; Recommendation No R (86) of the Council of Europe on Measures to Prevent and Reduce the Excessive Workload in Courts; Council of Europe recommendation Rec(2000)19 on the Role of Public Prosecution in the Criminal System.

95 See the website of the EU Commission http://ec.europa.eu/enlargement/policy/conditions-membership/chapters-of-the-acquis/index_en.htm

b. Anti-Corruption policy

Article 29 of the 2002 EU Treaty was the main reference point for preventing and combating corruption in the EU. The adopted EU Acquis in this field[96] was an EU Convention, a Council Framework Decision and again international instruments; United Nation Conventions and Council of Europe Conventions on corruption. An effective combat against corruption and the anti-corruption policy was a complementary element of the rule of law and necessary for the area of freedom and security.

c. Fundamental rights

Almost all the rights included in the ECHR was subject to the Chapter 23; right to life, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery, servitude, and forced or compulsory labour, respect of private and family life and communications, protection of personal data, right to marry and right to found a family, freedom of thought, conscience and religion, freedom of expression including freedom and pluralism of the media, freedom of assembly and association including freedom to form political parties, the right to establish trade unions, treatment of socially vulnerable and disabled persons and principle of non discrimination, right to education, right to property, gender equality and women's rights rights of the child. Pro-

[96] Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of the Member States of the EU; OJ C 195, 25.6.1997; Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector OJ L 192, 31.7.2003, p.54; Council Decision 2004/579/EC of 29 April 2004 on the conclusion, on behalf of the European Community, of the United Nations Convention against Transnational Organised Crime OJ L 261, 6.8.2004, p.69; UN Convention against Corruption, Merida 2003; OECD-Convention on Combating Bribery of foreign public officials in International Business Transactions, of 17 December 1997; (also relevant for judicial cooperation in penal matters); Council of Europe Criminal Law convention on Corruption, opened to signature on 27 January 1999; (also relevant for judicial cooperation in penal matters); Council of Europe Civil Law convention on corruption, opened to signature on 4 November 1999; UN Convention against Transnational Organized Crime, Palermo December 2000;Convention of 26 July 1995 on the protection of the European Communities' Financial Interests: JO C 316 of 27 November 1995 (also relevant for judicial cooperation in penal matters).

cedural safeguards related to liberty, security and right to a fair trial, access to justice and presumption of innocence, protection of personal data, minority rights and cultural rights measures against racism and xenophobia were also in the scope of the Chapter.

The EU Acquis in this field[97] was the relevant judgments of the ECJ, Coun-

[97] Related case law of the European Court of Justice; European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) as amended by Protocol No. 11 and its Protocol of 1952; Charter of fundamental rights of the European Union, OJ C 364 of 18 December 2000, p.1; UN Convention on the elimination of all forms of racial discrimination (New-York; 7 March 1966); Council of Europe Convention on the protection of individuals with regard to automatic processing of personal data (Strasbourg, 28 January 1981); European Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Strasbourg, 26 November 1987); The following protocols to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) as amended by Protocol No. 11: Protocol n° 1 of 1952, Protocol N°4 of 1963, Protocol N°6 on the abolition of the death-penalty of 1983, Protocol N°7 of 1984, Protocol N°12 of 2000, Protocol N°13 of 2002; UN Declaration on the elimination of violence against women (General Assembly resolution 48/104 of 20 December 1993); Council of Europe Recommendation Rec (2002) 5 on the protection of women against violence; UN Convention on the rights of the child (New-York, 20 November 1989); Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000); Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13 of 20.01.2004,; Council Decision of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, OJ L 048 of 21.02.2003, p. 1.; Resolution No R (76) 5 on legal aid and Resolution (78) 8 on legal aid and advice; Commission Decision 2005/630/EC of 26 August 2005 establishing a form for the transmission of legal aid applications under Council Directive 2003/8/EC, OJ L 225, 31/08/2005, p. 23; Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ L 261, 6.8.2004, p.15.; Council of Europe Framework Convention on the protection of Minorities (Strasbourg, 1 February 1995); European Charter for Regional or Minority Languages; Joint Action of 15 July 1996 concerning Action to Combat Racism and Xenophobia: OJ L 185 of 24 July 1996; Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia (OJ L 151, 10.6.1997, p. 1.), as amended by Regulation (EC) No 1652/2003 of 18 June 2003 (OJ L 245, 29.9.2003, p. 33.); United Nations guidelines concerning Computerized personal data files, adopted by

cil Framework Decisions, relevant Directives, European Commission Decisions and mostly international documents; the ECHR and its' Protocols, the UN and Council of Europe Conventions.

d. EU citizen's rights

The EU citizen's rights, was mostly related to issues related to post membership to the EU. These are "Right to vote and stand as a candidate in elections to the European Parliament", "Right to vote and stand as a candidate in municipal elections", "Right to move and reside freely within the European Union" and diplomatic and consular **protection**. Therefore this Article will not go details of this subject.

2. The second round Screening Meeting of Chapter 23

In the second round of the screening meeting of Chapter 23, Turkish side explained the current Turkish legislation and practice covering the EU Acquis on 12-13 October 2006.

Detailed information was submitted to the European Commission regarding the judiciary, anti-corruption and fundamental rights including the amendments in the reforms of the Constitution and the legislation with more than 1000 power point slides in order to reflect the whole picture in Turkey[98].

the General Assembly on 14 December 1990; Organisation for Economic Co-operation and Development (OECD): Recommendation of the Council concerning guidelines governing the protection of privacy and transborder flows of personal data, adopted by the Council 23 September 1980; Convention 108/81 for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 28 January 1981); Additional Protocol to the Convention regarding supervisory authorities and transborder data flows, CETS No 181 (Strasbourg, 8 November 2001); Treaty on the European Union (TEU): Article 6; Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31.; Judgement of the European Court of Justice of 20 May 2003, Joint Cases C-465/00, C-138/01 and C-139/01 – Rechnungshof, Judgment of the European Court of Justice of 6 November 2003, Case C-101/01 - Bodil Lindqvist, Judgment of the European Court of Justice of 30 May 2006 Joined Cases C-317/04 and C-318/04 - PNR data; Commission decisions on the adequacy of the protection of personal data in third countries ;

98 See the website of the Ministry for EU Affairs, http://www.abgs.gov.tr/index.

III. DEVELOPMENTS REGARDING THE CHAPTER 23 AFTER THE SCREENING PROCESS

The objective of the Turkey –EU negotiations was accession, however the outcome was not guaranteed beforehand.[99] Turkey resumed its reform process with that important disadvantage. In this process Constitutional amendment, judicial reform packages, amendmendts in various laws and intense project/ training activities were achieved.

A. Constitutional Amendment Package 2010[100]

The 2010 Constitutional amendment package was the most comprehensive one after 2001 amendment in respect of number of articles amended. In 2010, 25 Articles of the Constitution was amended. However, the weight of the articles may be considered more important than the 2001 amendment package because of the amended provisions. The package was supported by the EU Commission and the EU Parliament; however the opposition parties did not give support to it in the parliament and in the referendum. Nevertheless, the package and received a public approval vote of 58 % in the referandum.

This time the High Council of Judges and Prosecutors (HCJP) and the Constitutional Court were restructured[101]. The HCJP became representing the judiciary as a whole with increase in number of members. The secretariat was established and the autonomous budget and its own premise were given to the High Council. The Inspection Board competent to inspect judges and prosecutors was affiliated to the Council. The reform strengthened the independence of the judiciary[102]. The individual application process to the Constitutional Court was adopted and the Court started to receive individual applications as of September 23, 2012 as a new remedy before applying to the ECtHR. This was an important step regarding protection of human rights in Turkey. In accordance

php?p=173&l=1

99 Eric Faucompret and Jozef Konings, Turkish Accession to the EU, Satisfying the Copenhagen Criteria, 2008, Routledge Publication, p 46

100 The Law Amending Certain Articles of the Constitution, Law No: 5982, aapproved by the referendum on September 12, 2010.

101 Article 159 of the Constitution

102 See 2010 and 2011 Progress Reports of the EU Commission.

with this amendment the Constitutional Court was restructured and started to function with two Chambers[103] and General Assembly.

An ombudsman institution was introduced as an additional control mechanism for the acts of the administration.[104] The competence of the Military Courts was also changed to provide that civilians cannot be tried before the military courts.[105]

Certain rights and freedoms were introduced or broadened; protection of personal data, positive discrimination for children, women, elderly and the disabled persons, protection of children, the right to strike and the right to bargain collectively.[106]

The amendments covered several priorities in the 2008 Accession Partnership document and the criticisms in the Progress Reports. In the preparation phase of the Constitutional amendment package the ECHR and the ECtHR case-law were also seriously taken into consideration.

B. The Ninth Reform Package

In order to continue the reforms in the field of judiciary and fundamental rights a new reform package targeting legislative amendments in different Laws, enhancing administrative capacity and approval of 4 international conventions was declared by the government on December 6, 2006. The targets given below were named as "The Ninth Reform Package"[107].

According to the Reform Package the following Laws would be enacted:

- The Law on Ombudsman
- The Law on Foundations
- The Law on Settlement

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103 Article 146-149 of the Constitution and The Law on Establishment and Trial Procedures of the Constitutional Court, Law No: 6216 (Official Gazzette: 03/04/2011- 27894)

104 Article 74 of the Constitution

105 Article 145 of the Constitution

106 Articles 10, 20, 23, 41and 53 of the Constitution

107 EU Harmonization Law Packages, Republic of Turkey, Prime Ministry General Secretariat for the EU Affairs, Ankara, 2007 page 281.

- The Law on Private Education Institutions

- The Law amending the Law on Establishment and Legal Procedures of Military Courts

- The Draft Law on Court of Accounts

- The Draft Law on Administrative Trial Procedures

- The Draft Law on Establishment of a Political Ethics Commission

- The Draft Law on Fundamental Principles for Elections and Electoral Rolls

To enhance the administrative capacity the following measures would be taken:

- Human Rights Presidency of the Prime Ministry will be restructured

- A responsible body will be idenfied for the coordination of public institutions' activities in the field of anti-corruption policy

The following International Conventions would be ratified:

- Draft Law on the Ratification of the United Nations Convention against Corruption,

- Draft Law on the Ratification of Protocol No. 14 Amending the Control System of the European Convention on Human Rights,

- Draft Law on the Ratification of the Revised European Social Charter,

- Draft Law on the Ratification of the Protocol amending the European Social Charter.

Almost all the targets set up by the ninth reform package were achieved in the following years and details on this were given below.

C. Legislation Adopted

1. Fundamental Laws Were Re-Written

In 2011 three fundamental Codes were renewed; the Civil Procedural Code, the Turkish Commercial Code and the Law on Obligations. The Law on Ob-

ligations[108] was drafted taking the developments in Turkey and the world into account with modern institutions. The Civil Procedure Code[109] aimed at to speed up the judicial proceedings and provided new institutions to conclude cases with alternative dispute resolution methods. The Turkish Commercial Code[110] was drafted in order to ensure harmonization with the relevant EU Acquis and the modern requirements of the economic life.

As fulfilling the target of 9th Reform Package, the new Law on Foundations[111] was enacted to simplify the conditions for establishing a foundation and to ease the conditions for activities of an association, which was found a "positive step" by the EU Commission[112].

2. Other Legislation and Achievements

Likewise the reform process before the accession negotiations launched, the Turkish Parliament continued to enact reform laws in order to harmonize the Turkish legislation with the EU and ECHR/ECtHR standards.

With the amendments in the Law on Duties and Competences of the Police[113], the procedures on search of persons and cars, preventive search, taking fingerprint and usage of force and guns were amended to bring them in line with the ECHR and EctHR standards.

The Law on Witness Protection[114] was enacted to enable effective investigations with providing necessary measures on hiding the identity and ensuring security of the witnesses.

Ratification of the Revised European Social Charter, and the Protocol amending the European Social Charter[115] the United Nations Convention

108 Law No: 6098, (Official Gazzette:04/02/2011/ - 27836)
109 Law No: 6100 (Official Gazzette: 04/02/2011 - 27836)
110 Law No: 6102 (Official Gazzette: 14/02/2011 - 27846)
111 Law No: 5737, (Official Gazzette: 27/02/2008- 26800)
112 2008 Regular Report of the EU Commission
113 Law on Duties and Competences of the Police, Law No: 2559 was amended by the Law No: 5681, (Official Gazzette:14.06.2007- 26552)
114 Law No: 5726, (Official Gazzette: 05/01/2008-26747)
115 Law No: 5547, (Official Gazzette: 03/10/2006- 26308) and Law No: 5546, (Official Gazzette: 03/10/2006-26308)

against Corruption[116] and the Protocol No. 14 Amending the Control System Formed by the European Convention on Human Rights were approved by the Parliament in 2006 as part of the ninth reform package.

The Law on the Civil Aspects of International Child Abduction[117] was adopted in 2007.

The Law Amending Certain Laws to Harmonize them with the Fundamental Criminal Laws[118] reduced the sentences foreseen in the Law on Associations, the Law on Meetings and Demonstration Marches and the Law on Collective Bargaining and Strike and Lockout.

Broadcasting other than Turkish language became possible with the amendment in the Law on 5767[119] and as a concrete outcome of this Law, the TRT 6 started its broadcasting other than Turkish language in January 1, 2009.

The trial of civilians regarding military crimes was transferred to civilian courts in peace time in accordance with the amendment in Criminal Procedure Code[120]. The same amendment also aimed at meeting Turkey's responsibilities for the GRECO.

Turkey's main coordination body for the EU, the General Secretariat for the EU Affairs was transformed with an increase in the number of staff and new organization structure to better coordinate the EU relations[121].

Law on Main Principles of Elections and Electoral Register and Law Amending the Law on Elections of Deputies that enable all kind of propaganda in a language other than Turkish at election times came into force on 10th April 2010.

In order to prevent the severe punishment of the stone thrower children

116 Law No: 5506 (Official Gazzette: 24/05/2006- 26177)
117 Law No: 5717, (Official Gazzette: 04/12/2007-26720)
118 Law No 5728, (Official Gazzette: 08.02.2008- 26781)
119 The Law Amending the Law on Turkey Radio and Television and Establishment and Broadcasting of Radio and Televisions , (Official Gazzette: 26/06/2008-26918)
120 Law No: 5918, (Official Gazzette: 09.07.2009-27283), amended certain articles of the Criminal Code, Criminal Procedure Code and Law on Misdemeanours
121 Law No: 5916, (Official Gazzette: 09/07/2009- 27283)

used by terrorist organizations the Anti-terror Law was amended.[122]

In line with the 2010 Constitutional Amendment, the Law on High Council of Judges and Prosecutors[123] and the Law on Establishment and trial Procedures of the Constitutional Court[124] were entered into force to accomplish the process.

The new Law on the Establishment and Broadcasting Principles of Radio and TV stations[125] improved the interpretation of rules on broadcasting bans and sanctions imposed on broadcasters.

Introducing a new system to the Turkish law, the Law on Mediation in Civil Disputes[126] targeted at accelerating the judicial process with alternative dispute resolutions. The system became functional and the registered 1067 mediators[127] started to mediate disputes, between persons.

As a positive step to normalize the civil-military relations, the Emasya Protocol giving excessive competences to gendarmerie dated 1997, was abolished on February 2010.

The Office of the Prime Minister issued the Circular regarding full respect of the principle of gender equality for recruitment in public sector[128].

3. The Judicial Packages

The main aim of the "judicial packages" was to expedite the judicial proceedings in the context of the efficiency of the judiciary. As stressed out by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, the excessive length of proceedings has been a chronic dysfunction in the Turkish justice system and this caused very high number of violation

122 Law No: 6008 (Official Gazzette: 25/07/2010-27652)
123 Law No: 6087, (Official Gazzette: 18/12/2010-27789)
124 Law No: 6216, (Official Gazzette: 03/04/2011- 27894)
125 Law No: 6112, (Official Gazzette: 03/03/2011-27863)
126 Law No: 6325 (Official Gazzette: 22/06/2012 - 28331)
127 The website of Division of Mediation, DG for Legal Affairs of the Ministry of Justice http://www.adb.adalet.gov.tr/arabulucu/
128 Dated May, 24. 2010

judgments of the ECtHR[129].

a) The First Judicial Package[130]**,** increased the number of Chambers and members of the Court of Cassation and the Council of State to overcome the excessive backlog of the High Courts. Within the package the Law on Judges and Prosecutors (Law No: 2802) was amended in accordance with the amendment in the Civil Procedure Code (Law No: 6100).

b) The Second Judicial Package[131]**,** targeted at accelerating the judicial proceedings as understood from the title of the Law. The Law amended several provisions in various Laws; including the Law on Misdeamanors, the Law on Civil Enforcement. The notaries were authorized to issue certain documents like legacy certificate previously exclusively given by the courts as a solution to reduce files opened to courts. Measures were taken in various Laws for reducing the appeal applications.

c) The Third Judicial Package[132] as an omnibus law amended various laws. The package re-defined some crimes as misdemeanor and as for some misdemeanors the authority to issue fines was taken away from the judiciary and transferred to the administrative authorities. New provisions were introduced in order to speed up conclusion of cases in criminal and administrative judiciary. With a view to harmonize the legislation with the international conventions and fulfill the recommendations of the Group of States Against Corruption (GRECO)[133] provisions related to bribery and financial crimes were amended.

The specially authorized courts, established in accordance with the article 250-252 of the Criminal Procedure Code were replaced by the regional heavy criminal courts. The new courts were established by the Anti-terror Law Arti-

[129] Thomas Hammarberg, "Administration of justice and protection of human rights in Turkey" (10 January 2012), p 2

[130] Law No: 6110, Law on Amendments in Certain Laws (Official Gazzette: 14/02/2011 - 27846)

[131] Law No: 6217, Law on Amendments in Certain Laws to Speed up Judicial Services (Official Gazzette: 14/04/2011- 27905)

[132] Law No: 6352, Law on amending Certain Laws to Ensure Effectiveness of the Judicial Services and Postponement of the Cases and Sentences Regarding Crimes Committed via Press and Broadcasting , (Official Gazzette: 05/07/2012 – 28344)

[133] Turkey is a member to GRECO

cle 10. Most of the procedures remained the same in the new courts while some of them were improved taking the criticisms of the Report on Criminal Justice System in Turkey[134] into account. The application of suspension of sentences was broadened to include the simple form of terrorism offences and alternative sanctions became applicable for these offences.

In order to reduce the usage of detention of suspects or accused, the threshold for the minimum sentence for the detention has been increased to two years.[135] To ensure transparency in court decisions for detention of suspects, it became compulsory for judges to write tangible facts[136] and the scope of judicial control practice has been extended.[137]

The provisions in the package related to freedom of expression will be mentioned under the title of unofficial benchmarks of the Chapter 23.

d) The Fourth Judicial Package[138] was drafted taking into consideration of the violation decisions of the ECtHR which Turkey has been found in breach. In general the package arranged a number of subjects:

- The re-trial was expanded for the pending cases before the High Military Administrative Court.

- The problems occurred related to expropriation was amended to adjust the right to demand legal interest due to the late payment.

- Several articles of the Criminal Procedure Code were amended[139]; equality of arms between the suspect/accused and the public prosecutor ensured, compensation right for the persons taken into custody or detained was granted, the re-opening of the investigation provided upon the ECtHR violation decision regarding non-prosecution decisions of the prosecutors as a result of an ineffective investigation, right to legal aid broadened for the persons in need

134 Report by Luca Perilli indenpent expert of the EU Commission, Criminal Justice System in Turkey
135 Article 100 of the Criminal Procedure Code, Law No: 5271
136 Article 101 of the Criminal Procedure Code
137 Article 109 of the Criminal Procedure Code
138 Law No:6459, (Official Gazzette:30/04/2013-28633)
139 The Articles 94, 105, 108, 141,172, 311, of the Criminal Procedure Code,

and statue of limitation regarding the offence of torture removed.

The Civil Procedure Code was also amended to broaden right to legal aid.[140]

The provisions related to the freedom of expression will be mentioned under the title of unofficial benchmarks of the Chapter 23.

e) The Fifth Judicial Package[141]

The courts established in accordance with the Anti-terror Law Article 10 was abolished and this time, special trial procedures were not transferred to another court with a different name. Hence, the tradition coming from the State Security Courts, Specially Authorized Courts and Courts charged with Anti-Terror Law Article 10 was ended. As explained below the period of detention has been limited with maximum 5 years in all cases.

D. Developments Regarding the Penitentiary Instititutions

1. Judicial Control as an Alternative to Detention

The implementation of Judicial Control, as an alternative measure to detention, has been extended with legislative amendments[142] and judicial control became applicable to all crimes.

The judges well implemented the change in the Law and thus, the number of judicial control decisions given increased from 23.063 in 2010 to 70.574 in 2013. For the first time in 2013 the judicial control decisions exceeded in number of the detention decisions applied: 69.803.[143]

2. Probation Practices

The Law on Execution of Sentences and Security Measures and the Law on Probation and Assistance Centers and Protection Boards were amended[144] to widen the scope of Probation as well as to tackle with overcrowding problem

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140 Civil Procedure Code Articles 334, 337, 339

141 Law No: 6526,(known as the 5th Judicial Package), (Official Gazzette: 06/03/2014-28933-second)

142 Amendment in Article 109 of the Criminal Procedure Code, Law No: 6352

143 See the website of Ministry of Justice DG for Prisons and Detention Houses http://www.cte.adalet.gov.tr/

144 Law No: 6291 (Official Gazzette:11/04/2012 - 28621)

in prisons.

Besides, with the Law No, 6411 which took effect on 31 January 2013, the condition of serving remaining 6 months prison sentence in open penal institutions will not be sought until 31 December 2015. As of February 28, 2014 in total 247.286 persons were followed by the Probation centers [145].

3. Electronic Monitoring

The system was established in 2012 with the amendment in the Law on Probation[146] to monitor and control of the suspects, accused and convicts by electronic devices. Currently the capacity of the electronic monitoring center enables monitoring 10.000 persons at the same time. As of 15 May 2013, 255 convicts were monitored via this system.

4. Detention Practices and Reduce in number of Detainees

As explained above conditions for detention of suspects were improved[147] to a great extent. Judges have to explain the reasons for detention with concrete facts and the scope of detention was limited by the new legislation. Due to the legislative amendments and mentality change among the judges the ratio of detainee was reduced to 14,0 % in May 2014 from 24,65 in 2012. As of May 2014 the number of detainee was 20.734 while the number of convicted was 131.124 [148].

The Law on amending Anti-Terror Law, Criminal Procedure Code and Other Laws[149] limited the period of detention with maximum 5 years while previously it was 10 years in special circumstances. The ECtHR case-law was the main reference for the change[150].

E. Developments on Human Rights

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145 See the website of Ministry of Justice DG for Prisons and Detention Houses http://www.cte.adalet.gov.tr/

146 Law No: 6291Amending the Law on Probation, Article 15/A (Official Gazzette: 11/04/2012-28621)

147 European Commission 2013 Turkey Progress Report p 14

148 See the website of Ministry of Justice, DG for Prisons and Detention Houses http://www.cte.adalet.gov.tr/

149 Law No: 6526, the 5th Judicial Package, (Official Gazzette: 06/03/2014-28933-second)

150 Tendik and others-Turkey decision of the ECtHR, No. 23188/02, 22 December 2005

1. Reduce in Number of Pending Applications Against Turkey

There is a tendency to decrease regarding the pending applications against Turkey before the ECtHR. The ratio of pending applications against Turkey was 16.600 in 31 March 2013 and this number was reduced to 10.950[151] in 31 December 2013. This shows a radical change in number of pending applications against Turkey. Turkey was in the second row in the list of having most pending cases before the ECtHR in 2013 and in this list Turkey reduced to the fourth row as of 31 March 2014. The main reasons in the reduce of the number of applications can be summarized as the start of individual application process to the Constitutional Court, establishment of the Human Rights Compensation Commission, establishment of the Department of Human Rights in the Ministry of Justice, change in case-law of the judiciary as a result of reforms and training/project activities.

2. Establishment of the Human Rights Compensation Commission

The Commission was established by the Law No, 6384[152] that entered into force on January 19, 2013 to reduce pending cases in the ECtHR opened against Turkey and to reduce possible violation decisions against Turkey.The Commission started to receive applications as of 20 February 2013.

The Commission is competent regarding the applications lodged with the European Court of Human Rights on the grounds that the investigations and prosecutions within the scope of the criminal law and the proceedings within the scope of the private and administrative law have not been concluded within a reasonable time or the Court's judgments have been executed late or unsatisfactorily, or have not been executed.[153] This competence then was entended with a decision of the Council of Ministers on 10 February 2014.[154]

As of April 1, 2014 the total applications to the Commission was 5.390. The

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151 See the website of Ministry of Justice, Human Rights Department, http://www.inhak.adalet.gov.tr/istatistikler/istatistikler.html

152 Law No: 6384, (Official Gazzette: 19/01/2013- 2853)

153 Article 2 of the Law No: 6384

154 Official Gazzette: 16/03/2014-28943

Commission decided on 3737 of them (% 69) and accepted to give compensation to 3.086 applications (% 82.5 of the decided cases)[155].

3. The Start of Individual Application to the Constitutional Court as a New Remedy

The Constitutional Court had a new task as individual application process started as of September 2012. It is a new remedy for the Turkish legal system that before applying to the ECtHR, individuals are given the opportunity to apply the Constitutional Court when they deem that their fundamental freedoms defined in the ECHR are violated. As a concrete consequence annual applications to ECtHR reduced from 9.000 to 2.000 in 2013.

Most of the applications to the Constitutional Court were related to violations of the right to a fair trial, property rights, equality before the law, states' respect to human rights and protection of fundamental freedoms. The Court mostly referred to the case law of the ECtHR in its decisions. Until now, the court concluded cases regarding right to life, prohibition of torture and ill treatment, right to liberty and security, right to education, protection of the secrecy of private life, property rights, freedom of expression, excessive trial lengths, right to a fair trial and several other topics.[156]

4. Project Activities: Implementation of the Reforms

As a tool for training the practioners on the reforms, several EU projects[157] were implemented by the Ministry of Justice, the Ministry of Interior and other stakeholder institutions of the Chapter 23. By this way intense training activities were carried out to better implement the legislative amendments by the relevant institutions.

The projects were mainly targeted at enhancing the human rights practices

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155 The website of the Human Rights Compensation Commission, http://www.ihtk.adalet.gov.tr/istatistik/istatistik.pdf

156 The website of the Constitutional Court, http://www.anayasa.gov.tr/

157 See for the list http://www.abgm.adalet.gov.tr/projeler.html,
http://www.diab.gov.tr/isbirligi-17-ipa-i-donemi-tamamlanan-ab-projeleri-.html
http://www.diab.gov.tr/isbirligi-16-2000-2006-donemi-ab-projeleri-.html

and efficiency of the judicial system. Thousands of judges, prosecutors, police and gendarmarie officials and civil servants were trained with that purpose. The main expected outcome was the mentality change among the public officials. The project and training activities were achieved via EU funds as well as national resources of Turkey.

F. Works Carried out to Open Negotiations of the Chapter 23 and the State of Play on Turkey's Fulfillment of the Unofficial Benchmarks

Screening meetings of Chapter 23, Judiciary and Fundamental Rights was concluded on 13 October 2006. Despite the years passed, the screening reports of Chapter 23 have not been approved by the European Council. Thus, the opening benchmarks have not been officially made public to Turkey. However, the Turkish government continued the reform process to cover the six opening benchmarks of the Chapter which were given in bilateral meetings "unofficially" as explained below.

As Turkey came close to fulfill the required criteria in Chapter 23, the Turkish side requested from the EU to send the official benchmarks and to open the negotiations of the Chapter. The former EU Affairs Minister and Chief Negotiator of Turkey Egemen Bağış mentioned the key role of the Chapters 23 and 24 for the EU accession negotiations over and over again[158].In the first days after appointed as the EU Affairs Minister Mevlüt Çavusoglu also requested from the EU to open accession negotiations of the chapter 23, Judiciary and Fundamental Rights[159].

However, it was the former Justice Minister Sadullah Ergin who consistently repeated the criticism to EU, for not delivery of the official benchmarks. In several speeches, the former Minister Ergin said that "the EU does not tell us what our homework is and criticize us for not doing it". Minister Ergin reminded in his speeches that the Screening Meetings were completed in 2006 and the Reports were not sent yet[160]. According to the Justice Minister "there was

[158] http://egemenbagis.com/tr/4776
[159] 29 December 2013, http://en.trend.az/regions/met/turkey/2226463.html
[160] February 24, 2012, The speech in Turkey-EU Joint Parlamentarian Meeting http://www.

no legal and ethical infrastructure for the criticisms of the EU" regarding the judiciary and fundamental rights issues. The Minister Ergin imitated the EU "a physician asking the patient the reason for not using the healing pills without giving the prescription"[161]. On 25 March 2013 in a conference the Justice Minister Ergin harshly criticised the EU saying that "the EU did not tell what she requested from us in the last seven years. What came to the Chapter 23 did not come to the cooked chicken."[162] The Minister defined the situation as Turkey is trying to understand the body language of the EU to form her roadmap.

As a response to that calls the EU Commissioner Füle responsible for Enlargement expressed his support and "hope" for opening of Chapter 23 as soon as possible in various speeches. In one of his speech Mr Füle stated that, "I agree with those that believe it is important to have chapter 23 opened as early as possible, so that Turkey and the European Union have a process within which progress can be made"[163].

The EU high level officials gave these messages sometimes to Turkey as a warning for expediting the reform process. However, sometimes the target of the message was internal institutions of the EU that refrained sending the Screening Report of the Chapter 23 and the official benchmarks seen as a roadmap for Turkeys' reform process, after years.

The European Parliament Resolution of 12 March 2014 on the 2013 Pro-

euractiv.com.tr/yazici-sayfasi/interview/ergin-ab-hem-ev-odevimizi-soylemiyor-hem-de-yapmadik-diye-elestiriyor-024371

161 http://www.sondakika.com/haber/haber-adalet-bakani-ergin-aciklamasi-4150801/ 6 December 2012

162 http://www.aktifhaber.com/erginden-abye-muzakere-elestirisi-757323h.htm 25 March 2013

163 http://europa.eu/rapid/press-release_MEMO-13-613_en.htm **Remarks of Commissioner Štefan Füle at the press conference after the General Affairs Council's (GAC) meeting in Luxembourg** European Commission - MEMO/13/613 25/06/2013 "Let me repeat my firm conviction that it is in our interest to step up our engagement and I hope we can move also on the EU side to opening of the chapters 23 and 24 which are those most directly linked to the rule of law and also to the fundamental freedoms."
http://www.ikv.org.tr/icerik_en.asp?konu=haberler&baslik=EU+OPENS+A+NEW+CHAPTER+FOR+NEGOTIATIONS+WITH+TURKEY&id=599 "Füle also further pointed out that EU-Turkey relations should be further strengthened and that he hoped that Chapters 23 and 24 of the EU acquis would be soon opened soon."

gress Report on Turkey defined the Chapter 23 and Chapter 24 (justice, freedom and security) as the "center of the negotiations" [164]. In the same Report, opening Chapters 23 and 24 defined as a consistent approach and the Council was called to deliver "the official benchmarks for the opening of Chapters 23 and 24" to Turkey since that "would provide a clear roadmap for, and give a boost to, the reform process and, in particular, would provide a clear anchor for the reform process in Turkey"[165].

The EU Affairs Minister of Turkey Mevlüt Çavuşoğlu found it noteworthy that the EU Parliament made a call for the Council to send the opening benchmarks to Turkey regarding Chapters 23 and 24.[166]

Turkey's position to fulfill the political reforms irrespective of political impediments was an important factor for the EU to move forward and this move was seen as Positive Agenda Meetings explained below. The negotiation Chapter 23 is very important for Turkey in the sense that it is directly related to political reform process. The ultimate aim of the political reforms were to provide Turkish citizens more liberal democracy, efficient functioning of the judicial system and utmost respect to human rights. So, irrespective of the position of the accession negotiations, Turkey resumed the political reform process mainly with the aim of improving Turkish citizen's rights and freedoms.

As mentioned above the unofficial opening benchmarks were not send to Turkey via official ways. These benchmarks, although not approved by the European Council, were explained to Turkish side in bilateral meetings by the officials of the European Commission and can be understood from the state-

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164 European Parliament resolution of 12 March 2014 on the 2013 progress report on Turkey (2013/2945(RSP)) Paragraph E "…the rule of law is placed at the heart of enlargement policy, and (the Commission) confirmed the centrality in the negotiating process of Chapters 23 (judiciary and fundamental rights) and 24 which should be tackled early in the negotiations so as to allow clear benchmarks and sufficient time to carry out the necessary legislative changes and institutional reforms, and thus to establish a solid track record as regards implementation.

165 European Parliament resolution of 12 March 2014 on the 2013 progress report on Turkey (2013/2945(RSP)) Paragraph 25

166 See the website of the Ministry of EU Affairs, http://www.abgs.gov.tr/

ments of both Turkish and the EU authorities[167]. The six unofficial opening benchmarks of the Chapter 23 was very well known by the Turkish bureaucracy but these were only written in the project training books and other activities of the relevant Ministries[168].

1. The first unofficial benchmark is related to drafting a Judicial Reform Strategy: "Turkey should prepare a Judicial Reform Strategy for strengthening judicial independence, impartiality and efficiency."

The Judicial Reform Strategy and its' Action Plan including the objectives of independence, impartiality, efficiency and professionalism of the judiciary was adopted by the Council of Ministers on August 24, 2009. The Strategy was drafted by the Ministry of Justice after a long and comprehensive consultancy process (nearly one and a half year) with all the relevant stakeholders including high courts, bar associations, notaries and universities. Before the Strategy was adopted, the draft version of the Strategy had been shared with the EU Commission[169] and its views as well as the EU independent experts' peer review reports had been taken into account to a great extent[170].

All the subjects related to "judiciary" and a number of subjects related to "fundamental rights" of the EU acquis explained in the ccreening meetings of the Chapter 23 were covered in the 10 objectives and 85 targets of the strategy document. After 2009, the implementation of the Judicial Reform Strategy document has been completed to a great extent. Therefore, the Ministry of Justice continues to the update work of the strategy document.

2. The second benchmark is related to drafting a Strategy for Fight Against

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167 Kriter Journal, June 2012, Interview with Egemen Bağış, the EU Affairs Minister at the time http://www.kriterdergisi.com/haber.php?sayi=72&id=1551

168 Supra note, page 122.

169 The Judicial Reform Strategy, see pages 8 and 9 http://www.sgb.adalet.gov.tr/yrs.html

170 Thomas Giegerich, Peer Review Mission to Turkey (17 – 21 January 2011) – Chapter 23: Judiciary and Fundamental Rights Report on Independence, Impartiality and Administration of the Judiciary August 1, 2011 p 3, Thomas Giegerich, Peer-Based Assessment Mission to Turkey (17 – 21 November 2008): Reform of the Judiciary and Anti-Corruption, Report on Independence, Impartiality and Administration of the Judiciary, 14 April 2009, Luca Perilli, Peer-Based Assessment Mission to Turkey (17 – 21 November 2008): Reform of the Judiciary and Anti-Corruption, Report on Criminal Justice System.

Corruption: "Turkey should prepare the Strategy for Fight Against Corruption which includes establishment of more effective legislative and institutional framework on fight against corruption."

The Strategy for Fight Against Corruption[171] was prepared by the Prime Ministry Inspection and it was adopted by the Council of Ministers on February 1, 2010. In order to follow the implementation, the Executive Council for Improving Transparency and Strengthening Fight Against Corruption established by the Circular of Prime Ministry on December 2009 became responsible. As expected by the EU Commission, the Strategy and Action Plan contains concrete measures such as preventive measures (18 measures), sanctions (3 measures) and measures for raising the social awareness (7 measures) to attain the identified objectives and analysis of the existing law.

3. The third benchmark is related to drafting a National Action Plan for Fundamental Rights: "Turkey should prepare an action plan to respect the full exercise of these rights on the issue of fundamental rights. The Action Plan should include the rights and freedoms guaranteed by the legal measures under European Convention on Human Rights and the case-law of the European Court of Human Rights. In addition, Turkey should ensure the monitoring of developments on fundamental rights. "

The Council of Ministers adopted "The Action Plan on Prevention of European Convention on Human Rights Violations" on February 8, 2014. The Action Plan was drafted by the Ministry of Justice in a broad consultation process with the domestic stakeholders including all relevant public institutions and international actors, namely the ECtHR and the Council of Europe.

The Objectives of the Action Plan is to declare Turkey's commitment to human rights to both internal and international community, to fulfill one of the criteria for the Chapter 23 and to carry out ongoing work systematically under the umbrella of the Plan,

Expected outcomes are legislative amendments in the relevant Laws and

[171] The Strategy was published in the Official Gazzette, dated February 22, 2010.

enhancement in capacity of implementing institutions. The scope of the Action Plan consists of 14 main aims, 46 goals and 132 activities. The Action Plan includes the measures to be taken and activities and arrangements planned to be carried out with a timetable and it specifies the responsible authorities.

The Ministry of Justice will follow up the implementation in accordance with the specified timetable. Responsible institutions will send implementation reports in every six months. The Ministry of Justice will submit annual report to the Prime Ministry about implementation of the Action Plan.

4. The fourth unofficial benchmark is related to establishment of the Ombdusman and an independent human rights institution: "Turkey should establish an Ombudsman as well as an independent national human rights institution which have adequate sources and functions in conformity with principles of United Nations."

The establishment of the Ombudsman Institution was foreseen in the 2010 Constitution amendment. In parallel with this the Ombudsman Institution was established in 2012[172] and it became possible to apply to Ombudsman regarding all acts of the administration in accordance with the respect for human rights. Upon its examination the Ombudsman was entitled to give recommendations to the government. Today the institution is functional and it is delivering recommendations to the public administrations.

As the second part of the benchmark the Turkey Human Rights Institution was established by the Law No: 6332 that entered into force on June 30, 2012. The Turkey Human Rights Institution became the responsible institution regarding the implementation of the OPCAT.

5. The fifth unofficial benchmark is related to freedom of expression and implementation of the Law of Foundation: "Turkey should revise its foundation law and its legislation on freedom of expression in harmony with ECHR and the case law of the ECtHR."

The Ministry of Justice carried out a comparative study on freedom of ex-

[172] Law No: 6328, (Official Gazzette:29/06/2012 - 28338)

pression. Related to review of the legislation on freedom of expression several amendments occurred after the negotiation process launched. The infamous article 301 was amended on April 30, 2008[173] to introduce a permission mechanism as a precondition for starting an investigation.

The most significant changes regarding the freedom of expression and the media were occurred with the 3rd and 4th Judicial Packages. In the Third Judicial Package elements of violating the confidentiality of the investigation[174] and attempt to influence fair trial are re-defined in a concrete way. The prison sentence for attempt to influence fair trial is replaced by judicial fine[175]. Proactive Publication Ban is abolished via removal of Article 6/5 of Anti-Terror Law. The previous decisions on seizure of publications would be null and void. The pending cases and investigations as well as sentences which do not exceed 5 years imprisonment were suspended related to freedom of media[176].

The Fourth Judicial Package was prepared in the light of the judgments of the ECtHR in which Turkey was found in violation of the ECHR. For any statement or publication, the criteria of containing violence, force or threat or inciting or praising violence was enshrined to provisions regulating the offence of propaganda of terrorism[177] to bring it fully in line with the standards of the ECtHR. The provision on discouraging people from the military service[178] was also amended to define the elements of the crime concretely.

In order to implement the reforms and to boost the freedom of expression in Turkey several project activities were carried out by the Ministry of Justice in cooperation with the Council of Europe and the European Court of Human Rights.

The first project was the Council of Europe supported project on the free-

173 Law No: 5759, (Official Gazzette:08/05/2008- 26870)
174 Article 285 of theTurkish Criminal Code
175 Article 288 of theTurkish Criminal Code
176 for the offences which are committed via the press, publication or other communication ways and require judicial fine or sentence whose maximum limit is not more than 5 years, before 31st December 2011
177 Article 6 and 7 of the Anti-Terror Law and article 215 and 220 of the Turkish Criminal Code
178 Article 318 of the TCC

dom of expression[179] and it was implemented in cooperation with the Court of Cassation, Council of State, High Council of Judges and Prosecutors and the Ministry of Justice. Study visits have been paid to Berlin, Madrid and Strasbourg to observe the best practices and judges from the Court of Cassation, Council of State, first instance courts and from the Ministry of Justice participated to these visits. Round table meetings were organized to discuss the criteria of the ECtHR case law and judges and prosecutors from the cited institutions and first instance courts participated to the meetings.

The project of Increasing Awareness Towards Freedom of Expression in Judiciary[180] and The Project of Strengthening the Roles of High Judicial Institutions in Regard to the European Standards were also implemented to increase the level of knowledge in respect of the case-law of the ECtHR and best practices of the EU.

The project activities considerably contributed to better implementation of the provisions related to freedom of expression. Judges became aware of the Strazbourg Court decisions and they started to refer them in their judgments in parallel with their level of knowledge.

In overall assessment, Turkey achieved a lot in the field of freedom of expression to cover the unofficial benchmark. However, the recent reforms could not ensure full compliance with the ECHR requirements and the standards set out in the ECtHR case-law.

The second part of the opening benchmark is related to Foundations. The implementation of the Law on Foundations[181] dated 2008, with the provisional article 11 added in 2011 amendment[182], continues without serious problems[183]. General Directorate for Foundations resumes its evaluation process with regard to the applications on the properties of minority foundations. In case that

179 See the website of the project www.ifadeozgurlugu.adalet.gov.tr

180 MATRA Assistance Programme, see the website of the Netherland Embassy to Turkey http://turkey.nlembassy.org/services/civil-society/matra-decentral-programme

181 Law No: 5737, (Official Gazzette No: 27/02/2008-26800)

182 Decree No: 651, Dated 22/8/2011

183 See the website of the General Directorate for Foundations http://www.vgm.gov.tr/sayfa.aspx?Id=38

they prove their rights the minority foundations are entitled to receive back their immovables.

6. The sixth unofficial benchmark is related to UN Optional Protocol on Fight Against Torture:"Turkey should ratify the UN Optional Protocol on Fight Against Torture (OPCAT)"

The United Nations Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, was approved by the Parliament on February 23, 2011 and Turkey than ratified the Protocol.

The New Turkey Human Rights Institution undertook the responsibility of National Preventive Mechanism in line with the provisions of the Protocol.

In the light of the information given above, before receiving the official benchmarks of the Chapter 23, it can be said that Turkey sufficiently accomplished all the six items. This forms an advantage for Turkey to request opening the Chapter to negotiations and shows her readiness. Besides, when the official benchmarks are sent to Turkey, no further efforts will be required to open it.

G. Positive Agenda Meetings

After the screening meetings of the Chapter 23, although the screening reports were not send to Turkey, the reform process continued and the unofficial opening benchmarks of the Chapter 23 to a great extent were met by Turkey. As details are given above the reforms realized with contribution of the stakeholders of the Chapter 23; Ministry of Justice (MoJ), Ministry of Interior, Ministry of Foreign Affairs, Prime Ministry Inspection Board, Ministry of EU Affairs and other institutions.

The unofficial opening benchmarks of the Chapter 23 have been reviewed by the EU Commission in Turkey Progress Reports annually without referring them. The fulfillment of the "unofficial benchmarks" was a clear message to show Turkey's committment to resume the political reforms. The EU Commission, upon the pressure from the Turkish side with consistent calls on delivery of the Screening Report of the Chapter 23 (which is under the competence of

the European Council) together with the decisiveness for continuation of the reforms, felt necessary to make an opening for Turkey.

Thus, the EU Commission offered Turkey to start the positive agenda meetings which will be a platform to follow the improvements closely and a motivation element for Turkey. Since the Chapter was blocked by some EU Member States, the solution was continuing with a different name other than negotiations. The Turkish side emphasized in their statements that Positive Agenda process cannot replace the accession negotiations. This was seen as a temporary and pragmatic method to speed up the process until the actual negotiations on the Chapter will be opened.[184]

The first Positive Agenda Meeting was held in Ankara on 17-18 May, 2012 with participation of the EU Commissioner for Enlargement, the Minister of Justice and the Minister of EU Affairs of Turkey. The meeting was focused on concrete steps expected to be fulfilled by Turkey. Some of the subjects included in the target list were achieved in short term; the Law on Mediation, The Law on Ombudsman, The Third Judicial Package and the Law on Turkey Human Rights Institution was enacted by the Parliament just within two months. It can be argued that the first Positive Agenda meeting triggered the continuation of the reforms and reached its target.

The working group was convened in bureaucratic level two times after the May 2012 meeting to discuss the achievements. The second Positive Agenda Meeting was held in Ankara on June 17, 2014 with participation of the EU Commissioner for Enlargement and the Minister of Justice and the Minister of EU Affairs of Turkey to evaluate the developments.

IV. CONTRIBUTIONS OF THE CHAPTER 23 TO TURKEY'S REFORM PROCESS BEFORE AND AFTER THE LAUNCH OF NEGOTIATIONS

All the reforms briefly mentioned above started a new phase in the history

[184] The Chapter of Judiciary and Fundamental Rights in the EU Accession Negotiation Process, p 47

of Republic of Turkey[185]. The relation between individuals' rights and the state improved in favour of the individuals and the freedom atmosphere in the society became prevailing. The notion of "the imperative state" transformed to "the serving state" as it should be in an ordinary democratic society.

The reforms formed a freely thinking atmosphere and freely discussion environment among the society and thus people gained their self confidence to discuss all kind of subjects that was not possible before.[186] It can be considered that people tasted the freer society and higher standards. Like the pressed toothpaste, the reform process cannot go back to before the candidacy period.

Starting from 1999 the reforms achieved are big steps for Turkey and it will be unfair to underestimate them. The strenghtened rule of law, fundamental freedoms in ECHR and ECtHR standards and the normalized civil-military relations contributed to the stability of Turkish democracy as well as the welfare of the society[187].

The reforms in the field of judiciary and fundamental rights were supported by most of the segments of the society[188]. It can be evaluated that the reform process was more alive and faster before the negotiations started in October 2005 and it came to a slowdown process with the unwilling behaviours of the EU Member States to open new Chapters for Turkey during the negotiation process.[189] It is also known that the public opinion in the EU is very much against Turkey's accession to the EU.[190] In parallel with the pace of reform process the public support for the EU membership was more than 50 percent before the accession negotiations started[191]. The confidence of the Turkish so-

185 Meltem Müftüler Bac, Turkey's Political Reforms and the Impact of the European Union South European Society & Politics Vol. 10, No. 1, March 2005, pp.16–30

186 Political Reforms in Turkey page 29-30

187 Political Reforms in Turkey page 29-30

188 Political Reforms in Turkey page 29-30

189 Particularly the German and French Prime Ministers objected to Turkey's EU membership in their public statements

190 Eric Faucompret and Jozef Konings, Turkish Accession to the EU, Satisfying the Copenhagen Criteria, 2008, Routledge Publication, p 48

191 NTV TV Channel website http://arsiv.ntvmsnbc.com/news/164671.asp, according to a survey in June 2002

ciety to EU membership was decreased due to the statements of the EU Member States officials and the prolonged negotiation process without a significant improvement. In a public survey only 17 percent of the society stated the idea that "we belive that Turkey will be a member of EU"[192].

In the beginning of the reform process, freedoms were widened with minor amendments in the Laws. As an example the Law on Associations, the Law on Meetings and Demonstration Marches, the Law on Press and even the Law on Turkish Criminal Code were amended partially in several harmonization packages. However, it was understood that it would be wise to write a new Law reflecting the ECHR standards.[193]

In todays Turkey, most of the problems of the early 2000's like torture and ill-treatment no longer exist anymore. The human rights approach of the judges, prosecutors and law enforcement officials changed in the correct direction with contribution of the training they received. However, further work is necessary to deliver training to practioners on ECtHR case-law which is still not comprehensively known in Turkey.

Looking from the 2014 perspective, some EU Member States are reluctant to open more negotiation Chapters for Turkey and this cause indifference to the EU process in the Turkish society. However, both the Turkey and EU Member States do not want to end the process. It should be considered that the accession negotiations have never been easy for the current Members including the UK, Spain, Portugal and others. Turkey, as the most controversial candidate[194] having the geographic scale with east and south borders to Syria, Iraq, Iran, Azerbaijan, Armenia and Georgia and with a mostly Muslim population of 76 million[195] meaning cultural differences, should not be surprised for the difficulties in the accession negotiations.

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192 Daily Haberturk website, August 19, 2012, http://www.haberturk.com/dunya/haber/769291-abye-destek-dibe-vurdu

193 Political Reforms in Turkey Conclusion page 29-30

194 Eric Faucompret and Jozef Konings, Turkish Accession to the EU, Satisfying the Copenhagen Criteria, 2008, Routledge Publication, introduction page

195 Hurriyet Daily website January 29, 2014 http://www.hurriyet.com.tr/gundem/25688311.asp

CONCLUSION

Turkey has achieved a lot in all areas of the judiciary and fundamental rights in respect of legislation and implementation. However, there are still remaining reforms to achieve.[196]

It is hard to mention a provision either in the Constitution or in legislation related to independence, impartiality and efficiency of the judiciary or fundamental rights which has not amended in the EU accession process. However, the implementation of the reforms related to judiciary and fundamental rights is necessary to improve since "reform on paper" is not sufficient[197]. It can be considered that the mentality change among the practitioners of the law including judges, prosecutors and law enforcement officials has started. Today it is possible for judges to render a judgment in line with the ECtHR case-law even if there is discrepancy between the domestic law and the ECtHR ruling. Judges often make reference to ECtHR judgments in their reasoned opinion in parallel with their level of knowledge which is a strong indicator to their willingness for internalizing the reforms. However, more human rights training including comprehensive ECtHR case-law should be delivered to judges, prosecutors, law enforcement officials and public servants to improve the practice and to form a culture where human rights are given full effect. This new judicial as well as administrative culture will of course need time to grow since "a concerted effort must be made to foster them"[198].

After all the reforms achieved, provisions restricting the freedom of expression and media still exists in various laws[199], therefore legislative amendments are required in this field. Furthermore judges and prosecutors have to

196 Political Reforms in Turkey Conclusion page 29-30

197 Thomas Giegerich, Peer-Based Assessment Mission to Turkey (17 – 21 November 2008): Reform of the Judiciary and Anti-Corruption, Report on Independence, Impartiality and Administration of the Judiciary, 14 April 2009, p 28 www.abgm.adalet.gov.tr/ppt/2011_istisari_ziyaret_raporu_en.pdf

198 Thomas Giegerich, Peer-Based Assessment Mission to Turkey (17 – 21 November 2008), p 28

199 Lord Macdonald of River Glaven QC, Peer Review Visit to Turkey on Freedom of Expression, April 2011 www.abgm.adalet.gov.tr/ppt/2011_istisari_ziyaret_raporu_en.pdf p 18-19

change their views in favor of human rights and freedoms[200] in harmony with the ECtHR case law and ECHR principles.

Likewise, legislation is awaited regarding the protection of personal data to complement the 2010 Constitutional amendment. This will positively contribute to the EU negotiations with affecting several Chapters and will be a key to open the gate for effective cooperation with the Eurojust, Europol and other international institutions.

The legal framework for the labour and trade unions rights do not fit with the EU standards according to the EU Commission.[201]

Serious measures should be taken to ensure the efficiency and effectiveness of the judiciary as the backlog in the courts still exists as a problem. The steps should be taken calculating the increase in number of cases according to years and concrete targets should be specified to reduce the number of cases in general and per court.

"The political reform effort needs to be renewed"[202] to keep the society alive. The EU should contribute to the reform process in Turkey taking concrete steps to open Chapter 23 starting from sending the screening report to Turkey to motivate and convince the Turkish society that there is light at the end of the tunnel.

Irrespective of Turkey becomes a member to the EU at the end of the day, the candidacy period and negotiation process has always been and will be in favour of Turkey and Turkish citizens because of the reforms achieved.[203] The opening of negotiation Chapter 23 will further contribute to the new reforms which mean stability and welfare for Turkey in the long run that will also directly affect the EU and its Member States. From this point of view the EU Member States should evaluate their position regarding opening of "the most

200 Naim Karakaya, Hande Özhabeş, Judicial Reform Packages: Evaluating Their Effect on Rights and Freedoms TESEV Publications, November 2013, p 17
201 European Commission Turkey Progress Reports
202 Giegerich, Peer-Based Assessment Mission to Turkey (17 – 21 November 2008), p 28
203 Enlargement Strategy and Main Challenges 2011-2012 page 3

important Chapter" to the negotiations.

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THE COMPANIES ACT 2006 IN THE UNITED KINGDOM AND ITS IMPACT ON THE ENGLISH LEGAL SYSTEM

İngiltere'de Kabul Edilen 2006 Tarihli Şirketler Kanunu ve İngiliz Hukuk Sistemi Üzerindeki Etkileri

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ABSTRACT

English Legal System is one of the most well-established legal systems. A lot of countries have taken English Legal System as an example for themselves. However, this scene that looks like perfect has to maintain its continuity and to fulfil expectations in the whole social structure constantly changing with the needs of the developing world. The field in which the order and disorder of country which is the combination of social life and this structure and the stability that emerges with this make themselves felt most effectively is its economy. In a modern market economic system, Companies are the most functional value in the human life. Companies that are dynamos of economy constitute a separate whole in themselves. Companies supply all kinds of necessities for everyday life such as electricity, gas, food etc. They are regulated by Company Law in the English legal system.

Key Words: Company, English Legal System, Company Law, The United Kingdom, Modern Market Economic System, The Companies Act 2006

ÖZET

İngiliz hukuk sistemi dünyadaki hukuk sistemleri arasında uygulama örneği olarak en çok oturmuş hukuk sistemlerinden bir tanesidir. Günümüzde pek çok ülke, İngiliz hukuk sistemini kendisine örnek almaktadır. Ancak mükemmel olarak işleyen görünümdeki söz konusu sistem, bu tablonun sürekliliğini sağlamak, gelişen ve yenilenen dünyanın ihtiyaçlarına paralel olarak sürekli değişen tüm toplumsal yapıdaki beklentileri karşılamak zorundadır. Sosyal yaşam ve istikrar, bu yapının birleşimi ile oluşan sistemde, ülkenin düzeni ve düzensizliğini göstermekte ve ülke ekonomisinde

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kendisini en etkili biçimde hissettirmektedir. Modern pazar ekonomisi sisteminde şirketler, bu beklentilerin karşılanması amacıyla insan yaşamında çok önemli bir fonksiyonel değer olarak görülmektedir. Böyle bir değer olarak adeta ekonominin dinamoları olan şirketler ise kendi içlerinde ayrı bir bütünü oluşturmaktadırlar. Elektrik, gaz, beslenme v.b. gibi günlük yaşamın her alanında var olan tüm ihtiyaçların karşılanmasında şirketler önemli bir role sahiptir. Işte İngiliz hukuk sisteminde şirketler, bu tür ihtiyaçların karşılanmasını düzenlemektedirler.

Anahtar Kelimeler: Şirket, İngiliz Hukuk Sistemi, Şirketler Hukuku, İngiltere, Modern Pazar Ekonomisi Sistemi, 2006 tarihli Şirketler Kanunu

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INTRODUCTION

English Legal System is one of the most well-established legal systems. A lot of countries have taken English Legal System as an example for themselves. However, this scene that looks like perfect has to maintain its continuity and to fulfil expectations in the whole social structure constantly changing with the needs of the developing world. The field in which the order and disorder of country which is the combination of social life and this structure and the stability. It emerges with this make themselves felt most effectively is its economy. Companies that are dynamos of economy constitute a separate whole in themselves.

As a result of power, efficiency and healthy functioning of parts creating it, each whole continues to live in this change or ends. Parts constituting the whole are important. These are dynamic and provide us with seeing and understanding the big picture. While performing successful works in subjects related to these dynamism fields, government policies that are effective in continuity of these are also pushing, guiding and protective. The more conformity among company law, taxes, laws etc is close to real life, the more effective and successful it will be.

At this point, it is good to state that the English Legal System is nourished by many fields such as family law, digital rights management, penal law, company law, international law. Diversity, specialization and also researching for

achieving the rightness of this in practice shall ensure working and considering and finding the closest thing to truth. The principal quality of the English Law which is a quite broad subject having a 900-year past is the existence of oldness, speciality, continuity and historicity of this system. We must also state that the English Legal System is virtually not philosophic as distinct from European Legal Systems. When we look at the present, we see how attempt of this rooted structure to integrate itself into the good of modern world and administrative viewpoints balance the place in which traditionalism should stand.

In the sense of our subject, importance of providing and being able to provide this balance factor for companies being active representatives in economic life is the essential point. Corporate structures, management systems, investments, incentives need support with regulations in company law for achieving growth and protecting well-being of this dynamic structure. For this reason, each system to be brought and each amendment to be made should be able to provide appropriate and consistent solutions by observing balances and determining needs well. One of the most important parts of this change is Company Law 2006. One should not be afraid of knowing, learning, understanding and changing for success. When the aim is to put people-oriented and the best thing into people's service, the system which is not closed to change basically and which we show as an example in many subjects today does not make us forget its existence, it is the truth of England.

In a modern market economic system, there is the most functional value in the human life; Company. Companies supply all kinds of necessities for everyday life such as electricity, gas, food etc. They are regulated by Company Law in the English legal system. Moreover, they are also an artificial separate person which is capable of owning property, being a party to contracts etc.[1]

There are number of significant company law developments in this area because of changing business life. Some of them have been regulated to harmonize with new EC directives, the others have been trying to promote Britain's

[1] Mayson S., French D., Ryan C., 'Company Law', 24th ed., Oxford, 2007, p.1.

company law which is the most effective country in international trade.[2] The latest act is the Companies Act 2006 (CA 2006) which came into force on 1 October 2008. CA 2006 is probably the longest Act ever passed by the UK Parliament with 1300 sections and 16 schedules. Previous important act in force before CA 2006 was CA 1985 which had 747 sections and 25 schedules. When we look at the recent legislation developments in the UK, the legislative process, especially about companies, is quite long and contains detailed rules. It is notable that another reason contributing to size of codification is the detailed style of drafting traditionally used in British legislation.[3] It means that there is a gradually increasing approach on the style of code. However, in modern legal systems, this kind of codification style is seen negative to get the same level of live business life. The detailed style is called casuistic method.

The purpose of current company law is trying to promote enterprise and stimulate investment. It is determined to ensure that new system makes it easy to set up and grow a business. CA 1985 was regulated through the mainly large scale companies. The provisions, for example, enjoyed to private companies that were often expressed as an exception to the provisions enjoying to public companies, making them hard to understand. They have been turned this approach on its beginning with the CA 2006. Those parts of the Act most relevant to small companies (such as the model articles of association and the requirements on accounts and reports) come first so that the provisions that enjoy to them are easier to find. It also uses simpler, clearer language.[4]

The large majority of companies are small in the UK so it is aimed that to get balance with new system in the corporate governance. Furthermore, CA 2006 resets balance and makes the company law easier for all to understand and use. To sum up, the main changes to company law affecting small companies are as follows: according to new legislation, For example, it is not require that have a company secretary for private companies. In addition, it is trying to

2 Morse G., 'Charlesworth's Company Law', 17th ed., London, 2005, p.10.
3 Mayson S., French D., Ryan C., 'Company Law', p.11-15.
4 See recommendations, Company Law Reform Bill: Small Business Summary, November 2005.

simplify making a decision to take written resolution and do not need to hold an annual general meeting unless they opt to do. It is aimed that there is appropriate advice and guidance to smaller firms and their advisors in the CA 2006. It is ensuring that making it is easier to set up and run a company for reducing directors' general duties. Finally, the Government intend to provide a power to allow updating and amendment on the current company law for harmonizing today's business realities in the latest Act.[5]

There are four principal parts of replacement in the CA 2006 that are meetings, directors' duties, shareholder and electronic communication. I would like to examine these changings and updates in the next chapter.

I. MEETINGS

A meeting that all members of a company are entitled to attend is called a 'general meeting'. However, a meeting again which only one class of members are entitled to attend is called a 'class meeting'. General meeting which is not ordinary or annual general meeting is called extraordinary general meeting, whereas the term is not used in CA 2006.[6]

On the contrary, previous Act (CA 1985) recognized two types of company general meeting that are the annual general meeting (AGM) and the extraordinary general meeting (EGM). The previous Act was written from the perspective of the public companies with some derogations for the small, private companies.[7] Unlike the CA 1985, new legislation now provides measure to streamline company making-decision processes and to get them the same level with realities of modern business life. Under CA 2006, for example, provisions relating to take a decision that makes it easier for the small, private companies to understand the basic definitions and requirements for getting a resolution. In particular, the decision must be taken at a meeting held and conducted in

5 See also recommendations, Company Law Reform-White Paper, March 2005, para 1.
6 Mayson S., French D., Ryan C., 'Company Law', p.362.
7 Morse G., 'Charlesworth's Company Law', p.242-243; Keenan D., 'Smith and Keenan's Company Law', 13th ed., London, 2005, p.403, see also recommendations, Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication, October 1999.

accordance with ss 301 to 335 and if it is a public company's annual general meeting, § 336 to 340 and with the company's articles (s 301). Moreover, the current company law relating to meetings, CA 2006 § 301 to 333, applies to class meetings as it does to general meetings with exceptions which will be stated in the following discussion (s 334).[8]

Under CA 1985, s366 required companies to hold an AGM in every calendar year, except that the first may be held at any time within 18 months of incorporation; and also required that each AGM must be held not more than 15 months after the previous one. But a private company may dispense with the holding of an AGM by unanimous agreement (s 366A). On the other hand, under CA 2006, private companies are not required to hold AGM at all. It is only that public companies are required to hold AGM related to the reporting cycle in order to ensure members have a opportunity to read the reports.[9]

In my opinion, The Government aimed to protect to small private companies against redundant expenditures. Because, the new legislation tries to ensure a mechanism which makes it easier set up and run them especially for small companies with a 'Think Small First' approach. In particular, small and private companies have very limited shareholdings and if it is obliged to hold an AGM every year is really redundant and burdensome.[10]

II. DUTIES OF DIRECTORS

The current law about directors' duties has been changed from by CA 2006 which writes down the whole subject on legal agreement at first time. Before CA 2006 the duties of directors in a company that were regulated by the equitable principles of fiduciary duty and the common law of negligence. This codification is one of the most important changing through CA 2006. It is noteworthy that this regulation takes a risk in relation to loss adaptability in exchange for the certainty and accessibility of arranged statutory wording.[11]

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8 Mayson S., French D., Ryan C., 'Company Law', p.362.
9 Ibid, p. 363.
10 See recommendations, Company Law Reform-White Paper, March 2005, para 4.2.
11 Mayson S., French D., Ryan C., 'Company Law', p. 445-446.

In time of preparing statutory duties, developments were recommended by the Law Commissions and the Company Law Review in order to make the law more accessible to directors and other users. The Government believed that directors' duties are fundamental to company law.[12]

According to CA 2006, the new seven general duties stated in ss 171 to 177. We will move on these duties and examine individually:

CA 2006, ss 171 to 173 and 175 to 177 are based on the equitable principles of fiduciary duty which applied to directors until those sections came into force and must be explained in the same way as those principles. There are some differences in the content of the duties for different fiduciary relationships (Henderson v Merrett Syndicates Ltd [1995] 2 AC 145 per Lord Browne-Wilkinson at p. 206). It can be explained them into six sub-groups. For example, directors must remain within the scope of the powers, they must act in good faith, they must exercise independent judgment.[13] Moreover, the general duties enjoy to shadow directors where, and to the extend that, the corresponding common law rules or equitable principles so enjoy (s 170-5). Shadow directors are not enough to impose on that person the fiduciary duties of director if they are not a de jure director falls within the statement definition of shadow director (Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (ch).[14]

Furthermore, duty to act within powers regulates under s 171 that a director must act in accordance with the company's constitution, and exercise powers for the purposes for which they are conferred. Under the draft model articles for private and public companies, directors have authority to exercise all its powers in the management of the company's business. What about duty to promote the success of the company occurs in the CA 2006, s 172 requires a director to act in the way that the director considered in good faith. In the light of expert evidence, the court considered that would be most likely to promote the company's success. Unlike this, the creditors are not expressly listed in this

12 Morse G., 'Charlesworth's Company Law', p. 305.
13 Gower and Davies, 'Principles of Modern Company Law', 8th ed., Sweet&Maxwell, London, 2008, p. 497
14 Mayson S., French D., Ryan C., 'Company Law', p. 445-449.

section, as a particular electoral district to whose interests the directors must have regard, though some of the electors who are listed will be creditors such as employees, customers etc. On the contrary, before CA 2006, since 28 April 1986, the common law duty of directors of a company to consider the interests of the company's creditors has been put on a statute by what is now IA 1986, s 214.[15]

Another effective general duty is duty to exercise independent judgment. It is consist of under s 173, CA 2006 that a director must exercise independent judgment. The code reflects the equitable principle that it is legitimate for the directors to enter into a binding agreement. They will act as a director in a particular way in good faith that it is interests of the company (Thorby v Goldberg [1964] 112 CLR 597). Additionally, duty to exercise reasonable care, skill and diligence takes part in s 174 and it imposes what is known as a 'objective/subjective' standard for the statutory duty of care, skill and diligence. However, in cases in the latest centuries, only subjective standard was used (City Equitable Fire Insurance Co Ltd, Re. [1925] Ch. 407; [1924] All E.R Rep. 485, CA). Also, at the end of the 20th century, courts realised that this was too low a standard and they adopted the dual standard from IA 1986, s 214-4 (Norman v Theodore Goddard [1991] BCLC 1028). Furthermore, duty to avoid conflicts of interest is a little complicated and has variety of provisions. It is regulated by s 175, CA 2006 that is based on two equitable principles, the no-conflict and no-profit rules. However, the no-conflict and no-profit rules shall be applied in equity where there are two conditions of the conflict of interest arising in relation to a self-dealing transaction or arrangement with the company.[16]

Moreover, duty not to accept benefits from third parties is stated by s 176, CA 2006. This duty is not infringed if the acceptance of the benefit cannot rea-

[15] Ibid, p. 449-462.
[16] Mayson S., French D., Ryan C., 'Company Law', p. 465-471.

sonably be regarded as likely to give rise to a conflict of interest. Then, a person who stops to be a director continues to be subject to the duty not to accept benefits from third parties as regards things done. Final duty to declare interest in proposed transaction or arrangement is put in order s 177 that when a company is entering into a transaction, a director of the company must disclose to it any interest which director has in the transaction (Bentinck v Fenn [1887] 12 App Cas 652 at pp 661, 667 and 671). Indeed, this section does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question (s 177-5).[17]

III. SHAREHOLDER PROTECTION

Shareholders have a lawful right to sue directors in a derivative action on behalf of the company for negligence or fraud at first time under CA 2006. The Government succeeded to ensure significant changing on the company law with CA 2006. Indeed, they can bring a derivative action against directors for negligence although the directors claimed that has not benefited from this negligence.[18]

Before this new regime, former rule prevented derivative claims by shareholders for reflective losses. For example, if there is a wrong act to a company, the company can take the action as a proper claimant in respect of that wrong act. In addition, only in exceptional circumstances, where the wrongdoer is a majority shareholder, minority shareholders have been obtained the court's permission to bring a derivative claim on behalf of the company. There were two requirements at common law for the claim as follows: first, the alleged wrong or breach of duty is one that is incapable of being raitified by a simple majority of the members; second, the alleged wrongdoer is in control of the company, so that the company, which is the proper claimant can not claim by itself.[19]

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17 Ibid, p. 477-478.

18 Ohrenstein D., 2007, 'Derivative Action', New Law Journal, [online], 157 NLJ 1372.

19 Cain B., 2006, 'Members' Rights&Derivative Actions', Company Secretary's Review, [online], 30 CSR 2,9; Ohrenstein D., 'Derivative Action', New Law Journal, 157 NLJ 1372.

According to the current law, CA 2006 s 260 defines a derivative claim as one brought by a member of a company in respect of a reason of action endowed in the company and seeking on behalf of the company. For this reason, member means that trustees in bankruptcy and others who has been transferred shares by legal deal. Indeed, this is a considerable changing from previous law regime (see Pavlides v Jensen [1956] 2 All ER 518, [1956] 3 WLR 224). However, safeguards have been introduced to protect directors from uncertain slaims, the major one being that shareholders need to obtain the court's consent to continue a claim.[20]

Finally, under s 263(2), there are three situations in which permission for a derivative claim must be refused: "(a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or (b) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or (c) where the cause of action arises from an act or omission that has already occurred, that the act or omission—(i) was authorised by the company before it occurred, or (ii) has been ratified by the company since it occurred."

IV. ELECTRONIC COMMUNICATIONS

Communication is one of the most significant subject for companies to communicate with their shareholders. It has been used for notice of meetings, receiving or sending copies of reports and accounts by the companies. CA 2006 brings fundamental changing for companies about communications.

The new regime for communications between companies and shareholders required or authorised to be sent or supplied under the Act. Website publication of information and documents such as general meeting notices and annual reports can become the default position, although shareholders can always request hard copy documents. On the contrary, before the current regime, com-

[20] Ohrenstein D., 'Derivative Action', New Law Journal, 157 NLJ 1372; Dodd A.&Daly M., 2007, 'Directors' Duties&Derivative Actions', Company Secretary's Review, [online], 30 CSR 19,145.

panies could not send or receive the documents and communicate with shareholders in electronic form. This facility has not been used widely especially in the large companies. For this reason, these companies spend thousands of pounds redundantly for sending hard copies of the documents to shareholders and communicate with them.[21] It is noteworthy that the Government try to prevent this pointless expenditure in business life. It is also considerable burdensome for British economy.

According to new provisions on electronic communication, companies can communicate with their shareholders by email or via their websites. Indeed, shareholders receive notices of meetings, annual reports and accounts via email. However, each shareholder must have an valid email address and give it to the company. Furthermore, companies can publish all information and communications on their websites such as updates, notices of meetings etc. so that shareholders always access and learn everything from the website. However, companies are required to inform their shareholders always information is posted on their websites. As a consequence, CA 2006 provides to encourage grater use of electronic communication and reduce to print large quantities of hard copy documents.[22]

CONCLUSION

We observe that the traditional structure of English Legal System undergoes a process which may create an opinion that it may be flexible particularly in the field of Company Law in consideration of EU regulations. Nevertheless, it was able to protect its own structure despite of all adaptation practices performed.

To emphasize briefly a few points contained in our article, firstly concern of registered office as a specific concept in English Company Law has been

[21] Gershlick P.&Price A., 2007, 'Company Communications', Company Secretary's Review, [online], 30 21,161; Knapp V.&Mathieson A., 2007, 'The Companies Act 2006', Journal of International Banking and Financial Law, [online], 3 JIBFL 139; Morris G., 2007, 'Changes for Shareholders', Tolley's Practical Audit & Accounting, [online], 18 PAA 6,61.

[22] Morris G., 'Changes for Shareholders', Tolley's Practical Audit & Accounting, 18 PAA 6,61; Gershlick P.&Price A., 'Company Communications', Company Secretary's Review, 30 21,161; Knapp V.&Mathieson A., 'The Companies Act 2006', Journal of International Banking and Financial Law, 3 JIBFL 139.

regulated with miscellaneous articles in Companies Act 2006. For the most part, it has been regulated in section 86-88 in Chapter 6, however regulations regarding registered office in CA are not limited to this. We frequently come across regulations specific to registered office for a lot of provisions relating to management of companies, keeping records, purchasing, dividing and discharging shares etc. of CA. This shows us that the concept of registered office has constituted one of the cornerstones of Company Law by the legislation in the process from foundation to termination.

We see that the registered office is not only an important factor in formation of company, but it has been also regulated as a necessity that concerns secretaries and directors of company closely while managing activities of company. We may determine that, in Company Law of the United Kingdom, the procedures have been simplified and regulated with flexible provisions and that the bureaucracy has been decreased. Therefore, formation of company has become quite attractive for investors.

Another determination that must be stated is that transfers of registered offices between administration and jurisdiction regions are possible with introduction of special laws by the parliament. It may seem at first appearance that there is a heavy form requirement. However, we must state that the reason why the legislative body makes Company transfer so difficult is to consider an attentive protection in favour of shareholders and receivables of company.

The Companies Act 2006, which examined above summarily, provides considerable replacements in the company law. When we look at the whole Act, it is reflected that imposing to 'think small first' approach for protect small companies and promote enterprise and stimulate investment in the UK. The new regime ensures saving of money and time. It is aimed that the system eventually makes everything easy and grows a business.

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CYBER TERRORISM FROM THE CRIMINAL LAW PERSPECTIVE

Ceza Hukuku Açısından Siber Terörizm *

Mehmet YAYLA**

ABSTRACT

Cyber terrorism has been recognized as a threat at national and international level. The reason of that cyber attacks can come from anywhere on the globe and be easily hidden.

The Internet is not a single entity; no government, company, or individual owns it. As a result, cyber space has no border. The transnational character of cyber terrorism makes jurisdictional issues an important area of concern.

Responding to cyber terrorism requires special efforts and developing strategies and policies that need to be as inclusive as possible. It includes bringing efforts from all parties, including criminal law system.

The criminal law system must adapt to new development. But, before discussing what rules should be developed, it is important to explain "cyber terrorism" as a criminal law term. Because words are inevitable instruments of jurisprudence. In this study, cyber terrorism as a criminal law term has been examined and discussed which crimes in Turkish Penal Law can be committed by cyber terrorist.

Key Words: Cyber terrorism, cyber crime, cyber space, criminal law.

ÖZET

Siber terörizm, ulusal ve uluslararası seviyede tehdit olarak kabul edilmektedir. Bunun nedeni, siber saldırıların dünyanın herhangi bir yerinden gelebilmesi ve gizlenebilmesidir.

İnternet, kimsenin üzerinde tamamen egemenlik kuramadığı, devletlerin, şirketlerin ve kişilerin sahip olamadığı bir yapıdır. Bunun sonucu olarak siber ortam, sınıra

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sahip değildir. Siber terörizmin sınırları aşan yapısı, yargılama konularını önemli bir tartışma alanı yapmaktadır.

Siber terörizm, özel çaba gerektiren, olabildiğince kapsamlı strateji ve politika üretilelerek mücadele edilmesi gereken bir konudur. Bu mücadele, ceza hukuku sistemi de dâhil tüm tarafların çabalarını içermektedir.

Ceza hukuku sisteminin yeni gelişmelere uyum sağlaması gerekmektedir. Fakat, hangi kuralın geliştirilmesi gerektiğini tartışmadan önce, siber terörizm teriminin bir ceza hukuku terimi olarak açıklanması önem arz etmektedir. Çünkü, kelimeler hukuk biliminin vazgeçilmez malzemesidir. Bu çalışmada, siber terörizm bir ceza hukuku terimi olarak incelenmiş ve Türk Ceza Hukukunda siber teröristler tarafından işlenecebilecek suçlar tartışılmıştır.

Anahtar Kelimeler: Siber terrorizm, siber suç, siber ortam, ceza hukuku.

INTRODUCTION

Terrorism has been one of the complex issues faced by governments, policy makers, analysts, and the public. The complexity of terrorism has come out not only from the definition of the concept itself but also the tactics that terrorist groups use.

As the world changes at an unprecedented pace, the types of weapons, targets and the tactics of the terrorists have changed.[1] Today, it is considerably clear that information technologies, such as computers, telecommunication devices, software, and the internet have been used by all terrorist organizations. In our day, almost all of the active terrorist organizations have Web sites and use several languages to reach out to more and more people.[2]

Government, military, financial and service sectors use computer system and internet widely. As the world has become more and more reliant on technology and networked systems, not only have legitimate entities benefited from this trend, but also illegal groups, such as terrorists, organized crime groups,

1 Zanini, M. & Edwards, S. J. A., "The Networking of Terror in the Information Age", In J. Arquilla & D. Ronfelt (Eds), Networks and Netwars*,* Santa Monica, CA: RAND Corporation, 2001, p.29.

2 Weimann, G., "How Modern Terrorism Uses the Internet", 2004, http://www.usip.org/publications/www terrornet-how-modern-terrorism-uses-internet, access date 04.01.2013.

and other criminal entities have been using cyber space for their own benefits. The growing dependence of societies on information technology has created a new form of vulnerability, giving terrorists the ability to approach targets such as national defense systems and air traffic control systems.[3]

There are multiple reasons to think terrorist groups will utilize information systems as weapons of terror. Cyber terrorism is a wise choice for modern terrorists, who assess its anonymity, its potential to cause massive damage, its psychological impact, and its media appeal. If we consider terrorists as rational people who calculate the necessary preparation and consequences of their actions, cyber terrorism provides plenty of opportunity for terrorists because the attacks are cost-effective and may potentially disrupt and destroy enough lives to serve their political agenda. Also, cyber space enables terrorists to attack multiple targets at the same time, which can increase the significance of the attack.[4]

Cyber terrorism is one of the newest national security issue in the twenty-first century. The international and national legal system must adapt to this battleground. But, before discussing what national and international rules and strategy should be developed, It is important to explain "cyber terrorism". Firstly, this article will give the definition of cyber terrorism. After that, the definition in Turkish Criminal Law about cyber terrorism will be detected. Finally, which crimes in Turkish Penal Law can be committed by cyber terrorist will be discussed.

I. THE DEFINITION OF CYBER TERRORISM

A. The Etymologic Origin of "Cyber Terrorism"

Etymologically, "cyber terrorism" combines two nouns, "cyber" and "terrorism". In order to fully understand what is meant by "cyber terrorism", the

[3] Weimann, G., "Cyberterrorism: The Sum of All Fears?", Studies in Conflict & Terrorism, 28:2, 2005, p.129-131.

[4] Ozeren, S., Global Response to Cyberterrorism and Cybercrime: A Matrix for International Cooperation and Vulnerability Assessment (Unpublished Dissertation for Doctor of Philosophy), University of North Texas, 2005, p.33.

terms which are comprised should be explained.

1. The Definition of "Cyber" and "Cyber Space"

In Turkish, the term of "siber uzay" is used in place of "cyber space". The meaning of the words, which are combined, is examined, while the word of "siber" egual to "cyber", the word of "uzay" is equal to "space" and the usage of the term is the same meaning in Turkish.

The root of "cyber space" is "cyber" which is derived from "cybernetic". Etymologically, "cyber space" combines the term "space" with the root of "cyber" from the word "cybernetic", from the Greek, "kubernân", which means to lead or govern. The "cyber" environment includes all forms of digital activities, regardless of whether they are conducted through networks and without borders.[5]

In order to fully understand what is meant by cyber terrorism, the concept of "cyber space" should also be explored. Essentially, cyber space is the sum of electronic networks including, but not limited to, the Internet, where various information operations occur.[6]

In United Nations Multilingual Terminology Database, cyber space is defined as; "the global system of systems of internetted computers, communications infrastructures, online conferencing entities, databases and information utilities generally known as the Net. This mostly means the Internet; but the

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5 "Prospective Analysis on Trends in Cybercrime from 2011 to 2020", French National Gendarmerie (Agence Nationale de Sécurité des Systèmes d'Information (ANSSI), p.6, http://www.mcafee.com/hk/resources/white-papers/wp-trends-in-cybercrime-2011-2020.pdf, access date 22.3.2013.

6 Swanson, Lesley, "The Era of Cyber Warfare: Applying International Humanitarian Law to the 2008 Russian-Georgian Cyber Conflict", Loyola of Los Angeles International & Comparative Law Review, V.32, Y.Spring 2010, p.307; A. Sinks, Michael, Cyber Warfare and International Law 3 (April 2008) (unpublished research paper, Air University, Air Command and Staff College), https://www.afresearch.org/skins/RIMS/display.aspx?moduleid=be0e99f3-fc56-4ccb-8dfe-670c0822a153 &mode=user&action=researchproject&objectid=1120f215-38a9-4829-bb7a-33de2e42ec12 (noting that the National Military Strategy for Cyberspace Operations defines cyberspace as "a domain characterized by the use of electronics and the electromagnetic spectrum to store, modify, and exchange data via networked systems and associated physical infrastructure"), access date 23.3.2013.

term may also be used to refer to the specific, bounded electronic information environment of a corporation or of a military, government or other organization".[7]

In U.S. Department of Defense Dictionary of Military and Associated Terms, cyber space is defined as "a global domain within the information environment consisting of the interdependent network of information technology infrastructures, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers".[8]

One of the themes associated with the cyber space and with its prominent symbol, the Internet, which is very important for modern life should be examined. The Internet is a complex and dynamic system and there is no landlord for this system. Cyber space users-households, corporations, universities, governments, and the military-travel in cyber space to build and reach destinations of information, which is shared, acquired, and controlled through networked systems connected by ordinary telephone lines, microwave relays, satellite uplinks and downlinks, fiber optics, cables, transistors, and microchips.[9] States, criminal organizations, terrorist organizations, and specific individuals are using the developed networks to transverse cyber space and launch cyber attacks.

Even though the Internet is often dissociated from the State, the State never really abandoned it. The State initiated the Internet, releasing it to the private sector, but always keeping an open eye on the network, which grew, unpredictably, into a multinational network of networks, challenging the State's ability to govern.

2. The Definition of "Terrorism"

The word "terrorism" comes from the Latin word "terrere" which means

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7 United Nations Multilingual Terminology Database, http://unterm.un.org/DGAACS/unterm.nsf/WebView/99B98BDBCBAB096185256E620052EFD3?OpenDocument, access date 10.3.2013.

8 Joint Publication (JP) 1-02, Department of Defense Dictionary of Military and Associated Terms, p.71. http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf, access date 10.2.2013.

9 Antolin-Jenkins, Vida M., "Defining the Parameters of Cyberwar Operations: Looking for Law in All the Wrong Places?", Naval Law Review, V.51, Y.2005, p.132.

"to frighten scare, terrify, deter".[10] In very general terms we can view terrorism as any concerted action (or threat of action) undertaken in order to provoke fear.

Definition of the problem of terrorism is problematic because terrorism is a pejorative term. When people use the term, they are labeling the actions of their enemies as something sinister and devoid of human compassion. Governments may take actions against terrorists that would not be acceptable if used against the harshest criminals or military enemies. The term terrorism is difficult to define, and the pejorative nature of the term has deadly consequences whenever a definition is applied.[11]

One of the primary reasons terrorism is difficult to define is that the meaning changes within social and historical contexts. This is not to suggest that "one person's terrorist is another person's freedom fighter".[12]

Many states and international organizations accept the idea of a war against terrorism, even though the term "terrorism" remains undefined in international level. The difficulty in defining "terrorism" is in agreeing on a basis for determining when the use of violence (directed at whom, by whom, for what ends) is legitimate; therefore, the modern definition of terrorism is inherently controversial. The majority of definitions in use has been written by agencies directly associated with government, and is systematically biased to exclude governments from the definition.

Although the UN Member States still have no agreed-upon definition of terrorism, and this fact has been a major obstacle to meaningful international countermeasures, we can find definitions for terrorism:

"Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are

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10 Latin Dictionary, http://www.latin-dictionary.net/definition/37010/terreo-terrere-terrui-territus, access date 22.3.2013.

11 White, Jonathan R., "Terrorism&Homeland Security", Cengage Lerarning, Wadsworth, California, 2012, p.6

12 White, p.6

in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."[13]

"Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act".[14]

"Intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act."[15]

The Arab Convention for the Suppression of Terrorism was adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice in Cairo, Egypt in 1998. Terrorism was defined in the convention as:

"Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources."[16]

The European Union defines terrorism for legal/official purposes in Art.1 of the Framework Decision on Combating Terrorism (2002). This provides

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13 The UN General Assembly Resolution 49/60 (adopted on December 9, 1994), titled "Measures to Eliminate International Terrorism"; Perera, Rohan, "Declaration on Measures to Eliminate International Terrorism", 1994, http://untreaty.un.org/cod/avl/ha/dot/dot.html**,** access date 23.3.2013.

14 UN Security Council Resolution 1566 (2004), http://www.un.org/News/dh/infocus/terrorism/sg%20high-level%20panel%20report-terrorism.htm, access date 23.3.2013.

15 A UN panel, on March 17, 2005, http://www.ghri.org/GHR-International%20Definitions.htm, access date 23.3.2013**; "**The United Nations and The Fight Against Terrorism", p.8, 30, http://democrats.foreignaffairs.house.gov/archives/109/20061.PDF, access date 23.3.2013.

16 The Arab Convention for the Suppression of Terrorism, adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice, Cairo, April 1998, http://www.al-bab.com/arab/docs/league/terrorism98.htm, access date 23.3.2013.

that terrorist offences are certain criminal offences set out in a list comprised largely of serious offences against persons and property which given their nature or context, may seriously damage a country or an international organization where committed with the aim of: seriously intimidating a population; or unduly compelling a Government or international organization to perform or abstain from performing any act; or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.[17]

The United Kingdom's Terrorism Act 2000 defines terrorism; "the use or threat of action where;

(a) the action falls within subsection,

(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it;

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system."[18]

The United States has defined terrorism under the Federal Criminal Code.

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17 The European Union Council Framework Decision 2002/475 on Combating Terrorism, http://www.unhcr.org/refworld/docid/3f5342994.html, access date 23.3.2013.

18 The United Kingdom's Terrorism Act 2000**,** Part I, Introductory, Article 1, http://www.legislation.gov.uk/ukpga/2000/11/pdfs/ukpga_20000011_en.pdf, access date 29.3.2013.

While title 22 of the U.S. Code, Section 2656f(d) defines terrorism as: "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience"[19], title 18 of the United States Code defines terrorism and lists the crimes associated with terrorism. In Section 2331 of Chapter 113(B), there is two type of definitions for terrorism; "internetional terrorism" and "domestic terrorism". Code defines "terrorism" as: "…activities that involve violent… or life-threatening acts… that are a violation of the criminal laws of the United States or of any State and… appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and…(C) occur primarily within the territorial jurisdiction of the United States…".[20]

The U.S. Patriot Act of 2001 also counts some activities as a terrorist purposes: "threatening, conspiring or attempting to hijack airplanes, boats, buses or other vehicles; threatening, conspiring or attempting to commit acts of violence on any "protected" persons,such as government officials; any crime committed with "the use of any weapon or dangerous device,"; when the intent of the crime is determined to be the endangerment of public safety or substantial property damage rather than for "mere personal monetary gain".

The Turkish legislation regarding terrorism and terrorist offences dates back to 1991. Law 3713 on the Fight against Terrorism acted in 1991 and few amendments have been realised up till now. The norrow definition of "terrorism" is an act against the Turkish state in existing Turkish counterterrorism law poses concerns for joint and legal cooperation.

Law 3713 on Fight Against Terrorism of Turkey defines terrorism in article 1 as: "any criminal action conducted by one or more persons belonging to an organisation with the aim of changing the attributes of the Republic as specified in the Constitution, the political, legal, social, secular or economic system,

19 http://www.law.cornell.edu/uscode/text/22/2656f, access date 23.3.2013.
20 http://uscode.house.gov/download/pls/18C113B.txt, access date 25.3.2013.

damaging the indivisible unity of the State with its territory and nation, jeopardizing the existence of the Turkish State and the Republic, enfeebling, destroying or seizing the State authority, eliminating basic rights and freedoms, damaging the internal and external security of the State, the public order or general health, is defined as terrorism."

In addition to references to existing laws, defining and aggravating some of the pre-existing types of crimes as terrorist offences, the Law on Fight Against Terrorism also introduced new offences: The crimes of announcing and publication of declarations made by terrorist organisations, being a member, founding member or a leader of a terrorist organisation, and financing terrorist activities.

B. General Usage of the Term

It is important to note that no single definition of the term "terrorism" has yet been accepted among governments. Additionally, no single definition for the term "cyber terrorism" has been universally accepted. Also, labeling a computer attack as "cyber terrorism" is problematic, because it is often difficult to determine the intent, identity, or the political motivations of a computer attacker with any certainty until long after the event has occurred.

It follows that there is a degree of "understanding" of the meanings of cyber-terrorism, either from the popular media, other secondary sources, or personal experience; however, the specialists' use different definitions of the meaning. Cyber terrorism as well as other contemporary "terrorisms (bioterrorism, chemical terrorism, etc.) appeared as a mixture of words terrorism and a meaning of an area of application.

Since 1997 the word cyber terrorism has entered into the lexicon of security specialists and terrorist experts and the word list of mass media "professionals". Barry Collin, a senior research fellow at the Institute for Security and Intelligence in California, who in 1997 was attributed for creation of the term "cyber terrorism", defined cyber terrorism as the convergence of cybernetics

and terrorism.[21] In the same year, Mark Pollitt, special agent for the FBI, offers a working definition: "Cyberterrorism is the premeditated, politically motivated attack against information, computer systems, computer programs, and data which result in violence against noncombatant targets by subnational groups or clandestine agents."[22] In addition to these definitions, Dorothy Denning defined cyber terrorism as; "Cyber terrorism is the convergence of cyberspace and terrorism. It refers to unlawful attacks and threats of attack against computers, networks and the information stored therein that are carried out to intimidate or coerce a country's government or citizens in furtherance of political or social objectives".[23]

The attack should be sufficiently destructive or disruptive to generate fear comparable to that from physical acts of terrorism. To qualify as cyber terrorism, an attack should result in violence against persons or property, or at least cause enough harm to generate fear. For example, attacks that lead to death or bodily injury, explosions, or severe economic loss are admitted as cyber terrorism. [24]

After the definitions which are given above, cyber terrorism currently defines as "the use of cyber capabilities to conduct enabling, disruptive, and destructive militant operations in cyber space to create and exploit fear through violence or the threat of violence in the pursuit of political change".[25]

Terrorism has evolved and in the beginning of the 21st Century and World is dealing with a new type of terrorist organization as well as the classical groups. Traditionally terrorist organizations have been just that, an organization with

21 Collin, Barry, "The Future of CyberTerrorism," Proceedings of the 11th Annual International Symposium on Criminal Justice Issues, The University of Illinois at Chicago, 1996.

22 Pollitt, M.M., "Cyberterrorism: Fact or Fancy?", Proceedings of the 20 National Information Systems Security Conference, October 1997, p.285-289.

23 Denning, Doroty E., "Cyberterrorism: The Logic Bomb versus the Truck Bomb", Global Dialogue, Volume 2, Number 4, Autumn 2000, http://www.worlddialogue.org/content.php?id=111, access date 15.5.2013.

24 Denning, Doroty E., "Is Cyber Terror Next?", http://essays.ssrc.org/sept11/essays/denning.htm, access date 25.3.2013.

25 Brickey, Jonalan, "Defining Cyberterrorism: Capturing a Broad Range of Activities in Cyberspace", http://www.ctc.usma.edu/posts/defining-cyberterrorism-capturing-a-broad-range-of-activities-in-cyberspace, access date 15.3.2013.

a leadership and strict control. Attacks and campaigns would be planned and authorized by the leadership as part of a coordinated approach to their policy. The emergence of more 'networked' organizations with a horizontal leadership has made the Internet a breakthrough in command and communication. Activities of cyber terrorist may use information technology to organize and carry out attacks, support groups activities. Recently many terrorist groups have used new information technology in order to conduct operations without being detected.[26]

Obviously, there is no reasonable ground to talk about any international agreement or consensus in terms of the expression "cyber terrorism". However, as the dependence on tecchnology is growing and technology carries with it new possibilities for terrorist action, the discussion on these topics needs to go on.

C. Its Differences from the Terms of "Cyber War" and "Cyber Crime"

There is a clear line between cyber terrorism and cyber crime and allow us to define cyber terrorism as: Use of information technology and means by terrorist groups and agents. Thus, use of information technology and means by terrorist groups and agents constitute cyber terrorism. Other activities should be defined as cyber crime.[27]

Cyber crime is generally understood as the use of a computer based means to commit an illegal act. One typical definition describes cyber crime as "any crime that is facilitated or committed using a computer, network, or hardware device."[28] Cyber crime are fraudulent practices on the Internet, online piracy, storage and sharing of child pornography on a computer, and computer intrusions.[29] Unlike cyber terrorism or cyber war, cyber-crimes need not undermine

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26 Charvat, Jpiag, "Cyber Terrorism: A New Dimension in Battlespace", http://www.ccdcoe.org/publications/virtualbattlefield/05_CHARVAT_Cyber%20Terrorism.pdf, access date 29.3.2013.

27 Krasavin, Serge, "What is cyber-terrorism?", http://www.crime-research.org/library/Cyber-terrorism.htm, access date 12.3.2013.

28 Gordon, Sarah & Ford, Richard, "On the Definition and Classification of Cybercrime", J. Computer Virology, No:1, Y.2006, p.14.

29 U.S. Department Of Justıce, Computer Crime and Intellectual Property Section, Criminal

the target computer network (though in some cases they may do so), and most do not have a political or national security purpose. Finally, like all crimes, cyber crimes are generally understood to be committed by individuals, not states or terrorist organizations.

Cyber war and cyber terrorism have both similarities and differences. They are similar in that both involve using computer systems and cyber space against for their goals. They are both different because in cyber terrorism, violence can occur in order to striking fear into other groups and nations, such as people be can be hurt or killed for political or ideological goals of terrorist organizations.

Within cyber space, the intent and effects of individuals' cyber actions determine whether a terrorist, criminal, or war act has occurred. As reflected in cyber terrorism's definition the intent of a cyber terrorist is to force others to capitulate to demands through the acts and threats of violence. Instead of promoting fundamental belief systems, in cyber warfare, the combatants are trying to achieve military objectives, and in cyber crime, the cyber criminals are fulfilling their desires for financial or psychological benefits. Rather than desiring, like a cyber terrorist, to achieve destabilization and wide-spread publicity, the cyber criminal desires to steal money or information, gain personal fame and attention, be intellectually challenged, and/or experience illicit pleasure.[30]

II. TURKISH CRIMINAL LAW AND CYBER TERRORISM

A. Law 3713 on the Fight Against Terrorism

One of the ways of combating terrorism is making law. It is not effective

Division, "Prosecutıng Computer Crımes" (2d ed. 2010), http://www.justice.gov/criminal/cybercrime/ccmanual/ccmanual.pdf, access date 1.3.2013; "Cyber Crime", FBI, http://www.fbi.gov/about-us/investigate/cyber, access date 23.3.2013. The Council of Europe Convention on Cybercrime, similarly, covers a broad range of criminal activity committed by means of a computer, including "action directed against the confidentiality, integrity and availability of computer systems, networks and computer data as well as the misuse of such systems, networks and data." Council of Europe, ETS No. 185, Convention on Cybercrime, Budapest (November 23, 2001), entered into force July 1, 2004, http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm, access date 23.3.2013.

30 Collin, Barry C., "The Future of CyberTerrorism: Where the Physical and Virtual Worlds Converge", Remarks at the 11th Annual International Symposium on Criminal Justice Issues, http://afgen.com/terrorism1.html, access date 15.3.2013.

alone, even so, Penal Code must include crimes about cyber terrorism.

For Turkey, one of the most important problem have been terror for three decades. In response to the activities of separatist terrorist organisations in Turkey, The Turkish legislation regarding terrorism and terrorist offences dates back to 1991. Law 3713 on the Fight against Terrorism acted in 1991 and few amendments have been released up till now. Although there is no specific law for cyber terrorism in Turkey we can find a definition with examining the Law 3713 on the Fight against Terrorism.

In the Turkish legal system there two different types of offences; Terrorist offences, which are limited to those specified under the Law 3713, and some offences against the territorial integrity of the state, and offences committed with terrorist aims. The former are considered as terrorist offences per se, while the latter can only be treated as such when committed within the framework of a terrorist organisation and/or in furtherance of its aims. In this context, As a subset of terrorism, cyber terror involves using information as a weapon, method, or target, to achieve terrorist goals. Cyber terror exists in and beyond cyber space.

A characteristic of cyber terror is its ability to leverage inexpensive means to gain disproportionate effects through destruction, denial, deceit, corruption, exploitation, and disruption. Cyber terror may augment or support traditional terrorism, or be employed as a distinct form of action in its own right.

While Law 3713 on the Fight against Terrorism gives definition for terror in article 1, terrorist offender is defined by article 2 as "any person, who, being a member of organisations formed to achieve the aims specified under Article 1, in concert with others or individually, commits a crime in furtherance of these aims, or who, even though does not commit the targeted crime, is a member of the organisations". From this definition, a person, who, being a member of organizations formed to achieve the aims specified under article 1 by using cyber space is cyber terrorist. According to Law 3713, persons who, not being a member of a terrorist organisation, commit a crime in the name of the organisation, are also considered as terrorist offenders and shall be punished

as members of such organisations. Then, it can be also said that persons who, not being a member of a terrorist organisation, commit a cyber crime in the name of the organisation, are also considered as terrorist offenders and shall be called as a cyber terrorist.

Having analyzed how terrorists can use computer technology to advance their primary goals of demoralizing civilians and destabilizing governments, by logical extension, it is fair to define terrorism as a crime rather than as war.[31] Terrorism is defined and prosecuted as a crime in Turkey and elsewhere.

Law 3713 on the Fight against Terrorism and over 50 offences listed in the Turkish Penal Code count as terrorist acts, including human trafficking, creating propaganda for a terrorist organization, undertaking hunger strikes, and participating in activities that alienate people from military service. Even if these various crimes do not by their nature contain coercion, violence or threats, in cases where they are committed in the context of a terrorist organization's activity, they will be counted as terrorist offences.

Law 3713 on the Fight against Terrorism formulates two kind of offences, terrorist offences and offences committed with terrorist aims, which are punished as terrorist crimes. In Turkish Penal Code, while Article 302, 307, 309, 311, 312, 313, 314, 315, 320, and paragraph 1 of article 310 are are terrorist offences, 79, 80, 81, 82, 84, 86, 87, 96, 106, 107, 108, 109, 112, 113, 114, 115, 116, 117, 118, 142, 148, 149, 151, 152, 170, 172, 173, 174, 185, 188, 199, 200, 202, 204, 210, 213, 214, 215, 223, 224, 243, 244, 265, 294, 300, 316, 317, 318, 319 and paragraph 2 of article 310 and crimes which is counted in b, c, ç, d, e of article 4 of Law 3713 on the Fight against Terrorism are considered as "offences committed with terrorist aims" if they are committed within the framework of activities of a terrorist organisation.

Like terrorist offences and offences committed with terrorist aims, cyber terror offences can also be classified as terrorist offences and offences com-

[31] Brenner, Susan W., "Technological Change and The Evolution of Criminal Law: "At Light Speed": Attribution and Response To Cybercrime/Terrorism/Warfare", Journal of Criminal Law & Criminology, V.97, Winter, 2007, p.391, 398.

mitted with terrorist aims. Some crimes which are counted in Law 3713 on the Fight against Terrorism are committed by terrorist and admitted as cyber terrorism.

B. Crimes which can be Committed by Cyber Terrorist

Article 307 of Turkish Penal Code is only crime which can be committed as a cyber terror offences. In Article 307, any persons who partially or entirely destroys land, sea and air transport vehicles, roads, facilities, warehouses and or other military plants belonging to or under the service of State armed forces, or damages the same as to be out of use even for a definite period, is punished with imprisonment from six months to twelve years. This crime is committed via cyber attack by terrorist. Stuxnet case showed us that cyber attacks could give big damages to military plant. So, ın the future, this kind of attack will probabply be occured.

Although Law 3713 on the Fight against Terrorism counts crimes which is called "offences committed with terrorist aims", only few of them may be committed in cyberspace or via cyber space. Article 172, 173, 185, 214, 215, 243, 244 are crimes which is committed by cyber terrorist.

Cyber space and cyber tools may be used for triggering weapons of mass destruction. This is a conceptual option, but not a real possibility. Computers, as such, cannot inflict physical damage on persons or property; that is the province of real-world implements of death and destruction. However, computers can be used to set in motion forces that produce physical damage.[32] Cyber terrorists could disable the systems that control a nuclear power plant and cause an explosion by release of atomic energy or spread out radiation. Cyber terrorists could exploit the resulting illness, death, and radioactive contamination to undermine citizens' faith in their government's ability to protect them and maintain order.

In Turkish Penal Code, Article 172, 173 and 185 are against these possibility. Article 172, title's name "Spread out of radiation", first paragraph reads "If

[32] Brenner, p.391, 392.

a person is exposed to radiation by another person with the intention of giving harm to his health, the offender is punished with imprisonment from three years to fifteen years" and third paragraph reads "Any person who spreads our radiation or involves in atom smashing process in such a way to result with severe injury of one's life and health or damage of property, is punished with imprisonment from two years to five years".

Article 173, title's name "Causing explosion by atomic energy", first paragraph reads "Any person who risks others' life, health or property by causing explosion by release of atomic energy, is punished with imprisonment not less than five years".

Article 185, title's name "Mixing toxic substances", first paragraph reads "Any person who risks the lives or health of others by mixing toxic substances to drinking water or food or causes decaying of any other consumption goods used as beverage and foodstuff, is punished with imprisonment from two years to fifteen years".

Article 243 "Access to data processing system" and Article 244 "Hindrance or destruction of the system, deletion or alteration of data" are actually cyber crime but when these crimes are committed by terrorist or reaching aims of terrorist, they can be called cyber terror offences. According to Article 243, any person who unlawfully enters a part or whole of data processing system or remains there is punished with imprisonment up to one year, or imposed punitive fine. If such act results with deletion or alteration of data within the content of the system, the person responsible from such failure is sentenced to imprisonment from six months up to two years.

Any person who hinders or destroys operation of a data processing system is punished with imprisonment from one year to five years in first paragraph of Article 244. According to second paragraph, any person who garbles, deletes, changes or prevents access to data, or installs data in the system or sends the available data to other places is punished with imprisonment from six months to three years. The punishment to be imposed is increased by one half in case of commission of these offenses on the data processing systems belonging to a

bank or credit institution, or public institutions or corporations.

The cyber space, especially the Internet, allows small groups or individual terrorists the opportunity to reach literally millions of people very easily. One of the primary uses of Internet by terrorists is for the dissemination of propaganda. Provoking commission of offence and praising the offense or the offender are the way of propaganda which is used by terrorist. They generally take the form of multimedia communications providing ideological or practical instruction, explanations, justifications or promotion of terrorist activities. These may include virtual messages, presentations, magazines, treatises, audio and video files and video games developed by terrorist organizations or sympathizers.

Propaganda is essential to terrorism, these are rational people who carry out their campaigns for a political or social end state, they must have a medium to explain their message and 'justify' their actions. Before the Internet this was relatively difficult to achieve for a mass audience. Television and print media would run stories on terrorists but these would be subject to editorial control and sometimes to legal restrictions. Books, magazines and pamphlets would only hit a small audience and would only really be read by those with an interest in the terrorist's cause. The World Wide Web is unregulated and accessible to almost everyone.

Article 214 is prohibited "Provoking commission of offense" and and any person who openly provokes commission of an offense is punished with imprisonment from six months to five year. This means if any person uses internet for Provoking commission of terror offense" then he/she will be punished.

According to Article 215 "Praising the offense or the offender", any person who openly praises an offense or the person committing the offenses is punished with imprisonment up to two years.

Because of the global nature of the cyberspace, State regulation that would normally be justifiable within territorial borders can't be sufficient. Because Internet activities were not restricted to any geographical area.

Turkish terrorism law defines terrorism as attacks against Turkish citizens and the Turkish state. This definition hampers Turkey's ability to interdict, arrest, and prosecute those who plan and facilitate terrorist acts to be committed outside of Turkey, or acts to be committed against non-Turkish citizens within Turkey.

CONCLUSION

Today, terrorists have got greater advantages of cyber terrorism than the terrorists of yesterday. Moreover, the next generations of terrorists are growing up in a digital world. Tools that provide opportunity would become more powerful, simpler to use. Thus, it seems that cyber terrorism will become more attractive in the future. Cyber terrorism is one of the biggest threat against national security which requires a united response.

There are a lot of risks which range from national security and national infrastructure vulnerabilities to personal security, privacy, and integrity of personal information may come from cyber terrorism. It is necessary to state that vulnerability does not emerge only from increased reliance on technology. Lacks of legal measures, law enforcement efforts, cooperation at the national and international level contribute vulnerabilities.

Transnational characteristics of cyber attacks create problems in terms of investigation. Legal issues represent another set of problems to law enforcement and other criminal justice entities. Since prosecution of such crimes may involve multi-jurisdictions, legal issues surrounding cyber terrorism investigation in terms of pursuing and prosecuting criminals makes worse the problem.

Cyber terrorism knows no borders. Responding to cyber terrorism requires special efforts, developing strategies and policies and includes bringing efforts from all parties; governments, private sector, and multinational agencies and also requires all concerned parties work together at all fronts, technically, legally, politically, and culturally. These efforts may involve developing new tactics and strategies for effective terrorism response, creating legislation and establishing bilateral and multilateral cooperation taking into account univer-

sally accepted principles of law and justice. While taking necessary measures, governments should also be aware that the fundamental rights of individuals should be protected from. There is always tension between protecting the rights of a person and enforcing laws. Fundamental rights, democracy and the rule of law need to be protected in cyber space.

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A STUDY ON CONFISCATION WITHOUT EXPROPRIATION IN THE TURKISH LAW

Türk Hukukunda Kamulaştırmasız El Atma Sorunu Üzerine Bir İnceleme

Mustafa AVCI *

ABSTRACT

In the Turkish law, the most characteristic example of *de facto* action is confiscation without expropriation. Confiscation without expropriation occurs in the case that the administration intentionally or unintentionally occupies and allocates to public service an immovable property, without observing the rules and procedures related to expropriation and without paying any cost. Accordingly, a certain case is defined as confiscation without expropriation when an immovable property belonging to someone is occupied by the Administration for being used in public services and the occupation is not based on an expropriation procedure established in accordance with the rules and principles specified in the legislation. In that vein, it has been accepted that *de facto* confiscation resulting from unlawful acts of the Administration does not differ from wrongful acts of private persons, and thus such administrative acts should be subject to ordinary jurisdiction just like in the case of damages arising from wrongful acts of private persons. However, confiscation without expropriation is not always of this nature. In certain cases, although a given immovable property is not exposed to a *de facto* confiscation without expropriation, it may be specified as a green area on the zoning plan. In such a case, the owner's authorities deriving from property rights will be restricted. This situation may be considered a legal confiscation without expropriation. In accordance with the decision of the Court of Conflicts, in the case that a green area is allocated in the zoning plan but there is no case of *de facto* confiscation, a full remedy action may be filed in the administrative court rather than a case of confiscation without expropriation in the civil court. This study investigates the dualist structure resulting from the temporary Article 6 of the Law no. 2942 on Expropriation

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amended by Article 21 of the Law no. 6487 and the temporary Article 7 added to the Law of Expropriation by Article 22 of the same Law.

Key Words: Confiscation without expropriation, Expropriation Law, wrongful act, Zoning Law, property right.

ÖZET

Türk hukukunda fiilî yolun en karakteristik örneği, kamulaştırmasız el atmalardır. Kamulaştırmasız el atma, idarenin, bir kişiye ait gayrimenkûlü kamulaştırmaya ilişkin usûl ve kurallara uymaksızın ve bir bedel ödemeksizin el atarak kamu hizmetine özgülenmesi şeklinde tanımlanmaktadır. Buna göre, kamulaştırmasız el atmadan söz edilebilmesi için, kişiye ait gayrimenkûle idare tarafından kamu hizmetinde kullanılmak amacıyla fiilen el atılmış olması ve bu el atmanın kanunda öngörülen usûl ve esaslara uyularak tesis edilmiş bir kamulaştırma işlemine dayanmadan gerçekleştirilmiş olması gerekmektedir. Bu biçimde, idarenin hukuk dışı eyleminden kaynaklanan fiilî kamulaştırmasız el atmaların, özel kişilerin haksız fiil oluşturan eylemlerinden hiçbir farkının bulunmadığı, bu sebeple bu çeşit eylemlerden doğan zararların da özel kişilerin haksız fiilinden doğan zararlarda olduğu gibi adlî yargıda dava konusu edilmesi gerektiği kabul edilmektedir. Ancak kamulaştırmasız el atmalar her zaman bu şekilde gerçekleşmemektedir. Gayrimenkûl üzerinde herhangi bir fiilî kamulaştırmasız el atma olmamasına karşın gayrimenkûl, imar plânında yeşil alan olarak ayrılmış olabilir. Bu gibi durumlarda gayrimenkûl malikinin mülkiyet hakkından doğan yetkileri sınırlanmış olmaktadır. Burada hukukî kamulaştırmasız el atmanın mevcut olduğu belirtilmektedir. Bu çerçevede birçok Uyuşmazlık Mahkemesi kararına göre, imar plânında yeşil alan olarak ayrılan ancak fiilî kamulaştırmasız el atmanın bulunmadığı yani hukukî kamulaştırmasız el atmanın bulunduğu hâllerde idarî yargıda tam yargı davası açılmalıdır. Çalışmada 6487 sayılı Kanun'un 21.maddesiyle değiştirilen 2942 sayılı Kamulaştırma Kanunu'nun geçici 6. ve aynı Kanun'un 22.maddesiyle Kamulaştırma Kanunu'na eklenen geçici 7.maddeleriyle oluşan düalist yapı ile konuya ilişkin değişiklikler ve yenilikler incelenmektedir.

Anahtar kelimeler: Kamulaştırmasız el atma, Kamulaştırma Kanunu, haksız fiil, İmar Kanunu, mülkiyet hakkı.

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INTRODUCTION

The property right, regulated in the Turkish Law by Article 683 and subsequent articles in the Turkish Civil Code, is defined in general terms as an absolute and real right that entitles the right holder to use, benefit from and dispose a movable or immovable property and that should be enjoyed within the limits of legal order. The property right is divided into two as the right for movable and for immovable properties. The phenomena of expropriation and confiscation without expropriation, concerned only with immovable or real properties, eliminate the property owner's right regarding an immovable property. Confiscation without expropriation, the topic of this study, is defined as *de facto* or legal seizure of an immovable property by the administration without any expropriation procedure. This study first investigates *de facto* or legal confiscation without expropriation within the frame of higher judicial precedents, and then explains the amendments to the Expropriation Law no. 2942 made by Law no. 6487.

1. DEFINITION

It should be first noted that confiscation without expropriation is also a way of expropriation. A specific case is defined as confiscation without expropriation when an immovable property belonging to a real or legal person is seized by the administration illegally and when the seizure is inevitable in line with the principle of the continuity of public services[1]. The administration seizes the immovable property of a person and establishes a facility or a building on it by an act that does not comply with the Constitution or laws, and interrupts the given person's right to use their immovable property by allocating the property to a specific service. In all these cases, the administration confiscates an immovable property without expropriation[2]. Constructing a facility or a building on an immovable property owned by someone else, the administration

[1] İsmet GİRİTLİ/Pertev BİLGEN/Tayfun AKGÜNER/Kahraman BERK, İdare Hukuku), Der Yayınları, 4th ed., Istanbul, 2011. p.925.

[2] Ali YÜKSEL, "Kamulaştırmasız El Atma Davalarında Görevli Mahkeme", p.1. http://www.gayrimenkûlhukuku.org/kamulastirmasiz-el-atma-davalarinda-gorevli..., Date of Access:05.12.2013.

performs *de facto* confiscation without expropriation. However, confiscation without expropriation does not always occur in this way. In some cases, although there is no *de facto* seizure of an immovable property, the given property may be allocated as a green are or allocated to another public service in the zoning plan. In such as case, the owner's authorities arising from the property right are restricted. It is noted that this is a case of legal confiscation without expropriation[3].

2. LEGAL CONFISCATION WITHOUT EXPROPRIATION

A specific case is defined as a legal confiscation without expropriation either when the immovable property of a person is allocated to a road, park, school, green area or praying facilities in the zoning plan or when, as a result of planning on a cadastral parcel, the owners of an immovable property on the said area are required to give gratuitously the development readjustment share of not more than 40% percent of their property[4]. Claiming a development readjustment share in accordance with Article 28 of the Zoning Law means forceful confiscation of a part of immovable properties on a personal estate without any expropriation in accordance with the Expropriation Law[5]. While the administration must pay the cost of a property confiscated by expropriation according to the Law of Expropriation, it is not required to pay the cost of a property confiscated by receiving a development readjustment share according to the Law Zoning[6].

Below is one of the decisions of the Plenary Session of the Chambers for Administrative Cases, which provides an idea about the Council of State's approach to issue: "in order to perform expropriation, in actions for nullity filed with the claim of unlawfulness in procedures for the rejection of an application by the property owner, to conclude that there is uncertainty regarding the use

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3 ibid, p.1.

4 Gülşen AKAR PEHLİVAN, "İdarî Yargı Açısından Kamulaştırmasız El Atma Sorunu ve Uyuşmazlık Mahkemesinin Konuya Yaklaşımı", Ankara, 2013. p.8. http://www.uyusmazlik.gov.tr/galeri/sempozyum2/gulsenakarpehlivan.pdf, D.A:09.01.2013.

5 Metin GÜNDAY, İdare Hukuku, 10th ed., İmaj Yayıncılık, Ankara, 2011. p.276.

6 *ibid,* p.276-277.

of a property right and that the fair balance that should be established between public interests and property right is impaired, there is need for a minimum period of five years pursuant to the approval of zoning plans, the property rights of an immovable owner should be restricted for an uncertain period of time when the administration does not expropriate for a long period an immovable property that is allocated to public services in the zoning plan and thus the fair balance that should exist between public interests and property right is impaired"[7]. In one of its recent decisions, Chamber 6 of the Council of State ruled as follows: "The court decision regarding the rejection of the claim for compensation is not right given that the price of an immovable property allocated as a road or parking area in the zoning plan, but is not expropriated because it is not involved in the five-year zoning program should be paid after being determined by expertise"[8].

Related to this, one of the decisions by the Supreme Court Assembly of Civil Chambers reads as follows: "Given that the municipalities are liable to develop a five-year zoning program for the implementation of a zoning plan in three months after a zoning plan is put into force, the administration – not performing expropriation or barter for long years in order to put the zoning plan into practice – remains passive and silent, which means that intervention in the immovable property is accepted and that the administrations are liable in line with the provisions regarding confiscation without expropriation" [9]. In the above-quoted decision, evaluating "the modern social ownership approach" mentioned by the Constitutional Court[10] underlying the annulment of Article 13 in the Zoning Law and Sporrong and Lonnroth decisions of the European

7 Council of State Plenary Session of the Chambers for Administrative Cases, Date of Decision:24.05.2012, Case No:2007/2255, Decision No:2012/801, Council of State Plenary Session of the Chambers for Administrative Cases, Date of Decision:14.12.2006, Case No:2003/385, Decision No:2006/2124, See AKAR PEHLİVAN, *ibid,* p.13.

8 Chamber 6 of the Council of State, Date of Decision:17.04.2013, Case No:2011/8152, Decision No:2013/2702, See http://www.danistay.gov.tr/Güncel Kararlar, D.A:21.01.2014.

9 Supreme Court Assembly of Civil Chambers, Date of Decision:15.12.2010, Case No:2010/5-662, Decision No:2010/651, See http://www.turkhukuksitesi.com/serh.php?did=10934, D.A:15.01.2014.

10 Constitutional Court, Date of Decision:29.12.1999, Case No:1999/33, Decision No:1999/51, Official Gazette Date and Number:29.06.2000/24094, See http://www.anayasa.gov.tr/ Kararlar Bilgi Bankası, D.A:14.01.2014.

Court of Human Rights, the Supreme Court Assembly of Civil Chambers decided "that there is no difference in terms of result between *de facto* confiscation of an immovable property and restricting the legal use of an immovable property and that the property right of an individual is restricted in both cases", and concluded that "the cost of an immovable property may be claimed from the administration in the case that there is presence of legal confiscation, which causes challenges to selling, leasing and using the property or making beneficial changes on the property" [11]. This decision of the Supreme Court Assembly of Civil Chambers was a positive development for the owners of immovable properties that are allocated to a public service in the zoning plan without *de facto* confiscation. However, the decision was not implemented for a long time. The number of these cases handled in civil courts increased considerably and litigious administrations started raising objections of power. Upon this, the Court of Conflicts decided that "in the case that there is a legal confiscation of an immovable property, the case of confiscation without expropriation is heard in line with administrative procedures" [12]. The Court of Conflicts ruled that "in accordance with the mandatory provision of Article 10 in Law no. 3194, an action for damages deriving from the zoning plan, filed when the administration is required to expropriate a given property and pay its cost in five years but failed to do so, should be resolved in accordance with administrative procedures" [13]. Thereby, the cases heard in the administrative courts were brought

[11] AKAR PEHLİVAN, *ibid,* p.10.

[12] "It is claimed that the parcels subject to the dispute remained in the park area according to the zoning plan, the area has not been arranged as a park and expropriated for a long time and there is no possibility of constructing a building on the immovable property, and thus the cost of property should be paid due to confiscation without expropriation. The matter of dispute is the compensation of the cost of an immovable property of the complainant, which was allocated as a green area in the zoning plan by the administration with the use of public power in accordance with the Zoning Law no. 3194. The matter should be resolved by the administrative court within the scope of 'full remedy actions filed by those whose personal rights are directly impaired due to administrative acts and procedures' set in Article 2/1-b of Law of Administrative Jurisdiction Procedures Law no. 2577." Court of Conflicts, Date of Decision:09.04.2012, Case No:2011/238, Decision No:2012/63, See http://www.gencbaro.org/haber/fiilî-elatma..., D.A:05.12.2013.

[13] Court of Conflicts, Date of Decision:01.07.2013, Case Number:2013/541, Decision Number:2013/1073, Official Gazette Date and No:01.08.2013/28725 (Reprinted); Court of Conflicts, Date of Decision:04.06.2013, Case Number:2013/426, Decision

to the Court of Conflicts upon objections of administrations, and thus the same cases were filed in administrative courts[14].

Even after above-quoted decisions of the Court of Conflicts, the civil courts continued to handle the cases of confiscation without expropriation. For the cases filed in administrative courts, the courts usually made decisions of non-jurisdiction. In brief, the practices followed a course against the above-quoted decisions of the Court of Conflicts[15]. However, despite this, the Court of Conflicts continued to rule that the cases of confiscation without expropriation should be heard in accordance with the administrative procedures[16]. In the cases heard in civil courts, the administrations in defense raised objections of jurisdiction[17]. It would not be appropriate to consider relevant decisions of the Court of Conflicts as decisions referring to a simple division of jurisdiction. For these cases rejected due to jurisdiction issues, the property owner may have to pay fee of the other party's attorney, or even worse, file a new case. Furthermore, if there is no way to estimate the value of the claim when filing the case in the administrative judgment, it is possible to increase the value by adjustment in line with the cost amounts determined by experts[18]. The situation is of different nature in the administrative judgment. Until April 30, 2013, adjustment was not accepted in full remedy actions filed in administrative courts. As adjustment is not an accepted practice in administrative procedures due to various causes, there is a need to specify the amount of damages before an action is filed. It is nevertheless not always easy to estimate the cost of damages. In administrative courts as well, the cost of damages is determined exactly after investigation and expert review[19]. This means that, even when it was proved by expertise that the real amount of damages was greater than the amount demanded, individuals had to be contented with the amount of compensation specified before filing the

Number:2013/887, Official Gazette Date and No:18.04.2013/28622 (Reprinted), See http://www.resmigazete.gov.tr/arşiv-fihrist-düstur, D.A:17.01.2014.

14 YÜKSEL, *ibid,* p.1.

15 *ibid,* p.1.

16 *ibid,* p.1-2.

17 *ibid,* p.2.

18 *ibid,* p.2.

19 *ibid,* p.2.

action, as adjustments were not allowed in full remedy actions. However, with Article 4 of the Law no. 6459 on Amendments to Certain Laws in the Context of Human Rights and Freedom of Expression, published in the Official Gazette on April 30, 2013, the following sentence was added to paragraph 4 of Article 16 in Law no. 2577 on Administrative Jurisdiction Procedures: "However, in full remedy actions, the amount mentioned in the petition for filing a lawsuit may be increased for once only until the final decision is made, regardless of period and any other procedural rules, on condition that the legal fee required is paid, and the petition for the increase of amount is communicated to the other party to be replied within thirty days". The temporary Article 7 of the same law stipulates that "… the provision added applies to the cases pending on the date of enforcement, including the cases in the phase of legal remedy" [20]. With these arrangements, it may be concluded that partial adjustment is accepted in full remedy actions. These legal steps may be considered positive developments as they reduce, to a certain extent, the drawbacks of hearing the cases of confiscation without expropriation in line with administrative procedures[21].

Even after many decisions by the Court of Conflicts that full remedy actions for the damage resulting from zoning plans should be handled by the administrative justice, actions have still been filed in civil courts for legal confiscation without expropriation. However, the following provision was added to temporary Article 6[22] of the Expropriation Law with amendments by Article 21 of Law no. 6487 and Article 1[23] of Law no. 5999 of October 18, 2010: "Concerning the immovable properties whose disposal is restricted due to being allocated to public services or state institutions in the zoning plan or due to

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20 With temporary articles, the legislative body prescribed that adjustments can be used in pending cases and the cases that are heard in higher courts after being appealed.

21 YÜKSEL, *ibid,* p.2.

22 An application was filed to the Constitutional Court for the cancellation of certain parts of temporary Article 6 of Law no. 2942 amended by Law no. 6487. The Constitutional Court has not made its decision about this matter. The courts of first instance that receive relevant actions use this situation as an excuse for suspending the actions.

23 Some regulations brought by this article were annulled by the Constitutional Court. See Constitutional Court, Date of Decision:01.11.2012, Case No:2010/83, Decision No:2012/169, Official Gazette Date and No:22.02.2013/28567. http://www.resmigazete.gov.tr/eskiler/2013/02/20130222-10.htm, E.T:08.01.2014.

the implementation of relevant laws, an action shall be filed in administrative courts only after the administrative applications and procedures specified in Zoning Law no. 3195 of May 3, 1985 are completed. This article shall apply to all cases where the decision is not finalized or ascertained. The provisions only in paragraph 8 of this Article shall apply to the cases where the final decision is made." These decisions clearly regulate in legal terms that the actions of legal confiscation without expropriation should be heard in administrative courts[24]. In one of its decisions, the Constitutional Court did not object to this and made the following explanation: "The zoning plans are of regulatory nature, and starting from the preparation of these plans, the conflicts arising at any stage of the plans should be resolved by administrative courts. The annulment and full remedy actions filed by property owners, whose power of disposal on their immovable property is restricted due to zoning plans, are also heard by administrative courts.[25]"

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24 YÜKSEL, *ibid,* p.2.

25 "The subject of objection is the demand to annul paragraphs 7, 11 and 13 of temporary Article 6 of the Expropriation Law no. 2942, amended by Article 21 of Law no. 6487 on Amendments to Certain Laws and Decree Law no. 375, with the claim that they are against Article 10 and 38 of the Constitution. The litigious subject is that an immovable property of the complainant was involved in the boundaries of 'a strict preservation zone' and thus the complainant's power of disposition on the property was restricted. It is undisputable that this restriction will lead to a reduction in the complainant's wealth. However, the restriction of the power of disposition does not result from an act of the administration, but from a zoning plan which is unquestionably an administrative procedure. In this incident, there is not yet an administrative act that may be defined as *de facto* confiscation without expropriation. On the contrary, there is an inaction resulting from not performing the legally required expropriation procedures. On the other hand, confiscation without expropriation occurs when the ownership of a property is transferred to the administration and when the property is actually allocated to public services. However, in this case handled in the court, the ownership of property is still held by the owner and the power of disposition is subject to certain restrictions arising from the related legislation. As a result, it is concluded that the restriction of the power of disposition due to zoning planning cannot be defined as a confiscation without expropriation, that this is a mandatory consequence of zoning plans – which is an administrative procedure, and that the damage arising from the restriction can only be the subject of a full remedy action filed in administrative courts. Therefore, the said action does not fall into the scope of the jurisdiction of the court that raised the objection. The Court of Conflicts, established in accordance with Article 158 of the Constitution and authorized to settle definitely the disputes regarding the duties and decisions of judicial, administrative and military authorities, has judicial precedents that support this argument. (e.g. Court of Conflicts, Date of Decision:04.02.2013, Case No:2001/107, Decision No:2013/230) Paragraph 10 of temporary Article 6, including the rules related to this specific case, confirms that the actions for compensation due to restrictions resulting from zoning practices are filed in administrative courts, stipulating that 'Concerning the

3. DE FACTO CONFISCATION WITHOUT EXPROPRIATION

De facto confiscation without expropriation constitutes one of the most characteristic examples of *de facto* actions in the Turkish law[26]. *De facto* practice is defined as any action taken by the administration, without any legal basis, related to an issue that does not fall into its field of activity[27]. *De facto* confiscation without expropriation occurs in the case that the administration seizes and allocates to public services an immovable property belonging to someone else without observing intentionally or unintentionally the procedures and rules related to expropriation and without paying its cost[28]. In short, there is a case of *de facto* confiscation without expropriation when the administration confiscates the immovable property of a legal or real entity without expropriating it or starts the public works in actual terms by constructing buildings/facilities on the immovable property or allocates the property to a public service[29]. Confis-

immovable properties whose disposal is restricted due to being allocated to public services or state institutions in the zoning plan or due to the implementation of relevant laws, an action shall be filed in administrative courts only after the administrative applications and procedures specified in Zoning Law no. 3195 are completed.'". Constitutional Court, Date of Decision:25.09.2013, Case No:2013/93, Decision No:2013/101, See http://www.anayasa.gov.tr/Kararlar Bilgi Bankası, D.A:14.01.2014.

26 "Confiscation without expropriation is an illegal intervention to the property right. There is not an administrative procedure in this act. There is an administrative act that is against the law and that severely violates the property right. In the theory of administrative law, such acts are defined as de facto actions." See Kemal GÖZLER, İdare Hukuku, Vol. II, Ekin Yayınevi, Bursa, 2009. p.991.

27 "The following conditions should be satisfied in order to name an action as de facto action: 1- There should be a material exercise, an action carried out by the administration. This action could be in the form of either the execution of an administrative procedure declared null and avoid or an execution that is based on no procedure. 2- The underlying procedure or the action carried out should be the consequence of a clear and severe violation of laws. This means that the action performed has lost its administrative nature and the liability of the administration is exposed to the provisions of private law, not to the administrative law. 3- The administrative act should constitute a breach of the property right and public freedom." See Salih ŞAHİNİZ, Teoride ve Uygulamada Kamulaştırmasız El Koyma (İdarenin Özel Mülkiyetteki Taşınmazlara Hukuka Aykırı El Koyması), Seçkin Yayınevi, 1st ed, Ankara, 2006. p.38.

28 Ali ARCAK/Edip DOĞRUSÖZ, Kamulaştırmasız El Koyma (El Atmanın Önlenmesi ve Tazminat Davaları), Seçkin Yayınevi, Ankara, 1992. p.19.

29 "Temporary confiscation does not fall under the scope of confiscation without expropriation. If the seizure is in the form of appropriation, there is a case of confiscation without expropriation." See Ali Haydar KARAHACIOĞLU/Mehmet ALTIN, Kamulaştırmasız El Atma Davaları, Üçbilek Matbaası, Ankara, 1995. p.1.

cation without expropriation may be performed by the administration, or more precisely, by the administrative organizations that hold the power of expropriate[30]. It should be clarified that, should any public corporate entity needs the property of another public entity, it can take over this property in accordance with the procedure defined in Article 30 of the Expropriation Law. In the case of seizure of a property without following the procedure in Article 30 of the Expropriation Law, there again occurs a confiscation without expropriation[31]. The Court of Conflicts decided that an action for compensation could be filed in judicial courts for the compensation of damages in such a case[32].

The actions arising from *de facto* actions and hence *de facto* confiscation without expropriation[33] are heard in judicial courts[34]. The Constitutional Court also contends that *de facto* confiscation without appropriation occurs only on the condition that an immovable property is occupied by the administration (to be used for public services) and that the occupation is not the result of an expropriation procedure established in accordance with the rules and procedures specified in the Law. Thereby, it is acknowledged that *de facto* confiscation deriving from an illegal act of the administration does not differ from wrongful acts of real entities and that damages arising from such acts should be subject to judicial procedures just like the damages arising from wrongful acts of real entities[35]. Thus, in case of *de facto* confiscation of an immovable property, the courts acknowledge the presence of confiscation without expropriation and decide that the cost of property should be paid to the property owner. This means

30 "In the event that a private law company, for which an immovable is expropriated, confiscates the immovable properties of people other than the owner of given property, there arises a case of prohibition of intervention, not confiscation without expropriation. Chamber 6 of the Council of State confirmed this with one of its decisions (Date of Decision:16.12.1986, Case No:16858, Decision No:17085)". See KARAHACIOĞLU/ALTIN, *ibid,* p.1.

31 GÖZLER, *ibid,* p.992.

32 Court of Conflicts, Date of Decision:08.07.1991, Case No:1991/7, Decision No:1991/12, Official Gazette No:21027, Cited in GÖZLER, *ibid,* footnote on p.992.

33 Zeki AKAR, Gerekçeli-Açıklamalı-İçtihatlı Kamulaştırma ve Kamulaştırmasız El Atma Davaları, Vol. II, Turhan Kitabevi, 2nd ed, Ankara, 2007. p.1706-1879.

34 GÖZLER, ibid, p.991.; ŞAHİNİZ, ibid, p.38. ;A. Şeref GÖZÜBÜYÜK/Turgut TAN, İdare Hukuku, Genel Esaslar, Vol. I, Turhan Kitabevi, 8th ed, Ankara, 2011. p.1011.

35 Constitutional Court, Date of Decision:25.09.2013, Case No:2013/93, Decision No:2013/101, See http://www.anayasa.gov.tr/Kararlar Bilgi Bankası, D.A:14.01.2014.

that the immovable property owner may claim damages in case of confiscation without expropriation and the cost of property claimed for compensation is not the cost of expropriation[36]. Furthermore, the court is required to decide on the registration or annulment of the immovable property ownership in the name of the administration[37].

In short, with respect to the courts authorized to deal with both *de facto* and legal confiscation without expropriation, it would not be wrong to argue that there is a dualist functioning. According to the Court of Conflicts decisions quoted above, the administrative courts are authorized to hear full remedy actions filed for the claim of damages resulting from zoning plan applications. In other words, in the event that a piece of land is allocated as a green area in the zoning plan, but there is no *de facto* confiscation, a lawsuit may be filed in the administrative court, not in the civil court. Therefore, civil courts are authorized in the case of *de facto* confiscation without expropriation; administrative courts are authorized in the case of legal confiscation without expropriation[38].

4. NEW REGULATIONS IN THE EXPROPRIATION LAW

In the Turkish law, with regard to immovable properties subject to confiscation without expropriation, there are decisions made on different dates by the Supreme Court Grand General Assembly of the Unification of Judgments. In one of these decisions, the Supreme Court enables the owner of an immovable property that was subject to confiscation without expropriation to file an action for damages or for prohibition of intervention[39]. After this decision of

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36 An application was filed to the Constitutional Court for the cancellation of certain parts of temporary Article 6 of Law no. 2942 amended by Law no. 6487. The Constitutional Court has not made its decision about this matter. The courts of first instance that receive relevant actions use this situation as an excuse for suspending the actions.

37 Veli BÖKE, Kamulaştırmasız El Atma Davaları, Seçkin Yayınevi, 2nd ed, Ankara, 2006. p.19.

38 See http://www.gencbaro.org/haber/fiilî-elatma..., D.A:05.12.2013.

39 Supreme Court Unification of Judgments Decision, Date of Decision:16.05.1956, Case No:1956/1, Decision No:1956/6-7;"The Supreme Court decision for the unification of judgments yields the following results: The owner cannot file an action for recovery of property because the property right for the given property is not ceased due to confiscation without expropriation. The owner is entitled to file an action for prohibition of intervention against the administration that illegally seized ownership of the property. However, because

the Supreme Court, with Law no. 221[40], confiscations without expropriation were rendered legal for once[41]. However, since Law no. 221 was of temporary nature, it did not bring a permanent resolution to the problem. Subsequently, the regulation in Article 38 of the Expropriation Law no. 2942 did not specify which branch of justice holds the power to handle an action filed by an immovable property owner in case of confiscation without expropriation by the administration, but provided a period of prescription of twenty years for actions filed in such a case[42]. This regulation was annulled by the Constitutional Court[43]. In one of its decisions, the Supreme Court Grand General Assembly of the Unification of Judgments decided that "the administrative justice is authorized to settle the disputes arising from confiscations made in line with plans and projects as a result of the decisions of administrative authorities, and the judicial courts are authorized to handle actions of illegal confiscations" [44]. Law no. 6487, recently put into force, has brought new regulations[45]. It is noteworthy that the amendments to temporary Article 6 of the Expropriation Law no. 2942 brought by Article 21 of Law no. 6487 on Amendments to Certain Laws and Decree Law no. 375 are not restricted to the regulations, specifying that the *administrative justice* holds the power to handle legal confiscations without

the property confiscated without expropriation has become a road, the owner may transfer the property right to the administration and claim the price of property in return for this in the case of a difficulty or impossibility of executing the decision of prohibition of intervention. The price herein refers to the price on the date when the owner gave consent to the transfer of property to the administration. Since the property right of the owner continues, the right to file an action is not subject to period of prescription. See GÜNDAY, *ibid,* p.278.

40 For Law no. 221 of January 5, 1961 on Immovable Properties Allocated to Public Services by Statutory Bodies see KARAHACIOĞLU/ALTIN, *ibid,* p.200-202.; for further information on Law no. 221 see ARCAK/DOĞRUSÖZ, *ibid,* p.20-21.

41 GÜNDAY, *ibid,* p.279.

42 *Ibid,* s.279.

43 Constitutional Court, Date of Decision:10.04.2003, Case No:2002/112, Decision No:2003/33, Official Gazette Date and No:04.11.2003/25279. See http://www.anayasa.gov.tr/Kararlar Bilgi Bankası, D.A:14.01.2014.

44 Supreme Court Unification of Judgments Decision, Date of Decision:11.02.1959, Case No:1958/17, Decision No:1959/15, See ŞAHİNİZ, *ibid,* p.25-27.

45 An application was filed to the Constitutional Court for the cancellation of certain parts of temporary Article 6 of Law no. 2942 amended by Law no. 6487. The Constitutional Court has not made its decision about this matter. The courts of first instance that receive relevant actions use this situation as an excuse for suspending the actions.

expropriation. With Article 22 of Law no. 6487, the temporary Article 7 was added to the Expropriation Law[46]. While the title of temporary Article 6 of the Expropriation Law no. 2942 was "Compensation for Confiscation without Expropriation", it was replaced by "Determination of Prices of Immovable Properties Allocated to Public Services without Expropriation". The new regulations brought by amendments may be summarized as follows[47]: Between October 9, 1956 and November 4, 1983, in case of *de facto* confiscation without expropriation, the owner was deprived of the right to file an action, and compromise was one of the prerequisites of filing an action. Thus, the owner was forced to seek compromise. The price on which the parties compromised could be paid in installments during an undefined period of time in line with budgetary opportunities. In the absence of a compromise, the owner had to file an action for price determination within a period of three months. Allowing a short period of time for filing an action was against the abovementioned Constitutional Court decision, which annulled Article 38 of the Expropriation Law[48].

The new regulation stipulates that only an action for price determination can be filed due to confiscation without expropriation. The new regulation eliminated the possibility of filing actions for compensation, prohibition of

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[46] Expropriation Law no. 2942, Temporary Article *7-(Add:24.05.2013-6487/22)*: "In accordance with Articles 16 and 17 of the annulled Expropriation Law no. 6830 of August 31, 1956 and with annulled Articles 16 and 17 of the Expropriation Law no, 2942, in expropriations for which a decision of registration is made by courts in the name of administration, it is deemed that notifications and other expropriation procedures are completed. No rights and debts shall be claimed for these expropriation procedures; no actions for objection shall be filed against expropriation or expropriation prices; ongoing actions shall be finalized in accordance with this article".

[47] Tevrat DURAN, "6487 sayılı Yasa'nın 21 ve 22.maddesinin Anayasa'ya Aykırılık Sorunu ile İlgili Hukukî Çalışma", p.1-5. See http://tevratduran.com/6487-sayili-yasanin-21-ve-22-maddesiyle-ilgili..., D.A:05.12.2013.

[48] "Furthermore, whereas there is no longer a time limitation to file an action for compensation for confiscations without expropriation that occurred or are to occur after November 4, 2011 because Article 38 of the Expropriation Law was annulled by this annulment decision of the Constitutional Court, the period of three months prescribed for actions for compensation for confiscations without expropriation that occurred between October 9, 1956 and November 4, 1983 is a breach of the principle of equality. GÜNDAY, *ibid,* p.281; One of the parts in temporary Article 6 of Law no. 2942 amended by Law no. 6487, for which an application was filed to the Constitutional Court for cancellation, is the regulation related to this issue.

intervention and recovery of property[49]. The regulation is evidently against the decision of annulment made previously by the Constitutional Court[50]. Furthermore, while an action for compensation due to *de facto* confiscation without expropriation used to be an action for performance, it is defined as an action for determination in the new regulation.

With the recent regulation, the cases of *de facto* confiscation without expropriation and proceedings related to the execution of a decision are now subject to fixed rather than proportional fees of attorney. Furthermore, according to the regulation, it is not possible to seize the properties, rights and receivables of the administration arising from the collection of the price determined by the court in case of confiscation without expropriation by the administration between October 9, 1956 and November 4, 1983.

According to paragraph 8 of temporary Article 6 in the Law no. 2942, payments based on a finalized court decision can be made in installments. For *de*

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49 Gürsel KAPLAN, "Yeni Yasal Düzenlemelere Göre Kamulaştırmasız El Koyma Sebebiyle Doğan Tazmin Hakkının Tabi Olduğu Usûl ve Esaslar", Türkiye Barolar Birliği Dergisi, No: 99, Ankara, 2012. p.142.

50 "In the lawsuit petition, it is claimed that the rule in the first sentence of paragraph 6 prescribing that *'only'* an action for compensation can be filed by the owner violates the freedom to claim rights and hence is against Article 36 of the Constitution. Paragraph 6 stipulates that the owners whose property is confiscated without expropriation should apply to the administration to seek compromise, and can file an action for compensation on the condition that the parties do not reach a compromise in three months or that the administration fails to invite for compromise. Accordingly, in the event that the administration and property owner fail to reach a compromise, the owner shall file only an action for compensation within three months after the report of non-compromise is devised or the period of six months is over without any invitation for a compromise and cannot file any other actions that derive from the property law. Article 36 of the Constitution secures the freedom to claim rights. One of the basics of the freedom to claim rights is the right to access to court. The right to access to court encompasses the right to bring a legal dispute before a court authorized to make a decision. A rule that prohibits bringing a dispute arising from the violation of material law, without making any amendments to the material law, removes the freedom to claim rights. The rule prescribing that only an action for compensation can be filed by the owner of a property that is confiscated without expropriation prohibits the owner from filing actions arising from the property law, such as prevention of confiscation and action for adequate price, and hence disregards the freedom to claim rights. Due to these reasons, the rule prescribing that only an action for compensation can be filed by the owner is against Article 36 of the Constitution and should be annulled." See Constitutional Court, Date of Decision:01.11.2012, Case No:2010/83, Decision No:2012/169, Official Gazette Date and No:22.02.2013/28567. http://www.resmigazete.gov.tr/eskiler/2013/02/20130222-10.htm, D.A:08.01.2014.

facto confiscations without expropriation after November 4, 2011, the following regulations are brought: "payment in installments, prohibition of seizure and fixed rates for attorney fees". It is also stipulated that these regulations apply to ongoing, in other words, non-finalized pending cases[51]. Briefly stated, these regulations conflicting with Article 35 of the Constitution aim to compensate the damage of property owners whose property rights are violated because of wrongful acts arising from confiscations without expropriation and to reduce compensations arising from *de facto* confiscations without expropriation[52]. These regulations also do not comply with Article 1 of the European Human Rights Convention Additional Protocol 1. In one of its decisions, the European Court of Human Rights reinforced its approach that the laws in force cannot affect the essence of rights[53]: "Although such practices are seemingly based on a law in force, there is no procedure that provides a balance in protecting public interests and personal rights. Thus, such practices may be deemed arbitrary.[54]"

CONCLUSION

It is evident that the administrative justice holds the power and authority to settle the disputes arising from legal confiscations without expropriation, performed in line with the new rules regarding confiscation without expropriation brought by amendments to the Expropriation Law no. 2942 made by Law no. 6487, in other words from confiscations without expropriation falling under the scope of regulations in the Zoning Law. However, as explained above, the new regulations brought by Law no. 6487 eliminate the right to property stipulated in Article 35 of the Constitution and restrict the rights of owners

51 DURAN, *ibid,* p.1.

52 GÜNDAY, *ibid,* p.281.

53 Murat TEZCAN, "İdarelerin Kamulaştırmasız El Atma Uygulamalarını Kanun'la Hukuka Uygun Hâle Getirmek: 6487 sayılı Kanun'la Kamulaştırma Kanunu'na Eklenen Geçici 7.maddenin Değerlendirilmesi", p.7. See http://www.ankarahukukburosu.org/Makaledetay.aspx?makale=48, D.A:05.12.2013.

54 European Court of Human Rights, *Akıllı vs. Turkey,* Date of Decision: 11.04.2006, Application No: 71868/01, Decision No: 6330, See http://www.avrupakonseyi.org.tr/aihmk/mahkemekararlari2006_71.htm, D.A:13.01.2014; For European Court of Human Rights decisions see also http://aihm.anadolu.edu.tr/index.htm, D.A:13.01.2014.

more strictly compared to the former regulation. The administration necessarily holds the expropriation authority because public interests are superior to personal interests. It is evidently illegal and unacceptable that the administration confiscates an immovable property actually without expropriation while it is holding this authority. It would not be an accurate approach to argue that legal confiscations without expropriation deriving from the Law of Zoning, e.g. development readjustment share, are essentially legal acts. Thus, to assure compliance with the law, it is required to remove the regulations in the Law of Zoning which grant relevant authority and power to the administration. The administration should use the way of expropriation take into its possession the private properties needed as a result of zoning practices. In brief, the administration should, under no circumstances, confiscate without expropriation an immovable property. Furthermore, there is a need to annul regulations such as those in the Zoning Law, which lead the administration to confiscate properties without expropriation. Finally, it should be noted that an application was filed to the Constitutional Court for the cancellation of certain parts of temporary Article 6 of Law no. 2942 amended by Law no. 6487. The Constitutional Court has not made its decision about this matter. The courts of first instance, where related actions are filed, use this situation as an excuse for suspending the actions.

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THE PROTECTION OF REFUGEES AND ASYLUM SEEKERS AGAINST EXTRADITION UNDER INTERNATIONAL LAW

Uluslararası Hukuk Çerçevesinde Mültecilerin ve Sığınmacıların İadeye Karşı Korunma Hakkı

Mustafa KARAKAYA*

ABSTRACT

Everyone has the right to seek asylum from persecution.[1] However sometimes, albeit rare, some criminals use asylum to escape criminal justice, or some states use extradition requests to surrender refugees to countries where they might face persecution. Nevertheless, states provide asylum to those who deserve international protection, and also avoid abuse of asylum to escape from criminal justice.

This article seeks to explore the protection of refugees against extradition under international law. This is done though examining the concepts of refuee, non-refoulement and extradition, and discussing the relationship between asylum and extradition.

Key Words: Refugee, Asylum Seeker, Extradition, the Principle of Non-Refulement.

ÖZET

Herkesin zulüm karşısında başka memleketlerden mülteci olarak kabulünü talep etme hakkı vardır. Bazen, nadiren de olsa, bazı suçlular sığınma mekanizmasını adaletten kaçmak için kullanmaktadır. Bazen de bazı ülkeler iade taleplerini mültecileri kötü muameleye maruz kalabilecekleri ülkelere göndermek için de kullanabilir. Her şeye rağmen, prensip olarak ülkeler uluslararası korumayı hak eden kişilere sığınma sağlamakla birlikte, suçluların bu mekanizma ile adaletten kaçmalarına da engel olmaktadır.

Bu makalede, mültecilerin uluslararası hukuk çerçevesinde iadeye karşı korunması konusu ele alınacaktır. Bu çerçevede, öncelikle mülteci, iade edilememezlik prensibi

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1 Article 14(1) of the Universal Declaration of Human Rights.

ve iade kavramları incelenecek olup, devamla mülteci ile iade kavramları arasındaki ilişki tartışılacaktır.

Anahtar Kelimeler: Mülteci, Sığınmacı, İade, İade Edilememezlik Prensibi

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INTRODUCTION

The purpose of asylum is to provide a shelter to those individuals who have a well-founded fear of persecution in their home countries. This pupose is embodied in the internationally accepted definition of 'refugee' in Article 1 of the UN Convention Relating to the Status of Refugees (the Refugee Convention).[2] Those who might be persecuted in their home countries because of their race, religion, nationality, membership of a particular social group or political opinion, can seek refuge in a foreign country, if they are eligible for obtaining asylum in another country. After all, Article 14(1) of the Universal Declaration of Human Rights[3] proclaims that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.'

On the other hand, the only purpose of extradition is to prevent a person who has been accused of a crime from escaping justice by surrendering him to the jurisdiction of the country where the crime was committed, for the purpose of imprisonment or prosecution. In short, the purpose of extradition is criminal justice.

Whilst asylum intends to protect individuals concerned by providing shelter for them, extradition forces states to surrender fugitives to justice. Thus, these two concepts can intersect with each other at some point. In the case of an extradition request concerning a refugee or an asylum seeker, is there any explicit regulation that prohibits the requested State from extraditing the

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2 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html> [accessed 17 July 2013].

3 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 17 July 2013].

wanted person in all circumstances, or do the states need to consider different particular circumstances of all cases, such as the place where the refugee would be extradited, or recognition of refugee status by the requested State? In fact, the purpose of asylum would become impossible if an extradition request concerning a refugee was accepted under all circumstances because of giving priority to extradition over protection of refugees.

Therefore, the principle of non-refoulement, which indicates the commitment of the international community to guarantee the enjoyment of human rights for all,[4] prohibits the surrendering of refugees in any manner whatsoever to a place where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.[5] In this way, in such circumstances, states are bound by the principle of non-refoulement not to extradite refugees to countries where such danger exists.

The objective of this article is to present a thorough analysis of the relationship between asylum and extradition, and to understand extradition of recognized refugees and asylum seekers. Primarily we will be seeking to explore how refugees and asylum seekers are protected against extradition under international law.

In this article, in addition to the universally accepted Refugee Convention and some specific UN conventions, we will mainly focus on European conventions, such as the European Convention on Extraditon[6] and the 1950 European Convention on Human and Fundamental Freedoms (the ECHR)[7]. Furthermore, in order to provide a better understanding of the subjects being discussed, we will make some references to the Turkish legislation on extradition and asylum.

4 UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.refworld.org/docid/438c6d972.html> [accessed 17 July 2013].

5 Article 33(1) of the Refugee Convention.

6 Council of Europe, *European Convention on Extradition*, 13 December 1957, ETS 24, available at: <http://www.refworld.org/docid/3ae6b36b0.html> [accessed 17 July 2013].

7 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> [accessed 17 July 2013].

For the purpose of this article, the word 'refugee' will be used generically for recognized refugees, asylum seekers awaiting recognition of their status and asylum seekers appealing against the rejection of their application. However, where people's rights vary according to their legal status the categories will be differentiated.

In order to provide a comprehensive view, the determination of refugee status will be discussed in the first chapter of this article. Since the Refugee Convention 'is still the leading international agreement on refugees,'[8] when describing the definition of 'refugee', we will mainly focus on this Convention. Inclusion, cessation and exclusion clauses are one of the most important elements when deliberating the limits of refugees as regards extradition. The role of the United Nations High Commissioner for Refugees (the UNHCR) in determining refugee status will also be discussed in this chapter.

In the first part of the second chapter, we will define the principle of non-refoulement not only under international refugee law, but also under international human rights and customary law. Under the Refugee Convention, this principle is the primal guarantee of not surrendering refugees to well-founded fear of persecution. Under international human rights law, this however, has a broader meaning. It precludes states from surrendering any person to a place where they might be at risk of persecution. Therefore, we will also focus under international human rights law on the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention)[9], the 1966 International Covenant on Civil and Political Rights (the Political Covenant)[10], and the ECHR.

The concept of extradition, as defined mainly by the European Convention

[8] Elizabeth J. Lentini, 'The Definition of Refugee in International Law: Proposals for the Future', *Boston College Third World Law Journal*, Vol. 5, No.2, (1985), p. 187.

[9] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html> [accessed 17 July 2013].

[10] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 17 July 2013].

on Extradition, will be examined in the second part of the second chapter. In addition to the legal basis for extradition, general principles of extradition and grounds for refusing extradition requests will also be discussed in this part of the article.

After discussing the main concepts in the first two chapters, in the third chapter, we will evaluate the intersection points of these concepts. The main aim of this chapter is to see how these concepts intersect with each other, and to put forth the protection of refugees against extradition. Furthermore, extradition of recognised refugees and asylum seekers will be studied separately in the third chapter.

CHAPTER I:

REFUGEE STATUS DETERMINATION

The term 'refugee' is a term of art, and in ordinary usage, this term has a broader, looser meaning, signifying someone in flight, who seeks to escape conditions or personal circumstances found to be intolerable. Implicit in the ordinary meaning of 'refugee' lies an assumption that the person concerned is worthy of being, and ought to be, assisted, and, if necessary, protected from the causes and consequences of flight.[11] Black's Law Dictionary defines refugee as 'a person who flees or is expelled from a country, esp. because of persecution, and seeks haven in another country.'[12]

Although granting asylum to people fleeing persecution in foreign lands is one of the earliest hallmarks of civilization, and its historical roots date back to 3500 years ago,[13] it was not until the Treaty of Westphalia in 1648, that the

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11 Guy S. Goodwin-Gill & Jane McAdam, *The Refugee In International Law*, (3th edn, Oxford University Press, 2011), p. 15.

12 Brayn A. Garner, (Ed.), *Black's Law Dictionary*, (9th edn, West, 2009), p. 1394.

13 UN High Commissioner for Refugees, *Protecting Refugees & the Role of UNHCR*, March 2009, UNHCR / MRPIS / B•3 / ENG 1, available at: <http://www.refworld.org/docid/49f1d3e92.html> [accessed 17 July 2013]. References have been found in traditions and written texts, in one form or another, during the emergence of the great early empires in the Middle East, such as Babylonians, Assyrians, Hittites and the ancient Egyptians. See UNHCR, The State of the World's Refugees 1993: The Challenge of Protection, (Penguin Books, 1993). Treaty of Kadesh is the earliest known refugee treaty that in 1283 B.C., Hit-

understanding of who exactly is a refugee, started to change in modern meaning.[14] Following the First World War a comprehensive refugee regime emerged under the League of Nations.[15] This was the first time that the concept of refugee was recognized as an international issue, despite being limited to some specific groups.[16] After some unsuccessful attempts to expand the definition of refugee to include all persons[17], the end of the Second World War heralded a

tite King Hattusli III agreed on a treaty with the ruler of ancient Egypt, Pharaoh Ramses II, on the return of refugees to Egypt, in which he declared: "Concerning a refugee, I affirm on oath the following: when a refugee comes from your land into mine he will not be returned to you. To return a refugee from the land of the Hittites is not right." See Pirkko Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited*, (Kluwer Law International, 1997), p. 49.

14 Alexander Betts & Gil Loescher, 'Refugees in International Relations', in Alexander Betts & Gil Loescher (Eds.), *Refugees in International Relations,* (Oxford University Press, 2011), p. 2. With this Treaty, modern state system was established, and the rulers of the nation states were given sovereignty in their own territories. Since then, the concept of refugees has evolved with the modern state system, entrenching it within the territorial notion of boundaries, and reflecting changes within the broader scope of international politics, and highlighting notions of ideology, economics and balance of power. In this context, the first refugees recognised in the modern state system were Huguenots, French Protestants fleeing France to the Netherlands, Switzerland, England, Denmark, Germany and the United States in 1685. Later on, the early modern international system witnessed the flights of many aristocrats of French Revolution to Austria and Prussia, seeking refuge from persecution in 1789. Such flights indicated the beginning of the concept of the refugees in Europe in modern meaning, leading to early formations of the international refugee regime See Laura Barnett, 'Global Governance and the Evaluation of the International Refugee Regime', *International Journal of Refugee Law*, Vol. 14, No. 2/3, 2002, pp. 238-240.

15 Barnett, 'Global Governance and the Evaluation of the International Refugee Regime', p. 238. The League of Nations established the Office of High Commissioner for Refugees in 1921. Initially the Office had responsibility to deal with the problem created by the Russian refugees, but this responsibility was later extended to Turkish, Greek, Bulgarian and Armenian refugees. See Gil Loescher, Alexander Betts and James Milner, *The United Nations High Commissioner for Refugees (UNHCR): The Politics And Practice Of Refugee Protection into the Twenty-first Century*, (Routledge, 2008), p. 8; see also: Barnett, 'Global Governance and the Evaluation of the International Refugee Regime', p. 242.

16 Barnett, 'Global Governance and the Evaluation of the International Refugee Regime', p. 242. However, the Office could not create any general definition of refugee, instead used category-oriented approach that described refugees according to group affiliation and origin. In 1933 the position of some groups were finally regularized with the Convention Relating to the International Status of Refugees, which provided a definition that based refugee status on lack of protection and effective non-nationality. This Convention, in spite of still being category-oriented, provided a clear indication of what was required to belong to any group. See Barnett, 'Global Governance and the Evaluation of the International Refugee Regime', p. 242.

17 Category-oriented approach finally ended in 1938 with the establishment of the Intergo-

new period of upheaval for the international refugee regime,[18] and led to the establishment of the UNHCR, and to the preparation of the Refugee Convention.[19]

vernmental Committee on Refugees. Its main objective was to aid Germans and Austrians in emigrating to other countries, but its mission did not include all German and Austrian individuals. Rather, only persons emigrating on account of their political opinions, religious beliefs or racial origin were eligible for assistance. See Crystal Doyle, 'Isn't "Persecution" Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender- Based Persecution', *Washington and Lee Journal of Civil Rights and Social Justice*, Vo.15/2/7,2009, p. 524. However, this meeting failed because of that Germany refused to let Jews leave with their assets. See Barnett, 'Global Governance and the Evaluation of the International Refugee Regime', p. 242. Later on, a major review at the Bermuda Conference in April 1943 expanded the definition of 'refugee' to include 'all persons, wherever they may be, who, as a result of events in Europe, have had to leave, or may have to leave, their country of residence because of the danger to their lives or liberties on account of their race, religion or political beliefs.' See Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 18. The importance of this definition is that the scope of the definition of refugees expanded to those who had been affected by the events in Europe, with the abolition of previous limitations, such as those fleeing from Germany and Austria. In this way, the finalized version of this definition would later appear in the Refugee Convention. See Doyle, 'Isn't "Persecution" Enough?', p. 524.

18 Following the war ended in 1945, 30 million people were left uprooted around Europe. Many people, such as soldiers and displaced did not want or could not return home because of border changes, including more than 12 million people of German origin who were expelled from the Soviet Union. The League of Nations dismantled when the war drew to a close and the United Nations Relief and Reconstruction Agency (UNRRA) was created by the Allies in 1944 to deal with the refugees of Europe following the war. See Barnett, 'Global Governance and the Evaluation of the International Refugee Regime', p. 243-244. After coming to end of the Agency's mandate in 1947, the International Refugee Organization (IRO) was established outside the UN system in 1948 to take up where the UNRRA left off and to assist those who were left in European camps and still arriving from Eastern Europe. The IRO resettled over one million refugees between 1947 and 1951, including the United States, Canada, Australia, Israel and various European states. See Dennis Gallagher, 'The Evoluation of the International Refugee System', *International Migration Review*, Vol. 23, No. 3, Autumn, 1989, p. 579; see also: Barnett, 'Global Governance and the Evaluation of the International Refugee Regime', p. 244.

19 The IRO was slated to cease its activities on 30 June, 1950. However, when the time neared, it was clear that not all of the refugees could be either repatriated or resettled. In this context the United Nations proposed the effective assimilation of refugees under a new international regime, which ultimately led both to the establishment of UNHCR, and to the preparation of the Refugee Convention. See James C. Hathaway, *The Rights of Refugees Under International Law*, (Cambridge University Press, 2005), p. 91.

THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND REFUGEE STATUS DETERMINATION

Drafted by the United Nations, the Refugee Convention was adopted on 28 July 1951 and came into force on 21 April 1954, to meet the problem of the millions of refugees left displaced by the Second World War, and to set out the rights of refugees and the responsibilities of the international community to refugees. [20]

The Refugee Convention was the first international agreement to adopt a universal refugee definition[21] because, soon after the Second World War, as there were still many refugee problems not being solved, international community felt the need for a new international instrument to define the legal status of refugees. Therefore, it was decided to replace 'ad hoc agreements adopted in relation to specific refugee situations' with 'an instrument containing a general definition of who was to be considered a refugee.'[22]

Remaining the cornerstone of modern international refugee law, the Refugee Convention resurrected the earlier commitment to codification of legally binding refugee rights,'[23] and 'it is still the leading international agreement on refugees.'[24] The Refugee Convention, as of 1 April 2011, has been ratified by 144 countries.[25]

The Refugee Convention provides the definition of refugees and provides for certain standards of treatment to be accorded to refugees.[26] It is obvious that, to enable states parties to the Convention to implement their provisions, refugee

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20 Lentini, 'The Definition of Refugee in International Law', p. 187.

21 Jeanhee Hong, 'Refugees of the 21st Century: Environmental Injustice', *Cornell Journal of Law and Public Policy*, Vol. 10, 1995, p. 324.

22 UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, para. 5, available at: <http://www.refworld.org/docid/3ae6b3314.html> [accessed 17 July 2013].

23 Hathaway, *The Rights of Refugees Under International Law*, p. 91.

24 Lentini, 'The Definition of Refugee in International Law', p. 187.

25 UNHCR International web site, <http://www.unhcr.org/3b73b0d63.html> [accessed 06 June 2013].

26 Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 53.

status has to be determined.[27] However, the Refugee Convention does not contain anything about procedures for the detemination of refugee status, and leaves to states the choice of means as to implementation at the national level.[28]

The determination of refugee status is a process which takes place in two stages. Firstly, it is necessary for states to ascertain the relevant facts of the case. Secondly, the definition of refugee in the Refugee Convention has to be applied to the facts thus ascertained.[29]

The provisions of the Refugee Convention defining who is a refugee consist of three clauses: inclusion, cessation and exclusion clauses. Whilst the inclusion clauses have a positive significance and determine the criteria that a person must satisfy in order to be defined as a refugee, the other two clauses have a negative significance. The cessation clauses indicate the conditions under which refugee status comes to an end, and the exclusion clauses enumerate the circumstances in which a person is excluded from the application despite meeting the criteria of the inclusion clauses.[30]

Inclusion clauses:

The definition of the term 'refugee' is set out in Article 1 of the Refugee Convention. This article at the outset underlines that; any person who had already been determined a refugee 'under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization,'[31] will also be accepted as a refugee under the Refugee Convention.

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27 UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, para. 189, available at: <http://www.refworld.org/docid/4f33c8d92.html> [accessed 10 June 2013].

28 Goodwin-Gill & McAdam, *The Refugee In International Law*, pp. 53-54.

29 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, para. 29.

30 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* paras. 30-31.

31 Article 1(A)1 of the Refugee Convention.

In addition to this, a refugee is any person who:

"[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[32]

Due to the lack of a definition of an asylum seeker in the Refugee Convention, the difference between the terms 'refugee' and 'asylum seeker' is not clear.[33] However, since the Refugee Convention does not define refugee as any person who has been formally recognized as having a well-founded fear of persecution, etc., rather simply provides that the term 'refugee' shall apply to any person who 'owing to well-founded fear of being persecuted…,'[34] a person becomes a refugee within the meaning of the Refugee Convention when he fulfils the criteria contained in the definition. It would necessarily occur before his refugee status is formally determined. That is to say, recognition of refugee status is declaratory, rather than constructive. He does not become a refugee because of the recognition, but rather he is recognised as a refugee, because he is a refugee.[35] Therefore, the protective regime of the Refugee Convention

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32 Ibid., Article 1(A)2.

33 Even so, general characteristics of asylum seekers can be found in various UNHCR documents: "asylum seekers are individuals who have sought international protection and whose claims for refugee status have not yet been determined." See UNHCR, *2009 Global Trends: Refugees, Asylum-seekers, Returnees, ınternally Displaced and Staleless Persons*, p.23, available at: <www.unhcr.org/4c11f0be9.html> [accessed 10 June 2013]. In addition to referring to someone who is waiting for an answer, this definition could also refer to someone who has not yet submitted an application. See UN High Commissioner for Refugees, *Refugee Protection: A Guide to International Refugee Law*, 1 December 2001, p. 48, available at: <http://www.refworld.org/docid/3cd6a8444.html> [accessed 10 June 2013].

34 Elihu Lauterpacht & Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement : Opinion' in Erika Feller, Volker Turk and Frances Nicholson, (eds)., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), p. 116.

35 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* para. 28.

extends to asylum seekers who have not yet been formally recognized as refugees.[36]

The Refugee Convention's definition of refugee, after excluding events occurring after 1 January 1951[37], identifies four standards that must be met by potential refugees before they are able to obtain refugee status under the Refugee Convention. These standards are as follows: '(1) the potential refugees must be outside their country of origin; (2) they must be unable or unwilling to seek or take advantage of the protection of that country, or to return there; (3) such inability or unwillingness must be attributable to a well-founded fear of being persecuted; and (4) the persecution feared must be based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.'[38]

Events occurring before 1 January 1951:

Since the basis for the determination of refugee status is vital to the objective of the Refugee Convention, no reservations to the Article 1 is permitted.[39] However, Article 1(B)1 provides that:

For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either: (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951", and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.[40]

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36 Lauterpacht & Bethlehem, ''The Scope and Content of the Principle of Non-Refoulement', p. 116.

37 This limitation has different aspects and will be explained at next section detailed.

38 Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 37.

39 Samuel K. N. Blay & B. Martin Tsamanyi, 'Reservations and Declarations Under the Refugee Convention and the 1967 Protocol Relating to the Status of Refugees', *International Journal of Refugee Law*, Vol. 2, 1990, p. 537.

40 During the negotiations of the Refugee Convention, Western govenments mainly had tendencies to limit their financial and legal obligations to refugees. Faced with new refugee problems on different parts of the world, American and other Western officials believed that this problems would be virtually unending, and were opposed to commit themselves

In this way, although there is no temporal or geographical limits in the Statute of the UNHCR, the Refugee Convention covered only individuals who were refugees 'as a result of events occurring before 1 January 1951,' and the states were given discretion to apply the Convention to those who were refugees 'owing to events in Europe, or owing to events in Europe or elsewhere.'[41]

'The main caveat attached to the universalist character of the definition of refugee –a geographical and time limitation- was lifted comprehensively through the enabling of' the 1967 Protocol to the Refugee Convention.[42] The 1967 Protocol was adopted because new refugee situations had arisen since the Refugee Convention was adopted, and thus these new situations might not fall within the scope of the Refugee Convention. Therefore, while expressly adopting the substantive provisions of the Refugee Convention, along with the whole definition of refugee contained in Article 1 of the Refugee Convention, the 1967 Protocol, removed both the restrictive words 'as a result of events occurring before 1 January 1951' and geographical limitation in Article 1(B)1

in advance to unspecified responsibilities. Although they agreed on a general, universally applicable definition of the term refugee, they could not come to an agreement on whether the refugee convention should apply to refugees all over the world or whether it should be restricted to European refugees. For example, while the Great Britain, Scandinavian and Benelux countries supporting a broad definition of refugee, the United States and France argued for limiting the responsibilities of countries who were signatories to the refugee convention. Ultimately, the view that the refugee convention should serve primarily for the reception and care of European refugees prevailed. See Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis*, (Oxford University Press, 1996), p. 57.

41 Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis*, p. 57. However, the UN Conference of Plenipotentiaries expressed its hope in the Final Act that: *'the Convention Relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations would be guided by it in granting, so far as possible, to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.'* See UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <http://www.refworld.org/docid/40a8a7394.html> [accessed 18 July 2013]. Many States relied upon this recommendation in the cases of refugee crisis accelerated by events after 1 January 1951, until the 1967 Protocol relating to the Status of Refugees (the 1967 Protocol) expressly removed that limitation. See Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 36.

42 Erika Feller, 'The Evolution of the International Refugee Protection Regime', *Journal of Law and Policy*, Washington University, Vol.5:129, 2001, p. 131.

of the Refugee Convention, except for those states party to the Refugee Convention which had already declared geographical restriction.[43] As of 1 April 2011, there are 145 states who are parties to the 1967 Protocol.[44]

Turkey acceded to the Refugee Convention and ratified it in March 1962. However, the Turkish government made a declaration on geographical and temporal limitation to the Refugee Convention and limited herself only to '*events occurring in Europe before 1 January 1951.'* Turkey, when adopting the 1967 Protocol in July 1968, agreed to lift temporal limitation to the Refugee Convention, however, maintained its declaration of geographical limitation to European refugees.[45] In other words, Turkey only recognises persons as refugees who arrive into Turkish territory from European states.[46] Turkey could avoid taking legal responsibility towards non-Europeans, because, the terms of the Refugee Convention also allows Turkey to maintain in force a previously declared geographical restriction to European refugees, even while acceding to the 1967 Protocol.[47]

Owing to well-founded fear of being persecuted:

The hallmark of the Refugee Convention is the inability or unwillingness of people to return to their home due to 'well-founded fear of persecution.' Therefore, not all involuntary migrants qualify as refugees; only those who has a genuine fear of persecution in their country of origin are entitled to the protection established by the Refugee Convention.[48]

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43 Lentini, 'The Definition of Refugee in International Law', p. 189.

44 UNHCR International web site, <http://www.unhcr.org/3b73b0d63.html> [accessed 21 June 2013].

45 Ibid.

46 There is a different procedure for non-European asylum seekers and which will be discussed in Chapter 3.

47 Hathaway, *The Rights of Refugees Under International Law*, p. 97.

48 James C. Hathaway, *The Law of Refugee Status*, (Butterworths, 1991), p. 65. The term 'well-founded fear' contains two elements: subjective element and objective element. In order to qualify an asylum seeker as a Convention refugee, these two elements must be taken into consideration in determining whether well-founded fear exists or not. Since fear is a subjective emotion -a state of mind-, it involves a subjective element in the person applying for recognition as a refugee. Thus, the subjective element is established, if the fear is genuine and the applicant perceive himself to stand in fear of persecution. However,

For reasons of race, religion, nationality, membership of a particular social group or political opinion:

In order to qualify as a refugee within the meaning of the term established in the Refugee Convention, an applicant must show well-founded fear of persecution on one of the five grounds stated above. It does not matter whether the persecution arises from any single one of the protected grounds or from a combination of two or more of them.[49] In other words, not every applicant who has a well-founded fear of being persecuted and who is outside the country of his nationality is qualified as a refugee under the Refugee Convention. The well-founded fear faced by the applicant must be linked to at least on of the five protected grounds.

Outside the country of his nationality:

It is a general requirement that a potential refugee must be outside the country of his nationality. There are no exceptions to this rule. 'International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.'[50] Namely, even if a person shelters in a foreign embassy in his country of origin, and applies to the country's embassy or to the

since it is not only the frame of mind of the applicant that determines his refugee status, this frame of mind must be supprorted by an objective situation. In this phase, the applicant's statements must be assessed in the context of the situation prevailing in his country of origin. See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* paras. 37-38. Although there is no universally accepted definition of persecution, and 'various attempts to formulate such a definition have met with little success' it may be inferred from Article 33 of the Refugee Convention that 'a threat to life, or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights--for the same reasons--would also constitute persecution.' Whether other prejudicial actions or threats may also amount to persecution will depend on the circumstances of each case, including subjective elements. Because of the vagueness of the definition of persecution, and also since each case is unique and each applicant has different psychological make-up, interpretations of what amounts to persecution are bound to vary. See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* paras. 51-52.

[49] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* para. 66.

[50] Ibid., para. 88.

UNHCR in order to obtain refugee status, it is not possible for him to qualify as a refugee under the Refugee Convention. 'The fact of having fled, of having crossed an international frontier, is an intrinsic part of the quality of refugee, understood in its ordinary sense.'[51]

Unable or unwilling to avail himself of the protection of that country; or to return there for fear of persecution:

Whilst the phrase '*unable or, owing to such fear, is unwilling to avail himself of the protection of that country'*[52] relates to persons who have a nationality, the phrase '*not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'*[53] relates to stateless refugees.

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51 Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 63. On the other hand, the requirement that a potential refugee must be outside the country of his nationality does not mean that the potential refugee should have fled his country of origin by reason of persecution, or that persecution should have actually occurred. The fear might derive from situations arising during an ordinary absence (for example, as student, holiday-maker or diplomat), while the element of 'well-founded fear' looks more to the future, than to the past. This situation is referred to as refugees sur place. See Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 63.

52 Being unable to avail himself of the protection of the country of origin implies that circumstances are beyond the will of the person concerned, such as a state of war, civil war or other grave disturbance which prevents the country from extending protection or makes such protection ineffective. Furthermore, this protection may have been denied by the country of origin. On the other hand, the term 'unwilling' refers to refugees who refuse to accept the protection of their country of origin. In this context, this term is qualified by the phrase 'owing to such fear,' because if the protection of the country of origin is available and there is no well-founded fear of persecution, it demonstrates that the applicant is not in need of international protection. See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* paras. 97-100.

53 The phrase relating to stateless refugees is parallel to the phrase concerning refugees who have a nationality. In the case of stateless refugees, the phrase 'country of nationality' is replaced by 'the country of his former habitual residence' and the phrase 'unwilling to avail himself of the protection' is replaced by 'unwilling to return to it.' In addition for the stateless refugees, the question of 'availment of protection' of the country of his former habitual residence does not arise. Moreover, if the stateless person has abondened his country of former habitual residence for the reasond indicated in the definition, he is generally unable to return. See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* para. 101.

Cessation clauses:

In principle, once refugee status has been determined, it lasts only as long as international protection is needed. However, if it is no longer necessary or justifiable to benefit from refugee status, it may be terminated. Article 1 (C) of the Refugee Convention provides six conditions under which a refugee ceases to be a refugee.[54]

On the other hand, the cessation clauses must be distinguished from the cancellation of refugee status. The latter indicates that a person should never have been granted refugee status in the first place; for example if it is subsequently found that refugee status was obtained on the basis of misinterpretation of material facts or that one of the exclusion clauses would have applied to him, or that the person has another nationalty.[55]

Exclusion clauses:

Articles 1 (D), (E) and (F) of the Refugee Convention contain provisions whereby persons are excluded from refugee status. Article 1 (D) excludes persons from refugee status who are receiving United Nations protection and assistance. Article 1(E) excludes those who are 'recognized by the competent authorities of the country in which he has taken residence as having the rights

[54] Article 1 (C) of the Refugee Convention states that: *"This Convention shall cease to apply to any person falling under the terms of section A if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily re-acquired it; or (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; (6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence."*

[55] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* paras. 111-117.

and obligations which are attached to the possession of the nationality of that country.' As for Article 1 (F), this provision enlists the categories of persons who are considered to be not deserving of refugee protection under the terms of the Refugee Convention. In this article the term 'exclusion clauses' under the Refugee Convention will refer exclusively to Article 1 (F).

Article 1 (F) excludes individuals from refugee status. Namely, the guarentees of the Refugee Convention are not available. Article 1 (F) provides:

"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

The drafters of the Refugee Convention included exclusion clauses in order to achieve two aims. Firstly, it was considered that refugee status had to be protected from abuse by prohibiting its grant to undeserving cases. Secondly, it was ensured that those who had committed heinous acts and serious common crimes did not escape prosecution.[56]

THE ROLE OF THE UNHCR IN REFUGEE STATUS DETERMINATION

The UNHCR was established on 1 January 1951 by the UN General Assembly, initially for a three-year term. This agency is mandated to provide international protection to refugees, and to seek 'permanent solutions for the

[56] Geoff Gilbert, 'Current Issues in the Application of the Exclusion Clauses,' Erika Feller, Volker Turk and Frances Nicholson, (eds)., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), pp. 427-428.

problem of refugees.'[57] This independent, non-operational and non-political agency, acting under the authority of the UN General Assembly, soon became a permanent body and went on to play a fundamental role in the shapeing of the international refugee regime.[58] Of the two mandates, providing international protection is of primary importance, because without protection there can be no possibility of finding lasting solutions.[59]

The Statute of the UNHCR and the Refugee Convention contains very similar definitions of the term 'refugee'. The Statute applies to the same individuals as the Refugee Convention without time and geographical limitations.

As mentioned previously, it is for states parties to the Refugee Convention to determine the status of refugees under the Convention. In addition to this, it is also down to the UNHCR to determine the status of refugees under the Statute and any relevant General Assembly resolutions.[60] In most of the countries, the UNHCR directly or indirectly participates in the determination of refugee status, because either the State is not party to the Refugee Convention or the State still adheres to the temporal or geographical limitations permitted under the Convention,[61] or even being party to the Convention the State, such as Cambodia, does not have its own refugee status determination process.[62]

For example, in Turkey, a State which is party to the Refugee Convention with geographical reservation, only an asylum seeker who arrives into Turkish territory from the European countries can be qualified as a refugee under the Refugee Convention. Therefore, refugee status of asylum seekers who come into Turkish territory from non-European countries is determined by the UNHCR.[63]

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57 Article 1, Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html> [accessed 18 July 2013].

58 Barnett, 'Global Governance and the Evaluation of the International Refugee Regime', p. 245.

59 Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 426.

60 Ibid., p. 52.

61 Ibid.

62 Michael Alexander, 'Refugee Status Determination Conducted by UNHCR', *International Journal of Refugee Law*, Vol. 11, No. 2/1999, p. 251.

63 UNHCR Country Operations Profile- Turkey, 2013, available at: <http://www.unhcr.org/pages/49e48e0fa7f.html> [accessed 25 June 2013].

When assessing whether an applicant meets the criteria for refugee status, the UNHCR should consider whether the person concerned falls within the criteria for inclusion set out in the refugee definition of the Refugee Convention. Even in cases where the UNHCR determines refugee status, the definition of refugee in the Refugee Convention is applied. Even though there are cases in which the UNHCR extends its mandate to those who seek protection in a country which is not party to the Refugee Convention, or who is out of the scope of the refugee definition under the Convention, for the purpose of this article, they were not mentioned in this study.

CHAPTER II:
NON-REFOULEMENT AND EXTRADITION

PART I:
PRINCIPLE OF NON-REFOULEMENT

The term non-refoulement comes from the French word 'refouler', meaning to drive back or repel an enemy who fails to breach one's defences. In the context of immigration, 'refoulement is a term of art covering, in particular, summary reconduction to the frontier of those discovered to have entered illegally and summary refusal of admission of those without valid papers.'[64] In essence, non-refoulement is a concept which prohibits states from returning a refugee or asylum seeker to any country where he is likely to face persecution, torture or cruel, inhuman or degrading treatment or punishment.[65]

Non-refoulement has been a guiding principle of international refugee protection since its appearance in the 1933 Convention Relating to the Status of Refugees. In addition to international refugee law, this principle has also emerged in human rights treaties and in international customary law.[66] Following 'the right to seek and to enjoy in other countries asylum from persecu-

64 Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 201.
65 Lauterpacht & Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement', pp. 89-90.
66 Aoife Duffy, 'Expulsion to Face Torture? Non-Refoulement in International Law', *International Journal of Refugee Law*, 20, 2008, p. 373.

tion,'[67] this principle indicates the commitment of the international community to guarantee the enjoyment of human rights for all, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These rights are threatened when a refugee is sent back to possible persecution or danger.[68]

In this part, in order to explain the principle of non-refoulement, this will be examined under three headings: international refugee law, international human rights law and international customary law.

PRINCIPLE OF NON-REFOULEMENT UNDER INTERNATIONAL REFUGEE LAW

There are various documents and treaties including states' non-refoulement obligations with respect to refugees, such as the 1967 UN General Assembly Declaration on Territorial Asylum,[69] the Organization of African Unity Refugee Convention,[70] the American Convention on Human Rights[71] and the Cartagena Declaration on Refugees.[72] However, Article 33 of the Refugee Convention is the most important of these sources of the principle of non-refoulement. Because Article 33 is the clearest, most widely accepted and most direct source for the principle of non-refoulement among them. Therefore, because of these reasons and because of the scope of this article, in this part, in order to explain the principle of non-refoulement under International Refugee Law, we will

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67 Article 14(1) of the Universal Declaration of Human Rights.

68 *UNHCR Note on the Principle of Non-Refoulement.*

69 Article 3, *Declaration on Territorial Asylum*, UN General Assembly, 14 December 1967, A/RES/2312(XXII), available at: <http://www.refworld.org/docid/3b00f05a2c.html> [accessed 18 July 2013].

70 Article II(3), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, Organization of African Unity, 10 September 1969, 1001 U.N.T.S. 45, available at: <http://www.refworld.org/docid/3ae6b36018.html> [accessed 18 July 2013].

71 Article 22(8), , *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, Organization of American States, 22 November 1969, available at: <http://www.refworld.org/docid/3ae6b36510.html> [accessed 18 July 2013].

72 Section III(5), *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama,* Americas - Miscellaneous, 22 November 1984, available at: <http://www.refworld.org/docid/3ae6b36ec.html> [accessed 18 July 2013].

only explore Article 33 of the Refugee Convention

Principle of Non-Refoulement under the 1951 Convention Relating to the Status of Refugees

The principle of non-refoulement is set out in Article 33(1) of the Refugee Convention in the following terms:

"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

This principle constitutes one of the basic Articles of the Refugee Convention, to which no reservations are permitted.[73] It is binding for States party to the Convention. This principle is also binding on all States party to the 1967 Protocol, whether or not they are party to the Refugee Convention.[74] As previously mentioned, Turkey was one of the countries to ratify the Refugee Convention, and also Turkey joined the 1967 Protocol in 1968. Therefore, Turkey is bound by the principle of non-refoulement under the Refugee Convention.

Article 33(1) of the Refugee Convention clearly states that *'no Contracting State shall expel or return a refugee'*. That is to say, the principle of non-refoulement applies to any person who is a refugee under the terms of the Refugee Convention.[75] As explained in Chapter 1, the term 'refugee' is not limited to those who have been formally recognised as refugees, it also extends to asylum seekers who have not yet been recognized as refugees. In this way:

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73 UN High Commissioner for Refugees, *Note on Non-Refoulement (Submitted by the High Commissioner)*, 23 August 1977, EC/SCP/2, para. 4, available at: <http://www.refworld.org/docid/3ae68ccd10.html> [accessed 27 June 2013].

74 Lauterpacht & Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement', p. 108.

75 The criteria of being a refugee under the Refugee Convention was explained in a detailed way in Part 1. According to the Refugee Convention an applicant must meet three criteria: Inclusion, Cessation and Exclusion

"Every refugee is, initially, also an asylum seeker; therefore, to protect refugees, asylum seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established."[76]

The phrase *'in any manner whatsoever'* indicates that the drafters of the Refugee Convention intended to prohibit any act of removal or rejection that would expose the person concerned at risk. That is to say, the formal description of the act is not limited to the circumstances, such as expulsion, deportation, return, rejection, etc., and this phrase allows for the application of the principle of non-refoulement to other forms of removal.[77]

Furthermore, the phrase '*to the frontiers of territories'* identifies the place to which refoulement is prohibited. This expression refers not only to the applicant's country of origin, or in the case of stateless person, to the country of formal habitual residence, but also to the frontiers of any territory in which the person concerned has reason to fear persecution. The last one also includes third country in which there is a possibility that the applicant might be sent to a territory where he would be at risk.[78] Therefore, the phrase *'where his life or freedom would be threatened'* 'must be construed to encompass the well-founded fear of persecution that is cardinal to the definition of 'refugee' in Article 1A(2) of the Convention. Article 33(1) thus prohibits refoulement to

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[76] UN High Commissioner for Refugees, *Note on International Protection (submitted by the High Commissioner)* , 31 August 1993, A/AC.96/815, para. 11, available at: <http://www.refworld.org/docid/3ae68d5d10.html> [accessed 27 June 2013]. Another point in support of this approach is that the protection regime of Article 31(1) of the Refugee Convention, which prohibits States to impose penalties to refugees on account of their illegal entry or presence in the country, extends to asylum seekers as well. In this regard, since refoulement of a refugee would put him at much greater risk than would the imposition of penalties of illegal entry, the Refugee Convention, which protects asylum seekers from imposition of penalties for illegal entry or presence in the country, should also afford protection from refoulement to asylum seekers. See Lauterpacht & Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement', pp. 116-117.

[77] Lauterpacht & Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement', p. 112.

[78] Ibid., p. 122.

the frontiers of territories in respect of which a refugee has a well-founded fear of being persecuted'.[79]

The expression *'on account of his race, religion, nationality, membership of a particular social group or political opinion'* addresses the nature of the threat to the refugee. It indicates that a threat to life or freedom would only come within the scope of the principle of non-refoulement if it was on account of race, religion, nationality, membership of a particular social group or political opinion.[80] One point that should be taken into consideration here is that the applicant might face fear of persecution or threat to his life or freedom on account of reasons other than those specified. In this instance, the principle of non-refoulement in Article 33 of the Refugee Convention does not apply to this applicant. However, there are various international human rights instruments to be applied in these kinds of situations that will be explained below.

Exceptions to the Principle of Non-Refoulement under the 1951 Convention Relating to the Status of Refugees

Although Article 42(1) of the Refugee Convention expressly prohibits making reservations to Article 33, prohibition of refoulement is not an absolute principle since Article 33(2) provides for exceptions to the principle of non-refoulement.

Article 33(2) of the Refugee Convention stipulates that:

"The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

This means refugees in exceptional cases can be returned on two grounds: The first is in cases of posing danger to the national security of the country in

79 Ibid., p. 124.
80 Ibid., p. 126.

which he is[81]; and the second is in cases of having been convicted by a final judgment of a particularly serious crime that constitutes a danger to the community of that country.[82] In short, the first one is about 'national security' and the second one is about 'public order'. These exceptions are framed in terms of the individual and whether the applicant may be considered a security risk is necessarily left very much to the discretion of the State authorities.[83]

In addition to Article 33(2), the obligation of non-refoulement is already limited by Article1(F) of the Refugee Convention, which states that the term 'refugee' does not include individuals who have '*committed a crime against peace, a war crime, or a crime against humanity', committed a serious non-political crime outside the country of refuge prior to his admission to that country*

[81] The expression '*reasonable grounds for regarding as a danger to the security of the country in which he is'* includes some requirements: This expression requires that refugee must be a danger to the security of the country in the future, not in the past. This future risk must be to the national security of the host country, not to the other country. The State must demonstrate reasonable grounds for regarding a refugee as a danger to the national security of the country in which he is. The danger posed by the refugee must be assesed by considering individual circumstances. Lastly, given the serious individual consequences of refoulement, threshold level for the operation of exceptions to the non-refoulement ought to be very high, and therefore, in order to justify refoulement, the danger to the national security must be very serious. See Lauterpacht & Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement', pp. 135-137; and also Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 237.

[82] As for the expression of 'who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country,' many of the elements of the interpretation of the previous expression will apply mutatis mutandis to the interpretation of this expression, such as prospective nature of the danger, place of danger or individual circumstances of the danger. However, since the Refugee Convention does not provide a clear definition of the term 'particularly serious crime,' it is unclear to what extent one convicted of a particularly serious crime must also be shown to constitute a danger to the community. After all, an essential element in this regard is that 'the crime itself must be of a very grave nature', such as murder, rape, armed robbery, arson,etc. Another important requirement is that refugee must be convicted by the final judgment of the court, and there must be remain no possibility of appeal. See Lauterpacht & Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement', p. 139; Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 237; and also *UNHCR Note on the Principle of Non-Refoulement*.

[83] Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 235. However, '[g]iven the humanitarian character of non-refoulement and the serious consequences to a refugee or asylum seeker of being returned to a country where he or she is in danger, the exceptions to non-refoulement must be interpreted restrictively and applied with particular caution'. See Lauterpacht & Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement', pp. 133-134.

as a refugee' or 'been guilty of acts contrary to the purposes and principles of the United Nations'.[84] To put it another way, if the applicant can not fulfil the criteria contained in the definition of refugee, this insufficiency to qualify him as a refugee also prevents him from enjoying protection of non-refoulement under the Refugee Convention. As both Article 33(1) specifically employs the term 'refugee' (which states an individual, first of all, must meet the criteria for the determination of refugee status), and also Article 1 states that its exceptions apply to all the Refugee Convention's protections.[85] Whilst Article 1(F) primarily concerns excluding individuals deemed unworthy of benefiting from the Refugee Convention refugee status, Article 33(2) considers the risk of continued presence of those to the host state.[86]

However, this kind of criterion is only valid when applying the principle of non-refoulement under the Refugee Convention. One does not, therefore, need to qualify as a refugee or to be outside of the exceptions of Article 33(2) in order to benefit from the principle of non-refoulement under international human rights principles.[87]

PRINCIPLE OF NON-REFOULEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW

The principle of non-refoulement, complementing the prohibition of refoulement under the Refugee Convention, has also been established in other human rights instruments. 'the Torture Convention', 'the Political Covenant' and 'the ECHR' are among such international human rights instruments containing the principle of non-refoulement.

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84 Kathleen M. Keller, 'A Comperative and International Law Perspective on the United States (Non)Compliance with its Duty of Non-Refoulement', *Yale Human Rights and Development Law Journal* , Vol. 2, No. 183, 1999, p. 185.

85 Ibid., p. 187.

86 Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law', p.375.

87 To put it another way, neither exceptions to the principle of non-refoulement under Article 33(2) nor exclusion clauses under Article 1(F) affects non-refoulement obligations of the host country under international human rights law, under which there is no exception.

Principle of Non-Refoulement under the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Torture Convention entered into force in June 1987 and has been now ratified by 153 states. Turkey signed the Torture Convention on 25 January 1988 and ratified it on 2 August 1988.[88]

Similar to the Refugee Convention, the Torture Convention also explicitly prohibits refoulement of persons to countries where his life might be at risk. Article 3(1) of the Torture Convention provides that:

"No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

Article 3(1) of the Torture Convention is a non-derogable provision, and unlike the Refugee Convention, it does not accept any exceptions to the principle of non-refoulement.[89] However, two points of the Torture Convention might be interpreted as a limitation to the principle of non-refoulement.

Firstly, the Torture Convention only makes reference to the instance of 'torture'. It does not include 'other cruel, inhuman or degrading treatment' such as prohibiting refoulement. While Article 16 of the Torture Convention prohibits cruel, inhuman or degrading treatment, Article 3(1) only offers assistance to individuals who are at risk of torture. The Torture Convention therefore limits itself when it comes to non-refoulement, and puts a high threshold to prohibit refoulement.[90]

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88 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Signatory Status, available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en> [accessed 01 July 2013].

89 Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 301. Article 2(2) of the Torture Convention provides that: 'No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.'

90 Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law', pp. 380-381. But in this place, one might face the difficulty of identifying the threshold between ill-treatment and torture. See Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law', p. 381.

Secondly, in the Torture Convention, 'torture' encompasses only those acts that emanate from State actors. Namely, protection mechanism against refoulement in the Torture Convention limits itself only to danger of torture carried out or acquiesced in by the State. Neither the Political Covenant, the ECHR nor the Refugee Convention contains this kind of public requirement. These instruments, if the risk of harm emanates from non-State actors, ask the key question of the unwillingness or unability of State actors.[91]

Principle of Non-Refoulement under the 1966 International Covenant on Civil and Political Rights

The Political Covenant was adopted by the UN General Assembly on 16 December 1966 and came into force on 23 March 1976. A total of 167 states have ratified the Political Covenant to date. Turkey signed the Political Covenant on 15 August 2000 and ratified it on 23 September 2003.[92]

Although the Political Covenant does not specifically express prohibition of refoulement, the Human Rights Committee, which is the supervisory body of the Political Covenant, has adopted the principle of non-refoulement in its decisions regarding Article 7.[93] This article provides that:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 7 of the Political Covenant is also absolute and non-derogable.[94] The scope of Article 7 is wider than Article 3 of the Torture Convention. Unlike Article 3 of the Torture Convention, Article 7 of the Political Covenant

91 Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 302.

92 International Covenant on Civil and Political Rights Signatory Status, available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> [accessed 11 July 2013].

93 David Weissbrodt & Isabel Hörtreiter, 'The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties', *Buffalo Human Rights Law Review*, Vol. 5, No. 1, 1999, p. 42.

94 Article 4(2) of the Political Covenant prohibits derogation from Article 7 even in situations of public emergency.

encompasses not only torture but also cruel, inhuman or degrading treatment or punishment. Moreover, the Political Covenant contains no requirement that any of these forms of ill-treatment be carried out or acquiesced in, by the State.[95] The Human Rights Committee also did not prefer 'to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment.' Rather, the Committee stated that 'the distinctions depend on the nature, purpose and severity of the treatment applied.'[96]

Principle of Non-Refoulement under The 1950 European Convention on Human and Fundamental Freedoms

The ECHR, drafted by the Member States of the Council of Europe, opened for signature in Rome on 4 November 1950 and entered into force on 3 September 1953. As of May 2013, 47 states have ratified the ECHR.[97] Turkey, one of the first members of the Council of Europe, ratified the ECHR on 18 May 1954. The European Court of Human Rights (the ECtHR), set up in 1959, is the judicial mechanism of the ECHR. Turkey also accepted the right of individual petition to the ECtHR in 1987, and finally on 22 January 1990, Turkey recognized the compulsory jurisdiction of the ECtHR.

Unlike the Refugee Convention and the Torture Convention, the ECHR (similar to the Political Covenant) does not explicitly prohibit refoulement of refugees. However, the provision in Article 3 of the ECHR has been interpreted by the ECtHR as entailing prohibition of refoulement. Article 3 provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Although the view that Article 3 could be interpreted as implying a non-refoulement obligation had already been accepted by the European Commission

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95 Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 306.

96 UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para. 4 available at: <http://www.refworld.org/docid/453883fb0.html> [accessed 11 July 2013].

97 Convention for the Protection of Human Rights and Fundamental Freedoms Signatory Status, available at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=22/05/2013&CL=ENG> [accessed 12 July 2013].

of Human Rights in the 1970s, it was not until the Soering v United Kingdom extradition case of 1989 that there appeared to be concrete views.[98] Later on, a growing consensus appeared in the area of human rights that Article 3 of the ECHR provides more extensive protection against refoulement than Article 33 of the Refugee Convention.[99]

The resulting construction of Article 3 of the ECHR as a rule on the principle of non-refoulement is very wide in scope. Whilst the Refugee Convention encompasses only well-founded fear of persecution under five Convention grounds and the Torture Convention includes only torture, The ECHR (similar to the Political Covenant) embraces everything from torture to inhuman or degrading treatment or punishment.[100]

As regards the absolute character of the prohibition of the refoulement under Article 3, the Court in the Chahal v. UK case held that:

"The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation."[101]

In this respect, Article 3 of the ECHR does not accept any exceptions or limitations to the principle of non-refoulement. It was designed to safeguard the treatment of everyone (including refugees and asylum seekers) within the territory of the Member States.[102] Hence, it has a broader application than Ar-

98 Francesco Messineo, 'Non-Refoulement Obligations in Public International Law: Towards a New Protection Status?', in Satvinder S. Juss, (ed.), *The Ashgate Research Companion To Migration Law, Theory and Policy*, (Ashgate, 2013), p. 140.

99 Helene Lambert, 'Protection Against Refoulement from Europe: Human Rights Law Comes to the Rescue' *International & Comparative Law Quarterly*, Vol. 48, 1999, p. 515.

100 Messineo, 'Non-Refoulement Obligations in Public International Law', p. 142.

101 Chahal v. UK (1996) 23 EHRR, 413, para. 79.

102 Helene Lambert, 'The European Convention on Human Rights and the Protection of Refu-

ticle 33 of the Refugee Convention and may provide protection from refoulement to people who are expressly excluded from refugee status[103], even to terrorists. Although the standard of proof required by the ECtHR for assessing how real the risk is for a non-refoulement claim to be admissible is relatively high, the applicant does not have to demonstrate a nexus between the risk of torture and one of the five grounds of the Refugee Convention.[104]

PRINCIPLE OF NON-REFOULEMENT UNDER INTERNATIONAL CUSTOMARY LAW

So far, we have considered the principle of non-refoulement under various international refugee and human rights law treaties. The principle of non-refoulement is also believed to be a part of international customary law. This means that even if States are not party to the international instruments prohibiting refoulement, they are legally bound by the principle of non-refoulement.[105]

Although there is a bit of controversy as to whether the non-refoulement obligation is actually a principle of customary international law,[106] we will not discuss these different approaches in this article. However, to mention briefly, on the one hand, there are many scholars[107] and official documents of the UNHCR[108] and of others[109] that refer to the principle of non-refoulement as being

gees: Limits and Opportunities', *Refugee Survey Quarterly*, Vol. 24, Issue 2, 2005, p. 52.

103 Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 311.

104 Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law', p. 378.

105 Kate Jastram & Marilyn Achiron, *Refugee Protection: A Guide to International Refugee Law*, (UNHCR, 2001), p. 14.

106 Jason Popjoy, 'Treating Like Alike: The Principle of Non-Discrimination As a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection', *Melbourne University Law Review*, Vol. 34, No. 1, 2010, p. 189.

107 Some of them are: Goodwin-Gill, McAdam, Kapferer, Lauterpacht and Bethlehem.

108 See UNHCR, Declaration of States Parties to the Refugee Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12–13 December 2001, HCR/MMSP/2001/09, 16 January 2002 available at: <www.unhcr.org/419c74d64.pdf> [accessed 13 July 2013].

109 For example: *San Remo Declaration on the Principle of Non-Refoulement*, the International Institute of Humanitarian Law, September 2001, Sanremo, Italy, available at: <http://www.iihl.org/iihl/Album/San%20Remo%20Declaration%20%20on%20the%20Principle%20of%20Non-Refoulement.doc.> [accessed 18 July 2013]. The declaration states that: 'The principle of non-refoulement of refugees can be regarded as embodied in customary international law on the basis of the general practice of States supported by a strong opinio

an international customary law. For example, Goodwin-Gill and McAdam argues that;

"[t]here is substantial, if not conclusive, authority that the principle is binding in all states, independently of specific assent. State practice before 1951 is, at the least, equivocal as to whether, in that year, Article 33 of the Convention reflected or crystallized a rule of customary international law."[110]

Moreover, the UNHCR is of the view that: both 'consistent practice combined with a recognition on the part of States that the principle has a normative character' and 'the fact that the principle *has been incorporated in international treaties adopted at the universal and regional levels to which a very large number of States have now become parties' demonstrates that* the principle of non-refoulement has reached the level of international customary law.[111]

On the other hand, there are some scholars[112] who argue that there is insufficient evidence to justify the claim that the principle of non-refoulement has been part of international customary law.[113] In other words, they don't accept that the prohibition of refoulement in the Refugee Convention has crystallized as a customary norm.[114]

However, in spite of a minority of scholars' insistance that on non-refoulement is not a principle of international customary law, there is a near-universal acceptance that it has now attained this status.[115]

Nevertheless, considering the fact that the international community has already reached consensus that the prohibition of torture established a rule of

juris.' and 'This principle is normatively established both in treaty and in custom, and thus it constitutes an integral part of customary international law.'

110 Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 346.

111 *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, available at: <http://www.refworld.org/docid/437b6db64.html> [accessed 13 July 2013].

112 Hailbronner, K. and Hathaway, J. C.

113 Hathaway, *The Rights of Refugees Under International Law*, p. 363.

114 Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 351.

115 Ibid., p. 354.

international customary law,[116] at least in cases when there is a risk of torture upon return, States have a duty to assess the principle of non-refoulement under international customary law.

PART II:
EXTRADITION

The term 'extradition' has been understood for many centuries as 'the formal surrender, based on reciprocating arrangements, by one nation to another of an individual accused or convicted of an offence outside its own territory and within the jurisdiction of the other which, being competent to try and punish him, demands the surrender.'[117] Since this concept has been 'dominated by considerations and concerns deeply rooted in state interests, such as sovereignty, maintaining power and domestic order, keeping external political alliances, etc;'[118] there have been a lot of discussions on it. Therefore, there are various definitions of extradition. However, most of the definitions provided by scholars, organizations and various states have resulted in almost the same definition as mentioned above. All definitions assume that sovereign states have the power under their own laws to decide whether or not to grant extradition to another state for a crime the requested person committed or is alleged to have committed outside their jurisdiction; and that extradition is only granted on the condition that there exists reciprocal arrangements by which the requesting state will do the same in comparable cases.[119]

Extradition is regarded as one of the earliest forms of international cooperation in criminal matters. It is a concept that dates back to ancient societies such as the ancient Egyptians, Chineses, Babylonians, Assyrians and Hittites.[120]

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116 Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law', p.384.

117 Terlinden v. Ames 184 U.S. 279, 289 (1902), cited in Ivan Anthony Shearer, *Extradition in International Law*, (the University of Manchester, the University Press, 1971), p. 21.

118 Michael Plachta, 'Contemporary Problems of Extradition: Human Rights, Grounds for Refusal and the Principle Aut Dedere Aut Judicare', The UNAFEI Annual Report for 1999 and Resource Material Series No. 57, P 64-86, 2000, available at: < www.unafei.or.jp/english/pdf/PDF_rms/no57/57-07.pdf> [accessed 13 July 2013].

119 Wolfgang Wagner, 'Building an Internal Security Community: The Democratic Peace and the Politics of Extradition in Western Europe', *Journal of Peace Research*, 2003, 40, p. 703.

120 Kimberly Proust, 'International Co-operation:A Commonwealth Perspective', *South Afri-*

Historical roots of the concept of extradition goes back to the same treaty with that of the concept of refugee, to the treaty between Hittite King Hattusli III and the ruler of ancient Egypt, Pharaoh Ramses II in 1283 B.C.[121] In that treaty the Parties expressly provided for the mutual return of criminals.[122]

However, ancient treaties do not represent to any degree international co-operation –in an ordinary usage- to supress ordinary crime. Such extradition provisions were included only incidentally in ancient treaties of peace and alliance, and a willingness to deliver up the criminals of the other party is just one of the gesture of friendship and cooperation.[123] It was not until the eighteenth century that modern international cooperation began to surrender criminals.[124] Thus, today 'a majority of nations in the world community have come to look upon extradition as the major effective instrument of international co-operation in the suppression of crime.'[125]

LEGAL BASIS FOR EXTRADITION

Extradition is premised on the assumption that the interests of any state have been affected by the conduct of any individual who is not within that state's jurisdiction, but within the jurisdiction of another state.[126] 'It is [already] universally recognized that every state has the power to regulate conduct within its territory and, beyond it, such other conduct which affects its legitimate interests.'[127] However, the concept of power to regulate conduct beyond its territory, only means that that state has a right to request extradition. In other words, that state has not the right to force another state to extradite the requested person. This is because every state has sovereign rights over their own ter-

can Journal of Criminal Justice, Vol. 16, 2003, p. 296.

121 Shearer, *Extradition in International Law*, p. 5.

122 Kai I. Rebane, 'Extradition and Individual Rights: The Need For An International Criminal Court to Safeguard Individual Rights', *Fordham International Law Journal* ,Vol. 19, 1996, p. 1645.

123 Shearer, *Extradition in International Law*, p. 6.

124 Ibid.

125 Ibid., p. 2.

126 M. Cherif Bassiouni, 'Theories of Jurisdiction and Their Application in Extradition Law and Practice', *California Western International Law Journal*, Vol. 5, 1974-1975, p. 1.

127 Ibid., p. 2.

ritory and extradition is not accepted as an absolute international duty. To put it another way, under international law there is no general obligation to force states to extradite fugitives to other states. Therefore, if states want to ensure that they secure the return of their own criminals they must enter into treaties with other states.[128] A legal obligation only exists where states have entered into bilateral or multilateral extradition treaties, or if they have become parties to international instruments which impose a duty to extradite with respect to specific offences.[129] However, this does not mean that states only extradite criminals with reference to a treaty. There is also no regulation in international law which prevents states from extraditing criminals in the absence of a treaty.[130] However, since extradition treaties create international obligations, in this article we will only consider legally binding international instruments.

Bilateral extradition treaties

Bilateral extradition treaties based on the principle of reciprocity have traditionally been the preferred legal instrument used by states in their extradition relations. A large number of bilateral extradition treaties were concluded during the nineteenth century and the early part of the twentieth century, and many of them are still in force. Bilateral extradition treaties continue to provide legal basis for the extradition of criminals in many cases.[131]

Turkey has concluded many bilateral extradition treaties with other countries whereby Turkey hands over persons accused of crimes, on conditions of reciprocity. Even though it is not in force at the moment, the Ottomon Empire (ancestor of the Turkish Republic) was signed the first written and formal bilateral extradition treaty the United States of America on 11 August 1874.[132]

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128 Shearer, *Extradition in International Law*, p. 27.

129 UN High Commissioner for Refugees, *The Interface Between Extradition and Asylum*, November 2003, PPLA/2003/05, para. 12, available at: <http://www.refworld.org/docid/3fe846da4.html> [accessed 01 July 2013].

130 UNHCR *The Interface Between Extradition and Asylum*, para. 14.

131 Ibid., para. 13.

132 Treaties and Other International Agreements of the United States of America, 1776-1949, Department of State Publication, Vol.10, 1972, p. 642.

Multilateral extradition treaties

In addition to bilateral treaties, there is an increasing number of multilateral extradition treaties, which establish a mutual duty for states party to it.[133]

In 1990, the United Nations created a new Model Treaty on Extradition, which was designed to be used 'as a basis in developing treaty relations at the bilateral, regional or multilateral level.'[134] However, it is not a binding instrument. In fact, there is also no universally accepted treaty incorporating the entire principles of extradition. It is not only because of different approaches to extradition but also because of different traditions under common and civil law.[135]

There are a lot of bilateral and multinational extradition treaties, as well as some other treaties which provide for an obligation to extradite for certain offences. However, it is beyond the scope of this article to enlist the names of these treaties and to explore them fully. Nevertheless, when explaining general principles and exceptions of extradition we will mainly make reference to the European Convention on Extradition of 1957. This convention has been accepted as 'the mother convention' for all further developments on extraditon.[136] Thus, this Convention is the right place to explain the principles of extradition, since the principles cited in the European Convention on Extradition are also included in almost all bilateral and multilateral extradition treaties.

The European Convention on Extradition, which was drawn up by the Member States of the Council of Europe, is a multilateral extradition treaty. It was signed on 13 December 1957 and entered into force on 18 April 1960. It has been ratified by 50 States and three of them, Israel, South Africa and Korea, are not members of the Council of Europe. Turkey, as a member of the Council of Europe, became a party to the European Convention on Extradition in 1960.[137]

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133 UNHCR *The Interface Between Extradition and Asylum*, para. 15.
134 The UN General Assembly, 70th Plenary Meeting, 12 December 1997, A/RES/52/88.
135 UNHCR *The Interface Between Extradition and Asylum*, para. 16.
136 Wagner, 'Building an Internal Security Community' p. 703.
137 Status of the European Convention on Extradition, available at: <http://conventions.coe.int/

GENERAL PRINCIPLES OF EXTRADITION

Principle of reciprocity

'In international law, reciprocity means the right to equality and mutual respect between states.'[138] In matters of extradition reciprocity is basically a promise that the requesting State will accept same type of extradition request of the requested State in the future, should the requested State ever be asked to do so.[139] This principle underlies the whole structure of extradition.[140] In the absence of an extradition treaty, one state may extradite the accused person to another state on the basis of reciprocity. This principle is also incorporated into extradition treaties. For example Article 2(7) of the European Convention on Extradition allows states to apply reciprocity in respect of any offences excluded from the application of the Convention under the same Article.

Principle of double criminality

Double criminality means that a request for extradition will only be granted if the alleged conduct of the fugitive constitute a criminal offence in both the requesting and the requested State. Most of the extradition treaties require this principle to be satisfied.[141] The principle of double criminality emerged as a consequence of the principle of reciprocity,[142] and ensures that the requested

Treaty/Commun/ChercheSig.asp?NT=024&CM=8&DF=&CL=ENG> [accessed 01 July 2013].

138 Infornation Exchange Network for Mutual Assistance in Criminal Matters and Extradition,< http://www.oas.org/juridico/mla/en/ven/en_ven-mla-gen-reciprocity.html> [accessed 02 July 2013].

139 UNODC, Manual on Mutual Legal Assistance and Extradition, 2012, para. 55, available at: <www.unodc.org/documents/.../Mutual_Legal_Assistance_Ebook_E.pdf> [accessed 05 July 2013].

140 Daniel S. Margolies, *Spaces of Law In American Foreign Relations, Extradition and Extra-territoriality in the Borderlands and Beyond, 1877-1898*,(the University of Georgia Press, 2011), p. 205.

141 Ilias Bantekas & Susan Nash, *International Criminal Law*, (3th edn, Routledge-Cavendish, 2009), p. 296.

142 European Committee on Crime Problems, Committee of Experts on the Operation of European Conventions in the Penal Field, Expert Opinion for the Council of Europe on Questions concerning double criminality submitted by Professor Dr. Otto Lagodny, 24 June 2004, p. 3, available at: <www.coe.int/t/dghl/standardsetting/pc-oc/OC-WP(2004)02E.pdf> [accessed 18 July 2013].

State is not obliged to extradite the fugitive for conduct which it does not itself regard as criminal.[143] Article 2(1) of the European Convention on Extradition clearly stipulates that the requirement of double criminality with the words '[e] xtradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party.'

Principle of speciality

The principle of speciality means that the requesting State is under a duty not to prosecute the fugitive other than extradition crimes set out in the extradition request.[144] However, the requested State may give its consent for further prosecution for other charges.[145] The purpose of this principle is to provide the fugitive with protection against unfair treatment in the requesting State.[146] This principle no longer applies if the person surrendered to a state, leaves the territory of the requesting state and voluntarily returns to it, or does not leave that territory within a certain time after being free to do so.[147] For example, under Article 14(1) of the European Convention on Extradition, a person has 45 days to leave the territory of the requesting State before being charged with a new offence.

Re-extradition to a third place

Article 15 of the European Convention on Extradition provides that the requesting State is not entitled to re-extradite a person to a third place in respect of offences committed before surrender, without the consent of the State which granted that surrender in the first place.[148]

Aut dedere aut judicare

This principle places states under an obligation to either prosecute or extradite those persons who are suspected of having committed the crimes pre-

143 Bantekas &Nash, *International Criminal Law*, p. 296.
144 Ibid., p. 300.
145 UNHCR *The Interface Between Extradition and Asylum*, para. 65.
146 Bantekas &Nash, *International Criminal Law*, p. 300.
147 UNHCR *The Interface Between Extradition and Asylum*, para. 65.
148 Ibid., para. 66.

scribed in relevant extradition treaties.[149] The rationale behind this principle is to prevent such persons from avoiding prosecution for crimes they committed. Since many states do not want to extradite their own nationals, in such cases, this principle places on states the obligation to prosecute their own nationals.[150] Article 6(2) of the European Convention on Extradition provides that: '[i]f the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate.'

Principle of extraditable offences

Extraditable offences are offences that are serious enough to grant extradition. 'Extradition may only be granted if the conduct imputed to the individual concerned constitutes an extraditable offence.'[151] Most modern extradition treaties, in order to avoid confusion, prefer to adopt the practice of defining extraditable offences by reference to a minimum level of punishment instead of providing a list of such offences.[152] For example, according to Article 2(1) of the European Convention on Extradition, extraditable offences are offences punishable by deprivation of liberty for a maximum period of at least one year or by a more severe penalty; or when there is a sentence, for a period of at least four mounths.

Non bis in idem

This principle, also known as prohibition of double jeopardy, provides that a person who has already been tried and discharged or convicted and punished in another state can not be tried or punished again for the same crime.[153]

GROUNDS FOR REFUSING EXTRADITION REQUESTS

In some circumstances, states will reject a request for extradition. Exemp-

149 Bantekas &Nash, *International Criminal Law*, p. 91.
150 M. Cherif Bassiouni & Edward Martin, Aut Dedere Aut Judicare: The Duty to Extradite Or Prosecute in International Law, Martinus Nijhoff Publishers, 1995, p. 11.
151 UNHCR *The Interface Between Extradition and Asylum*, para. 59.
152 Bantekas &Nash, *International Criminal Law*, p. 296.
153 Ibid., pp. 306-307.

tion from extradition generally provides the requested person with some protection against unfairness.[154] These exemptions are as follows:

Double criminality

The requesting States are entitled to reject extradition requests if the conduct imputed to the individual concerned does not constitute an extraditable offence in their domestic legislation.

Non bis in idem

Article 9 of the European Convention on Extradition provides that 'extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party.' Furthermore, First[155] and Second[156] Additional Protocols to the European Convention on Extradition expanded this exemption to persons who had been acquitted or pardoned, and to offences of which amnesty has been declared respectively.

Political offence exception

Traditionally, states are not obliged to surrender persons for extradition if the offence is considered to be of a political nature. This universally accepted exception is related to the principle of sovereignty.[157] Article 3(1) of the European Convention on Extradition provides that 'Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.' However, some crimes will not be regarded as a political offence for the purpose of extradition.[158] For example, Article 1 of the First Additional Protocol

154 Ibid., p. 295.

155 Article 2, , *Additional Protocol to the European Convention on Extradition*, 15 October 1975, Council of Europe, ETS 86, available at: <http://www.refworld.org/docid/3ae6b37820.html> [accessed 18 July 2013].

156 Article 4, , *Second Additional Protocol to the European Convention on Extradition* , 17 March 1978, Council of Europe, ETS 98, available at:< http://www.refworld.org/docid/3ae6b37e1c.html> [accessed 18 July 2013].

157 Bantekas &Nash, *International Criminal Law*, p. 302.

158 Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction To International Criminal Law And Procedure*, (Cambridge University Press, 2010), p. 97.

to the European Convention on Extradition clarifies that genocide and certain war crimes shall not be considered political crimes.

Discrimination clause

Extradition shall not be granted 'if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.'[159]

Non-extradition of nationals

Many states prohibit the extradition of their own nationals because of the historical duty to protect their citizens and sovereignty or distrust in foreign legal systems.[160] For instance, Article 6(1) of the European Convention on Extradition provides for the possibility of refusal of extradition of states' own nationals.

Death penalty and other human rights grounds

States that have abolished the death penalty in their domestic law and practice, refuse extradition requests when the person concerned may face the death penalty, unless the requesting State accepts not to impose death penalty in that case or at least not to enforce it.[161]

If there are substantial grounds for believing that the individual concerned, if extradited, would be in danger of being subjected to torture, cruel, inhuman or degrading treatment of punishment, the requested State can refuse extradition requests. Even though, there is no provision in the European Convention on Extradition, after the Soering case, States party to the European Court of Human Rights are obliged not to extradite persons to a place where they might face human rights violations against the principles of the ECHR. On the other

[159] Article 3(2) of the European Convention on Extradition.
[160] Cryer and others, *An Introduction To International Criminal Law And Procedure*, p. 97.
[161] Article 11 of the European Convention on Extradition, See also: Cryer and others, *An Introduction To International Criminal Law And Procedure*, p. 98.

hand, there are other restrictions to extradition with respect to human rights violations. These restrictions are included in the provisions of international human rights law, such as the Torture Convention and the Political Covenant, which were explained in the previous part.

Moreover, if the person's extradition is imposed for the purpose of carrying out a sentence or detention order that has been rendered against him in absentia, the requested State may refuse an extradition request since the proceedings leading to the judgment did not satisfy the minimum rights of defence.[162] In addition, when there are sufficient evidences to believe that if the person concerned is extradited, he would be exposed to violation of the right to a fair trial,[163] the states reject extradition requests.

Lapse of time

Extradition shall not be granted when the person concerned has become immune by reason of lapse of time from prosecution or punishment.[164]

Fiscal offences and offences under military law

Since offences under military law are not offences under ordinary criminal law, extradition of military offences is excluded from the application of the European Convention on Extradition.[165]

With regards to fiscal offences, although extradition is traditionally refused in respect of tax and custom crimes,[166] the European Convention on Extradition provides states with the possibility of granting extradition to fiscal crimes if they are agree to include any such of the fiscal crimes.[167]

Non-extraditable offences

The States can refuse an extradition requests if the offence imputed to the

[162] Article 3 of the Second Additional Protocol to the European Convention on Extradition, (1978).
[163] For example violation of Article 6 of the European Convention of Human Rights.
[164] Article 10 of the European Convention on Extradition.
[165] Ibid., Article 4.
[166] Bantekas &Nash, *International Criminal Law*, p. 306.
[167] Article 5 of the European Convention on Extradition.

individual concerned is not an extraditable offence. It was explained previously under 'principle of extraditable offences.'

CHAPTER III:

THE INTER-RELATIONSHIP BETWEEN EXTRADITION AND REFUGEE PROTECTION

EXTRADITION AND ASYLUM[168]

Extradition is the formal surrender of an individual by one nation to another for the purpose of criminal prosecution. Thus, a person may be extradited from one country to another to stand trial for a crime he is alleged to have committed in that country. The purpose of asylum is to grant sanctuary or shelter[169] to those who are at risk or in danger, and to protect them from the consequences of a return to their own country.

Extradition and asylum are different subjects. They have different purposes, and they are governed by different legal criteria. Whilst under the concept of extradition the individual concerned is surrendered from one country to another, under the concept of asylum the refugee keeps staying in the refuge country. In other words, when an extradition request concerning a refugee is accepted, the protection mechanism of asylum comes to an end, and thus the individual concerned does not qualify as a refugee anymore. Thus when the person is extradited asylum stops.[170]

In fact, out of the millions of refugees and asylum seekers around the world, the vast majority have never been charged with extraditable offences; most of them tend to be victims of persecution because of their religion, ethnicity, political affiliation or membership in a particular social group in their home countries. On the other hand, those who are subject to extradition do not usu-

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168 For the purposes of this article, a narrow definition of asylum is used: asylum refers to refugees and asylum seekers under the Refugee Convention.

169 Garner, *Black's Law Dictionary*, p. 144.

170 The possibility of continuence of asylum of the individual in the third State, when extradited, does not change the general understanding of the difference between these two concepts.

ally seek asylum, and rarely come into contact with asylum procedures, this is because since they are fugitives from justice they tend to hide from authorities.

However, there are some exceptional situations where extradition and asylum overlap and intersect with each other; 'if the person whose extradition is sought is a refugee or asylum seeker, or if an asylum application is filed after the wanted person learns of a request for his or her extradition.'[171] As neither international refugee law intended to exempt refugees from criminal prosecution or from the enforcement of a sentence, nor extradition law prohibits extradition of refugees. Thus, it is unavoidable that some of the refugees may face extradition requests. Therefore, 'international refugee protection and criminal law enforcement are not mutually exclusive.'[172]

In Chapter 1, we have already mentioned the persons who are excluded from the benefits of refugee status and from being subjected to extradition. In this context, for example, 'one suspected of a serious non-political crime would in any event be excluded from the benefits of refugee status,'[173] and might be extradited. Since he does not meet the requirements for being a refugee, he cannot benefit from the protection mechanisms of international refugee law. However, even in this instance, international human rights law continues to protect that person from being subject to torture or other serious human rights violations.

On the other hand, any refugee or asylum seeker who is 'suspected or guilty of a non-serious non-political crime would remain liable to extradition, even to the state in which he or she had a well-founded fear of persecution.'[174] In this case, the principle of non-refoulement comes into play and protects refugees and asylum seekers from being subject to well-founded fear of persecution. The important point which must be stressed here is that if the extradition of a refugee is requested in respect of a non-serious non-political offence and the requesting State would not threaten the life or freedom of a refugee, then he

171 UNHCR *The Interface Between Extradition and Asylum*, para. 211.
172 Ibid., para. 212.
173 Goodwin-Gill & McAdam, *The Refugee In International Law*, p. 257.
174 Ibid., p. 257.

may be subject to extradition. In short, the principle of non-refoulement only prohibits extradition of a refugee to the frontiers of a territory where his life or freedom would be threatened.

The relationship between extradition and the principle of non-refoulement

It is the principle of non-refoulement that stands in the intersection point of extradition and asylum. When extradition of a refugee is requested by a state in which the refugee might face persecution, in order to keep sheltering the refugee from persecution, the extradition request has to be rejected. However, if the requested State is bound by international extradition obligations and there is no procedural deficiency with the application, the principle of non-refoulement is the only way by which an extradition request might be rejected. Thus, with the implementation of the principle of non-refoulement, extradition proceedings stop, and vice versa, with the acceptance of the extradition request, the principle of non-refoulement loses its functions.

An old example of the relationship between extradition and non-refoulement of refugees can be seen in 'the Refugee Question' of 1848 between the Ottoman State, Austria and Russia. It was the aftermath of the 1848 revolutions which pushed 'the refugee question' to the front of Ottoman State's diplomatic stage. When those revolutions were put down, thousands of defeated Hungarian and Polish refugees found themselves in the territories of Ottoman State. Russia and Austria, referring to the Treaty of Kucuk Kaynarca of 1774 and the Treaty of Belgrad of 1739 respectively, demanded the extradition of refugees without conditions. In these treaties the parties undertook mutual obligations not to accept evil-doers and rebels as refugees.[175] There was no doubt that these refugees were defeated revolutionaries, and thus according to the related treaties between parties, the Ottoman State had to extradite them to the requesting States. However, because of the Ottoman State's cultural understanding of not

[175] Gyorgy Csorba, 'Hungarian Emigrants of 1848-49 in the Ottoman Empire', in Hasan Celal Guzel, C. Cem Oguz and Osman Karatay (eds.), *The Turks Ottomans*, (Yeni Turkiye Publications, 2002), p. 224.

to accept surrender of refugees to a place in which they might face persecution, extradition requests were refused. Thereupon, the Russia planned to start a war with the Ottoman State. However, with the explicit supports of France and Britain, the Ottoman State resolved this problem in favour of herself.[176]

Hierarchy between extradition and the principle of non-refoulement

When determining whether or not to grant extradition to refugees or asylum seekers, the requested State might find herself in a conflict of obligations. On the one hand, there is a duty to extradite refugees arising from a bilateral or multilateral extradition treaty. On the other hand, the requested State is bound by the principle of non-refoulement under international refugee and human rights law, which clearly prohibits the extradition of refugees and asylum seekers to a place where their life or freedom would be threatened. In such situations the principle of non-refoulement prevails over any obligation to extradite.[177]

The precedence of the principle of non-refoulement under international refugee and human rights law over obligations arising from extradition treaties is based on both the nature of human rights obligations, and states' obligations under Article 103, in conjunction with Article 55(c) and 56 of the UN Charter.[178] While Article 103, establishes the prevalence of the UN Charter obligations over those stemming from other international treaties, the other two provisions bind member states to work towards the achievement of the purposes of the UN.[179]

PROTECTION OF REFUGEES AGAINST EXTRADITION

Protection of refugees against extradition under international refugee law

Although most international instruments include protection from extradition if the individual concerned faces ill-treatment in the requesting coun-

[176] Musa Gumus, '19th Century Turkish Diplomacy in the Case of 1848 Refugees Question', *International Journal of History, History Studies*, Vol. 2/2, 2010, p 251-275.

[177] UN High Commissioner for Refugees, *Guidance Note on Extradition and International Refugee Protection*, April 2008, para. 21, available at: <http://www.refworld.org/docid/481ec7d92.html> [accessed 02 July 2013].

[178] UNHCR *The Interface Between Extradition and Asylum*, para. 231.

[179] UNHCR, *Guidance Note On Extradition And International Refugee Protection*, para. 22.

tries,[180] the Refugee Convention does not contain any provisions on the protection of refugees against extradition. However, the principle of non-refoulement under Article 33(1) of the Refugee Convention prohibits states to '*expel or return ("refouler") a refugee in any manner whatsoever'* to a place where he might face ill-treatment. Even though this provision did not explicitly mention 'extradition' as a way of sending back of refugees, the term '*in any manner whatsoever'* must be interpreted as covering 'extradition.' On the other hand, there is nothing to the effect that extradition falls outside the scope of this Convention.[181] In other words, anyone who meets the the requirements of the refugee definition contained in Article 1(A)2 of the 1951 Refugee definition and does not come within the scope of one of its exclusion clauses in Article 1(D), (E) and (F) or that of exceptions in Article 33(2) and is protected against extradition under Article 33(1) of the Refugee Convention, if they might face ill-treatment on account of five grounds in the requesting State. Moreover, as mentioned in Chapter 1, the term 'refugee' under the Refugee Convention is not limited to those who have been formally recognised as refugees, but it also covers asylum seekers who have not yet been recognised as refugees.

One point that should be taken into consideration here is that this Convention does not protect refugees against extradition if the requesting State is a third country in which there is no reason for refugees to fear persecution and from which there is no possibility of returning refugees to a place where he might be in danger of being subject to ill-treatment.

Protection of refugees against extradition under international human rights law

International human rights law instruments containing –or are construed as contain- some provisions that protect every human being from refoulement to territories where they may be tortured, be subjected to inhuman or degrading treatment or punishment, or suffer to other violations of fundamental human

[180] Weissbrodt & Hörtreiter, 'The Principle of Non-Refoulement', p. 60.
[181] Lauterpacht & Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement', p. 112.

rights.[182] Thus, these instruments also include refugees and asylum seekers.

Article 3 of the Torture Convention explicitly prohibits extradition of any person to a place '*where there are substantial grounds for believing that he would be in danger of being subjected to torture.'* Whether or not the Refugee Convention prohibits extradition of refugees is not completely clear since there is no explicit mention of the term 'extradition' in the Convention, it is clear that the Torture Convention expressly prohibits extradition of any person to a place where he might face torture. Moreover Article 3 of the Torture Convention, like Article 33 of the Refugee Convention, prohibits extradition of any person to a third country from which he might be returned to a country where he would be in danger of being subjected to torture.[183] Unlike the Refugee Convention, the Torture Convention does not accept any exceptions to the principle of non-refoulement.[184]

Although the Political Covenant does not explicitly mention protection of persons against extradition in deliberate situations, in the case law of the Human Rights Committee, Article 7 of the Political Covenant has been interpreted to refer to extradition cases. In the view of the Human Rights Committee, 'State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.'[185] Namely, this covenant prohibits extradition of refugees and asylum seekers to other countries if there is a risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment, when extradited. This Covenant is also non-derogable and does not accept any exceptions like the other international human rights protection mechanisms.

The ECHR does not contain any provisions which protect refugees against extradition. Nevertheless, Article 3 of the Convention has been interpreted by

182 Messineo, 'Non-Refoulement Obligations in Public International Law', p. 138.
183 Weissbrodt & Hörtreiter, 'The Principle of Non-Refoulement', p. 8.
184 However, this Convention only protects persons who might subject to state torture, not those who might subject to any other ill-treatments.
185 UNHRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, para. 9.

the ECtHR so as to give extradition orders. The protection of refugees against extradition was first recognised in Soering v United Kingdom case, even if not being directly about refugees. In this seminal case, the ECtHR held that extraditing a person to a territory 'may give rise to a violation by that state of Article 3 where there are substantial grounds for believing that the person, if extradited, faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment.'[186] It is now well established case law of the Court that in the circumstances mentioned above, Article 3 obliges states not to extradite the person concerned to that country.[187] To put it another way, since all member states accepted compulsory jurisdiction of the Court and therefore they are bound by the Convention's enforcement machinery, it is prohibited for all member states to accept extradition requests of any other countries concerning refugees and asylum seekers, if there are substantial grounds for believing that, if extradited, they would face a real risk of being subjected to treatment contrary to Article 3.[188]

Protection of refugees against extradition under international extradition law

Whilst extradition as a mechanism is intended to facilitate the enforcement of criminal justice by states, some of the principles of extradition law have been developed to protect the basic interests of individuals (including refugees and asylum seekers) whose extradition is requested.[189] Hence, there should be a balance between the fight against crime on the one hand, and the necessity of protecting basic rights of the individual on the other.

In fact it is possible to refer to almost all principles and refusal grounds of extradition law to protect refugees, such as lapse of time or re-extradition to a third place, because most of them in some part protect refugees from extradi-

186 Soering v. UK (1989) 11 EHRR, 439, para. 91.
187 Chahal v. UK (1996) 23 EHRR, 413, para. 74.
188 John Kidd, 'Extradition and Expulsion Orders and the European Convention on Human Rights: The Soering Decision and Beyond', *Bracton Law Journal*, Vol. 26, 1994, p. 67.
189 UN High Commissioner for Refugees, *Note on Problems of Extradition Affecting Refugees*, August 1980, para. 9, available at: < www.unhcr.org/3ae68ccdc.html> [accessed 02 July 2013].

tion. However, below we will only mention the basic ones which clearly protect refugees against extradition, such as the principles of double criminality, political offence, specialty, capital punishment and discrimination clauses. These types of protection mechanisms in extradition law do not explicitly mention refugees, however since they are applicable to all individuals concerned, they are also safeguard to refugees against extradition.

From the perspective of protection of refugees against extradition, the first and foremost concern in extradition law should be to protect refugees from persecution in the requesting State on account of his race, religion, nationality, political opinion or prejudiciable position. Extradition treaties generally contain non-discrimination provisions according to which the requested State shall refuse an extradition request if there are substantial grounds for believing that the individual concerned, if extradited, will be prosecuted or punished in the requesting State on account of aforementioned reasons.[190] This exception is closely related to the non-refoulement principle of the Refugee Convention.[191]

Another safeguarding exception that protects refugees against extradition is political offence, according to which if the extradition of a refugee is requested in respect of a political offence, the request will be refused.[192]

According to the principle of double criminality, extradition request of refugees will be refused unless the offence for which it is requested constitutes an offence under the domestic laws of both the requesting and the requested State.[193]

Under the principle of speciality, extradition shall not be granted if not there is a guarantee that the requesting State will only prosecute and/or punish for the offence specified in the extradition request and not for any other offence.[194]

Extradition may not be granted if it is shown that there is a risk of the death

190 Article 3(2) of the European Convention on Extradition.
191 UNHCR, *Guidance Note On Extradition And International Refugee Protection*, para. 40.
192 UNHCR, *Note On Problems of Extradition Affecting Refugees*, para. 10.
193 Ibid., para. 12.
194 Ibid., para. 13.

penalty in the requesting State, if not the requesting State provides reliable assurances to the effect that not to seek or impose death penalty in that case.[195]

These traditional principles of extradition law provide important legal guarantees when the extradition of refugee is requested. However, due to their specific and clearly defined scope, they do not always provide the refugees and asylum seekers with the necessary protection, which can only be provided by the refusal of extradition requests of refugees by the principle of non-refoulement.[196]

Protection of refugees against extradition under Turkish law

The Turkish legal system does not contain any specific regulation on the extradition of refugees. However, there are some provisions in Turkish law which may provide for some kind of protection for refugees against extradition.

According to Article 90 of the Turkish Constitution, 'International agreements duly put into effect bear the force of law' as part of the national legislation and become applicable in domestic law. Furthermore it stipulates that '[i]n the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.'[197] That is to say, since the extradition of refugees is generally considered as matters concerning fundamental rights and freedoms, the relevant provisions of international instruments on fundamental rights and freedoms such as the Torture Convention, the Political Covenant and the ECHR, the Refugee Convention and European Convention on Extradition that Turkey is a party to can be invoked before Turkish Courts to protect refugees against extradition. Namely, all protection mechanisms under both international refugee and human rights law and international extradition law that were mentioned above, are also applicable to Turkish law.

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195 UNHCR, *Guidance Note On Extradition And International Refugee Protection*, para. 43.

196 UNHCR, *Note On Problems of Extradition Affecting Refugees*, para. 15.

197 Article 90 of the Turkish Constitution, available at: <http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf> [accessed 15 July 2013].

Article 18 of the Turkish Penal Code allows for extradition of offenders, but it also sets out some exceptions to extradition. Some of these exceptions are also protects refugees against extradition. For example, the demand for extradition is rejected: 'if there is deep concern or uncertainty about the future of a person after being extradited, whether he will be subject to prosecution or punishment due to racial, religious preference, or nationality, or membership to a social or political group, or to a cruel treatment or torture' (discriminatory clause); 'if the act does not constitute an offense according to the Turkish laws' (double criminality); 'if the act is not in the nature of a political or military offense' (political and military offence); or 'if the action is subject to statute of limitation or amnesty' (lapse of time and amnesty).[198] As can be seen clearly, Article 18 of the Turkish Penal Code ensures parallelism with the European Convention on Extradition, and hence what have been said above when examining 'the protection of refugees against extradition under extradition law' are also applicable to this provision.

Article 4 of the new Law on Foreigners and International Protection, which published in the Official Gazette of April, 4, 2013, and came into force one year following its publication except for certain provisions[199], explicitly prohibits refoulement of refugees and asylum seekers to a place where they might face torture, inhuman or degrading treatment or punishment, or persecution because of five Refugee Convention grounds.[200]

198 Article 18 of the Turkish Penal Code, available at: <http://www.justice.gov.tr/basiclaws/Criminal_Code.pdf> [accessed 15 July 2013].

199 Article 125 of the Law on Foreigners and International Protection, available at: <http://www.resmigazete.gov.tr/eskiler/2013/04/20130411-2.htm> [accessed 12 April 2014], see also for detailed information: Gülüm Bayraktaroglu Ozcelik, 'Deportation of Foreigners From Turkey Under the Foreigners and International Protection Act', *TBB Dergisi,* 2013, (108).

200 Article 4 of the Law on Foreigners and International Protection, available at: <http://www.resmigazete.gov.tr/eskiler/2013/04/20130411-2.htm> [accessed 15 July 2013].

EXTRADITION OF RECOGNIZED REFUGEES

Extradition request concerning a refugee recognized by the requested State

When an extradition request is made by the country of origin concerning a refugee who has been recognized as a refugee within the meaning of the Refugee Convention in the requested State, in principle, this request should be refused.[201] Even if the requesting State sends an assurance that the refugee will be well-treated upon extradition, the request shall be refused. This is because the requested State has already made a determination and recognized the refugee to have a well-founded fear of being persecuted in the country of origin, and thus has decided to protect him against the country of origin under the principle of non-refoulement. Namely, once the requested State has made this finding, it would be inconsistent with the protection afforded by the Refugee Convention.[202]

In this regard, since discriminatory clauses in national or international extradition laws, such as Article 18 of the Turkish Penal Code and Article 3(2) of the European Convention on Extradition, explicitly prohibit extradition of any person to a place where he might be subject to persecution, the requested State already rejects such extradition requests. On the other hand, the requested State is also bound to refuse such extradition requests under the principle of non-refoulement in both international refugee and human rights law.

When an extradition request is made by the third country concerning a refugee recognized by the requested State, the request must nonetheless be examined whether the extradition of the refugee would be consistent with the principle of non-refoulement under international refugee and human rights law.[203] In this case three different situations may ocur.

First, when there are substantial grounds for believing that the refugee, if

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201 UNHCR, *Guidance Note On Extradition And International Refugee Protection*, para. 52.

202 UN High Commissioner for Refugees, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, August 2006, para. 30, available at: <http://www.refworld.org/docid/44dc81164.html> [accessed 14 July 2013].

203 UNHCR, *Guidance Note On Extradition And International Refugee Protection*, para. 26.

extradited to a third country, would be exposed to a risk of persecution, torture or other irreperable harm, the requested State is clearly bound to refuse the extradition request under both discriminatory clauses of national and international extradition laws and non-refoulement obligations of international refugee and human rights law. However, in such cases, diplomatic assurances might be a way of extraditing refugees to a third country.

Secondly, if the requesting State is a country where there might be a possibility of re-extradition or any other form of removal of refugees to the country of origin or to a third country where such a risk exists, the requested State is bound to refuse extradition request under the grounds mentioned above. In such cases, the requested State may extradite a refugee only on the basis of assurances which effectively protect the individual concerned against refoulement from the requesting State to another country.[204]

Third, if the country seeking extradition of a refugee is a safe third country, then the requested State may extradite him to that country. However, in such cases, the requested State must carefully examine extradition refusal grounds and the criteria of being refugee. Because since refugee is a person who meets the criteria in the inclusion clauses and who does not fall under the exclusion clauses of the Refugee Convention, there are clear limits of being refugee. On the other hand, extradition law has some refusal grounds that also limit its extraditable offences to some sort of crimes. Thus, as explained above, in the intersection point between asylum and extradition there are only limited types of crimes.

The refugee might have committed a crime included in the exclusion clauses of the Refugee Convention before or after being recognized as a refugee. This kind of information may come to light during the extradition process, and thus may lead to cancellation or revocation of refugee status.[205] In such cases, the requested State terminates international refugee protection for the recognized refugee.

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[204] UNHCR *The Interface Between Extradition and Asylum*, para. 241.
[205] Ibid., para. 213.

The most important thing that should be stressed here is that irrespective of whether or not a refugee status has been cancelled, the requested State is always bound to ensure compliance with its non-refoulement obligations under international human rights law.[206]

Extradition request concerning a refugee recognized by other states

In relation to a person who has already been recognized as a refugee by a third country, although the UNHCR is of the opinion that that refugee status must be taken into consideration by the requested State,[207] since there is no explicit international rule that force states to abide by third country's refugee status, in practice, states deal with such cases in three different ways. Some states are willing to recognize the refugee status granted by another State party to the Refugee Convention and apply the provisions of their domestic law which prohibit the extradition of refugees. Others allows the person concerned to transfer his refugee status in such cases. Yet others, do not regard a refugee status granted by another country as binding and conduct their own extradition inquiry.[208]

For example, in Turkey, refugee recognition by another State party to the Refugee Convention is not legally binding for Turkish authorities and has no effect on extradition procedures. In any case, since refusal grounds in Article 18 of the Turkish Penal Code are applicable to every individual, he will in any event be protected against being exposed to a danger of persecution if extradited.

Moreover, in determining the extradition issue, all states are under any circumstances bound by their own non-refoulement obligations under international refugee and human rights law, as well as customary international law.[209]

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206 UNHCR, *Guidance Note On Extradition And International Refugee Protection*, para. 54.
207 Ibid., para. 55.
208 UNHCR *The Interface Between Extradition and Asylum*, para. 265.
209 Ibid., para. 265.

Extradition request concerning a refugee recognized by the UNHCR

Regarding the requested person who has been recognized as a refugee by the UNHCR authorities, his refugee status should be taken into consideration by the requested State. This is because the determination of refugee status by the UNHCR 'means that the individual concerned was found to be in need of, and eligible for, international protection in line with the standards required under the Refugee Convention.'[210] However, even though Article 35 of the Refugee Convention imposes an obligation of cooperation with the UNHCR, it is up to states whether or not to recognize the UNHCR refugee status because there is no legally binding international instruments which oblige states to recognize the UNHCR refugee status,[211] Nevertheless, by virtue of a states' cooperation obligations with the UNHCR, the findings of the UNHCR should be considered as a very important peace of evidence by the requested State during the extradition process.

For example, in the 'I.A. v. Asylum and Immigration Tribunal' application for leave to appeal of the United Kingdom it was underlined that 'UNHCR refugee status is not binding upon the UK authorities and courts.' The applicant was previously recognized as a refugee by the UNHCR authorities in Turkey, and he waited for resettlement to a third country. However, before being resettled to a third country, he went to the United Kingdom and claimed asylum thereafter. His asylum claim and appeal was refused. In this leave to appeal, the Court considered the effects of the refugee status recognized by the UNHCR, and finally decided that; even though the decisions of the UNHCR on refugee status is a very important peace of evidence throughout the decision maker's journey, there was no obligation on the UK courts to abandon their own deci-

210 UNHCR, *Guidance Note On Extradition And International Refugee Protection*, para. 56.

211 An example which shows that UNHCR refugee status is not a guarantee against extradition is that four refugees extradited from Kyrgyzstan to Uzbekistan in 2005. Even though Kyrgyzstan is a party to the Refugee Convention, Kyrgyzstan extradited four Uzbek refugees recognized under UNHCR's mandate to Uzbekistan. See UNHCR Press Releases, 'UNHCR shocked by Kyrgyzstan's Extradition of Uzbek Refugees,' 9 August 2006, available at: <http://www.unhcr.org/44d9f7742.html> [accessed 12 July 2013]. That is to say, it is in the discreation of States to decide whether or not to recognize UNHCR refugee status.

sions and bind themselves with the UNHCR's decisions.[212]

However, it should not be forgotten that in any event, states are bound by the principle of non-refoulement under international refugee and human rights law. Even if any refugee who was recognized under the UNHCR's mandate is not recognized as a refugee by the requested State, the principle of non-refoulement under the international human rights law continues to protect the individual concerned from being exposed to a danger of persecution.

EXTRADITION OF ASYLUM SEEKERS

As mentioned in Chapter 2, since every refugee is initially an asylum seeker, in order to protect refugees, asylum seekers must be treated on the assumption that they may be refugees until their status has been determined.[213] Therefore, protection of refugees against extradition also applies to asylum seekers.

In this regard, determination of refugee status of asylum seekers is an essential element to be considered by the requested State when establishing whether or not the individual concerned may be lawfully extradited.[214] However, as mentioned in Chapter 1, refugee status is not only determined by the States concerned, but also by the UNHCR. For example, since Turkey is a party to the Refugee Convention with geographical reservation, asylum seekers who come into Turkish territory from non-European countries are determined by the UNHCR. When a non-European asylum seeker arrives into Turkish Territory, competent Turkish authorities inform the UNHCR to be registered. Then, the UNHCR decides whether this person meets the legal definition of a refugee. However, until that time, Turkey provides them with 'temporary asylum seeker status.'[215] In other words, Turkey allows people whose applications are pending with the UNHCR to stay in the country during the application pro-

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212 *I.A. v. Asylum and Immigration Tribunal*, [2011] CSIH 28, United Kingdom: Court of Session (Scotland), 1 April 2011, available at: http://www.refworld.org/docid/4d9b0d832.html [accessed 12 July 2013].

213 UNHCR, *Note on International Protection*, para. 11.

214 UNHCR, *Guidance Note On Extradition And International Refugee Protection*, para. 59.

215 UNHCR Country Operations Profile- Turkey, 2013, available at:< http://www.unhcr.org/pages/49e48e0fa7f.html> [accessed 14 July 2013].

cess. When they are recognized as a refugee by the UNHCR, they are allowed to continue to stay in the country until they are resettled by the UNHCR to a country where a resettlement program operates.

Extradition request from the asylum seeker's country of origin

When an extradition request is made by the country of origin concerning an asylum seeker whose refugee status is in the process of being determined by the requested State, the requested State, before giving any decision on the extradition request, needs to resolve the question of the asylum seeker's refugee status. In this case, it is prohibited to extradite that asylum seeker to a place where he might face persecution because under the Refugee Convention every asylum seeker benefits from the principle of non-refoulement until their status has been determined.[216]

If, at the end of the proceedings, an asylum seeker has been granted refugee status, he will continue to benefit from the principle of non-refoulement under the Refugee Convention and his extradition request will be refused. Because under this circumstances, the requested State explicitly recognizes that if the individual concerned is extradited to the country of origin, he might face ill-treatment.

However, if he has not been granted refugee status, protection mechanisms under the Refugee Convention stops protecting him from extradition. However, even in that situation, the principle of non-refoulement under international human rights law continues to protect that person from extradition to a place where he would be exposed to a risk of persecution.

On the other hand, in the case of an extradition request made by the country of origin concerning an asylum seeker whose refugee status is in the process of being determined by the UNHCR, the requested State is under the obligation of waiting for the final decision of the UNHCR on asylum seeker's refugee status. This obligation comes from the principle of non-refoulement under international refugee and human rights law.

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[216] UNHCR, *Guidance Note On Extradition And International Refugee Protection*, para. 64.

If, at the end of the proceedings, an asylum seeker has been granted refugee status by the UNHCR, the requested State is prohibited to extradite that person to the country of origin. Granting refugee status to the asylum seeker means that, if extradited to the country of origin he might face persecution. Furthermore, discriminatory clauses in extradition law[217] explicitly prohibits extradition of any person to a place where he might face ill-treatment. In the case of not granting refugee status to the asylum seeker, he is protected only within the limits of extradition and international human rights law.

Extradition request from a country other than the asylum seeker's country of origin

When the extradition request of an asylum seeker is made by the third country, the wanted person, may, under certain circumstances, be extradited before his refugee status has been finally determined. However, in any event, extradition of an asylum seeker would be consistent with the principles of non-refoulement under international refugee and human rights law.[218]

If there are substantial grounds for believing that the asylum seeker, if extradited to a third country, would face a real risk of being subjected to persecution, the requested State is bound to reject that extradition request under both discriminatory clauses of national and international extradition laws and non-refoulement obligations of international refugee and human rights law. However, in such cases, diplomatic assurances might be a way of extraditing asylum seekers to a third country.

If the requesting State is a country where there might be a possibility of re-extradition or any other form of removal of asylum seekers to the country of origin, it is prohibited to extradite the individual concerned to the third country until his refugee status has been determined which was mentioned before. On the other hand, in the event of being a possibility of re-extradition or any other form of removal of asylum seekers to a third country where a risk of persecution exists, the requested State is bound to refuse extradition request under

[217] Article 3(2) of the European Convention on Extradition
[218] UNHCR, *Guidance Note On Extradition And International Refugee Protection*, para. 67.

the grounds mentioned above. In such cases, the requested State may extradite an asylum seeker only on the basis of assurances which effectively protect the wanted person against refoulement from the requesting State to another country.[219]

If the requesting State is a safe third country, then the requested State may extradite an asylum seeker to that country before his refugee status has been finally determined. In such cases, the principle of non-refoulement is not applicable, because that principle protects refugees and asylum seekers only when they might extradite to a place where might face ill-treatment.

Same conditions for all of the situations that have been mentioned above are also applicable in the case of an extradition request made by the third country concerning an asylum seeker whose refugee status is in the process of being determined by the UNHCR.

CONCLUSION

Even though extradition and asylum are different subjects, if the person whose extradition is requested is a refugee or an asylum seeker, they overlap and intersect with each other. Albeit being very rare, sometimes people seek to hide behind asylum for the purpose of evading being held responsible for serious crimes. Additionaly sometimes states use extradition request with persecutory intent, and extradition may amount to the surrendering of a refugee to a place where he would be at risk of persecution. Hence, states while providing asylum to those who are deserving international protection, at the same time should avoid abuse of asylum systems by criminals to escape from criminal justice. This requires, on the one hand, a full and fair determination of refugee status, and on the other hand, states' compliance with their protection obligations under international law.[220]

Therefore, in the first place, this article has explained the concepts of refugee status determination, non-refoulement and extradition, and has shown

[219] UNHCR, *The Interface Between Extradition and Asylum*, para. 241.
[220] UNHCR, *Guidance Note On Extradition And International Refugee Protection*, para. 97-100.

clearly that under international law, pure definitions and principles of refugee, non-refoulement and extradition are exist. Most notably, who is eligible for refugee status, who should be extradited or who is protected under the principle of non-refoulement completely has been determined.

Finally, this article has shown that the principle of non-refoulement prevails over any obligation to extradite. Namely, in cases considering extradition of a refugee or an asylum seeker, states are fully bound by the principles of non-refoulement under international refugee and human rights law. To put it another way, when an extradition request is made concerning a refugee or an asylum seeker, if there are substantial grounds for believing that the person concerned, if extradited, would be exposed to a risk of persecution, the requested State is clearly bound to ensure full respect for the principle of non-refoulement under international refugee and human rights law, as well as international customary and extradition law.

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THE NOTION OF CORPORATE GOVERNANCE AND COMPARISON OF THE US, UK AND GERMAN CORPORATE GOVERNANCE MODELS

Şirket Yönetimi Kavramı ile Amerikan, İngiliz ve Alman Şirket Yönetim Modellerin Bir Karşılaştırması

Nurullah TEKİN*

ABSTRACT

There are many different models of corporate governance around the world. Most countries adopt one of a set of models, each of which differs depending on the specific conditions in which the state itself operates. These models can be broadly classed in two categories: the shareholder system, as practised by the United Kingdom and the United States; the stakeholder system as used by the Japanese and most Latin and Continental European countries.

Historically, US companies have always followed the shareholder model. Here, shareholders elect a management board to control the company. These directors are tasked with the primary role of representing the best interests of their shareholders, namely, by increasing their wealth. The roots of the UK corporate system and law are based on the philosophy of individualism and freedom of contract; this gave rise to a traditional model which has influenced many systems, including the British colonies. The UK currently uses a one-tier board structure, with elected non-executive directors and independent auditors used as a safeguard of accountability for shareholders. Germany has adopted the stakeholder model to form its corporate governance system, and its focus is thus no limited solely to the protection of shareholders.

Key Words: Corporate Governance, Shareholder System, The Chief Executive Officer, Non-executive Directors, The Cadbury Report, Stakeholder Model, Management Board

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ÖZET

Dünyada birçok farklı şirket yönetimi modeli bulunmaktadır. Ülkelerin büyük çoğunluğu kendi özel şartlarına bağlı olan ve diğerlerinden farklılık gösteren bir model yönetimini benimsemişlerdir. Bu yönetim modelleri genel olarak iki kategori içinde sınıflandırılabilirler. Bunlardan ilki; İngiltere ve Amerika'da uygulanan hissedarlık sistemi, diğeri ise; Japonya ile birçok Latin ülkesi ve Kıta Avrupasında görülen paydaşlık sistemidir.

Amerikan şirketleri geleneksel olarak hissedarlık modelini benimsemişlerdir. Burada, hissedar ya da ortaklar şirketi kontrol edecek yönetim kurulunu seçmektedirler. Bu yöneticilerin başlıca görevi; hissedarların menfaatlerini en iyi şekilde temsil etmek, zenginliklerini arttırmaktır. İngiliz şirket yönetimi ve hukukunun kökleri ise bireyselcilik felsefesi ve sözleşme serbestisine dayanmaktadır. Bu durum, İngiliz kolonilerini de kapsayan ve birçok sistemi etkileyen geleneksel bir modelin ortaya çıkmasına yol açmıştır. İngiltere şu anda hissedarlar için hesap verilebilirliği güvence altına almakta kullanılan bağımsız yönetici ve denetçilerle tek kademeli yönetim modelini kullanmaktadır. Buna karşılık Almanya, kendi şirket yönetim sistemini oluşturmak için paydaşlık modelini kabul etmiştir. Bu nedenledir ki, bu modelin odağı yalnızca hissedarların korunmasıyla sınırlı değildir.

Anahtar Kelimeler: Şirket Yönetimi, Hissedarlık (Ortaklık) Sistemi, Genel Müdür, Bağımsız Yönetim Kurulu Üyesi, Cadbury Raporu, Paydaşlık Modeli, Yönetim Kurulu

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I. INTRODUCTION

Debates about corporate governance have existed as long as the corporate form itself has occurred[1]. Adam Smith observed in 1776 that "*It is in the interest of every man to live as much at his ease as he can... in as careless and slovenly a manner as that authority will permit*" - illustrating the essential dichotomy between the interests of agent and the agent's principal[2].

Early 'corporations' were granted charters to by their government, but by

[1] Plessis Jean Jacques Du/Hargovan Anil and Bagaric Mirko, *Principles of Contemporary Corporate Governance*, Cambridge University Press, Second Edition, November 2010, p.3

[2] Goergen Marc, *International Corporate Governance*, 2012, p.7

the mid 19th century, had begun to be incorporated either legislatively, or by a process of registration. But, the modern connotation of the term 'corporate governance' indicates more than just the mechanics of governance; it appears to originate in the mid-to-late 1970's in the United States (US) after the Watergate scandal and the revelations of secret political contributions and corrupt payments by large American organisations[3]. It gained acceptance in Europe as a concept separate from company law, corporate management or organisation[4].

There are many different models of corporate governance around the world. Most countries adopt one of a set of models, each of which differs depending on the specific conditions in which the state itself operates[5]. These models can be broadly classed in two categories: the shareholder system (marked-oriented), as practised by the United Kingdom (UK) and the US; the stakeholder system (network-oriented) as used by the Japanese and most Latin and Continental European countries.

This essay will compare and contrast corporate governance in the US with the European Union (EU). Although the UK is an EU country, it shares a common history, legal tradition and a very similar corporate governance system with the US. Germany, meanwhile, is a leading country with a large industrial and manufacturing sector and has a markedly different corporate governance model.

This paper will first give a brief definition of corporate governance, describe its origins and then present the US, UK and German corporate governance models. Finally, the essay will compare and contrast the three models in detail.

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3 Veasey E. Norman, *The Emergence of Corporate Governance as a New Legal Discipline*, The Business Lawyer, Volume:48, No:4, 1993, p.1276

4 Salacuse Jeswald W, *Corporate Governance in the New Century*, Company Lawyer, 2004, p.632

5 Clarke Thomas and Douglas Branson, *Introduction: Corporate Governance – An Emerging Discipline*? in Clarke Thomas and Branson Douglas (editors), The SAGE Handbook of Corporate Governance, SAGE, 2012, p.20-21

II. DEFINITION AND SOURCES OF CORPORATE GOVERNANCE

There are various descriptions of corporate governance. One definition is that it is the *"...framework of laws, rules, and procedures that regulate the interactions and relationships between the providers of capital, the governing body, senior managers and other parties that take part to varying degrees in the decision making process and are themselves affected by the company's dispositions and business activities*"[6].

Economists, scholars, and social scientists have a broader definition of corporate governance, describing it as "*...institutions that influence how business corporations allocate resources and returns*"[7]. Legal academics, policy makers and corporate managers, on the other hand, tend to articulate a narrower definition of corporate governance. It is postulated that, corporate governance is the system of institutions and rules that determine the control and direction of the corporation and that indicate relationship among the corporation's major participants[8].

Further efforts to express the concept of corporate governance appeared in the Cadbury Report (1992) and South African King Report[9] (1994) defining corporate governance functionally as the system by which businesses are directed and controlled[10]. So concise and straightforward is the Cadbury Report's approach that many of its proposals remain at the heart of current conceptions of corporate governance[11]. Countries intent on developing their own corporate governance regulation have also used the report to serve as a model and starting point in their endeavours[12].

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6 Mendez A. Miguel, *Corporate Governance: A US/EU Comparison – Course Outline,* online at: http://www.foster.washington.edu/centers/gbc/Documents/Faculty/Miguel%20Mendez%20Final.pdf, accessed on: 05.01.2013

7 O'Sullivan Mary, *Corporate Governance and Globalization*, the Annals of the American Academy of Political Science, 570, 2000, p. 153-154 (pp.153-172)

8 Supra note 4, p.632

9 Supra note 1, p.3

10 Tricker Bob, *Corporate Governance: principles, policies and practices*, Second Edition, Oxford University Press, 2012, p.29

11 Tricker Bob, *The Evolution of Corporate Governance*, in Clarke Thomas and Branson Douglas (editors), The SAGE Handbook of Corporate Governance, SAGE, 2012, p.45

12 Supra note 2, p.129

Institutions meanwhile, have also attempted to define the term by introducing universal, international corporate governance codes of practice. The Organization for Economic Cooperation and Development (OECD) published the first standards of corporate governance which have been internationally accepted, defining it as a "*...structure of relationships and corresponding responsibilities among a core group consisting of shareholders, board members and managers designed to best foster the competitive performance required to achieve the corporation's primary objective*"[13].

Finally, it must be acknowledged that while many definitions differ, most agree that corporate governance is implicitly concerned with both internal and external control of a company[14]. The European Commission qualifies corporate governance as following: "*Corporate governance is traditionally defined as the system by which companies are directed and controlled and as a set of relationships between a company's management, its board, its shareholders and its other stakeholders*"[15].

The institutions and rules of corporate governance are based on a broad variety of sources, both public and private. The principle source is the company/corporation law of an individual state, since this legislation shapes the formation, basic structure and foundational rules of operation of the corporation, company or other corporate legal form that a firm prefers to utilise[16].

For instance, the US, unlike the UK or Germany, has individual company statutes for each federal state (although Delaware's is often the most preferred). Moreover, significant legal doctrines such as 'the business judgement rule' and laws governing the duties of care and loyalty required of corporate officers and

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13 See the full text on: http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf, accessed on: 10.01.2013; See also Solomon Jill, *Corporate Governance and Accountability*, Third Edition, 2010, p.199

14 Towers Watson, *A Lack of Shared Identity versus a Move towards Convergence*, online at: http://www.towerswatson.com/assets/pdf/6977/EC-Corporate-Governance.pdf, accessed on: 10.01.2013

15 European Commission, *Green Paper: The EU corporate governance framework*, online at: http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf, accessed on: 11.01.2013

16 Supra note 4, p.635

directors have been improved by jurisdictional decisions of state courts[17].

National rules and regulations, which deal with the distribution, sale and trading of securities involving the public serve as a second important source of corporate governance in the US. Despite EU legislation, individual European state legislation similarly constitutes a primary source of corporate governance within the EU. Although EU legislation influences certain aspects, it has, understandably considering the difficulties, not unified corporate governance practice to the same extent as US federal law and regulations. As a result of this, there is a greater variety of corporate governance practices in evidence among European public companies than there is among their American counterparts[18].

The decisions and rules of private bodies (such as professional accounting institutions, stock exchanges) and the role of a number of international bodies (e.g. the World Bank, the International Corporate Governance Network and the Global Corporate Governance Forum) constitute a secondary source of corporate governance. Reports published by the High Level Group of Company Law Experts set up by the European Commission have implications for company law within Europe[19].

Finally, accounting has a significant impact on corporate governance as it is the basis of disclosure regimes in relation to information about corporate actions. Rules regarding accounting and related professional practices, as defined by the Financial Accounting Standards Board (US) and the International Accounting Standards Board (Europe), constitute a further substantial source of rules concerning corporate governance[20].

III. THE US MODEL

Historically, US companies have always followed the shareholder model. Here, shareholders elect a management board to control the company. These

17 Supra note 4, p.635
18 Supra note 4, p.635-636
19 Mallin A. Christine, *Corporate Governance*, Oxford University Press, 2004, p.37
20 Supra note 4, p.635-636

directors are tasked with the primary role of representing the best interests of their shareholders, namely, by increasing their wealth[21].

Under state law, all corporations must have boards and, with some exceptions, most fundamental powers are allocated only to the board. These involve the authority to sell the corporation, to pay dividends or declare bankruptcy and so forth. Boards of US companies are unitary, in contrast to the German model, which employ a board of managers and a board of owners or employees[22].

The Chief Executive Officer (CEO) serves as the chairman of the board of directors[23]. His exact responsibilities are defined by the board, and can be either restrictive or open, depending on the particular framework in operation. Directors themselves are accountable to their shareholders, as well as to the appropriate corporate governance standard[24].

In 1932, Adolf Berle and Gardiner Means wrote T*he Modern Corporation and Private Property*, criticising aspects of the shareholder model. They viewed the dispersal of shareholder power, and thus their lack of control over the organisation they owned, as a classic (Smithian) agency problem[25]. Instead, they framed the argument that corporations had a responsibility towards the society in which they found themselves – not just their shareholders.

Nevertheless, the collapse of Enron in 2001 illustrated the limitations of existing US corporate governance[26]. Similar scandals involving WorldCom,

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21 Jackson Katharine V, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: a Comparative Analysis,* Hasting Business Law Journal, Volume:7, Issue:2, 2011, p.312 (pp.309-392)

22 Raber Roger and Lajoux Alexandra, *The United States of America*, in the Handbook of International Corporate Governance: a definitive guide, Second Edition, 2009, p.146

23 Aguilera, Ruth V, Williams Cynthia A, Conley John M and Rupp Deborah, *Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and the US*, Corporate Governance: An International Review, Volume:14, No:3, May 2006, p.148 (pp.147-158)

24 Barnett Abigail and Maniam Balasundram, *A Comparison of US Corporate Governance and European Corporate Governance*, The Business Review, Cambridge, Volume: 9, Issue: 2, Summer, 2008, p.24

25 Supra note 4, p.633

26 Supra note 11, p.49

Adelphia, Tyco, Parmalat etc in both the US and Europe have helped galvanise recent changes to corporate governance standards as well as the commitment of governments and shareholders to corporate governance reform[27].

A significant reaction by the US was the Sarbanes-Oxley Act of 2002, which set new standards of corporate governance for companies registered with the SEC[28]. (The UK responded to this scandal by producing the Higgs Report and the Smith Report in 2003 – not by legislating)[29]. In addition to the new Sarbanes-Oxley Act, the NYSE and the NASDAQ adopted new rules concerning board structure.

Further federal legislation was nevertheless felt necessary. The global financial crisis, beginning in 2007, led to the collapse and bailout of some major financial institutions by the US government. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 were enacted, with the aim of creating a stronger regulatory structure and thus greater transparency within the financial system[30].

IV. EUROPEAN MODELS

Corporate governance models differ in Europe. The discrepancies are due to both various laws and cultures among European countries. Despite incremental unification attempts[31], Europe still retains the largest diversity of corporate governance systems across the world[32]. While there are many different

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27 Supra note 24, p. 23

28 Grossman, Nadelle, *Director Compliance with Elusive Fiduciary Duties in a Climate of Corporate Governance Reform*, Fordham Journal of Corporate and Financial Law, Volume:12, Issue:3, 2007, p.418 (pp.393-466)

29 Supra note 13, p.4

30 Supra note 10, p.114

31 For instance, the European legislator created the European Company, the Societas Europaea (SE). "According to Article 38 of the Council Regulation (EC) No. 2157/2001 of October 8, 2001 on the Statute for a European company, a SE shall be comprised of either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system)". (Jungmann Carsten, *The Effectiveness of Corporate Governance in One-Tier and Two-Tier Board Systems – Evidence from the UK and Germany*, European Company and Financial Law Review, Volume:3, No:4, 2006, p.427 (pp.427-474)

32 Iulia Lupu, *Corporate Governance in Central and Eastern Europe: Convergence to European Corporate Governance?* Annals of the University of Oradea, Economic Science Se-

norms, there are two chief approaches: the shareholder model as represented by the UK and the stakeholder model as exemplified by Germany[33]. These two systems have considerably different structures and aims.

The Commission of the EU has dedicated itself to producing guidance for its members. But they have, to date, not attempted to develop an overarching code of corporate governance best practice for member states. Instead, they have chosen to pursue a step-by-step process of standardisation. For example, the Commission's first set of EU standards in 2004 focused on disclosure of directors' remuneration and outside directors[34].

This attitude that 'one size does not fill all', is predicated on the belief that it is not possible to have one set of corporate governance principles for all EU member states. As a result of varying legal frameworks, as well as issues of corporate ownership structure, culture and traditions, flexibility is vital for member states[35]. Instead, the EU has preferred to adopt a 'comply or explain' approach[36].

A. THE UK MODEL

The roots of the UK corporate system and law are based on the philosophy of individualism and freedom of contract; this gave rise to a traditional model which has influenced many systems, including the British colonies. The UK currently uses a one-tier board structure, with elected non-executive directors and independent auditors used as a safeguard of accountability for sharehold-

ries, Volume: 17 Issue: 2, 2008, p.694, (pp.694-698)

33 Other countries in Europe such as France, Italy, Belgium, Sweden, and Portugal also apply a stakeholder corporate governance models with two-tiered board systems. (Albert-Roulhac, Catherine, and Peter Breen, *Corporate Governance in Europe: Current Status and Future Trends*, Journal of Business Strategy, Volume:26, Issue:6, 2005, p.22 (pp.19-29)

34 Supra note 13, p.202-203

35 Supra note 13, p.203

36 It means that government regulators (for example; the Financial Reporting Council in the UK and the Aktiengesetz in Germany) introduces rules of conduct, instead of establishing mandatory laws in the area of corporate governance. Companies may comply with it, or not. If companies prefer not to comply with aspects of the governance code they have to explain publicly why they do not. (Supra note 24, p.26)

ers[37].

The Financial Reporting Council's (FRC) Combined Code on Corporate Governance is a central tool for corporate governance in the UK. It is based on 'comply or explain' principles. The unitary board has a collective responsibility and the duties of chief executive and chairman are separated. Furthermore the executive and independent non-executive directors have particular and distinct powers. The board must monitor the performance of the company and audit, remuneration and nomination committees must be independent and transparent. Incorporated into the system is consideration for the importance of shareholders[38].

The primary functions of non-executive directors are the supervision of management and ensuring that shareholders' interests are represented. Non-executive directors have a significant part in strategy development, offering criticism and constructive thought and ensure objectives and goals are met. They have responsibilities over executive directors, specifically in the appointment or removal processes and they set levels of remuneration for these positions[39].

Companies are regulated by the UK Companies Act, principally the Companies Act 2006. However reports in the UK are of importance also. In 1992, it produced the world's first corporate governance report (the Cadbury Report) and between 1992 and 2010 the UK published more reports than any other country, for example, The Greenbury Report (1995), the UK Combined Code (1998), Myners Review (2001), the Higgs Report (2003) and so forth[40].

The global financial crisis led the FRC to reform the Combined Code. The newly established UK Corporate Governance Code (2010) provided efficient and effective practice standards for board leadership and accountability to shareholders. According to the Code, the board's role is to "*...provide entrepre-*

37 Wei Yuwa, *Comparative Corporate Governance*, Kluwer Law International, 2003, p.14

38 Burmajster Anna, *The United Kingdom*, in The Handbook of International Corporate Governance: a definitive guide, Second Edition, 2009, p.204

39 Bohinc Rado, *One or Two-Tier Corporate Governance Systems in Some EU And Non EU Countries*, p.61, online at: http://www.megatrendreview.com/files/articles/015/RadoBohinc.pdf, accessed on: 16.01.2013

40 Supra note 10, p.119-121

neurial leadership of the company within a framework of prudent and effective controls which enables risk to be assessed and managed"[41].

B. THE GERMAN MODEL

Germany has adopted the stakeholder model to form its corporate governance system, and its focus is thus no limited solely to the protection of shareholders. This system underlines "*cooperative relationships among banks, shareholders, boards, managers and employees in the interests of labour peace and corporate efficiency*" [42].

Sizeable and public companies are supposed to have a two-tier board structure in the German corporate governance system: the lower; management board or committee and the upper; supervisory board. The members of one body are rigorously forbidden to be members of the other body[43].

The two-tiered system is a unique facet of the German model. While the management board is comprised completely of executive directors, the supervisory board consists entirely of outside directors[44]. Supervisory board appoints, dismisses, advises and supervises the members of the management board and must approve decisions of fundamental importance to the company[45]. The management board is in charge of the day-to-day business of the company[46].

The membership of the supervisory board is considerably different to that of shareholder models. Under a co-determination structure, a minimum of half of the supervisory board members have to be employee or trade union repre-

41 Supra note 39, p.61
42 Supra note 24, p.27
43 Zhao Jun, *Comparative Study of US and German Corporate Governance: Suggestions on the Relationship Between Independent Directors and the Supervisory Board of Listed Companies in China*, Michigan State Journal of International Law, Volume:18, No:3, 2010, p.500 (pp.495-510)
44 Supra note 10, p.52
45 Strenger Christian, *Overview and Current Issues in Germany*, in The Handbook of International Corporate Governance: a definitive guide, Second Edition, 2009, p.193
46 Supra note 37, p.16

sentatives[47]. In this way, employee interests can be represented. Indeed, the German model's principle aim is to ensure that not just shareholders are represented in decision making processes[48].

In this regard, it's interesting to note the statement of the CEO of the German car maker Volkswagen: "*Why should I care about the shareholders, who I see once a year at the general meeting. It is much more important that I care about the employees; I see them every day*"[49].

Another distinctive feature of the German corporate governance model is the representation of banks on the supervisory board. Bank representatives may represent shareholder or lender interests – a further example of how the interests of stakeholders, balance those of shareholders in German corporate governance implementation[50].

V. SIMILARITIES AND DIFFERENCES BETWEEN THE THREE MODELS

A. THE US MODEL AND THE UK MODEL

To reiterate, in the US and the UK, the purpose of the corporation is to bring profit to its shareholders. In principle, the UK system is very similar to the US model. Both stress the "*...primacy of shareholders as beneficiaries of fiduciary duties, the importance of equity financing, dispersed share ownership among uncommitted shareholders, active markets for corporate control as a mechanism of managerial accountability and flexible labour markets*"[51].

Similarly, both the US and the UK corporations have a board of directors who are elected by shareholders. These directors carry out their duties through permanently delegated audit, remuneration, and nominating committees[52].

47 Supra note 10, p.52

48 Hopt, Klaus J, and Leyens Patrick C, *Board Models in Europe – Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy*, European Company and Financial Law Review, Volume:1, Issue:2, 2004, p.157, (pp.135-168)

49 Supra note 2, p.5

50 Supra note 24, p.29

51 Supra note 23, p.148

52 Supra note 24, p.26

Like the US, the UK relies on a unitary board of directors which includes both executive managers and non-executive directors whose overriding mandate is to look after the interests of shareholders. Unlike the US however, "*the balance between executive and non-executive directors is in general – by custom and practice, not law or regulation – more nearly even*"[53].

However, there are several significantly different corporate governance practices in the UK. For instance, institutional investor ownership is higher in the UK and encourages UK firms to take a long-term perspective regarding risky investments, by essentially spreading the risk in a large portfolio[54].

Secondly, other institutional practices, such as the Cadbury Code's recommendation that no one individual should dominate the boardroom, means that in the UK, the role of board chairman and CEO are separated[55]. Institutional practice in the US often dictates that these be held by same person, although there have been some calls for separation, notably in the Combined Code on Corporate Governance[56]. It's instructive to note how in politics, the principle of curtailing executive power has long been accepted, particularly through the use of fixed term offices and impeachment procedures – restrictions which would, undoubtedly, ensure greater CEO accountability.

The UK also requires at least one director on the audit committee to have 'recent and relevant financial experience'. By contrast, the Sarbanes-Oxley Act only requires that the company should reveal if an expert is available or not[57].

Further differences between US and UK standards involve directorial responsibility to shareholders. The Combined Code stipulates the duties of directors, such as the chairman's responsibility to ensure that the board is aware of the opinions of shareholders on the actions and decisions of the firm, a check on the autonomy of the board. Finally, unlike in the US, the Combined Code

53 Nordberg Donald, *Corporate Governance: Principles and Issues*, SAGE, 2011, p.81
54 Supra note 24, p.26
55 Supra note 48, p.81
56 Supra note 10, p.154
57 Supra note 24, p.26-27

requires that an annual meeting between independent directors should take place, as well as a separate annual meeting between the independent directors and the board chairman[58].

With regard to regulation, UK and the US approaches should be very similar. In practice, they are very different. The UK's approach is founded on self-regulation and voluntary codes of conduct whereas the US' approach is based on prescriptive law. Ironically, the US approach is one a civil law country, rather than a common law country, might be expected to adopt[59].

The UK has a system of regulation derived from parliamentary acts and rules established by self-regulatory organisations, such as the Securities and Investment Board. The latter is not a government agency analogous to the SEC in the US. Thus, though there is a clear method for disclosure and sharing of information among shareholders, some critics claim that self-regulation is not sufficient, particularly in light of the recent financial crisis. Instead, they suggest that a government agency similar to the US SEC would be more effective[60]. This is not an attitude shared by the UK regulator who argues that "*introducing procedures to comply with detailed regulations... ...unnecessarily constrain business practice and innovation*"[61].

B. THE US MODEL AND THE GERMAN MODEL

The UK and the US have a common law system which tends to ensure protection of shareholder rights. By contrast, civil law countries (such as Germany) often have less effective legal protection for shareholders, instead preferring to place more emphasis on the rights of stakeholders[62]. By necessity

58 Supra note 24, p.27

59 Supra note 2, p.147

60 EWMI/PFS Program / Lectures on Corporate Governance - *Three Models of Corporate Governance* –December2005.doc, online at: http://www.emergingmarketsesg.net/esg/wp-content/uploads/2011/01/Three-Models-of-Corporate-Governance-January-2009.pdf, accessed on: 06.01.2013

61 Financial Reporting Council, *The UK Approach to Corporate Governance*, October 2010, online at: http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/The-UK-Approach-to-Corporate-Governance.aspx, accessed on: 01.02.2013

62 Supra note 19, p.15

then, Germany requires a different corporate governance model to balance the interests of all stakeholders. The two-tiered board structure is the most obvious difference.

In the US there is a unitary board system which comprises both independent members and executive management. Unlike in the US, where the nature of the structure requires a definition of directorial independence[63], the German Corporate Governance Code does not need to, since management and oversight roles are separated into distinct groups within the two-tier system. This is intended to enshrine independence within the company, allowing effective supervision of managerial decision-making, with the added benefit of allowing managers to better focus on the day-to-day operation of the company[64].

This separation of power means roles are clearly defined: the management board is in charge of the activities of the corporation - "*...the supervisory board controls the management (not the corporation), its compliance with the law and articles of the corporation, and its business strategies*"[65]. The supervisory board meanwhile, is responsible for appointing and overseeing members of the management, but their supervisory remit is limited deliberately to the management board[66].

Interestingly, while independent board committees are not required in Germany, a majority of large German corporations have established audit, nomination and remuneration committees, or are considering them. In this respect however, the German system is not homologous to the US method. The power of the German board committees does not extend to resolving disputes, but is limited to the management board. Rather, the audit committee is tasked with establishing the auditor's independence and overseeing the maintenance of that independence[67].

Most significantly, in the US, boards traditionally have a powerful chair-

63 Supra note 48, p.156
64 Supra note 24, p.28
65 Supra note 48, p.141
66 Supra note 24, p.28
67 Supra note 24, p.29

man-CEO who is allowed to nominate outside directors. German supervisory boards do not have an executive representation. Indeed, while the chief executive can also be chairman of the board in the US, this is prohibited in the German system[68]. Instead, half the board consists of employee representatives who have the right to elect members of the supervisory board. Employees cannot be found on shareholder-friendly US boards and as a consequence, shareholder-elected board members have a majority of the voting rights.[69]. The German structure clearly provides a strong motivation for the management board to prevent important matters being decided by the supervisory board[70].

Finally, banks play an important role in German corporate governance, in contrast to the US, where they are practically absent. Historically, this has been due to the fact that bank loans have long been a favourite method of large corporations raising capital. That they had a role in the German governance structure is in no small part due to the significant investments the banks made to their success. Despite recent reductions in their shareholdings (due to improved shareholder protection) banks remain powerful factors in German corporate governance[71].

VI. CONCLUSION

Corporate governance is difficult to define as its definition is intimately entangled with corporate ethics. At its core, it's the characteristics of the corporate governance process, and various different models are applied across the world. Each of these models has developed in a unique cultural, historical and technological context, and is influenced by particular national economic and social conditions, such as the financial markets, the banking sector and by government. No model of corporate governance is perfect, but each is effective in its own way, such that each corporate governance structure specific to a

68 Thomsen Steen and Conyon Martin, *Corporate Governance: Mechanisms and Systems*, McGraw-Hill Education, 2012, p.76
69 Supra note 68, p.76
70 Supra note 53, p.81
71 Supra note 68, p.76-77

country is difficult to transfer to another[72].

In the US, ownership is dispersed more than in any other model. Instead, control is concentrated in the hands of managers. The CEO, in particular, wields tremendous power[73]. The weaknesses of this are readily apparent – there is limited accountability for management and the potential for corruption. Further, US corporations are market-orientated, actively embracing fierce competition. This is facilitated by a regulatory structure that provides a framework, but leaves the success of companies to the vagaries of market forces, and state governance codes which give primacy to shareholders over stakeholders. Together, these factors mean American companies have the potential to adapt quickly to changeable market conditions, but often adopt high-risk, short-term strategies.

In the UK, ownership is also dispersed, but both the UK and the US are committed to open markets and the protection of investor rights. Nevertheless, UK company law is less bureaucratic. The UK has not adopted Sarbanes-Oxley style rules, so regulation is less punitive. This is not to say that the UK is not bureaucratic whatsoever, but rather that government is reluctant to step in if the industry can prove itself capable of effective self-regulation[74].

Finally, US corporate governance arrangements contrast most with the German stakeholder model. This emphasises the legitimacy of multiple interests and prizes stability over the maximisation of shareholder value. This is reflected in a two-tier board structure which includes a supervisory board with employee and trade union representatives – something unheard of in US and UK companies. German boards also include bank representatives with links to debt financiers[75]. Inevitably, these factors mean that German companies are simply not as concerned with the interests of shareholders as American companies, but are more likely to be concerned with the consequences of their actions on their

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72 Ungureanu Mihaela, *Models and Practices of Corporate Governance Worldwide*, Volume: 4, Issue: 3a, 2012, p.625 (pp.625-635)

73 Ping Zou and Andy W. Cheng, *Corporate Governance: A Summary Review on Different Theory Approaches*, International Research Journal of Finance and Economics Issue: 68, 2011, p.10 (pp.7-13)

74 Supra note 68, p.212

75 Supra note 68, p.202

employees and the local community. In this respect, it would seem, German

companies are more heedful of Adam Smith's warning[76].

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[76] According to him; "*The directors of such companies, however, being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own... Negligence and profusion, therefore, must always prevail...*" (Smith Adam, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, 2009, p. 439)

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THE COMPERISON OF THE CORPORATE GOVERNANCE MODELS OF THE UNITED STATES, THE UNITED KINGDOM AND GERMANY

Amerika Birleşik Devletleri, İngiltere ve Almanya Ortaklık Yönetimi Modellerinin Karşılaştırması

Özgür BEYAZIT*

ABSTRACT

This article attempts to give a general view to corporate governance models presenting three examples from the significant ones having pioneer role for the other models. The United States (US) model has represented a pure liberal model whilst the German model has carried out as a social responsibility principle paying attention to stakeholders as well as shareholders. The United Kingdom (UK) corporate governance system used to has –in fact still has - many similarities with the US model. However due to the experienced corruptions in last decade stemmed from lacking accountability in the corporate governance caused to strengthen supervising boards that can be argued the UK diverted to the German model to find a solution to the problem. In parallel to the UK, having same problems some States in the US made similar arrangements nevertheless sheer antipathy of corporations to state involvement US companies their liberal essence remained untouched. From the other side the EU have sought to establish a common corporate governance model for the EU member states called 'Societas Europaea' (SE).

Key Words: Corporate Governance, shareholders, stakeholders, management boards, supervisory boards.

ÖZET

Bu makale, diğer sistemler için de öncü rol oynayan üç önemli şirket yönetimi modeline genel bir bakış getirmeye çalışmaktadır. Amerika Birleşik Devletleri (ABD) saf liberal modeli temsil ederken Alman modeli farklı olarak hissedarların yanı sıra diğer ilgili paydaşları da sosyal sorumluluk ilkesine uygun olarak değer atfeden bir uygulama yapmıştır. İngiltere modeli ise ABD modeli ile birçok benzerliği paylaşmaktaydı ki

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hala birçok yönden benzer. Ancak şirket yönetimindeki hesap verilebilirlik sorununa bağlı olarak son on yılda yaşanan yolsuzluk olayları İngiltere'yi bu soruna bir çözüm bulmak üzere Alman modeline yönlendirmiştir. İngiltere gibi ABD'de benzer sorunlara çare bulmak için bir takım düzenlemeler yapsa da şirketlerin devlet müdahalesine karşı duydukları ciddi antipati liberal yapının özüne dokunulmamıştır. Diğer taraftan Avrupa Birliği üye devletler için ‹Societas Europaea› olarak adlandırılan ortak bir şirket Yönetim modeli kurma arayışına girmiştir.

Anahtar Kelimeler: Ortaklık yönetimi, hissedarlar, paydaşlar, yönetim kurulu, denetleme kurulu.

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INTRODUCTION

Corporate governance systems have many varieties on a worldwide scale. Thus, it is said that 'there are as many corporate governance systems as there are countries'[1] although they have similarities in the general context. Furthermore, there is a trend, such as the OECD principles and attempts on the EU level, to harmonize transparency and accountability systems in the world.

Comparisons are generally made between the United States (US) and the rest.[2] In this case it is the EU. This article aims to compare the US corporate governance system with the EU one. As was mentioned above, divergences in the EU, the United Kingdom (UK), and Germany are presented as a sample. In addition, harmonizing endeavours for a common company statute within the EU are touched upon.

The UK understanding has many similarities with the US one, sharing common law or Anglo – American systems. In fact, being a member of the EU, and in a firm relationship with the other member states, the UK partially approaches the continental system; nevertheless she remains closer to the US. From the

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1 Jill Solomon, *Corporate Governance and Accountability*, 2nd edn, (John Willey & Sons Press, West Sussex, 2007), 181

2 Geoffrey Owen, Tom Kirchmaier, Jeremy Grant, 'Corporate Governance in the US and Europe: Where Are We Now?' in *Corporate Governance in the US and Europe*, Owen G, Kirchmaier T, Grant J (eds), 11

continental side, Germany having a two-tier system as a result of the social responsibility notion is considered to be best example of a system veering very far away from Anglo-American system.

THE NOTION OF CORPORATE GOVERNANCE

Finding a single and concrete definition to the corporate governance systems in existence does not seem possible. However, depending on the country or system, corporate governance can be explained in two ways; narrow and broader. The narrow one centres on only the shareholders and the company. That is literally called the agency theory, and the broader one also includes stakeholders, and is called the stakeholder theory.[3] In other words, the determination of accountability to shareholders or stakeholders consists of the basis of the many theories. Hence, a comprehensive definition can be fashioned such as the 'alignment of managerial decision making with the interest of corporate stakeholders and shareowners in particular.'[4]

Corporate governance codes in any country are introduced or amended with the aim of 'more transparency and accountability, and a desire to increase investor confidence'.[5] Liberalism and Capitalism constitute the economical notion of the US. Thus keeping the state regulations minimized and leaving companies alone are the summarizing words for the US concept. Due to this fact, the US has its own system which has a single board and a powerful CEO who determines the company's direction. However, when it comes to the EU countries, lacking complete harmonizing, there are observed several types and practices of corporate governance.

At the EU level, classifications can be made according to the board structures. One-tier and two-tier systems are the main instruments that differentiate the corporate governance systems from each other. The UK and Ireland repre-

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3 Solomon, 12

4 Axel V Werder and Till Talaulicar, 'Corporate Governance in Germany: Basic Characteristics, Recent Developments and Future Perspectives', *Handbook on International Corporate Governance: Country Analyses,* 2nd edn, Mallin C A (eds), 36

5 Christine A Mallin, *Corporate Governance*, 3rd edn, 25

sent systems with a one--tier board, whereas Germany, Austria, Netherlands, Finland, and Denmark are significant implementers of the dual board system. Spain, Portugal, and Belgium leave it to the discretion of the companies to decide on their systems. The other countries, such as Sweden, have unique systems that cannot be classified into single or two board systems.[6]

The perception in the Anglo –American systems is that the company owned by the shareholders, and control is delegated to a management board, whilst in continental Europe, stakeholders, particularly employees, have been considered as part of the company. Hence, unlike the Europe system that are targeted to protect stakeholders' interests in a sense, to maximize the shareholders' benefit is the main aim in the US. This divergence has remained up to the present in the corporate governance context. Nevertheless, the sharp edges of the both systems have been rasped after management scandals in several large scale companies in the UK and the US, and in old-fashioned two-tier systems in many European companies.

UNITED STATES

From the US perspective, the definition of the term of corporate governance will be an agency theory that aims at increasing the value of the company on behalf of its shareholders.[7] Companies follow a market-based system to add value to the company securities for the benefit of their short-term shareholders.[8]

Divergence and numerous shareholders, in some instance millions of them, technically are not able to observe closely their companies' road maps, targets, financial situations, etc. other than following them on the news or o in written material as anyone can do. Managers of companies behave independently

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6 Carsten Jungmann, 'The Effectiveness of Corporate Governance in One - Tier and Two – Tier Board Systems – Evidence from the UK and Germany', (2006) ECFR, 427

7 Mark J Roe, 'The Political Roots of American Corporate Finance*',* in *US Corporate Governance*, Chew D and Gillan S L (eds), 19

8 Julian Franks and Colin, Mayer, 'Corporate Ownership and Control in the UK, Germany and France', in Chew D and Gillan S L (eds), 239

without hearing the shareholders' voices, and they lack efficient supervision.

Legislation

The US is not familiar with numerical and prescriptive corporate governance statutes. However, after the collapse of Enron and subsequently other companies, lacking the financial transparency of management boards, the management of companies came on the agenda of the government, resulted in the Sarbanes-Oxley Act of 2002 that mandated that companies are required to submit an annual effectiveness report to the Securities and Exchange Commission (SEC) and additions to this internal financial report would be supervised by independent auditors[9].

In general, the legislation intend to create a liberal area for investors to organize as they wish, and to decide what to do. Within this context, to establish cooperation, labour and capital may come together equally. However, it is unfeasible under the EU directives, or pre-emptive rights to come first in the EU. Thus it is said that the US's achievement stems from freedom of contract whereas the EU's is due to statutes and regulations. The other thing is that the US heavily companies and investors rely on judges' decisions, which are issued much faster than by the EU bureaucracy.[10]

In the US, each state has its own legislation for the companies, and the most significant one is Delaware. Owing to flexible company-friendly regulations, the majority of New York Stock Exchange companies are registered in Delaware.[11] Additionally, the Delaware courts have made a great contribution with their decisions to the development of corporate governance in the US.[12]

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9 Bengt Holmstrom and Steven N Kaplan, 'The State of US Corporate Governance :What's Right and What's Wrong?', in *US Corporate Governance*, Chew D and Gillan S L (eds), 38-39. NYSE Rules in 2003 that have been considered an improvement in corporate governance, see Mallin, 43

10 Frank H Easterbrook, 'International Corporate Differences; Markets or Law?' in *US Corporate Governance*, Chew D and Gillan S L (eds), 19

11 Mallin, 43

12 Jeswald W Salacuse, 'Corporate Governance In New Century' (2004), Company Lawyer, 2004, 25(3), 78

Shares and Shareholders

The approach to the shareholders was quite different in the 1980's, since the directors did not pay much attention to increasing the shareholders' interest. Instead, they generally considered themselves the representatives of the company, and thus struggled to promote the growth and volume of the company and its business, due to the fact that many hostile takeovers took place. Later on in the 1980s, the notion changed in a sense in favour of the shareholders.[13]

Shares that are distributed between the numbers of the owners can reach millions. Unlike in Germany or many other continental Europe examples, the owners of the company, in many cases, have even less than 1% of the shares. Likewise in the UK, shareholders can be divided into three groups: institutional investors, financial institutions, and individuals.[14]

In the continental Europe practice, it is quite common that just one shareholder may have the majority of the stakes having more than 50 % of all lots in a company. Therefore, the owner dominates and manages the company, whereas in the Anglo–American system, a shareholder practically cannot succeed in having over 10 % of the shares. Thus, to have even a slight power on a US management board. Several and maybe thousands of shareholders must come together, and that is technically very difficult[15].

Administration

When it comes to the administration of companies in the US, the featured instrument is a management board that lead by a CEO (Chief Executive Officer). The system relies on a one-tier board that includes executive and non-executive directors. Executive directors fulfil the management duties, whereas non-executives carry out indirect supervision. Day to day work is done by hired personal such as an accountant, controller, vice president, and in many

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13 Holmstrom/Kaplan, 29-35

14 Mallin, 43

15 Marc Goergen, *International Corporate Governance*, (Pearson Education Ltd, Essex, 2012), 31

instances, a CEO.[16]

The US companies are managed by a powerful CEO unlike in the UK companies that have both a CEO and a chairman. CEOs tend to have overall control of the company, lacking another power, and the US's company culture results in fewer conflicts inside,[17] as well as producing 'imperial CEOs'.[18] In fact, the CEO was designed as a position to solve problems and take actions more efficiently in a very large scale company in the 1960s.[19]

CEOs can be an insider or an outsider. Many times, poor performance or entering another market results in replacing an insider CEO with an outsider one.[20] In the Continental Europe practice, the outsider chairman is very rare and there are less frequent turnovers due to poor performance. A field research study covering the years between 1994 and 2003 related to the turnovers due to poor performance demonstrated that in German companies, over the scrutinized period, the turnovers were 8.88 % for poor performance, and then went up to 12.18% for poor performance. In the UK, in the same time period, it went up from 11.71 % to 15.44 %. The difference was 0.87 in Germany, whilst it was 1.21 in the UK.[21]

The managers' fiduciary duties are to the company itself not to shareholders, whereas in Europe, shareholders combine into the company itself, and the managers' fiduciary duties are quite slight respectively.[22]

The corporate governance system in the US, which is also similar to the UK, can be addressed in agency theory in that the shareholders or principals

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16 Tien Glaub, 'Lessons from Germany: Improving on the US Model for Corporate Governance', (2009) ILMR, 5 (2), 237

17 Solomon, 81

18 Jonathan Rickford, 'On Corporate Governance Systems- How much convergence?', in *Corporate Governance in the US and Europe*, Owen G, Kirchmaier T, Grant J, (eds), 26

19 Li Zhi, 'The Research on the Problems of CEOs' Legal Status and Legal Liability' (2009), IJLM, 51(4), 245

20 Goergen, 97

21 For detailed information about the research, see Jungmann, 447

22 Rickford, 29

delegate managing decision-making duties to directors or in the other words, their agents. The directors' independent positions in terms of agency theory may reveal problems. The directors may pursue their own benefit rather than the shareholders', such as trying to obtain larger bonuses and more perquisites or directors may lack hesitation to spend the company's money for luxury that results in 'residual loss'.[23] Executives' remuneration in the US is traditionally higher than in other countries.[24] The average payment of an S&P 500 chief executive last year was $13.7 million, according to GMI.[25] Meanwhile, the average annual salary for chief directors for 2011/2012 was 1.15 million GBP in the UK.[26]

Notably, shareholders cannot enjoy a visible administrative right apart from having shares in the company. They are not allowed to ask for Extraordinary General Meetings. Block groups are very small respectively as compared to many continental European systems. Institutional shareholders play a crucial role in monitoring managers that impede high level managerial bonuses and salaries as well as creating shareowner value in general.[27]

The other main difficulty is a supervision problem stemming from the agency model of having a one-tier board. Consolidating management and supervisory duties in a board results in insufficient and inefficient oversight and caused many big company collapses.[28] Hence, a dependable financial report –that is an expensive cost for the company- can be produced by external auditing rather than an internal mechanism. In reverse, the shareholders in a German company rely on the supervisory board's auditing mechanism.[29]

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23 Solomon, 17; Even, the managers may provide position their relatives instead of qualified personnel. See, Goergen, 9

24 Solomon, 99

25 GMI <http://www.theguardian.com/business/2013/oct/22/top-earning-ceos-100m-pay-checks-record> accessed on 30.12.13

26 See <http://www.accountancyage.com/aa/news/2240871/ftse-350-fds-scoop-gbp213m-in-2012> accessed on 30.12.13

27 Goergen, 97

28 Glaub, 238

29 Werder/Talaulicar, 36

THE UNITED KINGDOM

The UK and the US share a common law legal system which also leads to many similarities in corporate governance and in this aspect in both countries the board of directors plays the most important role in the governing and supervising of the corporation[30]. In recent years, regulators from the US and the UK work together frequently related to corporate governance topics.[31]

Shareholders

Relations with shareholders are stronger in the UK with respect to the US, since the institutional shareholders are probably more powerful in the UK.[32] The institutional shareholders try to affect the manager's agenda.[33] The British system is in some respects more shareholder-friendly than that of the US, since shareholders can call an extraordinary general meeting with 10 percent of the shares of capital, and more than that, they can remove the management board with a plurality of the votes[34].

In the US, and in the UK as well, the shares are dispersed between a large numbers of owners so that to constitute a influential group is very difficult. Thus, a conflict takes places between managers and shareholders. The other divergence is that significant shareholders in the US are institutional shareholders whereas it is industrial and holding firms in Germany and in many other EU member states.[35]

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30 Allison Garret, 'Comparison of United Kingdom and United States Approaches to Board Structure' (2007), CGLR, 3(2), 93

31 Garret, 108

32 Ethiopis Tafara, 'Remarks on UK and US Approaches to Corporate Governance and on the Market for Corporate Control' (2007), SEC speech, <http://www.sec.gov/news/speech/2007/spch0208 07et.htm> accessed on 31.12.13

33 Garret, 114; Geoffrey, 3

34 Geoffrey, 3

35 Goergen, 40, 9.06 % of the shares of the Coca-Cola Company are owned by Berkshire Hathaway Inc. And the second largest group had 4.88 % on 30 September 2013. The statistics can be seen on <http://investors.morningstar.com/ownership/shareholders-major.html?t=KO> Accessed on 27.12.13

Legislation

As in many countries, in the UK, reforms related to the companies came after scandals and financial collapses[36]The UK has several statutes concerning companies, specifically the Combined Code on Corporate Governance (the Code) which was updated in 2012,[37] which is directly related with the CG which is that the companies are free to abide by what is called a comply or explain model. That also constitutes the main divergence from the US system. The other main regulation is the Companies Act of 2006, which strengthened the shareholders' power and communication.[38]

Subsequent the Caldbury Report listed companies in the LSE companies which had been required to 'comply or explain' to provide a statement which states whether they comply with the recommendations of the code or to provide an explanation as to why they have decided not to follow a particular recommendation[39] since 1993. The remarkable recommendations were mainly the separation of the CEO and chairman and making non-executive members partially independent, as well as a committee for determining salaries and payments, and an audit committee.

Administration

The UK has a single board system in which all executive and non-executive members are elected or removed from their positions by shareholders.[40] The Code has several articles regulating the form of the board for large companies rather than small ones.

The Management board is made up executive and non-executive mem-

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36 Mallin, 26

37 The first one was in 1998, which was prepared after several published reports on the corporate governance issues. See Mallin, 27-30

38 Mallin, 34

39 Goergen, 129

40 The removals happened in very rare cases mostly due to heavy misconduct. See, Jungmann, 435

bers equally. Non-executive members cannot be considered as employees of the company; their responsibilities are mainly related to the managerial problems aside from control.[41] The Code says '*scrutinise the performance of management in meeting agreed goals and objectives and monitor the reporting of performance'*.[42]

The Board is led by a chairman who is responsible for setting the board's agenda and providing decent communication between the board and the shareholders[43]. The chairman and the CEO are set apart from each other in the UK system, whereas they are traditionally combined the US[44]

According to section B.1.2. of the Code, at least half of the non-executive members of the directors board must be independent.[45] To provide independence, these members must not be in any relation with the company nor management[46].

Daily issues of a company, in general, are carried out by the individuals of the board who are called senior managers. They have meetings together on a regular basis to discuss the management and current matters. Theoretically, executive board members can be an outsider, however in most cases, they are insiders.

Non-executive members do not get involved in the daily works of company. This is the main difference between executive and non-executive members.[47] However, it is a significant instrument to curb the extreme power of executive

41 Jungmann, 436

42 The Code s A4

43 The Code s A3

44 After The Caldbury report in 1992 which was prepared after Maxwell affair 1991, and the Higgs Committee in 2003 separated them, Garret, 109

45 The Code s B11, for the meaning of independent from the company

46 Garret, 97; However sufficient evidence does not exist to demonstrate that the independency of boards resulted with better management efficient corporate performance. Goergen, 95, 96

47 Jungmann, 437

members. Being away from the management of the company, the turnover of the non-executive members due to poor decisions, especially financial misconduct, is very rare.[48]

GERMANY

Having a two-tier board and representatives at the supervisory board from the workforce of the company are two significant diversity factors in the German system, whose insider character means that the company is considered to belong not only to the shareholders, but also to the stakeholders consisting of employees, creditors, suppliers, customers, and government.[49] This concept is very distant from the US, the homeland of liberalism and capitalism.

This system is the result of the stakeholder theory that conforms with a broader definition of the corporate governance. It is argued that the companies not only have a responsibility to rise up the values of the shareholders, but also responsibilities to the society as a whole. According to this understanding, in order to achieve long-term success, companies must pay attention to all the stakeholders rather than just short-term shareholders. However, the stakeholder theory is criticized on the basis that the theory neglects the right of private property in addition to the fact that some stakeholders may exploit their rights against both the shareholders and the long-term policy of the company.[50]

Legislation

The legislation created a new corporate governance system for Germany in 2000, and were updated to harmonize to with the contemporary system.

The Cromme Code 2002 brought online many laws on companies, and included worldwide best practices samples regarding corporate governance for listed companies, and with the Public Corporate Governance Code in 2009, further steps were taken.

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48 Jungmann, 439

49 Thomas Clarke, *International Corporate Governance: A Comparative Approach*, 181

50 Salacuse, 78

Shareholders

Shareowners consist of investment institutions, domestic or foreign companies, banks, holdings, government, and individuals, However in most cases a larger owner is the company itself.

Corporate governance is interiorized to raise stakeholders' value rather than shareholders.'[51] That is a result of the stakeholder theory arguing that the action of companies affects society more as a whole than it does shareholders.[52] Thus, companies must also take into consideration the interests of all stakeholders, including shareholders, employees, suppliers, customers, creditors, local communities, the environment, and government.

Insider dominated shareholders characterize the system in Germany whilst outsider domination is very common in the US, and the proportion of institutional shareholders is also rising, resulting to an approach to the insiders. The insider system promotes strengthening and long-term success. However, the system fails to attract institutional investors. [53]

The shareholders enjoy their power in General Meetings where the decisions and financial developments taken by management and supervisory boards are examined. Shareholder representatives to the supervisory board and auditors are elected at the General Meetings.

In many companies, a majority of the shares, in the other words votes, are held by a single or a group of shareholders, undermining minorities and resulting in disagreements between the majority and minority of the shareholders as a remarkable difference with the US.[54]

Administration

Boards, In Germany, one of the distinctive issues is the two-tier system in the board mechanism; a management board and a supervisory board.

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51 Mallin, 220

52 Solomon, 23

53 Solomon, 184

54 Goergen, 34

The supervisory board, appoints, supervises, and gives advice to the management board. Nevertheless, the removal of members of the management board is rare, and must be justified.[55]

The supervisory board is elected by the shareholders and employees if the company has over 500 employees. If it exceeds 2000 employees, half of the board is elected by the workforce of the company.[56] Therefore, boards not only deal with shareholders, but also with the company's employees in strong relations. However, the supervisory board members, coming from the domestic workforce, may consider only the domestic workforce that is not always to the interest of the company, furthermore they may ask for privileges to approve some important managerial decisions.[57] That is to say, some decisions to be taken might be seen as against the benefit of the employees whilst they are crucial for company as a whole, or versa verse.[58] The other problem is that the participation of employees in the governance may be frightening to foreign investors who wish to takeover or get into a partnership with the company.[59]

The Anglo – American system is formed by market powers, thus an improved stock market dispersed ownership is compulsory. Unlike the US, Germany relies on internal mechanisms rather than the stock market. Thus banks play a very crucial role in providing capital, so that in many instance they appoint members to the supervisory board.[60]

The management board is shaped by the supervisory board with its chairman conducting day to day work, and more generally designating the company's strategy, and struggling for the best interest of the company while staying

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55 Werder/Talaulicar, 41

56 Representation of employees on boards can be seen in Austria, Denmark, Finland, Luxemburg, and Sweden as well. In France and the Netherlands, employees are represented on consultancy bodies. See, Goergen, 179

57 Werder/Talaulicar, 43

58 Mallin, 215

59 Jean du Plessis and Otto Sandrock, 'The Rise and Fall of Supervisory Codetermination in Germany?' (2005), ICCLR, 16(2), 68

60 Werder/Talaulicar, 42

in contact with the supervisory board.

All the members of management board are jointly responsible and accountable for the company. The members may appoint a chairman to organize and coordinate the daily business; however the chairman cannot be considered a superior of the other members.[61] Thus, a chairman never considered as CEO. They cannot be held solely responsible for poor performance; correspondingly, they are paid much lesser than CEOs.

According to the Code for Transparency, any event which may affect the company must be reveal to the public, and annual reports must be published either by the management or supervisory boards, especially when exceeding the issued shares by 1%.

Apart from several divergences in details, the main difference between the US and German companies are a two-tier board which includes employees of the company; executives, and the supervisory board. However company owners are not fond of the current system, and open market conditions force Germany to update her employee participation system[62].

THE EU MODEL: SOCIETAS EUROPAEA

The Council Regulation 2157/2001 and Council and Directive 2001/86 came into force enacted on 8 October 2001. The aim was to accomplish an EU company model existing along with the other national companies models to cope with the obstacles of different national legal systems that would facilitate operating all over the EU successfully under the unified laws.[63] The Latin name 'Societas Europaea (SE)' has been introduced instead of the European Company, and the registered companies shall use company names such as Allianz SE.

61 Werder/Talaulicar, 41

62 Solomon, 206

63 Wolf Georg Ringe, 'The European Company Statute in the Context of Freedom of Establishment' (2007), JCLS, 7(2), 185-212

Foundation

SEs can be established in several ways: the switch of a national company to SE, the merger of several companies from different member states, a joint venture between companies, and by the establishment of an SE subsidiary of a company.

It is a fact that there are more corporate governance systems than the number of the member states in the EU. Thus, the Commission has sought a way to harmonize the systems and designate standards to combine the best practices and find common applications instead of composing an authentic code. The Commission aimed at leaving it a natural evolution rather than forcing the member states to apply a mandatory code.[64]

Administration

During the preparations of the SE regulations, many debates occurred since many member states were reluctant to give up a two-tier administration. At the end of that, two options, which were not new, were presented by the directive to the enterprisers; a one-tier system managed by an administrative board, and a two-tier system including a management board and a supervisory board. In addition to these, the workforce can be represented on administrative boards as long as the numbers of the members are three or more.

Advantages

Carrying the SE abbreviation next to company's name puts it under the EU umbrella which provides many benefits.

1- SE companies are allowed to move their registered offices in member states as the national companies are not able to do. That is to say a SE can be established and registered in different member states.

2- Cross – Border mergers are easier, since the merging companies are spared from being subject to each other's national regulations. For other companies, achievement of unification takes very long.

[64] Solomon, 191

3- It saves time and money for the companies. However, due to a lack of harmonization of the different tax regimes, the host country's tax regime will be applicable.

4- Unlike in the UK, an SE is allowed to be founded by single-person. Nevertheless, SE receives the benefit of Directive 90/434 forbidding double taxation for cross-state mergers.

Existing regulations related to the SE are outnumbered by national ones that makes an SE a national law dominated company. The mentioned divergences and hesitations of the EU to create a very strict framework to comply with might stem from the purpose of following a mild agenda rather than an urgent one.

In many companies, the majority of the shares, in other words votes, are held by a single shareholder or a group of shareholders, undermining minority shareholders, resulting in a disagreement between the majority and minority of the shareholders.[65]

CONCLUSION

To begin with the UK model as concluding remarks, in general, the UK corporate governance system remained a part of the Anglo – American system, having a one-tier board. However, because of strong relations with continental Europe and EU affairs, the system made steps towards to the EU models by softening the system after many reports were released seeking solutions to several company collapses. The CEO and chairman were separated as positions, and independent members were introduced on management boards in order to sustain better supervision.

The sharp capitalist atmosphere of the US created a very different corporate governance understanding than the EU ones. Shareholders are the sole rightful owners so that companies do not take into consideration other stakeholders' opinions and benefits other than aiming to provide for the short-term interest

[65] Goergen, 34

of shareholders, or maximize the value of the corporation for their owners. However, difficulty in supervising and being independent from shareholders caused managers to receive as much in the way of bonuses as they wished even when the company itself was in a poor situation, and this became notorious in various corporate governance scandals.

Unlike the capitalist US firms, German corporate governance was affected by social reflections in the country. Therefore, a two-tier board system, putting the stakeholders into the governance of the company apart from shareholders, became very common in Germany. Employees participated in the governance of the company, which was probably a nightmare for the US companies which were accustomed to dismissing employees in difficult times.

As was mentioned in the introduction, a variety of corporate governance implementations all over the EU, the UK, and Germany were focused on as examples. However, the EU institutions have spent great deal of time and effort trying to harmonize a company law statute to simplify the cross-border activities of companies within a single type of corporate governance in the existing single market. Within this context, a European company model SE was implemented by means of several regulations and directives. Nevertheless, the model is quite new at seeking to represent a unique system purged from the national laws' discretions. Looking at the road travelled to date gives us an indication that the EU company model will be incorporated into the UK and German systems.

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EU ENLARGEMENT MACHINERY AND THE UNIQUENESS OF TURKEY'S PROTRACTED CANDIDACY

Avrupa Birliği Genişleme Makinesi ve
Türkiye'nin Uzatmalı Adalet Sürecinin Özgünlüğü

Serkan TAŞ *

ABSTRACT

Turkey began her journey towards European Union nearly 50 years ago in the early 1960's with the intention to become a full member of the community. During these 50 years many things had changed such as the name of the structure and the criteria to become a member. The community of 6 states became a union of 28 states. The relation between the EU and Turkey was reshaped with the encouraging decision of the EU in 2005 and Turkey earned the status of being a candidate country. Many people had thought that this decision opened Turkey's way towards the EU, yet it turned out to be another false hope. After a few years, despite several reforms and determined efforts, Turkey once again excluded from the EU. This paper will take a brief look to the enlargement system of the EU and its application to Turkey. The deviations in the system will be searched for and the future of the relation will be discussed.

Key Words: EU Accession, Ankara Agreement, Englargement, Copenhagen, Criteria, Cyprus Issue, Migration, Borders.

ÖZET

Türkiye'nin Avrupa Birliği serüveni bundan yaklaşık 50 yıl kadar 1960'lı yılların başında tam üyelik niyetiyle başlamıştır. Bu sürede üyelik kriterleri ve birliğin adı gibi çok şey değişmiştir. 6 ülkeden oluşan topluluk 28 üyeli bir birlik haline gelmiştir. AB ile Türkiye arasındaki ilişki AB'nin 2005 yılında vermiş olduğu kararla yeniden şekillenmiş, Türkiye aday ülke statüsünü kazanmıştır. Birçok insan bu kararın Türkiye'nin AB üyeliği yolunu açtığını düşünmüş ancak bu kararda boş bir umut haline dönmüştür. Birkaç yıl geçtikten sonar, Türkiye kararlı çabalarına ve gerçekleştirdiği çok sayıda reforma rağmen bir kez daha birlikten dışlanmıştır. Bu çalışma AB'nin genişleme sistemine ve sistemin Türkiye'ye uygulanmasına kısaca değinecektir. Genel uygulama-

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dan sapmalar araştırılacak ve ilişkinin geleceği tartışılacaktır.

Anahtar Kelimeler: AB Katılım Süreci, Ankara Anlaşması, Genişleme, Kopenhag Kriterleri, Kıbrıs Meselesi, Göç, Sınırlar.

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GENERAL INTRODUCTION

Turkey's European Union adventure started almost 50 years ago in the early 1960's. During this time the name of the structure has changed and the community of 6 states became a union of 28 states. EU's enlargement policy and Turkey's potential membership has been the topic of many scholarly works. This piece of work will focus on the application of EU's enlargement policy and rules to Turkey after her becoming a candidate country in 2005 with EU's promising and encouraging decision and will look into reasons of Turkey's exclusion from the EU despite her continuous and determined efforts.

The dissertation will be comprised of two main blocks. Each part will have its own introduction and conclusion sections. The first part will focus on EU's enlargement policy and its application to Turkey's candidacy. In this part current EU-Turkey relationship from the enlargement perspective and the change and "development" in this relationship from both sides will be looked into.

After the introduction and general overview of the enlargement system, in second and third chapter, EU's enlargement machinery (enlargement criteria stated in the treaties , Helsinki Summit and Copenhagen Criteria and Lisbon Treaty) and the change (or evolution) in the policy during enlargement processes will be addressed. The recent global economic crisis, euro zone problems, hurdles in decision making process and reflections of these events to enlargement policy will be emphasized. After providing basic information regarding the machinery, the application of this policy and relevant rules to Turkey's candidacy will be discussed in order to find out if there are deviations from general application. Especially in the third chapter the unique features of Turkey's candidacy will be touched upon and the deviations from general application of the enlargement rules will be looked into.

In the second part after mentioning the popular and constantly articulated reasons of Turkey's rejection such as Cyprus issue, clash of religions and moral values, Turkey's economy and Kurdish issue with a brief introduction in chapter five three particular reasons will be analyzed in the following chapters. It is expected that the limited analysis with three relatively important reasons will help understanding the general ongoing situation among these two long time half-hearted pals.

The sixth chapter will focus on the possible effects of Turkey's accession with her huge population and high population growth rate compared to any other EU member state. In this chapter the possible effects of Turkey's membership to the EU's decision making mechanism and power balance between small and big countries, which are the main arguments against Turkish membership regarding this issue, will be addressed.

The next chapter will focus on border issues which is also a sensitive area for the EU. Even though this problem is overshadowed by others it is not easy to absorb the fact that the new borders will not be European for both public and governors. The foreign, security and defence policy aspects of this issue will be briefly addressed in this section.

Chapter eight will be about migration problems which would occur after Turkey's possible membership. This issue will be analyzed from to different aspects. Firstly the possible migration from Turkey in case of the realisation of Turkish membership will be dealt with. Secondly Turkey's being a transit country for illegal migration will be discussed.

In each chapter and conclusion overall assessment of these factors will be made briefly and the possible gains and losses of the EU from Turkey's accession will be discussed in order to find out if these reasons are capable of justifying the EU's approach towards Turkey's membership.

Finally, the impossibility of the full EU membership for Turkey in the earliest time with current enlargement mechanisms will be discussed. The sustainability of the relationship will also be addressed with special emphasis to possible solutions regarding current deadlock in the accession process.

Part I

EU Enlargement Machinery and Compatibility of Turkey's Membership with the System

Chapter I

Introduction and Overview of EU Enlargement System

Enlargement system of the EU has been rightfully accepted and praised for being the most successful international peace keeping and unifying tool by many scholars, politicians and strategists. The EU up until now experienced 6 successful enlargement rounds which began with the accession of the UK in 1973 and ended with the Croatia's becoming a member of the Union in 2013. The system is not a simple and static organism; on the contrary it is a complex and advancing organism. The 49th article of the Treaty on European Union (TEU)[1] sets the basic rules of the system. The article reads as follows:

"*Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.*

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements."

According to this Article the basic criteria for becoming a member of the

[1] European Union, "*Consolidated version of the Treaty on European Union*," En. 30.3.2010. Official Journal of the European Union, C 83/13, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:en:PDF

club is to respect the values articulated in the second article of the same Treaty. This article reads as follows:

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

All the required criteria for establishing an enlargement system is regulated in this very simple, short and clear article one may think, but when you think about the values counted in this article you can see that each of them are vague concepts which has to be actively respected by any European States that wants to become a member of the Union.

The 'enlargement *acquis*', which is known as the set of rules, principles and values which establish membership eligibilities such as which states can be members and membership requirements such as when they are welcomed to the family, and how will they become members, is broad, comprehensive and precise. The abovementioned Article 49 of the TEU gives a clear definition of the accession procedure, Article 2 states the necessary conditions for becoming a member for the applicant States. In addition to those basic rules, there are also a series of principles which regulates the area of accession negotiations such as indivisibility of the *acquis*, non-discrimination and relative merit.[2]

In 1993, after the summit held in Copenhagen the so called "Copenhagen Criteria" was created. These rules are complementary to the rules regulated by the TEU and according to these criteria;

"*Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces*

[2] José Ignacio Torreblanca, "*Arguing about Enlargement*", Enlargement in Perspective edited by Helene Sjursen, Oslo, January 2005, p 22, available at http://www.sv.uio.no/arena/english/research/projects/cidel/old/Reports/AvilaReport_PartI.pdf.

within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union."[3]

The conditions which were designed at the Copenhagen European Council for the candidate countries aimed at preventing the possible problems which might arise after the finalization of accession negotiations of these countries. The current members were aware of the fact that their political instability and economical incapability may become a burden for the Union. With these new conditions, they planned to minimize the risk and make sure that the new entrants were ready to meet all legal requirements, namely adapt the entire acquis with a few necessary exceptions once they become members. [4]

Furthermore in this summit the capacity of the EU to absorb new members was emphasized as follows:

"*The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries*."[5]

This additional condition can be seen a safety valve for the current member which can be used even all the necessary conditions for becoming a member were met by the candidate states. It is a reflection of the fear among member states regarding the possible side effects of the new entries such as the possible negative impact of the enlargement on the functioning of the EU institutions and political decision making mechanisms.

Generally speaking, all three main Copenhagen conditions are vague and open to various interpretations which could cause different implementations for different candidates. Detailing of what constitutes meeting these conditions

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3 European Council Meetings, Conclusions of the Presidency - Copenhagen, June 21-22 1993, SN 180/1/93 REV 1, p 13, available at www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf

4 Heather Grabbe, "*European Union Conditionality and the "Acquis Communautaire"*", International Political Science Review (2002), Vol 23, No. 3, pp 249-268, p 251, available at http://www.jstor.org/stable/1601310 .

5 European Council Meetings, Conclusions of the Presidency – Copenhagen, p 13.

has widened the criteria for membership.[6]

Looking into past enlargement rounds one can see the change regarding the conditions of becoming a member. Similar to the changes and developments in the acquis in general, the enlargement rules also changed and developed. Especially after challenging enlargement rounds, with the lessons learned from these enlargements, the rules of enlargement and the criteria of accession also evolved. The abovementioned Copenhagen Criteria is surely one of the results of this evolution.

In each enlargement rounds, current member states brought their own agenda consisted of their economic and geopolitical interests to the negotiation table. They also actively participated in these meetings to find the right principles and conditions which should be applied to each enlargement processes. These elaborate and constructive discussions resulted in the development of an evolved enlargement acquis. This body of rules and principles emerged in process of time after several meetings and enlargement rounds.[7]

The future enlargement rounds will be more challenging for the Union. It will probably include Balkan countries. This new enlargement has some unique aspects. These countries don't have well established democracies and mostly placed in post conflict zones. For this reason a new approach was developed by the Union. In its report the Commission stressed the need for a different management way stating that:

"*Countries aspiring to join the Union must demonstrate their ability to strengthen the practical realisation of the values on which the Union is based at all stages of the accession process. They have to establish and promote from an early stage the proper functioning of the core institutions necessary for democratic governance and the rule of law, from the national Parliament through Government and the judicial system, including the courts and public*

6 Heather Grabbe, , "*European Union Conditionality and the "Acquis Communautaire"*", p 251.

7 José Ignacio Torreblanca, p 35.

prosecutor, and law enforcement agencies."[8]

Since the first enlargement round which includes the UK, Ireland and Denmark, it has become more challenging to become a member of the EU. The requirements to become a member has gradually increased because of the deepening of the EU and accumulated regulations which have to be adapted by candidate states. In the past decade because of the political status and economic condition of the candidate states, the enlargement process was more carefully managed. After the European Council summit held in Brussels in 2006 the absorption capacity of the Union for further enlargements was brought to the forefront again but this time more seriously. It was stated in the conclusions that:

"*The European Council stresses the importance of ensuring that the EU can maintain and deepen its own development. The pace of enlargement must take into account the capacity of the Union to absorb new members. The European Council invites the Commission to provide impact assessments on the key policy areas in the Commission's Opinion on a country's application for membership and in the course of accession negotiations. As the Union enlarges, successful European integration requires that EU institutions function effectively and that EU policies are further developed and financed in a sustainable manner.*"[9]

As it was stated in the conclusions, the main objective of this principle is to secure the safe and sound functioning of European integration from any kind of side effects of the accession of new member states.[10]

It is quite understandable from the perspective of the EU that it should take

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8 European Commission, "*Enlargement Strategy and Main Challenges 2012-2013*", Communication from the Commission to the European Parliament and the Council, Brussels, 10.10.2012, COM(2012) 600 final, p 4, available at http://eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri= COM:2012:0600:FIN:EN:PDF

9 European Council Meetings, Conclusions of the Presidency, Brussels, 12 February 2007, 16879/1/06 REV 1, p 3, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/92202.pdf

10 Mette Buskjær Christensen, "*EU-Turkey relations and the functioning of the EU*", Policy Brief, Danish Institute for International Studies, May 2009, p 3-4, available at http://accesstr.ces.metu.edu.tr/dosya/christensen.pdf

all necessary precautions in order to keep its ability to successfully absorb new members while maintaining effective decision making processes and well functioning institutions to achieve its final goal of political union. The objective of the EU is to keep its previous form after each enlargement which is an almost impossible task since all new entrants bring in their own perception of integration and ideas. The main problem of enlargement is preserving the ability to develop common policies regarding all areas while showing respect to different ideas of each members and find a common agreeable solution to various problems. [11]

Among all of the principles regulating this area, the most challenging and distinguished one is the indivisibility of the *acquis* communautaire. *In accordance with* this principle, new members must accept the current *acquis* in full which is approximately 100 000 pages, without any derogation. When it comes to enlargement, the *acquis* is defined very inclusively. It includes the basic Treaties; the international agreements; the legislation (regulations, directives and other legislative acts) passed since the foundation of the European Economic Community; all the jurisprudence of the European Court of Justice; and all the agreements, resolutions and statements by the European Council, the Commission and the Parliament.[12]

The alignment of the candidate states' legal system with EU acquis and its acceptance as a whole is seriously problematic. The acquis is an evolving and expanding mechanism. Taking into consideration the required time of accession, it is challenging for the candidate states to make necessary amendments to their current legislation and in the meantime to catch up with new developments in the acquis.

Because the EU's policies continue to evolve, meeting the requirements of membership is like trying to catch a moving vehicle. This is also the logic behind accession process' being an open ended negotiation. In the end it is the

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11 Tanel Kerikmäe and Lehte Roots, "*EU Enlargement as a Never Ending Story – Reasons for Changing Thoeretical Paradigm"*, Canada, 11-13 April 2012, p 7, available at http://www.bergfiles.com/i/bf5294e6a5h32i0

12 José Ignacio Torreblanca, p 23-24.

unanimous decision of all of the member states which finalize the accession process and let the new entrants become members.[13]

The success of the enlargement both from the point of view of the EU and negotiating State depends on well management of the process. Both sides should be well prepared for the integration. Accession of new members must not hinder prompt decision making of the EU. The union should keep its ability to take decisions and implement them while retaining EU citizens' support. The new entrants should also be ready to accept the community rules and give up some of their sovereign rights. The Union must also find a way to gain a momentum for further integration from these entries and foster hopes for further enlargement. To keep the position of the Union and its ability to absorb new members without giving up its sense of purpose, its unifying role and, more importantly, its ability to perform together in the benefits of its citizens is an important part of enlargement system.[14]

Another important aspect of enlargement is the security concerns caused by new entries. One of the main propulsive forces behind the enlargement is creating a more secure environment for its citizens. Past enlargement rounds proved that it is an effective way of pacification in the region and close neighbourhood. This perspective especially served effectively in legitimizing the fifth enlargement round which includes Central and Eastern European States. It is commonly argued by many scholars that the main force behind EU's Eastern enlargement is to expand the European security community to CEEC and bring permanent peace and prosperity to the region.[15]

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13 Nanette Neuwahl, "*Turkish EU Accession and EU Foreign Policy*", Collegium, No. 31, Spring 2005, pp11-28, p 18, available at https://www.coleurope.eu/content/publications/pdf/Collegium%2031.pdf.

14 Fraser Cameron, "*The European Union and the Challenge of Enlargement"*, Halki International Seminars , p 12, available at http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?fecvnodeid=128525&dom=1&groupot593=0c54e3b3-1e9c-be1e-2c24a6a8c7060233-&lng=en&fecvid=21&v21=128525&v33=106522&ots627=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&id=23278

15 Ayşe Sayın, "*A Content Analysis of the Security Dimension of the Turkish Accession to the European Union*", Master Thesis, Middle East Technical University , Ankara, July 2008, p 73, available at http://www.belgeler.com/blg/1guh/a-content-analysis-of-the-security-dimension-of-the-turkish-accession-to-the-european-union-avrupa-birligine-turk-

The other aspect of enlargement which was usually analyzed by scholars is the credibility of the EU regarding enlargement. Especially regarding Turkey's and CEEC's accession processes the relationship between candidate countries and the EU was troublesome. The entry of CEEC before Turkey despite Turkey's long term candidate status brought out the question if the EU have priorities regarding the entry sequence of candidate countries. From the perspective of the EU, referring to the abovementioned criteria it can be argued that the criteria for membership which are to be met by all candidates are clear and fixed. The path which candidate states should follow is known by them beforehand. After achieving the candidate status, it is up to them to meet the conditions as soon as possible. The conditions of enlargement are not completely arbitrary although some might claim that it is open to different interpretation. The applicants are aware of the fact that once they meet the requirements of membership they will be welcomed to the family.[16]

Concerning past enlargement rounds, accession criteria functioned effectively under two conditions. The first and relatively more important one was the credibility of the membership. The candidate states have to be sure in order to convince their citizens and go through a painful reform process that in the end if they successfully meet the criteria they will become members.[17] This issue was also articulated repeatedly by the European Commission. In its latest enlargement strategy document the Commission stated as follows:

"*Maintaining the credibility of the enlargement process is crucial to its success. This applies in terms of ensuring far reaching reforms are pursued in enlargement countries so that they meet the established criteria, in particular the Copenhagen criteria. It also applies in terms of ensuring the support of*

katiliminin-guvenlik-boyutunun-icerik-analizi.

16 Åsa Lundgren , "*Prioritisations in the Enlargement Process: Are some Candidates more 'European' than Others*?", Enlargement in Perspective edited by Helene Sjursen, Oslo, January 2005, p 155-156, available at http://www.sv.uio.no/arena/english/research/projects/cidel/old/Reports/AvilaReport_PartI.pdf

17 Sandra Lavenex, Frank Schimmelfennig, "*Relations with the Wider Europe*", JCMS 2008, Volume 46, Annual Review pp. 145–164, p 146, available at http://graduateinstitute.ch/files/live/sites/iheid/files/shared/summer/IA2009_readings/CD12.pdf.

Member states and their citizens."[18]

The second one is related to domestic conditions of the candidate country. The candidate states should be ready as a whole with its public and politicians to go through accession road. To be more precise, if the political costs of meeting the enlargement requirements are too high for the political power in charge, even credible membership incentives can not effectively contribute to the finalization of the process.[19]

Obviously the decision of the Union to commence the negotiations for the final aim of becoming a member with new states is a declaration that it is ready to expand. The rules of the game were set before the start and this declaration also means that only on the condition that the candidates are to reach an agreement with all 28 members of the union regarding the closure of negotiation chapters they will be admitted to the club. The decision to commence the negotiations does not mean that the process will necessarily end up with the membership of the applicant state.[20]

The enlargement has two dimensions which can be seen as different sides of a coin. On the one side there is the price of being a member of the Union, on the other side tough reform processes which should continue with patience and determination in the candidate states. The Union's non-conciliatory commitment to the process strengthens the candidate state governments' hand to keep the reform process in the agenda. The more the states show their full commitment to the process, the stronger the Union's support became. This mutual healthy effect of democratic incentives is the most important dynamic behind the success of transformation of previous candidate states.[21]

This abovementioned virtuous circle also worked for Turkey at the beginning of the accession road. With the incentive of future membership, the gov-

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18 Enlargement Strategy and Main Challenges 2012-2013, p 3.

19 Sandra Lavenex, Frank Schimmelfennig, p 146.

20 Christina J. Schneider, "*Conflict, Negotiation and European Union Enlargement*", Cambridge, January 2009, p 52.

21 Sinan Ülgen, "*Avoiding a Divorce: A Virtual Membership for Turkey*", Carnegie Papers, Brussels, December 2012, p 27, available at www.CarnegieEndowment.org/pubs.

ernments in office at that time along with the support of the regional actors and the EU Commission actualize several reforms between 1999 and 2005 most of which broke taboos in Turkey. Unfortunately for Turkey, these positive dynamics are now part of the past. The dynamics that were so essential in pushing forward the reform agenda in previous candidate countries were undermined by the unclear messages of the Union which were perceived as delaying tactics by Turkish side. The membership prize which was used by the EU proponents to justify critical reforms became unreliable.[22]

Above, the commonly debated aspects of the enlargement were analyzed as objectively as possible. From the perspective of the EU it can be said that the enlargement machinery served well to the purposes of the Union. However, it is hard to share this feeling from the perspective of the candidate states especially Turkey. As it was mentioned in this chapter, although the accession criteria seem clear and fixed, it can be applied to different candidates in a different manner. When combined with the political anti Turkish and anti enlargement declarations of the political leaders of the prominent members of the Union, the accession process become unmanageable and unsustainable. The next Chapter will focus on the relations between Turkey and the Union from the perspective of enlargement. Following this chapter, attitudes of the EU towards Turkey in accession process will be critically evaluated.

Chapter II

EU Turkey Relations from Enlargement Perspective

Even though the EU couldn't achieve political union and nowadays struggle against some problems stemming from economic crisis, it brought peace and prosperity to Europe. Enlargement is one of the main goals of the union. The provisions regarding enlargement in the treaties encourage new potential members to become a part of the EU. The machinery worked very well until the latest enlargement wave just before the emergence of the recent global crisis. After the crisis, it seems like the priorities of the EU have changed and

[22] Sinan Ülgen, p 27.

Turkey's membership became highly unlikely in the near future. These above-mentioned factors bring Turkey EU relationship to a new era.

This new era soon will bring out some new challenges for Turkey. For this reason a different point of view is necessary to evaluate Turkey EU relation. Turkey's EU accession story is a long one begun in the early 1960's with the sign of Ankara Agreement. In 1959 Turkey applied for associate membership to the EEC after a few years from its establishment. In September 1963 Ankara Agreement was signed with the aim of establishing a functioning customs union between Turkey and the EEC. The 28th article of this agreement is a clear sign of the EEC's and Turkey's intentions regarding the final point of this relationship. This article reads as follows:

"*As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community.*"[23]

It is clear that the agreement had not created an automatic mechanism which can change Turkey's position from being an associate to being a member, yet it established a solid membership perspective for Turkey. [24]

Turkey applied for full membership in the European Economic Community (EEC) in 1987 but was kindly rejected for various excusable reasons by the EEC and was advised to renew her application in a more favourable time and environment. In 1996, the Customs Union entered into force which was the end of the first phase envisaged in Ankara Agreement. It was the time to search for possibilities of membership. The need to improve democratic conditions of the country and to solve human rights issues were the only reasonable criteria

[23] Agreement Establishing an Association between the European Economic Community and Turkey, 12 September 1963, Official Journal of the European Communities, Volume 16, No C 113, 24 December 1973, available at http://ec.europa.eu/enlargement/pdf /turkey/association_agreement_1964_en.pdf

[24] Frank Schimmelfennig, "*Entrapped Again: The way to EU Membership Negotiations with Turkey*", International Politics Vol. 46, 4, pp 413–431, p 420, available at www.palgrave-journals.com/ip.

which could be applied Turkish membership.[25]

In 1997 after the Luxemburg Summit, the eligibility of Turkey to become a member was declared but candidate status was not given. This heightened the tension between the EU and Turkey. Fortunately after 2 years in 1999 the candidate status of Turkey was recognized. As mentioned before, a general membership perspective was articulated in the Ankara Agreement but it was not concrete until the EU granted Turkey candidate status in Helsinki. Turkey was promised that as soon as the country fulfils the Copenhagen criteria, the negotiations will commence.[26]

The decision given in the Helsinki Summit was crucial for the relationship. It ameliorated the conditions of EU-Turkey relations and dispelled the tension. There was an urgent need to bring in a new aspect to the Turkish case by establishing better communication ways to sustain the relations of the EU and Turkey. This decision served this purpose once declared that Turkey is a European Country and deserves to be treated like any other European State regarding EU membership one more time.[27]

According to Article 49 of the Treaty on European Union "*Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.*" Even though there had been some serious discussions regarding Turkey's being a European State, especially after the Helsinki decision, Turkey is now commonly accepted as a part of Europe both geographically and mentally. From the beginning of the relation between the EU and Turkey Turkey's europeanness has never been discussed in official documents and its location or identity has never been mentioned as an obstacle for membership.[28]

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25 Frank Schimmelfennig, p 420.

26 Frank Schimmelfennig , Stefan Engert, Heiko Knobel, "*Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey*", JCMS 2003 Volume 41. Number 3. pp. 495–518, p 506-507, available at http://media.library.ku.edu.tr/reserve/resfall08_09/INTL533_BRumelili/10thNovember/Costs_commitment_Wiley.pdf .

27 Atila Eralp , "*Turkey In The Enlargement Process: From Luxembourg To Helsinki*", p 7, available at http://sam.gov.tr/wp-content/uploads/2012/01/Atila-Eralp.pdf.

28 Thomas Diez, "*Expanding Europe: The Ethics of EU-Turkey Relation*'s", Ethics & International Affairs, Volume 21, Issue 4, pages 415–422, p 419, winter 2007, available at

During the process the Commission was asked to prepare a report regarding the possible impact of Turkey's accession to the Union. In 2004 the Commission prepared a report under the name of "*Issues Arising from Turkey's Membership Perspective",* in which it shared its opinions which depend on the deep analyses conducted by its organs. The following passages from the report would give the general perception of this relation from the point of view of the Union.

"*Accession of Turkey to the Union would be challenging both for the EU and Turkey. If well managed, it would offer important opportunities for both. The necessary preparations for accession would last well into the next decade. The EU will evolve over this period, and Turkey should change even more radically. The acquis will develop further and respond to the needs of an EU of 27 or more. Its development may also anticipate the challenges and opportunities of Turkey's accession*.

...Turkey's accession would be different from previous enlargements because of the combined impact of Turkey's population, size, geographical location, economic, security and military potential, as well as cultural and religious characteristics. "[29]

Soon after this above-mentioned report, the Commission also prepared its annual progress report about Turkey which was a relatively positive one compared to other reports concluding that:

"*In conclusion, Turkey has achieved significant legislative progress in many areas, through further reform packages, constitutional changes and the adoption of a new Penal Code, and in particular in those identified as priorities in last year's report and in the Accession Partnership. Important progress was made in the implementation of political reforms, but these need to be fur-*

https://www.carnegiecouncil.org/publications/journal/21_4-/essays/002.html/_res/id=sa_File1/TDiez.pdf

[29] Commission of the European Communities, "*Issues Arising from Turkey's Membership Perspective*" Commission Staff Working Document, Brussels, 6.10.2004, SEC(2004) 1202, COM(2004) 656 final, p 4, available at http://ec.europa.eu/enlargement/archives/pdf/key_documents/2004/issues_paper_en.pdf.

ther consolidated and broadened. This applies to the strengthening and full implementation of provisions related to the respect of fundamental freedoms and protection of human rights, including women's rights, trade union rights, minority rights and problems faced by non-Muslim religious communities…"[30]

Taking into consideration this abovementioned report and the Turkey's progress report prepared by the commission, at the summit which was held in Brussels at the end of 2004 the European Council gave a signal with its positive conclusions that the issue of Turkey's starting the accession negotiations is just a matter of time. The European Council made an important decision regarding Turkey's EU membership prospective. Finally as expected by both sides, the Council decided to open accession negotiations on 3 October 2005.

During Turkey's long wait in front of EU's door, both European Community's and the Union's efforts and pressures to Turkey to improve her human rights records and democracy standards could not achieve any results. It was the approved candidate status and concrete membership perspective that triggered the domestic political reform process. The 5 years between 1999 and 2004 were the most productive and fruitful period in Turkey EU relations. This alone is a strong evidence which shows the motivating power of credible conditionality.[31]

Turkey's case proved that a well functioning mechanism can provide incentives for the improvement of the situation in any state. Turkey has undergone a long and fast moving reform process especially in between 2002-2004 both internally and internationally without being forced to do so. It was the incentive of the price of being a part of a strong entity behind this success. All the Union did was creating credible and objective criteria and giving the impression that it will honour the contract.[32]

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30 Commission of the European Communities , "*2004 Regular Report on Turkey's Progress towards Accession*", Brussels, 6.10.2004, SEC(2004) 1201, COM(2004) 656 final**,** p 167, available at http://ec.europa.eu/enlargement/archives/pdf/key_documents/2004/rr_tr_2004_en.pdf

31 Frank Schimmelfennig , Stefan Engert, Heiko Knobel, p 509.

32 Paschalis Zilidis, "*Turkey and European Union. Problems and Prospects for Membership*", Naval Postgraduate School, June 2004, Thesis, Monterey, California, p 100, available at

After this hope pumping decision of the Council the real challenge in Turkey's membership journey began in her bumpy accession path. Turkeys' accession to the Union is by far the most debated one among member states and also its citizens. It caused several conflicts between proponents and opponents of Turkey's membership which sometimes disturbed Turkey's moral and motivation. Since the UK's becoming a member of the EU, probably EU has never faced a real challenge during enlargement processes. As in Turkey's accession UK's application also faced with strong French opposition. Just after the beginning of the negotiations, along with France some other EU members strongly opposed to full membership of Turkey. Some of them proposed alternative mechanisms such as privileged partnership or gradual membership and some of them insisted on permanent derogations in several policy areas which have not been articulated in other candidates' accession processes. Until now a way to reconcile these different positions of member states can not be found. For the finalization of Turkey's membership bid, a consensus among these members should be reached. Even though Turkey's accession has some supporters, none of them seem strong enough to convince others and, many governments still seem to keep their opposing position regarding further accession after Bulgaria, Romania (wide range of discriminatory measures applied to these countries) and Croatia's (a small and relatively well prepared country which did not cause significant conflicts among the members) becoming members.[33]

During Turkey's negotiations with the EU, as anticipated, many things have change especially after new entries and global economic crisis. In official documents of the Union these changes and their impact on enlargement was perceived. In its latest report concerning enlargement strategy the Commission stated that:

"*…the principle of own merits is key. The pace at which each country advances towards membership depends on its performance in meeting the necessary conditions. Enlargement is thus by definition a gradual process, based on*

http://www.dtic.mil/dtic/tr/fulltext/u2/a424737.pdf.

[33] Christina J. Schneider, p187.

solid and sustainable implementation of reforms by the countries concerned. The new approach to negotiations in the rule of law area introduces the need for solid track records of reform implementation to be developed throughout the negotiations process. Reforms need to be deeply entrenched, with the aim of irreversibility."[34]

As an example of these recent developments the principle of absorption capacity was brought into question several times during the discussions over Turkish enlargement which is seemed as a considerable threat to the institutional and socio-economic balance in the EU because of its large and growing population, relatively poor economic condition and socio-cultural differences.[35]

This can also be seen in the negotiating framework. The absorption capacity criteria are solidly embedded in this document.

"*…While having full regard to all Copenhagen criteria, including the absorption capacity of the Union…*

…In accordance with the conclusions of the Copenhagen European Council in 1993, the Union's capacity to absorb Turkey, while maintaining the momentum of European integration is an important consideration in the general interest of both the Union and Turkey…"[36]

To avoid from negative effects of these developments and disappointing declarations made by prominent EU members on Turkey, credibility of accession process was emphasized by EU officials several times. In the same document the Commission stated that:

"*The potential of the EU-Turkey relationship can be fully tapped only within the framework of an active and credible accession process. The accession process remains the most suitable framework for promoting EU-related reforms, developing dialogue on foreign and security policy issues, strengthen-*

34 Enlargement Strategy and Main Challenges 2012-2013, p 3.
35 Mette Buskjær Christensen, p 4.
36 Negotiating Framework, Luxembourg, 3 October 2005, p 1, available at //ec.europa.eu/enlargement/pdf/turkey/st200-02_05_tr_framedoc_en.pdf.

ing economic competitiveness and increasing cooperation in the field of energy and justice and home affairs. This process must respect the EU's commitments and the established conditionality."[37]

This statement included messages for both Turkey and the EU member states, especially for France, Austria and Germany whose officials made declarations regarding finding alternatives to membership and holding referendums on Turkey's membership after Turkey fulfils her obligations.

EU is a body which highly esteems the rule of law and demands the candidates to do the same. Its basic norms regarding enlargement oblige the EU to evaluate all applications from candidate countries according to the same criteria and standards. It is not possible to dismiss Turkey's application legitimately by making references to socioeconomic or cultural differences arguing their incompatibility. Given that Turkey fulfils the required criteria for membership and respects the liberal democratic values and norms, alleged religious and cultural incompatibilities can not be used for blocking Turkish membership by member states opposed to further enlargement, and as a consequence they will be rhetorically entrapped by their own rules.[38]

Effectiveness of the conditionality in enlargement process highly depends on the credibility of the process. Membership is the most effective motivator which can be offered to the candidates by the EU on the condition that it retains its credibility during the process. The credibility of the process is questionable in Turkey's case and to some degree in the current candidates in the Western Balkans. Additionally, in Turkey the domestic costs of accession process, especially for the political parties in office, are also usually very high since they touch on sensitive questions regarding national integrity such as Kurdish issue and Cyprus problem.[39]

It can be claimed that the organs of the Union are aware of this incontesta-

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37 Enlargement Strategy and Main Challenges 2012-2013, p 16.

38 Frank Schimmelfennig, p 415.

39 Ulrich Sedelmeier, "*Europeanisation in New Member and Candidate States*", Living Reviews in European Governance, Vol. 6, (2011), No. 1, p 31, available at http://www.livingreviews.org/lreg-2011-1

ble fact concerning the credibility of enlargement. The passage taken from an EU document which includes conclusion of a Council meeting held in Brussels at the end of 2012 is a clear sign of this awareness.

"*The Council recalls the renewed consensus on enlargement and reaffirms the importance of its coherent implementation, which is based on consolidation of commitments, fair and rigorous conditionality, better communication, combined with the EU's capacity, in all its dimensions, to integrate new members, with each country being assessed on its own merits. A credible enlargement policy is key to maintaining the momentum of reform in the countries concerned, and public support for enlargement in the Member States. The Council remains firmly committed to taking the enlargement process forward on the basis of agreed principles and conclusions*."[40]

There is no doubt that Turkey's accession has its own unique features and had to be dealt with in a different way. Turkey is not comparable with other accession countries such as Serbia and Iceland or even with the new members such as Croatia and Bulgaria. Most of the recent members of the Union and candidates are small scaled countries which do not have mighty regional and global ambitions. They wanted to have the sense of belonging to a strong entity and looked for the prosperity and security which the Union offered. Compared to those, Turkey with the positive effects of her recent economic development sees herself as an emerging regional and global power.

The future will show whether this self confidence depends on an illusion or solid facts. The recent ties established with neighbouring countries and developing economic and social relations with old ones flatter Turkey's national pride. Turkey likes to define herself as an equal partner of the Union and can give the impression that she can not accept an ordinary position among many other member states.[41]

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40 Council of the European Union, "*Council Conclusions on Enlargement and Stabilisation and Association Process",* 3210th General Affairs Council Meeting, Brussels, 11 December 2012, p 2, available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/134234.pdf.

41 Katinka Barysch, "*Why the EU and Turkey Need to Coordinate Their Foreign Policies*", Article, August 31, 2011, available at http://carnegieendowment.org/2011/08/31/why-eu-

Apart from Turkey's self perception, most of the EU documents accept the regional importance of Turkey especially its importance to EU'S foreign and security policies. These documents and similar declarations of some of the leaders of prominent EU members even France and Germany is further proof that Turkey is not seen as an average EU candidate country. Turkey in the future could be a triggering factor in the development of the Union's position in the world. The progress in Turkey's accession will surely have a positive influence on the evolution of Unions' security and defence policies. The process of membership and Turkey's integration in EU's security and foreign policy must go hand in hand. Otherwise at some point, there could be a considerable divergence regarding common security and defence policy of the Union among its members.[42]

This abovementioned behaviour of Turkey was not welcomed by some of the member states. Yet it does not make a difference because, Turkey has never seen eligible by these members neither when it is strong nor when it is weak. Whenever the Commission or the Council evaluates the relation between the EU and Turkey, they highlight the need to establish strong ties with Turkey but they could not make declarations showing their commitments to the process. [43]

Even after more then 50 years long relation, there are still some fractions within the EU's political sphere who still see Turkey outside the coverage zone of Europe on historical, religious and cultural grounds while admitting her strategic value and regional importance. Members who are belong to this group still live in the past and struggle against ghosts of the Ottoman Empire. It is mainly this perception which cripples the accession process. One of the main aims of the establishment of the Union is to bring peace to the continent. For this purpose after two devastating world war the nations who have fought

and-turkey-need-to-coordinate-their-foreign-policies/8kso.

42 Steven Blockmans, "*Participation of Turkey in the EU's common security and Defence Policy: Kingmaker or Trojan Horse?*", CLEER Working Paper No. 41 - March 2010, p 24, available at http://ghum.kuleuven.be/ggs/publications-/working_papers/new_series/wp41-50/wp41.pdf.

43 E. Fuat Keyman, Senem Aydın Düzgit, "*Transforming Turkey-EU Relations: Ground for Hope"*, Policy Brief 06, March 2013, Istanbul Policy Center, p 2, available at http://www.iai.it/pdf/GTE/GTE_PB_06.pdf.

against each other managed to break with the past and come together for a better future. It is ironic that after forgiving each other they could not let go of the memories of the past conflicts with Turkey and still turn their back to her.[44]

Another problematic aspect of Turkey EU relation is gaining the support of EU citizens and maintaining the public support in Turkey. Especially after Turkey's EU accession gain a solid form with the decision given in Helsinki, the public support started to decline gradually. After the fifth successful enlargement round, public sympathy for a possible enlargement including Balkan countries increased. However Turkey could not benefit from this trend. Turkish membership the least popular among possible future EU enlargement processes. [45] On the other side even though being a member of the Union still perceived as a positive development by Turkish public, because of the stalemate in the accession process, which is mostly believed to be caused by the EU side, EU membership becoming less attractive.

It is a challenging if not an impossible task for Turkey and the EU, with their current attitudes and ignorance of these facts, to reverse this course of events since most of the public debates comes to identity and values in the end.[46] Nevertheless, it is also possible to say that since the factors behind the continuing decrease in support are mostly figurative concerns, rather than tangible differences, there can be some ways to influence public support and tip the scales in favour of Turkey.[47]

Turkish and EU governments must find a way to win the hearts of European public by convincing them in the end they will benefit from this enlargement.

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44 John Redmond, "*Turkey and the European Union: Troubled European or European Trouble",* International Affairs 83: 2 (2007) 305-317, p 306, available at http://xa.yimg.com/kq/groups/17519069/675609452/name/eu-turkey1.pdf.

45 Antonia M. Ruiz-Jiménez, José I. Torreblanca, "*European Public Opinion and Turkey's Accession Making Sense of Arguments For and Against*", EPIN Working Paper No. 16, May 2007, p 23, available at http://www.ceps.be.

46 Antonia M. Ruiz-Jiménez, José I. Torreblanca, p 23.

47 Gizem Arıkan, *"Attitudes Towards the European Union in Turkey: The Role of Perceived Threats and Benefits*", PERCEPTIONS, Autumn 2012, Volume XVII, Number 3, pp. 81-103, p 97-98, available at http://sam.gov.tr/attitudes-towards-the-european-union-in-turkey-the-role-of-perceived-threats-and-benefits/.

The previous enlargements, especially the one which includes CEEC had the full support of EU elites. Despite unwilling support of much of the public, the accession of these countries became reality. Turkey's case is totally different from these examples because it is more debatable and it carries great risks. The negotiations began during these discussions without an effort to convince European public. EU leaders must stand behind their decisions in Helsinki and commence public campaigns to tell the public why Turkey should join the club. On the other side Turkish political leaders should warn their citizens that the accession road is full of challenges and sometimes disappointments but there will be the prize of membership.[48]

To conclude this section, it is obvious that both the expected benefits of accession from the point of view of Turkey and the EU shape the enlargement preferences. Each interest groups aim to gain maximum benefits from the process. In other words this process has two sides whose short and long term expectations usually contradict each other. Turkish membership will not only change the future of the Union but also the future of Turkey. The definition of European identity will change and most probably Christianity will not be at the centre of this new definition. The Union will become more global and the new borders will require a more proactive defence and foreign policy. On the other side Turkey will have to give up her hundred years old traditional policy concepts and also go through a challenging way in order to improve her economy and democracy.[49]

Chapter III

Changes in EU Enlargement Policy towards Turkey and Deviations from Regular Policy

Previous chapters should have given the impression that after this long

[48] Heather Grabbe, "*When Negotiations Begin: The Next Phase In Eu-Turkey Relations*", Centre for European Reform, p 6, available at http://www.cer.org.uk/publications/archive/essay/2004/when-negotiations-begin-next-phase-eu-turkey-relations

[49] Meltem Müftüler BAÇ, Evrim Taşkın, *"Turkey's Accession To The European Union: Does Culture And Identity Play A Role*?", Ankara Review of European Studies, Volume: 6, No:2 (Spring: 2007), pp. 31-50, p 49-50, available at http://dergiler.ankara.edu.tr/dergiler/16/1124/13229.pdf.

analysis of the EU enlargement system and its application to Turkey the topic will finally come to popular and mostly debated double standard issue. The arguments under the headings of "absorption capacity of the EU", " EU's enlargement fatigue", "EU has reached its limits", " further widening will hamper deepening" or " further enlargement weakens the ultimate goal political Union" has prevailed and begun to be articulated more often after Turkey's candidate status was approved. There was also a prevalent belief among European public that after the accession of the latest 12 newcomers the EU has reached its limits and now exhausted because of enlargement. This issue has also been more often discussed when it comes to Turkish accession.[50]

These discussions raised suspicions among Turkish public and even the most determined proponents of accession began to lose their appetites for membership. This chapter will try to analyze recent developments and changes in enlargement implementation of the EU from this perspective.

A union including the whole Europe might seem powerful but it has a lot of weaknesses. Controlling such power is almost impossible and with the increasing numbers of member states (especially already powerful States) and their interests, it is already becoming hard to reach common conclusions regarding important matters. The cost of governing the Union is also problematic. This perspective can help explain the change in enlargement policy and understand the reasons behind EU's denial of Turkey's membership. However there is still one question to be answered convincingly; why now? It is a challenging question and it is highly unlikely to find an appropriate and convincing answer to this simple question.

The decision of the EU to commence accession negotiations with Turkey reflected the EU members' different ideas and concerns over Turkey. To find an agreeable common position and to eliminate the concerns it was stated in the decision that Turkey's accession process has an open-ended nature meaning

[50] Seda Domaniç, "*The Turkish Accession to the European Union: Mutually beneficial? Mutually possible*?", Institude of Public Affairs, Research Reports, p 12, available at http://www.isp.org.pl/files/184444904708974090011694590 97.pdf.

the result of negotiations cannot be assured beforehand.[51]

Even though the commence of the accession negotiations was an important step forward for Turkey's membership adventure, some of the conditions articulated in this decision was harshly criticized in Turkey for being unfair. The wording of the document and the deviations from regular enlargement policy provoked the fear of being accepted to the Union as a second class member.[52]

This aspect of the negotiations was clearly articulated in Turkey's negotiating framework as follows:

"*The shared objective of the negotiations is accession. These negotiations are an open-ended process, the outcome of which cannot be guaranteed beforehand*."[53]

As it was mentioned above, after the fifth enlargement, the criteria of membership was made more difficult. Tougher principles and rules were included in Turkey's and Croatia's negotiating frameworks compared to the ones applied for the CEEC's. To give an example, the conditions of the CEEC and Turkey were similar before the accession and similar principles of conditionality could be applied to them. However the EU did not confine itself with the current criteria and avoid from giving any guarantees regarding the overarching nature of enlargement. Contrarily, it had stated that the negotiations will be an open-ended process. In addition to that, as a new instrument of enlargement opening and closing benchmarks was added to the process.[54]

The fifth enlargement was seen as long awaited reunification of the east with the west. The strong ties established in the past maybe with a little contribution of the Ottoman Empire can be a reason for the different policies towards

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51 Mette Buskjær Christensen, p 9.

52 Mette Buskjær Christensen, p 9.

53 Negotiating Framework, p 1.

54 Erhan Erçin, "*A Comparative Analysis Of The EU's Enlargement Policy towards Turkey-With Special Emphasis on the Cyprus Problem*", Doctorate Thesis, Istanbul, 2008, p 227, available at http://www.belgeler.com/blg/1g2i/a-comparative-analysis-of-the-eu-s-enlargement-policy-towards-turkey-with-special-emphasis-on-the-cyprus-problem-ab-nin-turkiye-karsisindaki-genisleme-politikasinin-mukayeseli-analizi-kibris-sorunun-yarattigi-etkilere-ozel-vurgu-ile

Turkey and the CEECs. The thought that the EU has priorities over candidate states depending on identity issues was confirmed again. Repeatedly, some of the EU officials stated that it was the Unions responsibility and duty to embrace these countries despite their differences.[55]

Furthermore, the possibility to apply permanent safeguards regarding free labor movements after Turkey's becoming a full member was articulated in official negotiating documents. Different from Turkey case, in the previous round of enlargements, EU accession documents had only foreseen transition periods and avoided using the term "permanent" most probably not to harm the effectiveness of conditionality.

This issue was reflected in Turkey's negotiating framework document as follows:

"*Long transitional periods, derogations, specific arrangements or permanent safeguard clauses, i.e. clauses which are permanently available as a basis for safeguard measures, may be considered. The Commission will include these, as appropriate, in its proposals in areas such as freedom of movement of persons, structural policies or agriculture.*"[56]

This open-ended and extended negotiation process which was damaged by uncertainties and political threats had turned the solvable problems between Turkey and the EU into a crisis. Turkey started to question if it worths to go through this painful way which requires political sacrifices and a considerable amount of budget. Adopting the mountains of EU acquis and giving up on self interests in foreign policy in order to comply with EU rules without the guarantee of full membership does not seem logical.[57]

The following paragraph which is taken from the negotiating framework of Turkey gives the Union the power to suspend the negotiations which will stand

55 Åsa Lundgren, p 170-171.

56 Negotiating Framework, p 5.

57 Beril Dedeoğlu, Seyfettin Gürsel, "*EU and Turkey: The Analysis of Privileged Partnership or Membership*", p 16, available at http://betam.bahcesehir.edu.tr/en/wp-content/uploads/2010/05/EU-and-Turkey-The-Analysis-of-Privileged-Partnership-or-Membership_final.pdf

over Turkey's head like the sword of Damocles. The Cyprus issue on the table, there is always the possibility to use this emergency valve.

"*In the case of a serious and persistent breach in Turkey of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law on which the Union is founded, the Commission will, on its own initiative or on the request of one third of the Member States, recommend the suspension of negotiations and propose the conditions for eventual resumption. The Council will decide by qualified majority on such a recommendation, after having heard Turkey, whether to suspend the negotiations and on the conditions for their resumption.*"[58]

As expected by Turkey this clause was used to force Turkey to give up on his interests regarding Cyprus issue. Some of the members tried to convince the Council to suspend the negotiations because of Turkey's not implementing additional protocol to South Cyprus. Their first attempt was not successful because of the binding effect of their past policy choices and decisions. During the discussions, the Commission reminded the Council that they should respect the principle of "pacta sund servanda" and honour the agreement. The Commission has been a determined supporter of Turkey's EU accession and fought for the credibility of the conditionality principle. The European Commission continues to use the power of rule of law to drive back these attempts and act like a lightning conductor between Turkey and the EU. The Commission is still an important actor in the enlargement discourse who is committed to the process.[59]

The unfavourable behaviours, declarations and policies of European leaders are in contradiction with all previous EU decisions and commitments. Sometimes they try to gain public support during the elections over Turkey's accession process. They harm EU's trustworthiness, credibility and reputation

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58 Negotiating Framework, p 2.

59 Alexander Burgin, "*Cosmopolitan Entrapment: The Failed Strategies to Reverse Turkey's EU Membership Eligibility*", Perspectives Vol. 18, No. 2 2010, pp 33-56, p 52, available at http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=137788.

especially regarding the principle of *pacta sunt servanda,* that contracts must be honoured. All of the contractual relations are actually open ended by nature. If any of the sides do not fulfil its obligations or if the results are not satisfying for each sides the contract may not be concluded. Sabotaging these talks at the beginning of the relationship by offering alternatives for the goal of membership is a clear breach of mutual trust. These kinds of attitudes provoke a nationalist backlash in the country and make relevant actors in Turkey to think that EU has discriminatory double, maybe triple standards when dealing with a country which does not share same religion and cultural background with it.[60]

There is no doubt that the EU wants a peaceful, stabilized and successful Turkey to keep the region secure and stable , not just because of its self concerns about the future supply of energy or uninterrupted transit of energy to meet its demands but also to keep its borders in order and to benefit economically from the region. Both proponents and opponents of Turkey's membership agree on one thing that they should keep Turkey engaged in the process as long as possible in order not to be affected by the negative developments in the region both economically and morally.[61]

Apart from above-mentioned issues which already make Turkish public and elite feel that their country has not been treated fairly and equally in the process, there are also some other solid facts and past experiences which affect their feelings negatively regarding the accession marathon.

In previous enlargements the Council always found a way to shorten the accession durations of some members and stretched the rules of enlargement. The Union mostly gives the impression that the Turkey's stubborn stance in Cyprus issue is the main problem blocking the negotiations. A divided island in the EU

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60 Martti Ahtisaari, Kurt Biedenkopf, Emma Bonino and others, "*Turkey in Europe: Breaking the Vicious Circle*", Second Report of the Independent Commission on Turkey, September 2009, page 9, available at http://www.independentcommissiononturkey.org/pdfs/2009_english.pdf.

61 Amanda Akçakoca, "*EU-Turkey Relations 43 Years on: Train Crash or Temporary Derailment*?", EPC Issue Paper No.50, November 2006, p 13, available at http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24a6a8c7060233&lng= en&id= 26865

was unimaginable at least because there is the requirement that the candidate states must solve their border problems and must have good relations with their neighbours, yet Cyprus is in the Union and still divided. It is hard to claim that it has good relations with its neighbours. After the end of the military regime in 1974, Greece applied for membership after one year with a creeping democracy. The Commission prepared its report and shared its negative opinion with the Council regarding the possibility of accession, yet Greece became a member in only 6 years. In a similar way during the negotiation process of the Europe Agreements with Central and Eastern European countries which were at that time have new democracies and just recovered from Soviet oppression, the EU did not even want to make a reference to EU membership, yet again in approximately 15 years most of them managed to meet the required conditions for membership which Turkey, a country with long democratic traditions could not manage in sixty years, and after a fast transformation they became EU members like butterflies coming out of their cocoons. [62]

There are also some differences regarding support for Turkey's accession process both morally and technically. From a financial aspect there is the fact that Turkey has not received as much financial support as Romania and Poland or other applicant states. Calculated as aid per capita its amount is much less than a quarter of what other candidates received. Given the fact that Turkey has not benefited from some of the pre-accession funds that have been available for the other candidate states to prepare them for membership, it is possible to assert that she has not been treated equally with the other old and new applicants.[63]

Because of the EU elites' full support, the Central and Eastern European countries were in a more advantageous position compared to Turkey regarding moral support. On all possible occasions the Union sent clear signals to the CEEC concerning their membership whereas they never averted from scolding Turkey whenever she made a mistake. Turkey had to wait for almost 45 years

62 John Redmond, p 316.
63 Åsa Lundgren, p 159.

to see the light behind the door to membership and especially today she is more hopeless than ever. Until the Council summit held in Luxemburg in December 1997, Turkey has never been mentioned seriously in enlargement discussions. For almost 15 years enlargement talks were about inclusion of CEECs, Cyprus and Malta. For Turkey it was only about the finalization of Customs Union. Every document which was prepared after Council meetings included some references to the need to strengthen the relations between the EU and Turkey. Despite Turkey's persistent requests Turkey's aspirations for membership has never been taken into consideration.[64]

These facts raise some questions. Why Turkey should implement the Copenhagen criteria in full, and for what reasons the EU repeatedly underlines the Cyprus problem and human rights debates and why these conditions seen as absolute pre-requisites for Turkish membership? As can be asserted from abovementioned discussions same issues have not been a problem for Spain, Greece, Cyprus, Romania or Bulgaria. What are the main differences between these countries and Turkey? This shows that there is something that makes accession of Turkey different, and that there are some more powerful issues affecting Turkey's accession. It seems like there is a notable double-standard regarding Turkey's case of joining the EU. [65]

It is not easy to understand the politics of the enlargement without taking identity aspects into account. As we discussed above thanks to the lack of identity problems CEES did not face serious difficulty during their accession processes. According to the Union these countries are always belong to Europe and there had been a short and involuntary separation. Contrary to this fact Turkey has always been seen as an outsider who is trying to crack open the doors of the Union. Both Turkey and the EU have always described Turkey as a bridge between Europe and Asia and referred this fact as an advantage. This phrase has always been used in a positive manner but maybe on the back-

64 Åsa Lundgren, p 160-161.

65 James Toghill, "*Are the Official Economic and Political Obstacles to Turkey's EU Accession Merely a 'Fig Leaf' Covering Real Unofficial Cultural and Religious Reservations*?", POLIS Journal Vol. 6, Winter 2011/2012, p 11, available at http://www.polis.leeds.ac.uk/assets/files/students/student-journal/ug-winter-11/james-toghill.pdf

ground, there is an insinuation of Turkey's not belonging to Europe. The awkward history of Turkish-EU relations illustrates the ambiguity of the relation between Turkey and the Union.[66]

Demanding full compliance with the whole entry criteria from Turkey and forcing her to fulfill all of her obligations before she can join the Union even without proper incentives is not fair and also is inconsistent with previous practice. It is possible to claim that there are still some member states in the Union which still do not comply fully with all the required conditions that candidate states must meet. The EU could have shown the same flexibility and tolerance to Turkey and assisted her in fulfilling the requirements of membership instead of making things difficult for her. Still Turkey's membership is more than a dream and it is achievable if the EU can display the same vision and strong political will as it did in the past.[67]

The negative debates in Europe regarding Turkey's EU membership have of course noticed even by ordinary citizens who have different concerns yet alone by interested parties in EU Turkey relation. The Turkish government's response to these negative declarations was sometimes passive, sometimes defensive but mostly reactionary. For the last 6-7 years not only the accession process was blocked but also the healthy communication channels between Turkey and the EU were interrupted. Turkey lost her faith in the process and this results slowing down in the reform process and decrease in public support. To accelerate the accession process and to break this vicious circle determination and sacrifice from both sides is necessary. Each of the parties blames each other for the stagnation. EU wants Turkey to continue the reform process and the commission tries to establish alternative ways to circumvent the blockage. Turkish stakeholders, including the most passionate supporters of the membership demand fair treatment to Turkey from the EU.[68]

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66 Thomas Risse, "*Identity Matters: Exploring the Ambivalence of EU Foreign Policy*", Global Policy Volume 3 . Supplement 1 . December 2012, p 92, available at http://onlinelibrary.wiley.com/doi/10.1111/1758-5899.12019/abstract

67 John Redmond, p 316-317.

68 Nathalie Tocci, Donatella Cugliandro*, "A European Communication Strategy on Turkey",* Talking Turkey In Europe: Towards a Differentiated Communication Strategy edited by

It is widely argued in Turkey that the EU with its abovementioned attitudes and double standards damages its own credibility and the credibility of the enlargement machinery not only in the eyes of Turkish public but also in the eyes of the worldwide supporters of Turkey's EU membership by renewing its political expectations from her and determining Turkey's EU accession requirements mostly in a subjective political manner rather than technical and objective manner. The politicization of the accession requirements together with continuing references to the open-endedness of the process and absorption capacity of the Union annoys Turkish public and create suspicions of a secret agenda behind them.[69]

The economic crisis in the Eurozone and its impacts, the increasing public scepticism towards enlargement, different approaches declarations of EU elites' regarding Turkey's possible future membership and negative public opinion caused by partly cultural and religious differences but mainly by manipulative acts of some EU politicians clouded EU Turkey relations despite the need to foster good neighbourly relations with Turkey. [70]

Another negative factor in this relation is the considerable differences among EU members regarding the future of the Union. This ambiguity also affected current relations and will surely affect Turkey's position after a possible accession.[71]

Some of the EU members notably the UK and especially the EU Commission, keep publically expressing their wish to see Turkey's accession proceed. Some have said that despite Pro-Turkey's efforts, Europe's disinterest and

Nathalie Tocci, *Quaderni IAI* , December 2008, pp 249-277, p 277, available at http://www.iai.it/pdf/Quaderni/Quaderni_E_13.pdf.

69 Mustafa Aydin, Asli Toksabay Esen, "*Conditionality, Impact and Prejudice: A Concluding View from Turkey*", Conditionality, Impact and Prejudice in Eu-Turkey Relations edited by Nathalie Tocci, IAI-TEPAV Report, Quaderni IAI, July 2007, pp 129-139, p 132, available at http://www.iai.it/content.asp?langid=1&contentid=136.

70 Vincent Morelli, "*European Union Enlargement: A Status Report on Turkey's Accession Negotiations*", Congressional Research Service, CRS Report for Congress, January 8, 2013, p 13, available at http://www.fas.org/sgp/crs/row/RS22517.pdf .

71 Aylin Güney, "*The Future of Turkey in the European Union*", Futures 37 (2005) 303–316, Ankara, p 312, available at http://yoksis.bilkent.edu.tr/doi_getpdf/articles/10.1016-j.futures.2004.07.001.pdf.

scepticism towards Turkey case, turning its back to Turkey and the perceived EU procrastination regarding accession negotiations have strengthen a growing ambivalence in Turkey concerning its future in the Union.[72]

It was up to the Union to offer membership to Turkey , in Helsinki they decided to start negotiations and now the EU is obliged to conduct the accession negotiations fairly and seriously because of the past promises to conduct membership negotiations. Moreover if Turkey meets the criteria of accession negotiations she should be granted with nothing but full membership.[73]

Chapter 4
Conclusion

In the first chapter, the functioning of the enlargement machinery was analyzed referring past enlargements and focusing on most debatable aspects of the system. At the end, the result of the analysis gives the reader the impression that the system was not flawless. In the second and third chapters the application of the enlargement rules and principles to Turkey's enlargement case were mostly addressed. It can be asserted from the abovementioned discussions that both in the EU and Turkey it is widely believed that Turkey has not been treated fairly. This chapter will make a general assessment of the accession process before passing through second part.

The requirement for membership in the Treaty are shared values articulated in Article 2 of TEU and the will and determination to work together in order to join the club. Turkey had set its course towards Europe since its birth as a new nation out of the ashes of Ottoman Empire. Since the sign of Ankara Agreement, Turkey is knocking the doors of the EU for more than 50 years even though she was rejected several times. This is a clear sign of Turkey's intentions and determination. Her commitment to the idea of becoming a member of the Union should have been rewarded at the very least.

It is not wrong to say that despite being a respected member of all European

[72] Vincent Morelli, p 13.
[73] Thomas Diez, p 419.

organization except the EU and her continuous efforts to become a part of the EU, Turkey is still seen as Europe's "Other" because of her historical, cultural and mainly religious differences. Turkey will not be able to get rid of being seen as other by Europeans.[74]

At this point the negative contributions of the Turks to this perception should be mentioned briefly.

If we set aside the political support of the EU governments and focus on public support among EU nationals, a dramatic table will present itself.[75] This situation itself illustrates the failure of Turkish people in representing their values and true nature of being a real Turk. The main opposition comes from the States which host a considerable amount of Turkish population.

Turkish workers' wide presence in Europe, mainly in Germany, unfortunately has been a negative factor regarding Turkey's image. They could not be able to integrate into the societies they lived in due to low level of education and language problem. They created enclosed small living areas like Chinatowns in the USA and as a result of this attitude they were regarded as an outside agent injected into the body.[76]

Several scholars emphasized the fact that since conditions beyond Turkey's control, such as the possible referendums to be held regarding her membership and EU's integration capacity became to the fore of the discussions, the Turkish candidacy has gained a peculiar feature. These newly highlighted subjective criteria damaged the efficiency of conditionality. Furthermore, continuous discussions among the Union members regarding the EU's own identity issues and unrealized institutional reforms also affected Turkey's membership prospects. These developments combining with the negative public opinion of the

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74 James Toghill p 17.

75 Heinz Kramer, "*Turkey and the EU: The EU's Perspective*", Insight Turkey, October-November 2006, Volume 8, No 4, pp 24-32, p 26, available at http://www.swp-berlin.org/fileadmin/contents/products/fachpublikationen/Heinz_Kramer_ks.pdf.

76 Yalım Eralp," *Eu's Rejection of Turkey: The Real Underlying Reason*", Policy Brief, January 2011, Pb. no 21, Global Political Trends Center, Istanbul, p 5, available at http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=136478.

EU citizens reversed the pro- EU trends in Turkey and ignited fears of being rejected again.[77] One of the other factors which paved the way to the common Turkish belief that, after the finalisation of the accession process it would be Turkey who is going to be pay for lack of the absorption capacity of the EU, was the interactive relation between open ended nature of Turkey's accession process and EU's absorption capacity.[78]

One of the aspects of the relation between the EU and Turkey is foreign policy. Turkey's EU membership goal plays an important role in shaping Turkey's decisions in this area. Even though she was surrounded with conflicting areas and she has to develop several policies for her each neighbour Turkey has been able to conduct a foreign policy in compliance with the EU's foreign policy goals. It is going to be hard to continue this trend without the prospect of membership. Until now, Turkey did this on her own taking considerable risks even without the possibility to share her opinions concerning EU's foreign policy decisions which in the end may affect Turkey's relations with her neighbours. This is not a sustainable position both from economic and political aspects without a guaranteed accession process with the aim of full unconditional membership. In her turbulent but naturally prosperous region where Turkey is located, strong alliances matter. If the EU is absent, there will be always someone else ready to fill the gap.[79]

The main question regarding this relation is what will happen if Turkey successfully meets the accession criteria which are by far the most challenging requirements compared to other past and present candidate states. This means that Turkey will earn her place in the Union deservingly after going through a painful process. After all these political, economic, social and legal transformation, a possible rejection by the EU would certainly be an insult to the principles of fairness and "pacta sund servanda" that must underpin the EU. This scenario would damage EU Turkey relations irreparably and force Turkey to

77 Mustafa Aydin, Asli Toksabay Esen, p 133.
78 Erhan Erçin, p 145.
79 Can Buharalı, "*Turkey's Foreign Policy Towards EU Membership: A Security Perspective"*, p 17-18, available at http://www.edam.org.tr/document/Buharali1.pdf.

re-orientate itself away from the West and look for new alliances in the Middle East and Central Asia.[80] The Shangai Five can be seen as an alternatine if the Russia-Turkey relations deepens.

Finally the current and possible future effects of the deteriorating relation between the EU and Turkey must be addressed.

Because of the lost of faith, the reform process in Turkey came to a halt. It was the incentive of full membership which keeps Turkey on track. Current stagnation in EU Turkey relations brought democratization into a standstill. A vicious cycle took place of the virtuous cycle in the relationship and this situation further parted Turkey's and the Union's ways. There are several ways to overcome this impasse, but all of them require determination and sacrifices from both sides. The two sides must set aside their differences and agree on short and long term measures which reinvigorate the relations. As it has before, EU can act as an anchor for Turkish democracy with a stronger commitment and a broader vision. This may require a restructuring of Turkey-EU relations from the aspect of mutual benefits.[81]

The post 2005 developments shows that Turkey's membership in the near future is not likely, but there is still hope for the finalisation of the accession process. Bearing this in mind the reform process must go on because, past years proved that EU's demands from Turkey were mostly beneficial for Turkish citizens. If the EU wishes to see a more developed and prosperous Turkey by its side the EU must treat her carefully in a manner that will repair the damages of ongoing accession process.[82]

Part II - Excusable Reasons of the EU for Rejecting Turkey's Membership: Borders, Population and Migration

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80 Adam Hug, "*Making Turkish Membership a Reality*", Turkey in Europe: The economic case for Turkish membership of the European Union, Edited by Adam Hug, Foreign Policy Center, 2008, p 72, available at http://fpc.org.uk/fsblob/991.pdf.

81 Senem Aydın-Düzgit, E. Fuat Keyman," *EU-Turkey Relations and the Stagnation of Turkish Democracy*", Global Turkey in Europe, Istanbul Policy Center, Working Paper 02, p 17-18, available at http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lng=en&id=156275.

82 Paschalis Zilidis, p 101.

Chapter V - Introduction - Generally Articulated Reasons of Unrealized Union of EU and Turkey

It has always been articulated that EU's approach to Turkey's membership affected by several prejudices and EU never intended to accept Turkey as a member. I partly agree with the second part of this statement but I believe that EU's policy regarding Turkey's membership also shaped by some tangible and reasonable facts not merely biased thoughts.

In these past sixty years many other European countries became EU members including the ones which were not even a State at that time. Turkey's accession to European Union alone caused much more oppositions and hot arguments in the EU member states than the enlargement wave which includes 12 states which even have major differences among themselves and perceived more problematic than the accession of last 13 members. Many EU and Turkish scholars discussed this issue in their works. There are several reasons which were mentioned in these works. Turkey's geopolitical location and current population seem to be the more reasonable and unbiased reasons. To critically and neutrally assess these problems may help Turkey stay in its path towards EU and be open to new offers regarding its membership other than becoming a full member of the EU.

As it has been several times articulated by Turkey sceptics, it is no secret that the accession of Turkey will to a great extend determine the future shape of both Turkey and the EU.

Turkish accession will surely change the power balance in the region and affect the EU's demography, security and foreign policy, financial dynamics and institutional capacity. The important question is will these changes be for better or worse when the accession process comes to an end. If Turkey and the EU will manage to overcome these negative effects of this merge with a consensus the results will be beneficial for both sides.[83]

[83] Mehmet Öğütçü, "*Turkey and the European Union: How to Achieve a Forward-looking and "Win-Win" Accession by 2015?"* Collegium, No. 31, Spring 2005, pp 37-54, p 38, available at https://www.coleurope.eu/content/publications/pdf/-Collegium%2031.pdf.

It is possible to separate the reasons of Turkey's exclusion from the EU into two main groups. Turkey's relatively poor economic conditions, negative human rights record, high population and population growth rate, location and external borders, international relations and finally slowly developing democracy can be grouped under the heading of official reasons. These factors are represented within the official criteria which is applied to all candidate countries. Identity, religion and cultural differences constitute the unofficial reasons of Turkey's exclusion.[84]

Economic implications of Turkey will be similar to the fifth enlargement. Cost and benefit analysis conducted by the EU and Turkey indicates that the consequences will be manageable [85], but there are still some serious concerns among EU public that the country is too big and too poor and because of this, her accession will require huge financial transfers from current Member States which will decrease their welfare level. [86]

Another important official reason is Turkey's possible influence on decision-making mechanism of the EU.[87] It is feared that the dynamics of Turkey's different political system and her ambitious foreign policy objectives might cause significant problems in EU decision-making which is already a complex structure. Even though it is highly unlikely, there is a possibility that after her becoming member Turkey might use her voting powers to block decision making processes contradicting her national interests and dominate the EU's agenda. [88] EU has experienced six enlargement rounds and successfully survived. Each enlargement rounds caused serious concerns but with proper precautions evolved by the EU institutions it has been proved that these concerns were groundless. Abovementioned concerns regarding Turkey's possible influence

84 James Toghill, p 2.

85 Annabelle Littoz-Monnet and Beatriz Villanueva Penas, "*Turkey and the European Union; The Implications of a Specific Enlargement*", p 16, available at http://aei.pitt.edu/9307/1/050404Turquie-ALM-BVP.pdf

86 Amanda Akçakoca, Fraser Cameron and Eberhard Rhein, **"***Turkey – Ready for the EU*?", EPC Issue Paper No. 16, 28.9.2004, p 14, available at http://www.epc.eu/pub_details.php?cat_id=2&pub_id=297.

87 Amanda Akçakoca, Fraser Cameron and Eberhard Rhein, p14.

88 Heinz Kramer, Turkey and the EU, p 29.

are also groundless. Even though Turkey is a big country even with the current voting system she could not affect EU decisions without serious support from other states.

Turkey's accession will also change the current balance between small and big states. Turkey will have a considerable impact on EU foreign policy interests because of her non-European borders with the Middle East, Caucasus and the Black Sea and at the same time she will play a key role regarding the EU's future energy supplies.[89]

Actually this is the reason why EU finally commenced accession negotiations with Turkey. Both the proponents and opponents of Turkish membership attach importance to relations with Turkey regarding these abovementioned issues and do not want to lose her. It is widely argued that if the EU desires to become an important player it needs Turkey. It is expected that Turkey's possible accession will force the Union to put in an appearance in the global arena and make her presence felt in the world politics.

Some argue that Turkey' s membership will help the EU to reach its final goal which was envisaged by the founding fathers of the Union and become a political union. On the contrary there is also a prevailed opinion that Turkish accession could wide-open the gates of the Union and trigger further enlargement which would turn the EU into an economic interest based entity and political union dreams would come to naught. [90] It is not possible to know what future will bring, but both scenarios are possible with or without Turkey. It will not be Turkey's decision to establish a political union; it will be the Union's.

Cyprus issue has always been a hindering object in front of Turkey's EU accession. It was one of the understandable political problems stated by EU officials. When they claimed that Southern Cyprus' becoming a member of the EU would help the solution of the problem they lose the upper hand in this issue.

It is a known fact that Turkey will not recognize Republic of Cyprus with-

89 Annabelle Littoz-Monnet and Beatriz Villanueva Penas, p 16.
90 Heinz Kramer, Turkey and the EU, p 29.

out finding a solution on the island. Cyprus's using her veto power over Turkey is not acceptable for Turkey. Turkey will not bow to the pressures coming from Cyprus and give up on her interests over the island.[91]

EU is always proud of using accession process effectively for peace building. Because of some political considerations and Greece's non-conciliatory stance, the EU members decided not to make the solution of the current problems a precondition for Cyprus.[92] Now the same EU members declare their oppositions to Turkey's becoming a member without a settlement in the island. If Southern Cyprus' becoming a member would help establishing a permanent solution, Turkey's membership would help more. Cyprus issue would become a family matter and bring the parties to equal position.[93]

Turkey's accession is both important for the EU and Turkey. The EU must take responsibility and prevent Cyprus from blocking the negotiations for its own interests. Turkey has supported the Annan plan for a permanent solution and did her fair share of work.[94] It is now the EU's and Cyprus's turn to show their good will. If the EU could not contribute settlement of the problem it should at least stop bringing this problem into negotiation table.

Regarding unofficial maybe a little bit emotional reasons of Turkey's exclusion from the club, identity politics is always in the lead. There are two different and contradicting European identity constructions. The first one is the inclusionary and liberal Europe which welcomes new members with the condition that they comply with the Copenhagen criteria. The other one is the exclusionary European identity which rejects Turkey and alike highlighting geographical, cultural, historical and religious differences. Going further some versions use the modern European identity in a primitive way in order that

91 Nanette Neuwahl, p 27.

92 Simon Duke, Aurélie Courtier, "*EU Peacebuilding: Concepts, Players and Instruments*", The European Union and Peacebuilding - Policy and Legal Aspects edited by Steven Blocmans Jan Wouters andTom Ruys, T.M.C. Asser Institute University of Leuven, The Netherlands, 2010, p 36.

93 Heinz Kramer, "*Turkey's Accession Process tu the EU – The Agenda Behind the Agenda*", SWP Comments 25, October 2009, p 4-5, available at http://www.swp-berlin.org/fileadmin/contents/products/comments/2009C25_krm_ks.pdf.

94 Nanette Neuwahl, p 27.

others who do not share the same history that paves the way to this identity can never take part in it.[95]

The EU in the eyes of the world is characterized by a religious and cultural heterogeneity and was shown as an example of a body in which members set aside their differences and come together for a common purpose. European integration from the beginning has always planned to unify European states which have their own features under an umbrella. It was this perspective which brought prosperity and peace to the continent. This is why, any European country which shares some fundamental values might be considered as a possible accession country.[96]

Regarding unofficial reasons of Turkey's exclusion, it would be an overstatement to claim that these arguments are unethical, but the principles that these arguments depend on are either flawed or subjective. The application of these principles to Turkey's case is not possible without running into serious objections.[97]

After this brief analysis the following three chapters will discuss three of the official reasons in detail.

Chapter VI
Problems Stemming from Turkey's Population

Turkey's growing population has always been a concern for the EU. Positive and especially negative aspects of this issue in case of Turkey's membership have repeatedly been addressed in official documents. Turkey could be a good market with its 75 million population and its economic and political relations with post USSR countries, yet after integration still there is the risk of population movements towards current EU countries which may harm their economies and raise their unemployment rates. Furthermore there is always

[95] Thomas Risse, p 93.

[96] Rana Deep Islam, "*The Accession of Turkey to the European Union Security Implications for Transatlantic Relations*", DIAS-Analyse, Nr. 29 · Mai 2008, Düsseldorf, p 6, available at www.dias-online.org.

[97] Thomas Diez, p 418.

the risk of overestimated possible influence of Turkey in decision making processes because of the EU's voting system and parliamentary structure.

According to the data taken from Eurostat, Turkey's current population is slightly over 75,5 million and with its population growth rate she will be the most populated state in less than 10 years among current EU members and candidate countries.[98]

Both European public and elite argue that Turkey having considerably higher population than almost all of the member states will bring an enormous financial burden on the EU without offering much in return. She will also have a strong voice in the decision making process because of her large population.[99]

It is a known fact that institutional arrangements based on population will bring Turkey on the same level with Germany, France, Britain, and Italy. For voting in the European Council, according to the new double majority system at least 55% of Member States representing at least 65% of the population of the EU will constitute a qualified majority which will be necessary to pass most of the decisions. Turkey would have the same voting power as any other state in the first part of the voting system but in the second part it will be powerful as Germany. This will give Turkey at least an important power to block some decisions with a little support from other members. Turkey might establish coalitions with Mediterranean countries on some issues or with the UK regarding foreign policy issues. Additionally Turkey will have considerable number of seats in the European parliament.[100]

It is expected by the EU and its citizens that entry of a large and poor country such as Turkey to the Union would trigger labour movements and thus they don't want to let Turkey in, in order to avoid from a possible decrease in

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98 For more information please visit http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home .

99 İ. Semih Akçomak and Saeed Parto, "*How "black" is the black sheep compared to all others? Turkey and the EU*", June 2006, UNU MERIT Working Papers, p 13, available at http://www.merit.unu.edu/publications/wppdf/2006/wp2006-024.pdf

100 Martti Ahtisaari and others, "*Turkey in Europe: More than a promise*?" Report of the Independent Commission on Turkey, September 2004, p 24, available at http://www.emmabonino.it/campagne/turchia/english.pdf

their incomes because of cheaper labour force which will penetrate European labour markets. [101] This issue is also related to the migration issue and will be addressed in the following chapters more elaborately.

Germany and France are by far the most important states in the EU whose thoughts and perceptions regarding Turkey's accession will affect her future. For different reasons both of these countries declared their oppositions to Turkish membership publicly. If Turkey becomes a member of the Union, these two states would have to face with a new developing rival whose political benefits would not most probably overlap in most areas with theirs. The functioning power balance in between these two states would change forever with the entry of another ambitious and powerful player.[102]

There is also an emotional side of this problem. Turkey is a secular Muslim country. Almost all of her citizens are Muslim. With Turkey in the EU the number of Muslims in the EU will exceed 100 million. With the possibility of free movements of persons it is likely that there will be religious confrontations especially among conservatives of these two religions.

The EU's concerns about Turkey's membership regarding its population are quite understandable. The EU has a well functioning mechanism and does not want a possible disruption. However, even problems stemming from Turkey's population are manageable with proper approaches. The EU has a considerable experience dealing with these kinds of problems regarding enlargement. The real question is will it take such a risk.

Next chapter will deal with another important and problematic aspect of Turkish membership which is Turkey's long and porous borders and her border management capacity.

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[101] European Council: Accession of Turkey to the European Union, Sumun, 2013, p 5, available at http://sumun.org/wp-content/uploads/2013/04/EC.pdf

[102] Francesco M. Bongiovanni, "*Turkey-EU Relationship: The Rationale for a Third Way*", Turkish Policy Quarterly, Spring 2012, Vol. 11, No: 1, p 87, available at http://www.turkishpolicy.com/dosyalar/files/2012-1-FrancescoBongiovanni.pdf.

Chapter VII
Extension of EU's Borders to Non European Neighbourhood

The Commission document regarding the possible affects of Turkey's potential membership addressed this issue as follows:

"*Turkey's accession to the European Union would lengthen the external border. As the borders with Bulgaria and Greece will be internal, the external land border would be extended to Georgia (276 km), Armenia (328 km), Azerbaijan (18 km), Iraq (384 km), Iran (560 km) and Syria (911 km). To this new external land border of 2,477 km should be added the Black Sea blue border which runs for 1,762 km and the Aegean and Mediterranean blue border which runs for 4,768 km. Much of the border in the east and south-east crosses mountainous terrain*."[103]

One of the criticisms regarding Turkey's accession to the EU articulated by opponents of her membership is her geographical position which makes the country a major transit route for trafficking. They argue that despite its strategic advantages Turkey's position may endanger EU's own security, and to protect the Union from possible threats, Turkey should not be accepted as a member.[104]

As mentioned above, accession will mean that the EU's new borders will reach Iraq, Iran and Syria in the south and south east and the Caucasus countries Armenia, Azerbaijan and Georgia in the east.[105] Within these borders the problems of Turkey with its non European neighbours could be a serious problem for EU especially regarding its foreign and security policy. Middle East is a problematic region. Syria's and Iraq's current situation is obvious. Iran is a powerful country which has a deep rooted history and it is an historical fact that Iran and Turkey had never been allies. The events which occurred in 2010 which had almost triggered an armed conflict between Israel and Turkey should be enough to illustrate what may happen if one of these countries loses their control.

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103 Issues Arising from Turkey's Membership Perspective, p 41-42.
104 Ayşe Sayın, p 130.
105 Amanda Akçakoca, Fraser Cameron and Eberhard Rhein, p 11.

Turkey's unstable international relations and potential conflicts with its neighbours carry great risk. Turkey's EU accession may affect the situation in the region both in a positive way and negative way. It could help achieving a permanent peace in the region but it also may drag EU in this conflicting zone. Turkey is positioned at the east end of Europe; hence Turkey's membership would be the end of the EU's eastward enlargement. At the same time this enlargement would bring new dimensions to the EU – Middle East and Eurasia relationship for better or worse.[106]

The EU has experienced huge difficulties in dealing with crisis situations in its close neighbourhood like the Balkans which is a relatively small region compared to the Middle East and Caucasus. EU's current crisis management capacity is a matter of great concern. After Turkey's becoming a member the Union is supposed to cope with the problems of the Middle East which is a more troublesome area. Some argue that, for that reason alone, Turkey's membership should be treated very cautiously.[107]

The regions surrounding Turkey also represent the EU's primary security interests, Balkans, the Caucasus, Central Asia, Iraq, Iran, Israel, Palestine and the Mediterranean.[108] These regions surrounding Turkey have always been very critical places where nowadays a new variety of security threats such as illegal migration, international terrorism, drug and human trafficking, transnational organized crime has developed because of authority gap and lack of effective control.[109]

Undoubtedly this aspect of the relation between the EU and Turkey is the most challenging one. These challenges will sharpen the Union's foreign policy concerns regarding these regions and force the EU to play a more active role via increasing its involvement in issues which were previously would have

106 Michael Emerson, Nathalie Tocci, "*Turkey as a Bridgehead and Spearhead Integrating EU and Turkish Foreign Policy*", CEPS EU-Turkey Working Papers, No. 1/August 2004, p 33, available at http://www.ceps.be.
107 Rana Deep Islam, p 27.
108 Michael Emerson, Nathalie Tocci, p 33.
109 Ayşe Sayın, p 31.

been considered as Turkey's own business. These issues vary from border controls to conflicts over natural resources.[110]

There are also some doubts that because of her geographical position and regional interests, Turkey's foreign policy choices might differ from those of Europe's. The EU's priorities are; keeping the region stable, establishing long term regional friendships, staying out of local disputes, securing oil and energy supplies, continuing trade with local states, and the like. Turkey's regional interests are shaped by different factors other than the EU's. Historical bounds with the region (Ottoman heritage), cultural and religious factors, and territorial and security concerns dominate Turkish foreign policy. The mutually beneficial convergence of the policies of the EU and Turkey in this area require sacrifices and hard work from both sides.[111]

Related to this issue, stemming from above mentioned discussions regarding foreign policy priorities, it is argued that, Turkey might use the EU to realize her own national foreign policy interests in her region instead of aligning her foreign policy and security objectives those of the EU's giving up on her priorities regarding this area. If such fears are to become real, the EU would turn into a front-Line actor in this volatile and insecure region. Shortly, Turkey's membership would become a liability for the EU from the angle of security and defence policy instead of being a security policy asset.[112]

During the accession process Turkey will have to align her visa and border management rules with the EU's in full without any exceptions as soon as possible. The Commission has been addressing this issue in its regular progress reports. The latest report proves that alignment in this area will be seriously problematic for Turkey and it is not likely that the EU will ease Turkey's burden. In the latest report the Commission stated that:

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110 Kirsty Hughes*,"Turkey and the European Union:Just Another Enlargement?",* A Friends of Europe working paper, June 2004, p 27, available at http://www.sant.ox.ac.uk/seesox/michaelmas04/turkey_report2004.pdf,

111 Mehmet Öğütçü, p 45.

112 Heinz Kramer, Turkey and the EU, p 30.

"*…Turkey did not align with the EU lists of countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.*

... Limited progress can be reported on external borders and Schengen. Legislation on transferring border management tasks and coordination to a specialized and professional border security entity has not yet been submitted to parliament for approval.

... Adoption of the Law on Foreigners and International Protection as well as reforms in the area of border management continue to be a priority. Only limited progress could be reported in aligning visa legislation…"[113]

Turkish case has some special characteristics which need to be taken into consideration. Most of the Turkey's neighbours are in the EU's obligatory visa list to which currently Turkey does not apply visa restrictions. Turkey's obligation to align her visa policy with the EU's will affect her current relations with her neighbours.[114]

Apart from these concerns there is also another problem regarding the management of the borders. This issue was addressed in the commission's reports as follows:

"*The management of the EU's long new external borders would constitute an important policy challenge and require significant investment. Managing migration and asylum as well as fighting organised crime, terrorism, trafficking of human beings, drugs and arms smuggling would all be facilitated through closer cooperation both before and after accession.*"[115]

Turkey is in the neighbourhood of the Union which is an attractive region for citizens of poor and politically unstable countries who are easy preys for human smugglers. It is also a good market for drugs and other illegal substanc-

113 European Commission, "Turkey 2012 Progress Report", Commission Staff Working Document, Brussels, 10.10.2012, SWD(2012) 336 final, p 76, available at, http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/tr_rapport_2012_en.pdf

114 Michael Emerson, Nathalie Tocci, p 30-31.

115 Issues Arising from Turkey's Membership Perspective, p 5-6.

es. This makes Turkey an origin, destination and transit country for transnational crime.[116]

The capability of the Union to control its external borders and more importantly the capacity of its current foreign, security and defence policy to take action beyond them will be challenged by Turkey's accession. Today the EU is consisted of 28 states which have different interests and concerns regarding foreign, security and defence policy matters. The EU has to melt all these interests in a pot and shape a common strategy which would satisfy all of the members. With the inclusion of Turkey the manageability of this process would be further challenging. Therefore the Union would need to build an operable system whereby its huge economic, religious, social, cultural and political diversity would no longer be an obstacle to effective decision-making.[117] If the EU manages to do that, the disadvantages of possible new external borders would turn to be advantageous and serve the EU's purposes.

Chapter VIII

Migration Issue

From the perspective of Turkey's accession, migration issue has two different aspects. The first is the most important one which is the possible migration especially labour migration from Turkey to the EU in case of Turkey's membership. The second one is already a significant problem for the EU which is illegal migration of third country nationals through Turkey. Both aspects will be respectively addressed in this chapter.

There are several factors which increase the EU's concerns about possible migration flows from Turkey in case of her membership. Turkey's high population with high growth rate is the leading one. Following this; Turkey's low level of economic wealth and the past migration flows from Turkey to Europe are other factors. Taking these facts into consideration EU's concerns are quite

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116 Seiju Desai, "*Turkey in the European Union: A Security Perspective – Risk or Opportunity?",* Defence Studies, 5:3, 366-393, 2005, p 378, available at http://www.tandfonline.com/doi/pdf/10.1080/14702430500492807.

117 Michael Emerson, Nathalie Tocci, p 8.

understandable. Turkish membership has the potential to trigger greater migration to certain EU countries especially Germany, France Austria and the Netherlands. These possible migration flows would harm the social structure of these countries and create new social problems for governments.[118]

The effect of Turkey's membership on migration is not easily predictable. The accession of Turkey will probably take at least another 10 years. The demographic developments in Turkey and the EU during this time would change both sides' approach to this issue. Migration would be something desirable due to the need to labour force. Economic conditions of Turkey would be much better in ten years time and migration policies of EU members would change. Taking into consideration abovementioned factors, estimated numbers regarding migration potential from Turkey vary considerably, the most recent number being of 2.7 million people. This number may seem insignificant considering the total population of the EU which is approximately half a billion. However, these migration movements are not expected to be equally distributed among member states; those states with large Turkish communities may well receive the big part of migration flows.[119] Because of these concerns Turkey is the only EU candidate country that does not have a visa-free regime with the EU.[120]

Probably after a long transition period following Turkish membership Turkey will become a part of Schengen area. Any failure of Turkey regarding border management will directly affect the Union. Turkey is a transit country which is located in between Europe which is a prosperous area and Asia and Africa which are problematic areas for the EU for many reasons such as terrorism, human trafficking, drugs, illegal immigration and other aspects of organised crime.[121] If Turkey's membership dreams come true, it will be a place

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118 Abdi Pehlivan, "*Turkey's Membership in the European Union: Analyzing Potential Benefits and Drawbacks*", Naval Postgraduate School, Thesis, Monterey, California, December 2008, p 39, available at http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ada493841

119 Martti Ahtisaari and others, p 32-33.

120 Amanda Paul, *Turkey's EU Journey: What Next?,* Insight Turkey Vol. 14 / No. 3 / 2012, pp. 25-33, p 29, available at http://www.epc.eu/documents/uploads/pub_2852_insight_turkey.pdf.

121 Sami Andoura, "*EU's Capacity to Absorb Turkey*", 21/12/2005, p 9, available at http://www.egmontinstitute.be/papers/06/eu/EU-Turkey.pdf.

of attraction for unstable states surrounding her and once Turkey's borders are crossed illegally, there will be undesired immigration movements to the member states from the Middle East and Asia.[122]

Especially Turkey's eastern borders are a matter of concern because of natural reasons. These borders are relatively porous and it is extremely difficult and costly to protect and manage these borders. Developing an effective system to deal with the problems stemming from Turkey's position such as asylum, illegal immigration and transnational organised crime would be economically burdensome and could raise the issue of burden sharing by the current member states.[123] In order to overcome fair doubts of the EU member states Turkey must show that she can make the EU standards regarding this issue applicable in Turkey.[124]

Migration is a serious problem of the world, which should be dealt with caution and with respect to human rights. From this perspective the EU's fear of possible migration from and through Turkey is understandable. It is true that there had been some serious labour migration movements from Turkey to the EU in the past. However there are some promising developments regarding this issue. Due to the improvement in Turkey's economy Turks who are resident in the EU started to move back to Turkey. The latest researches indicate that Germany is no longer an exclusive country of immigration for Turkish citizens. Considerable numbers of Turkish nationals go back to Turkey.[125]

There are also other factors that needed to be taken into consideration regarding estimated numbers of possible Turkish immigrants. EU membership of Turkey will increase welfare level of Turkish citizens and with increasing foreign investment new employment possibilities will emerge. This will help to close the gap regarding per capita income between Turkey and the EU. These

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122 Beril Dedeoğlu, Seyfettin Gürsel, p 15.

123 Sami Andoura, p 4-5.

124 Miroslav N. Jovanović, "*Turkey in the European Union: Euthanasia or the Rejuvenation of Europe?",* Scuola Estiva Di Venezia**,** İX Edizione, 14-16 July 2005, p 31, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=747224

125 European Stability Initiative, "*Facts and figures Related to Visa-free Travel for Turkey*", Brussels, 15 June 2012, p 16, available at www.esiweb.org.

possible developments will encourage potential migrants from Turkey to stay in their home country rather than moving into EU member states.[126]

Regarding Turkey's being a transit country for illegal migration; the EU membership of Turkey will probably make positive contributions to this area. The official documents of the EU show that there are already a considerable number of illegal immigrants passing through Turkey to the EU member states. Because of the lack of a readmission agreement with Turkey these immigrants became Union's problem. If Turkey becomes a member, because of the Dublin regulations since she will be the country of first entry in most cases, she will have to deal with the problems of these illegal immigrants and this issue will become Turkey's problem instead of being others' problem. This will ease the EU's burden and force Turkey to stiffen her border controls.

Chapter IX
Conclusion

The reasons discussed in the previous three chapters can be deemed justifiable from the point of view of the EU. It is obvious that under current circumstances Turkey does not have much to lose from this unification whereas the risk for the EU is considerably high.

Future security and identity considerations have an important place in the discussions among EU member states regarding the repercussions of Turkey's joining the Union. Some strongly argue that the EU should keep its religious and cultural integrity and stay a closed inward-looking club. According to the defenders of this idea, the Union must be protected against Turkish migrants who does not at least whole heartedly share European values. Others visualise the EU as a multicultural global actor which can make differences in its region and furthermore in the whole world and contribute to efforts to create a more secure and peaceful world.[127] Accepting Turkey to the club will mean that the

[126] Demet Beton, "*Migration Issues: Turkey and The European Union*", Doctorate Thesis, Eastern Mediterranean University, March 2011, Gazimağusa, North Cyprus, p 103, available at http://i-rep.emu.edu.tr:8080/jspui/bitstream/11129/179/1/Beton.pdf.

[127] Seiju Desai p 387.

EU wants to take the necessary risks in order to play an important role in world politics.

There is also a common belief that further enlargement and especially Turkey's accession to the Union will interrupt deepening process. However, the historical record shows that with each enlargement the EU comes closer to become a political union. Further enlargement may actually force all member states to search for an effective mechanism such as federalism as a solution to governance and decision making problems.[128]

Turkey is a dam between problematic Middle East region and the EU. This dam should be supported to a certain degree in order to keep it functioning and durable. Otherwise the flood will sweep Turkey and ruin the Europe. On the other hand this dam should not be too strong to give the impression to its owners that they don't need any help from outsiders. Turkey's accession process and the EU's attitudes towards Turkey during the process proved that it will not be the Turkey's hard work to meet the required criteria which will determine her fate; it will be the Union's needs and political choices. Either excusable or not, there is nothing Turkey can do to convince Europeans that all the reasons and the obstacles grounded with these reasons used to exclude Turkey from the Union can be managed with a little bit of trust and faith.

Final Assessment

It is obvious that these abovementioned problems will not be easily solved in the near future, but there is also the fact that Turkey and the EU mutually need each other for several reasons, security concerns being in the first place. It can be said that without proper mechanisms and a sound functioning political unity, Turkey's membership for the EU can be too jeopardous. However, making this relationship beneficial and sustainable for the EU and Turkey, a solution which could satisfy both sides must be found.[129]

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128 José Ignacio Torreblanca, p 19.

129 Barry Buzan and Thomas Diez, "*The European Union and Turkey*", Survival, Volume 41, No1, Spring 1999, pp 41-57, p 52, available at http://akmc.biz/ShareSpace/NienkeThesis/Thesis/CHAPTERS/VIV%20Bilbiography/The%20European%20Union%20-and%20Turkey%20-%20Buzan%20and%20Diez.pdf.

After Turkey's latest partially successful efforts to meet the standards regarding Copenhagen Criteria, the relation between EU and Turkey came to a different era. Now, Turkey is a relatively more democratic State compared to 10 years ago whose judicial and political settlement with its past is still in progress. Compared to some of the EU countries, one can claim that Turkey is economically more stable and strong.

It is argued that the absorption capacity of the EU is not adequate for now and will not be adequate for an enlargement including Turkey in the near future. However there are also some solid facts which should be taken into consideration by the supporters of this idea. It is a fact that the EU has already absorbed 13 new members in the last 9 years successfully and in every possible occasion it is proud of declaring that the EU is now stronger and more secure with its enlarged form. This also means that the Union is in fact capable of accommodating Turkey. [130]

Turkey has always been alone in his accession way. Apart from the UK whose support is only limited to governmental support, Turkey does not have strong supporters among the EU members. As in other member states the UK public does not also lean to Turkish membership. Turkey has always been considered to be too different. It is almost not likely to find resembling statements made by the EU officials articulating that Turkey is a part of the "European Family" compared to the declarations regarding other candidates. She has been consistently treated like a step child.[131]

Although it was Turkey who knocked the door of the EU for more then fifty years in the end it was the EU who opened the door slightly and half heartedly welcomed Turkey to the EU. This act alone gives the right to Turkey to demand to be treated equally with other candidates.

For the healthy continuation of accession process, both sides have to bear

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130 John Redmond, p 317.

131 H. Tansu Tuna, "*A Comparison of Accession Processes of the Central and Eastern European Countries and Turkey to the European Union: Can the Turkish Star be an EU Star*?", Thesis, August 2007, p 80-81, available athttp://www.ekonomi.gov.tr/upload/BF09AE98-D8D3-8566-4520B0D124E5614D/Tansu_Tuna.pdf

responsibility for their failures and stop blaming each other and public. In the end it is the commissioned individuals or elected politicians who make decisions that shape the future of this relationship. Their motivating or demotivating declarations and actions regarding the membership of an aspiring state directly affect these states' ability to accede. While EU members manipulate each other to pursue their interests, Turkey sits by herself; irritated by the unfair treatment it faces is waiting for another possibility to make a last-ditch effort to gain membership.[132] Because of these reasons the number of supporters of Turkey's EU accession endeavours decreased in the last 10 years because of the loss of the belief that Turkey in near future will be a part of the EU.

Especially the fast and determined reform process in between 1999-2005, Turkey proved that he is worthy of membership and she can meet the criteria for membership with a constructive approach supported with credible and right incentives. It is true that Turkey still have some human rights and democracy problems, but it is also true that most of the member states are still trying to improve conditions in their country regarding these problems. It is also true that Turkey's developing economy needs further stability measures, but it is hard to claim that EU members' economic conditions are perfect.

Furthermore, there are some reasons to expect that there will be developments in Turkey and the EU until Turkey's membership becomes a reality which is not likely to be less than another 10-15 years. Maybe in this time the things which are now being discussed will not be a matter of concern anymore.[133]

Regarding Turkey's accession, it is always possible to claim that it is not all about the readiness of Turkey; it is mostly the readiness of the EU which at the end brings the relation to a stalemate. Turkish membership will undoubtedly change the dynamics of the EU. The answer to the question whether is it going

[132] Tahira Dean, "*Popular Resistance, Leadership Attitudes, and Turkish Accession to the European Union*", p 8, available at http://web3.unt.edu/honors/eaglefeather/wp-content/2011/08/Dean-Tahira-072911.pdf

[133] Neill Nugent, "*Turkey's Membership Application: Implications for the EU*", Jean Monnet/ Robert Schuman Paper Series Vol. 5 No. 26, August 2005, p 19, available athttp://www6.miami.edu/eucenter/nugentfinal.pdf.

to be for better or worse depends on the performance of the EU and Turkey regarding the management of the process.

Consequently, the EU's policy to stall Turkey hiding behind vaguely defined and immeasurable conditions and principles does not seem like a sustainable policy regarding Turkey's accession to the Union. Everybody knows that accepting a new member is in reality a political decision based on qualitative assessments rather than quantitative measurement.[134]

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[134] John Redmond, p 317.

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THE SIGNIFICANCE OF PRACTICAL TRAINING IN LEGAL EDUCATION AND ITS CONTRIBUTION TO EMPLOYMENTIN TURKEY *

Makale Adı: Türkiye'de Hukuk Öğreniminde Pratik Eğitim ve Bu Eğitimin İstihdama Katkısının Değeri

Yücel Oğurlu, Seda Bağdatlı Kalkan*****

ABSTRACT

Law, as a major stabilizer in the fields of politics, socio-economic and culture, satisfies the sense of justice in the society while aiming to reach the idea of "justice" and plays a significant role for the benefit of the society. The legal system in Turkey, which is based on the legal system of the continental Europe and exists in the form of statute lawand the legal education concerns, has gone through a rapid renovation process in the last century. Today, while under the influence of EU legal system, still going through its renovation originated in the West, it has been paving the way for the legal education to be transformed into a standard and traceable structure as it is the case with the other fields within the "Bologna Process". In one sense, this process enables an "internal control" which is open to an "external control", attaches importance particularly to the fact that theories are in parallel to practice and so to employment.

The students at law schools in Turkey are not allowed a vocational specialization in any legal areas prior to their under graduation. In the period following their under graduation, they are qualified as lawyers and notaries upon completion of their internship or as judges or prosecutors provided that they succeed in exams. Regarding the issue of employment in the postgraduate period, the study will analyze the ratio of the theoretical and practice courses that students of law were taking during their studies and the ratio of their contribution to the legal profession by using the methods of survey research and statistical analysis.

One of the most common problems that law students face is to harmonizing their

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expectations for the future and what they learn and practice during their studies[1].

The students at law schools in Turkey are not allowed a vocational specialization in any legal areas prior to their under graduation. In the period following their under graduation, they are qualified as lawyers and notaries upon completion of their internship or as judges or prosecutors provided that they succeed in exams. However, there has always been criticism concerning the legal education itself. The legal experts who cannot pursue the social and legal changes, adapt themselves to the new laws, and so go beyond the level of a technician in the field have drawn strong criticism.[2]

The general criticism concerning the significance of practical legal education in Turkey is as follows[3]:

- The professors cannot transfer the theoretical knowledge they teach into practice,

- The testing system does not serve the purpose of assessing the application of the theoretical knowledge and putting it into practice,

- Theory and practice are treated and separately and cannot be integrated,

- Law students are educated to become 'technicians' rather than 'legal experts'.

As a matter of fact, in all of the criticismoutlined above is argued that the legal education in Turkey fails to integrate the theory into practice. This study uses scientific methods to measure the effectiveness of arguments. Regarding the issue of employment in the postgraduate period, the study analyses the ratio of the theoretical and practice courses that students of law were taking during their studies and the ratio of their contribution to the legal profession by using the methods of survey research

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1 Larry E. RIBSTEIN, `Practicing Theory: Legal Education for the Twenty-First Century`, Iowa Law Review, Vol. 96, 2011, p. 1672.

2 KARAYALÇIN, Yasar, (2001), Hukukta *Öğretim-Kaynaklar-Metot,* Ankara, Banka ve Ticaret Hukuku Araştırma Enstitüsü Yay., p.38.

3 It has been also criticized that the legal education in Turkey has been carried out as mass education due to the big numbers of students, a teacher-centered approach has been adopted in which student are in a passive role, the system is based on memorization, the current legal education cannot contribute to the student's training in the legal profession and their reasoning skills, the curriculum is over-loaded and the lack of variety in terms of selective courses, and the period of education is short. KARAYALÇIN, Yaşar, Hukukta *Öğretim-Kaynaklar-Metot-Problem Çözme,* Genisletilmiş 5. Baskı, Ankara 2001, p.38; ÇELIKEL, Aysel, "Hukuk Eğitimi ve Öğretimi Konusunda Düşünceler", Yeni Türkiye, Yargı Reformu Özel Sayısı, Ankara, 1996, p.10, p.903; Hukuk *Öğretimi* Sempozyumu, (Editör: Adnan Güriz), AÜHF. Yayınları no: 497, Ankara 1993; ÖZTÜRK, Hakan, "Hukukçularin Eğitimi", Türkiye Adalet Akademisi Dergisi (TAAD), Nisan 2010, Sayi: 1, p.167-192.

and statistical analysis. The survey was carried out in seven law schools in bothstate and private universities. The questions were answered by the law studentsand the academicstaff as well as professional lawyers, judges and prosecutors in the profession. The role of the unions in the profession in the postgraduate period was also examined and it was attempted to establish a relationship between the profession and the legal education.

Key Words: Law schools, Faculty of Law, Practical Training, Employment of Lawyers, "clinical education model", vocational training, internship, judge, prosecutor, lawyer, academic staff on law,

ÖZET

Hukuk, bir yandan siyaset, sosyal, ekonomik ve kültür alanlarında sosyal yapının önemli bir dengeleyicisi olarak "adalet" idealine ulaşmayı hedeflerken diğer yandan toplumun adalet duygusunu tatmin etme ve kamu yararını sağlama yönünde önemli bir görevi üstlenir. Zamana bağlı olarak değişen hukuk sistemi, hukuk öğreniminin de değişimini zorunlu kılar. Genel olarak Kıta Avrupasi hukuk sistemine dayalı olan Türkiye'deki hukuk sistemi de bu gerçeğin bir parçasıdır ve son yüzyılda hızlı bir yenileme sürecine girmiş ve hukuk eğitimi de buna bağlı olarak farklı bir yönde şekillenmiştir. Son zamanlarda ise, özellikle AB hukuk sisteminin etkisi altında yenilenmesini halen sürdürürken "Bologna Süreci" standartları aracılığıyla hukuk öğreniminin izlenebilir ve denetlenebilir bir yapıya dönüştürülmesinin minimum ölçüde de olsa izlenebilir ve denetlenebilir bir yapıya kavuşması sağlanmıştır. Bir anlamda bu süreç, hukuk eğitiminde de "dış denetim"e açık bir "iç denetim" yoluyla, öğrenilen teoriyi uygulama ve böylece istihdama katkısı yönüyle farklılık sağlamaya başlamıstır. Türkiye'de hukuk fakültelerinde öğrencilerin mezuniyetlerinden önce herhangi bir hukuk sahasında önceden bir mesleki uzmanlık kazanma şansları bulunmamaktadır. Mezunlar mezuniyetlerini müteakiben, sınavlarda başarılı olmaları şartıyla ve stajlarının hemen bitiminde avukat, noter, hakim ya da savcı vasfını kazanırlar.

Bu çalışmada, hukuk öğrencilerinin lisans eğitimleri sırasında aldıkları teorik ve pratik derslerin hukuk mesleğine katkılarını ve araçların etkinliğini ölçmek amacıyla bilimsel yöntemler kullanılarak ölçülmeye çalışılmıştır. Anket, yedi farklı devlet ve özel üniversitesindeki hukuk fakültelerinde yürütülmüştür. Sorular, öğrenci, genç akademisyen ve meslekte profesyonel avukatlar, hakimler ve savcılar tarafından cevaplanmıştır.

Anahtar Kelimeler: Hukuk fakültesi, hukuk mesleği, pratik dersler, hukukçuların istihdamı, `klinik öğrenim usulü`, mesleki eğitim, staj, hakim, savcı, avukat, hukukçu akademisyen

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DATA ANALYSIS AND FINDINGS

This research is conducted in state and foundational universities in Istanbul among students of Faculties of Law as well as lawyers, judges and prosecutors to represent professionals. The survey that was applied on 382 randomly selected test subjects had completely answered its task. In this section, the findings of this survey will be presented and results will be discussed.

Table 1: Gender

Gender	Frequency	Percent
Female	160	42.2
Male	219	57.8
Total	379	100.0
N/A	3	
Total	**382**	

Table 1 indicates that 160 of the 382 of totalparticipants in the survey are female, and 219 of them are male. 3 participants didn't respond to this question.

Table 2: Type of the University

Type of University	Frequency	Percent
State	219	58,2
Private	157	41,8
Total	376	100,0
N/A	6	
Total	**382**	

Table 2 indicates that 219 of the 382 of total participants in the survey studied or are studying at state universities, and 157 of them studied or are studying at private universities. 6 participants didn't respond to this question.

Table 3: Educational Status

Educational Status	Frequency	Percent
3rd year	34	9,1
4th year	205	55,0
Graduate	64	17,2
Postgraduate	70	18,8
Total	373	100,0
N/A	9	
Total	**382**	

Based on Table 3, it is shown that 34 of the 382 of total participants in the survey are in their third year, 205 of them are in their fourth year, 64 of them are graduates and 70 of them have earned their master's degrees. 9 participants did not respond to this question.

Table 4: Employment Status

Employment Status	Frequency	Percent
Judge	25	14,1
Prosecutor	7	4,0
Lawyer	72	40,7
Research Assistant	59	33,3
Other	14	7,9
Total	177	100,0
Not Graduate	205	
Total	**382**	

Table 4 indicates that 25 of the 382 of total participants in the survey work as judges, 7 of them are prosecutors, 72 of them are lawyers, 59 of them are research assistants and 14 of them work in different fields. (It differs from Table 3 because of the fact that some of the graduates defined themselves as law students of the final, fourth year of study.

An opinion scale consisted of 25 questions was used in the study in order to measure the perception of professional competence for all 382 participants. A score of professional competence perception for each participant in the survey

was created by adding up scores ascribed to each option on the scale. Kolmogorov-Smirnov Z test was applied to the perception of professional competence scores. As a result of the findings by using this test, parametric tests can be used when it is observed that data is normally distributed. However, nonparametric tests are used when data is not normally distributed.

The Kolmogorov-Smirnov Z test tries to test that the sample distribution (the distribution of the perception of professional competence scores for 382 participants) is equal to the normal distribution. The hypotheses for this test are:

H_0= the sample distribution is equal to the normal distribution.

H_1= the sample distribution is not equal to the normal distribution.

Table 5: Test for Normality forthe Scale on Perception of Professional Competence (The Kolmogorov-Smirnov Z test)

	Scale
Number of Participants	347
Mean	68,1
Standard Deviation	16,2
Kolmogorov-Smirnov Z	1,377
Significance	0,045

Since the p-value which is the calculated probability of obtaining Z statistics for the scale using the Kolmogorov-Smirnov Z test is greater than 0.01, we fail to reject the null hypothesis (H_0). It is concluded that the sample distribution is normal with a level of significance at 0.01. Within this frame, it is seen fit to conduct nonparametric tests for the comparison of means for the perception of professional competence scores.

Gender-based Analysis

Independent sample z test was used to determine if the scores of the female and male participants collected from the scale differ. The hypotheses for this test are:

H_0= themean of scale scores for the female (μ_1) and the male (μ_2) are equal ($\mu_1=\mu_2$)

H_1= the mean of scale scores of the female (μ_1) and the male (μ_2) are not equal ($\mu_1\neq\mu_2$)

Before the independent sample z test was applied, it was tested to see if the variables tested in the groups for are equal or not and it was hypothesized that the variables tested in the groups for are equal (F=0,537 p=0,464).

Table 6: Descriptive Statistics for the Gender-based Scale Scores

	Gender	N	Mean	Standard Deviation
Scale	Female	146	685,205	17,2
	Male	199	676,985	15,5

Table 6 indicates that the point of scale scores for female participants is 68,5 and the point of scale scores for male participants is 67,7.

Table 7: Test Results

Levene's Test for Equality of Variances							
						95% Confidence Interval	
	F	**Significance**	**Z**	**df**	**Significance (two- tailed)**	**Lower**	**Upper**
Equal Varations Assumed	0,537	0,464	0,465	343	0,462	-2,66	4,30
Equal Varations Not Assumed			0,457	293	0,648	-2,72	4,36

Based on Table 7, it is shown that Z value is 0,465 and the *probability value p is*0.642 (p>0.05), so, the null hypothesis is not rejected ensuring us of the conclusion that "there is no difference between the mean of scale scores for the female and male participants".

Analysis Based on the Type of University

Independent sample z test was used to determine if the scores of the participants collected from the scale differ depending on the type of universities they are studying or studied at. The hypotheses for the z test are:

H_0= the mean of scale scores for the participants who are studying/studied at state universities (μ_1) and those who are studying/studied at private universities (μ_2) are equal ($\mu_1=\mu_2$).

H_1= the mean of scale scores for the participants who are studying/studied at state universities (μ_1) and those who are studying/studied at private universities (μ_2) are not equal ($\mu_1\neq\mu_2$).

Before the independent sample z test was applied, it was tested to see if the variables tested in the groups for are equal or not and the hypothesis that the variables tested in the groups for are equal is rejected (F=4,891 p=0,028).

Table 8: Descriptive Statisticsfor the Scale Scores Based on the Type of University

University Type	N	Mean	Standard Deviation
State	199	64,2	14,3
Private	143	73,7	17,2

Based on Table 8, it is shown that the mean of scale scores for the participants who are studying/studied at state universities is 64,2 and the mean of scale scores for the participants who are studying/studied at private universities is 73,7.

Table 9: Test Results

Levene's Test for Equality of Variances							
						95% Confidence Interval	
	F	Significance	Z	df	Significance (two- tailed)	Lower	Upper
Equal Varations Assumed	4,891	0,028	-5,565	340	0,000	-12,85	-6,14
Equal Varations Not Assumed			-5,397	270	0,000	-12,96	-6,03

Based on Table 9, it is shown that Z value is -5.397and the *probability value p is*0.00 (p<0.05), so, the null hypothesis is rejected, ensuring us of the conclusion that "the scores for the participants based on the type of the university

they are studying/studied at differ". As Table 8 indicates too, it is concluded that the mean of scale scores for the participants who are studying/studied at private universities are higher than the ones who are studying/studied at state universities.

Analysis Based on the Educational Status

*Analysis*of Variance *(ANOVA)* was used to see if there is any difference between the scores of the participants collected from the scale based on their educational status.*Analysis*of Variance is used to determine whether there are any differences between the means of three or more independent groups. The hypotheses for the *analysis* of variance are:

H_0= the mean of scale scores for the 4 groups are equal ($\mu_1 = \mu_2 = \mu_3$).

H_1= There is at least 1 group for which themean of scale scores is different from themeans of scale scoresforthe other 4 groups.

Table 10: Descriptive Statistics for the Scale Scores Based on Educational Status

	N	Mean	Standard Deviation
3rd year	30	723,3	13,3
4th year	186	705,8	16,8
Graduate	58	642,2	14,5
Postgraduate	65	624,6	15,5
Total	**339**	**680,9**	**16,3**

Table 11: Testing for Homogeneity of Variance

Levene Test	df1	df2	Significance
1,676	3	335	0,172

Before proceeding to the analysis of variance, the homogeneity *of variance which is one of the assumptions in the analysis of variants was tested using Levene's test* (Table 11). The F value is 1,676 and the probability value p is 0,172, so, the hypothesis that the variables are equal is not rejected with a level of significance at 0.05 which ensures us of the conclusion that the analysis of variance can be used.

Table 12: Results of the *Analysis of Variance*

	Sum of Squares	df	Mean Square	F	Significance
Within Group	4620,0	3	1540,0	6,06	0,001
Between Groups	85136,2	335	254,1		
Total	**89756,2**	**338**			

Based on Table 12, the probability value p is 0, 01 ($p<0.05$) and so the null hypothesis is rejected which ensures us of the conclusion that the means of scale scores forthe participants based on their educational status are different from each other. In order to determine which groups caused the difference between themeans of scale scores, the Tukey's test was used. Table 13 illustrates the table of multiple comparisons using the Tukey's test.

Table 13: Results of the Multiple Comparison Test

					95% Significance Interval	
Educatinal Status	**Educatinal Status**	**Mean Difference**	**Standard Deviation**	**Significance**	**Lower**	**Upper**
	4th year	1,75269	3,13649	0,944	-6,3457	9,8510
3rd year	Graduate	8,10920	3,58510	0,109	-1,1474	17,3658
	Postgraduate	9,87179*	3,51868	0,027	0,7867	18,9569
	3rd year	-1,75269	3,13649	0,944	-9,8510	6,3457
4th year	Graduate	6,35651*	2,39750	0,042	0,1662	12,5468
	Postgraduate	8,11911*	2,29699	0,003	2,1884	14,0499
	3rd year	-8,1092	3,5851	0,109	-17,3658	1,1474
Graduate	4rd year	-6,35651*	2,3975	0,042	-12,5468	-0,1662
	Postgraduate	1,7626	2,8795	0,928	-5,6722	9,1974
	3rd year	-9,87179*	3,51868	0,027	-18,9569	-0,7867
Postgraduate	4rd year	-8,11911*	2,29699	0,003	-14,0499	-2,1884
	Graduate	-1,7626	2,87950	0,928	-9,1974	5,6722

Based on Table 13, it is concluded that there are differences between the bolded and asteriskedgroups. Themean of scale scores forthe 3rd year students and the postgraduates differ. When the significance intervals for the two groups are examined, it is monitored that the lower and upper limits are positive, so, it is concluded that the mean of scale scores for the 3rd year studentsare higher than the mean of scale scores forthe postgraduates. Similarly, it is illustrated that the mean of scale scores forthe students of the 4th year are higher than the means of scale scores forthe graduates and postgraduates.

Analysis Based on the Employment Status

*Analysis*of Variance *(ANOVA)*was used to see if there are any differences between the scores of the participants collected from the scale based on their employment status.The hypotheses for the *analysis*of variance are:

H_0= themean of scale scores forthe 5 groups are equal ($\mu_1 = \mu_2 = \mu_3 = \mu_4 = \mu_5$).

H_1= there is at least 1 group for which themean of scale scores is different from the means of scale scores for the 5 other groups.

Table 14: Descriptive Statistics for the Scale Scores Based on Employment Status

	N	Mean	Standard Deviation
Judge	23	72,3	18,3
Prosecutor	7	73,7	20,2
Lawyer	64	64,5	14,2
Research Assistant	55	63,3	14,6
Other	11	65,2	10,4
Total	**160**	**65,7**	**15,3**

Table 15: Testing for Homogeneity of Variance

Levene's Test	df1	df2	Significance
1,946	4	155	0,106

Before proceeding to the analysis of variance, the homogeneity *of variance which is one of the assumptions in the analysis of variants was tested using*

Levene's test(Table 15). The F value is 1,946 and the probability value p is 0,106, so, the hypothesis that the variables are equal is not rejected with a level of significance at 0.05 which ensures us of the conclusion that the analysis of variance can be used.

Table 16: Results of the Analysis of Variance

	Sum of Squares	df	Mean Square	F	Significance
Between Groups	1868,5	4	467,1	2,06	0,089
Within Group	35143,9	155	226,7		
Total	37012,4	159			

Based on Table 16, the probability value p is 0,089 (p>0.05) and so the null hypothesis is not rejected which ensures us of the conclusion that the means of scale scores for the participants based on their employment status are not different from each other.

Table 17: The Frequency Results of the Survey (%)

Questions	Strongly disagree	Disagree	Neither Agree nor Disagree	Agree	Strongly Agree
The education in law schools in Turkey is one of the most prestigious ones.	4,7	8,1	3,7	47,1	36,4
The courses provided at law schools are at an adequate level to meet the modern-day professional needs.	7,3	37,8	11	40,4	3,4
Law schools provide their students with the minimum level of knowledge they are supposed to acquire.	6,3	32,1	13,4	43,2	5
Law schools provide practice courses at a sufficient level.	19,9	44	9,7	24,9	1,6
Law school students graduate with a level of knowledge to meet the minimum needs of their profession.	12,9	38	12,9	32,7	3,4
Law schools possess sufficient academic staffs	9,4	35,6	16	34,8	4,2
Law schools possess the necessary physical conditions, libraries and research facilities.	14,5	30,9	35,6	35,6	6,9
Theory and practice are integrated into the courses provided by law schools.	8,1	35,7	16,5	36,5	6,9
The courses at law schools are provided to the students within the frame of comparative law.	14,3	41,5	16,7	25,1	2,4
The academic staffs in law schools have successfully provided the students with knowledge and experience they will need in practice.	6,60	42,60	16,30	30,30	4,20
The students at law schools effectively benefit from the experience of the academic staff.	11,3	38,3	15,7	29,4	5,2
The law school education has been strengthening the student's tie to the other areas in life.	11,6	19,2	8,4	43,4	17,4

Table 17 - Continued

Academic calendars of the law schools are sufficient for the students to reach a satisfactory level in every course.	17,6	39,9	14,9	22,9	4,8
The testing system at law schools is sufficient to assess and evaluate the student's level of knowledge.	20,5	42,1	10,3	23,4	3,7
Law schools provide the necessary counseling and guidance services.	27,4	40,4	16,6	12,7	2,9
Law schools offer sufficient vocational counseling to their students to choose the best career in law for themselves.	15,6	40,2	15,6	25,7	2,9
Law schools have been functioning to teach theory and practice integrated in the legal education they provide and putting them into effect.	19,6	39,9	18,5	19,8	2,1
Law schools and the judicial bodies are in collaboration to teach law integrated with theory and practice and put it into effect.	27,6	42,8	15,2	12,9	1,6
Law schools and the executive bodies are in collaboration to teach law integrated with theory and practice and put it into effect.	23,4	44,4	16,8	12,6	2,9
Law schools and professional chambers are in collaboration to teach law integrated with theory and practice and put it into effect.	25,7	40,2	18,5	12,4	2,9
Law schools and nongovernmental organizations are in collaboration to teach law integrated with theory and practice and put it into effect.	24,6	41,4	17,4	14,5	2,4
Law school graduates are employed in the most suitable law careers for themselves.	12,6	36,3	21,8	23,4	5,8
After under graduation, law school students do not face any problems of competency with the level of knowledge they possess.	14	44,1	15,6	20,8	5,5
After under graduation, law school students are offered adequate employment opportunities.	9,4	19,7	13,1	45,1	12,6
Law school graduates hold a place of respect and status they deserve in every section of the society thanks to their careers in law.	13,4	28,3	11,8	34,9	11,5

CONCLUSION

Based on the research findings, it was concluded that law schools in Turkey fail to integrate practice into the legal education sufficiently and they cannot meet the needs of the profession.

For the purpose of reducing the current problems of the system, it is suggested for a legal education system to be established in form that is similar to the "clinical education model" implemented in the USA and the principles and all the other learning done in the theoretical courses should be put into practice under the supervision of a professor within the frame of "on-the-job training". It is essential that practical skills are crucial for the students in their future careers such as writing writs of summons, bills of indictment, court decisions, and pleas of defense; conducting a case; dialectics of procedure; learning the ethical values; and observing the institutions forming the judicial system[4]should be well suitedin the legal education before law students finish their studies.

The law classes in France are known to have between 20 and 40 students and the students deal with solving legal cases, writing essays, decision analysis and debates along with the weekly assignments they are given for which they carry out thorough research on significant issues. The students have to take oral and written exams which are as important as the final exam done at the end of the year and besides they attend three or four study groups a week[5].

The fact that people in the legal profession in Turkey are taught only theoretical skills at undergraduate programs and during their vocational training is referred to as the most critical mistake made in the system and the necessity to implement a more responsive education model instead is stated.

Today, people in the legal profession, following an overall education in the field, are required to be specialized through hands-on training, equipped

[4] HACIOĞLU, B. Caner, (2001), "Adalet Reformu Içinde Hukukçuların Yetistirilmesinde Klinik Eğitim Zorunluluğu ve Klinik Eğitim Anlayısı", Atatürk ÜHF. Dergisi, C.5, Sayı 1–4, p.93.

[5] DREIFUSS, Frederique, Fransız Hukuk *Öğretimi,* Hukuk Öğretimi ve Hukukçunun Eğitimi, TBB. Yay., 2004, ,p.145.

with a methodological approach and become highly educated. The law schools in Turkey, as well as providing a career education through teaching theoretical skills, should aim at contributing to the education process through raising students with developed personalities who are capable of taking the initiative when necessary and educate them as competent and highly skilled lawyers[6].

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