



**TURKEY TRIBUNAL**

Because Silence is the Greatest Enemy of  
Fundamental Human Rights

# Crimes Against Humanity

UNDER THE ROME STATUTE IN TURKEY TODAY

AUGUST 2021

PROF. DR. EM. JOHAN  
VANDE LANOTTE

in collaboration with



**INTERNATIONAL  
OBSERVATORY  
HUMAN RIGHTS**

# Executive Summary

## Crimes Against Humanity under the Rome Statute in Turkey Today

BY PROF. DR. EM. JOHAN VANDE LANOTTE

In this report, we will investigate if the acts of torture and the abductions, as described in the other reports presented to the **Turkey Tribunal**, can be qualified as crimes against humanity, according to the Rome Statute and the case law of the International Criminal Court (ICC). We will NOT examine the competence of the ICC in the specific cases cited, nor will we examine who is, or are, the person(s) that are punishable under the Rome Statute for the specific cases cited in the reports. Eventually this will be the competence of the ICC itself.

The Rome Statute has defined the criteria and the decisive elements needed to qualify acts as crimes against humanity. We will evaluate if each of these decisive elements are present in the reports concerning the abductions and the acts of torture. To be considered as a crime against humanity, some specific requirements must be fulfilled. These requirements are the “contextual elements for crimes against humanity” or “the chapeau”.

To qualify a crime as a ‘crime against humanity’ the crimes must be an attack, meaning: a course of conduct, involving the multiple commission of acts, that widespread or systematic, directed against any civilian population and committed pursuant to, or in furtherance of, a state or organisational policy to commit such attack.

The Turkish government has denied the existence of torture and internal abductions so uncovering the exact figures of such acts is not possible, however, it is our conclusion from the data that is available, that we are confronted with an attack, meaning a course of conduct involving the multiple commission of acts of torture and abductions.

It seems appropriate to define “widespread” as “massive, frequent, large scaled, directed against a multiplicity of victims” whereby the assessment must be carried out on the basis of the individual

facts, while the term “systematic” must be defined as “*a non-coincidental repetition of crimes*” or as the “*improbability of their random occurrence*”. Taking into account the numbers, compared to the targeted group, the seriousness of the acts and the high impact on the targeted group, it is our view that torture can be qualified to be widespread in Turkey.

Based on the high numbers during a long period, the specific targeting of some groups, the existence of recurring patterns and the use of specialized teams; torture in Turkey is systematic.

We acknowledge that the qualification of the internal and/or international abductions executed by the Turkish authorities as widespread, how important they may be, within the context of the Rome Statute is disputable. However, what is not disputable is that these abductions must be considered as systematic within this framework.

The attack must be directed (intention) against any civilian population (not necessarily against all the civilian population), which means a clearly defined and stable group, with common characteristics, that in turn make it the target of an attack, so the acts are not merely directed against randomly selected individuals. The victims of the abductions and or torture are therefore not randomly selected persons but belong to two groups that are critical towards the government and are abducted and or tortured for that reason – the Gülen movement and the Kurdish movement.

To be considered as crimes against humanity, acts must be committed pursuant to or in furtherance of a state or organizational policy to commit such attack. We can define the policy on torture of the Turkish state as follows: by torturing the persons who are allegedly linked to the Gülen movement or the Kurdish movement, which they all indicate as terrorists, the Turkish state wants to make them confess and aims to physically punish them. The state also aims to extract from them information – true or false- about other persons who in their turn will be tortured, and so the cycle continues.

All these persons will then be condemned to long prison sentences, based upon declarations done under torture. The ultimate hope of the government seems to be the annihilation of both movements, and to create a deterrent effect on other (alleged) members of these movements, but that is the political long-term ambition, not the concrete intention. Delivering torture to punish and to extract, real or false information, which leads to long prison sentences, is the concrete intention. It is our finding that every level of the state: legislator, government, governors,

the judicial system and the security services, organize, encourage and actively promote this policy, either in a direct or indirect way. The requirements foreseen in Article 7(2) of the Rome Statute are fulfilled.

The policy of the Turkish state on enforced disappearance can be summarized as follows: by abducting, and depriving victims of their freedom and meanwhile torturing the persons who are allegedly linked to the Gülen movement or the Kurdish movement, which they all indicate as terrorists, the Turkish state wants to make victims of enforced disappearances confess, which will enable the state to physically punish them and ultimately condemn them to long prison sentences.

With regards to internal enforced disappearances, our conclusion is that the policy of the Turkish state is promoted and encouraged in a direct and indirect way. Abductions need a complex form of coordination of different services and require substantial resources, which are elements of promotion or encouragement. Normally abductions would cause intensive investigations. In Turkey, abductions go together with an extreme form of impunity with negating all elements of proof, with refusing any investigation and with controlling the possible consequences of the abductions by legally and extra-legally limiting possible vindication of the victims and or their family. As with the extraterritorial enforced disappearances, the policy of the Turkish state is promoted and directly encouraged in an open way by the government itself, who even seems to take pride in it.

In order to constitute a crime against humanity, the acts of violence committed as part of a widespread or systematic attack directed against any civilian population must fall within (one of) the categories of offences listed in Article 7 (1) of the Rome Statute. For the purposes of this report, only the underlying offences of torture and enforced disappearance of persons are discussed.

Our conclusion is that the acts of torture and the enforced disappearances, as described in the report '**Torture in Turkey today**' and the report '**Abductions in Turkey Today**', are in line with the definition of torture in the Rome Statute.

The ICC should only deal with the gravest of all crimes and the evaluation of facts that constitute crimes against humanity must be strict. However, we cannot deny the reality.

**Our conclusion is clear and firm: the facts of torture and the abductions described in our reports, are crimes against humanity.**

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## I. INTRODUCTION

1. Together with war crimes, genocide and the crime of aggression, crimes against humanity are one of the four “core crimes” – the most serious violations of human rights and international criminal law – with respect to which the International Criminal Court (the “ICC”) in the Hague has jurisdiction.<sup>1</sup>

***“ ... crimes against humanity as defined in art. 7 are among the most serious crimes of concern to the international community as a whole”<sup>2</sup>***

2. Crimes against humanity were first introduced as a separate category of international crimes in the Charter of the Nuremberg Tribunal.<sup>3</sup> The aim was to criminalize three sorts of criminality that had, until then, evaded the sanction of international law: (i) atrocities committed outside the context of an armed conflict or independent of it, (ii) crimes committed against fellow nationals and (iii) institutionalized discriminatory violence that resulted in individuals being targeted and mistreated by a state because of their identity.<sup>4</sup>
3. Almost immediately after the Nuremberg and Tokyo proceedings, the law of crimes against humanity gained recognition as general international law,<sup>5</sup> and is now considered to be part of customary international law.<sup>6</sup> The contours and elements of the notion of crimes against humanity continued to be refined after Nuremberg through the adoption of resolutions, treaties, statutory instruments, etc., and through

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<sup>1</sup> Article 5 of the Rome Statute of the International Criminal Court, 17 July 1998, United Nations, Treaty Series, vol. 2187, No. 38544 (the “Rome Statute”).

<sup>2</sup> Elements of Crimes. Article 7 Crimes against Humanity. Introduction. The “Elements of Crime” are based on Article 9 of the Rome Statute: “*Elements of Crimes shall assist the Court in the interpretation and application of Articles 6,7,8 and 8bis. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties*”.

<sup>3</sup> Article 6 (c) of the Charter of the International Military Tribunal (“IMT”) annexed to the Agreement for the prosecution and punishment of the major war criminals of the European Axis.

<sup>4</sup> METTRAUX, G., *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 38.

<sup>5</sup> IMT Judgement (N 77) 461; UNGA, “Nuremberg Principles”, UN Doc A/1316, para. 123.

<sup>6</sup> E.g. Secretary-General Report on ICTY, para. 35; METTRAUX, G., *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 33.

the statutes and jurisprudence of international criminal tribunals.<sup>7</sup> McCORMACK clearly states,

***“one of the major achievements of the negotiations of the definition of crimes against humanity in Rome was the final elimination of a requisite nexus with armed conflict”<sup>8</sup>***

4. In this report we will concentrate our attention on the Rome Statute and the International Criminal Court. The definition of crimes against humanity in the Rome Statute was, at the time of its adoption on 17 July 1998, both a codification of existing law and a further development of that law, adding new elements to this offence for the purpose of proceedings before the ICC.<sup>9</sup>
5. As TRIFFTERER and AMBOS rightly state: *“Article 7 represents both a ‘codification’ and a ‘progressive development’ of international law within the meaning of article 13 UN Charter”<sup>10</sup>*. With the adoption of the Rome Statute, the link between the presence of armed conflict on the one hand and the criminalization of some human rights violations on the other hand, was definitively left behind. *“the concept of crimes against humanity has also seen an evolution in the legislative and jurisprudential sphere, in that it is no longer shackled to the jus in bello framework”<sup>11</sup>*.
6. In this report, we will investigate if the acts of torture and the abductions, as described in the other reports presented to the Turkey Tribunal, can be qualified as crimes against humanity, according to the Rome Statute and the case law of the ICC. We will NOT examine the competence of the ICC in the specific cases cited, nor will we

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<sup>7</sup> METTRAUX, G., *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 35.

<sup>8</sup> McCormack, T.L., *Crimes Against Humanity*, in McGoldrick, D, Rowe, P. and Donnelly, E. (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, 2004, Hart, 182.

<sup>9</sup> Ambos, K. “Crimes Against Humanity and the International Criminal Court”, in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (CUP 2011), 279-304.

<sup>10</sup> Triffterer, O. and Ambos, K (eds). *Rome Statute of the International Criminal Court. A Commentary*, München, 2016, 3rd Edition, C.H. Beck, 155.

<sup>11</sup> Abtahi, H., ‘Crimes against Humanity and the Armed Conflict Nexus: From Nürenberg to the ICC’ (2013) 3 European Society of International Law Conference, Conference paper 1/2013, 2.

examine who is or are the person(s) that are punishable under the Rome Statute for the specific cases cited in the reports. For the Turkey Tribunal, we will not suggest or examine individually which of these crimes can be attributed to whom specifically. Eventually this will be the competence of the ICC itself. The Rome Statute has defined the criteria and the decisive elements needed to qualify acts as crimes against humanity. For each of these decisive elements we will evaluate if they are present in what has been commented in the reports concerning the abductions and the acts of torture.

The question we submit in this report to the Tribunal is the following;

Do we need to qualify the acts of torture, as well as the national and the extraterritorial abductions, as described in the reports brought before the Turkey Tribunal, as crimes against humanity, according to the Rome Statute?

## **II. THE *CHAPEAU* OR THE CONTEXTUAL ELEMENTS FOR CRIMES AGAINST HUMANITY.**

7. Article 7 of the Rome Statute defines the contextual elements (also referred to as the *chapeau* element) that need to be present to qualify a certain conduct as a crime against humanity:

*“For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.*

Further is stipulated:

*“Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.*

The elements of Crimes further specify:

*It is understood that "policy to commit such an attack" requires that the State or organization actively promote or encourage such an attack against a civilian population".*

8. In accordance with these clauses, as contextual elements must be considered:

- An attack (meaning: a course of conduct, involving the multiple commission of acts)
- Widespread or systematic
- Directed against any civilian population
- Pursuant to or in furtherance of a state or organizational policy to commit such attack.

9. "Ordinary" crimes and violations of human rights may be prosecuted on the domestic level but not brought before the ICC. This distinction of enabling crimes against humanity to be brought before the ICC can be identified by these contextual elements. To constitute a crime against humanity, an act that falls within one of the specified categories of crimes against humanity (see III.) must be committed in the context of, and as part of, a widespread or systematic attack against a civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack. We will pay attention to each of these elements separately and for each of them we will evaluate if these elements are present in our case.

## **II.1. THERE MUST BE AN "ATTACK", MEANING: A COURSE OF CONDUCT, INVOLVING THE MULTIPLE COMMISSION OF ACTS.**

### **II.1.2. DEFINITION WITHIN THE ROME STATUTE.**

10. Article 7 (2) (a) of the Rome Statute and the Elements of Crimes define an "attack" as a course of conduct involving the multiple commission of acts falling within the specified categories of crimes against humanity. Although the word "attack" seems to point to military or anyhow violent actions, this is not the case. As TRIFFTENER and

AMBOS state: *"Thus the attack need not even involve military forces or armed hostilities or any violent force at all. It can involve any mistreatment of the civilian population"*<sup>12</sup>.

11. In its case law, the ICC has several times interpreted the notion of "course of conduct". In the Gbagbo confirmation decision, the ICC states it as follows:

*"209. The expression "course of conduct" already embodies a systemic aspect as it describes a series or overall flow of events as opposed to a mere aggregate of random acts. As already recognised by the jurisprudence of the Court, it implies the existence of a certain pattern as the "attack" refers to a "campaign or operation carried out against the civilian population" which involves the multiple commission of acts referred to in article 7(1) of the Statute directed against any group distinguishable by nationality, ethnicity or other distinguishing features including (perceived) political affiliation.*

*210. Therefore, while a course of conduct must involve multiple acts, the occurrence of those acts is not the only evidence that may be relevant to prove its existence. On the contrary, since the course of conduct requires a certain "pattern" of behaviour, evidence relevant to proving the degree of planning, direction or organisation by a group or organisation is also relevant to assessing the links and commonality of features between individual acts that demonstrate the existence of a "course of conduct" within the meaning of article 7(2)(a) of the Statute"*<sup>13</sup>.

More recently, in the Appeals Judgement in the case of Mr Bosco Ntaganda of 30 March 2021, the Appeals Chamber of the ICC specified this requirement as follows:

*"The requirement that the acts form part of a 'course of conduct' indicates that Article 7 is meant to cover a series or overall flow of events, as opposed to a mere aggregate of random or isolated acts. However, this does not mean that a trial chamber must have regard to the totality of the activities and military operations of a state or organization for the purposes of establishing that*

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<sup>12</sup> Triffterer, O. and Ambos, K. (eds), *The Rome Statute of the International Criminal Court, A Commentary*, München, 2016, 3rd edition CH.Beck, 166.

<sup>13</sup> Decision of the Confirmation of Charges against Laurent Gbagbo, ICC-02/11-01/11-656-Red, 12 June 2014, paras. 209 – 210.

*there was a course of conduct involving the multiple commission of acts referred to in article 7(1) or that the attack targeted a civilian population. These determinations can be made through an examination of the circumstances and manner in which the criminal acts were carried out. It is not necessary for this purpose to have regard to other military operations or the wider activities of the state or organization in question, including activities that did not involve the commission of crimes.”*<sup>14</sup> (Underlining added)

12. TRIFFTERER and AMBOS state it as follows:

*“The fundamental requirement is that the facts must not be unrelated to the attack, capable of being characterized as the isolated and random conduct of an individual acting alone”*<sup>15</sup>.

METTRAUX literally citing the ICC comes to the same conclusion:

*“The ICC has interpreted the notion of “course of conduct” as implying a series or overall flow of criminal events as opposed to a mere aggregate of random acts”*<sup>16</sup>.

13. No minimum threshold is set for the amount of criminality or a quantifiable geographical area which an attack must reach. However, the ICC considered the “multiple commission of acts” to be “more than a few”, “several” or “many” acts.<sup>17</sup> The acts may be performed in a single incident in which many crimes are committed or in a succession of violent acts that occurred in different places, at different times.<sup>18</sup>

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<sup>14</sup> Judgment on the appeals of Mr. Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019, ICC-01/04-02/06-2666-Red, 30 March 2021, para. 8.

<sup>15</sup> Triffterer, O. and Ambos, K. (eds), *The Rome Statute of the International Criminal Court, A Commentary*, München, 2016, 3rd edition CH.Beck, 167.

<sup>16</sup> METTRAUX, G., *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 200.

<sup>17</sup> Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 21 March 2016, para. 150.

<sup>18</sup> METTRAUX, G., *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 204-205.

14. The “acts” relevant to establishing the existence of an attack are limited by the Rome Statute to those “referred to in paragraph 1” of its Article 7, i.e. the specified categories of crimes against humanity (see part III).<sup>19</sup>
15. As a conclusion, an “attack”, meaning a course of conduct, involving the multiple commission of acts, implies basically a series of criminal events that cannot be seen as a mere aggregate of random acts, whereby “multiple” means: more than a few, several or many, without a specific number that can be defined as the threshold.

### **II.1.2. APPLICATION TO THE TURKISH SITUATION: TORTURE.**

16. Are we confronted with “multiple acts”? As far as torture is concerned, we have to rely on the statistical information about the complaints delivered by the Ministry of Justice and the reports of international institutions. In our report *‘Torture in Turkey Today’* we stated it as follows:

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<sup>19</sup> METTRAUX, G., *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 203-204.

*"In table 1 data is given about the judicial action against torture in Turkey. This is the official data from the Ministry of Justice and is available on the website of the Ministry. No data has been published for 2019 or 2020.*

| Year          | Total       | Investigation Phase |                                   | Trial Phase |              |
|---------------|-------------|---------------------|-----------------------------------|-------------|--------------|
|               |             | Non-Prosecution     | Filing a Public Case (Indictment) | Acquittals  | Imprisonment |
| 2013          | 1826        | 1148                | 211                               | 86          | 20           |
| 2014          | 1719        | 1029                | 248                               | 99          | 13           |
| 2015          | 1475        | 894                 | 294                               | 65          | 17           |
| 2016          | 1359        | 903                 | 128                               | 52          | 11           |
| 2017          | 1191        | 804                 | 98                                | 144         | 7            |
| 2018          | 960         | 652                 | 83                                | 38          | 10           |
| <b>Total</b>  | <b>8530</b> | <b>5430</b>         | <b>1062</b>                       | <b>484</b>  | <b>78</b>    |
| <b>Yearly</b> | <b>1422</b> | <b>905</b>          | <b>177</b>                        | <b>80</b>   | <b>13</b>    |

*Based on this information we can present the following overview in Scheme 1.*

**Scheme 1: Overview of the judicial action against Torture in Turkey (based on data for 2013-2018, numbers are yearly average)**



Some remarks must be made to clarify this diagram."

17. We have no statistics about the exact number of cases of torture. It is common and universal knowledge that the dark number is high, certainly in a system where the number of convictions is low.
  
18. Neither do we know the exact number of complaints. For the period 2013-2018 Human Rights Organization (HRA – IHD in Turkish) received in average yearly 2063 complaints (...) <sup>20</sup>. Of course they do not receive all the complaints of the whole country. In the report of the Committee against Torture for the fourth periodic report on Turkey, the Committee against Torture noticed: *"a significant disparity between the high number of allegations reported by non-governmental organizations and the data provided by the state party in its periodic report...suggesting that not all allegations of torture have been investigated during the reporting period."* (CAT/C/TUR/CO/4, No 9).

<sup>20</sup> In their figures we see a slow growth of the number of complaints till 2010 (average 843 complaints in a year), from 2011 till 2014 the number is higher (average 1428 complaints per year), from 2015 till 2019 we notice a very sharp increase of complaints (average of 2300 complaints per year). As far as the location where the torture allegedly is executed is concerned, prisons represent 39% of the complaints but the proportion is markedly lower before 2010. We see the opposite situation for "custody", in police stations (this also includes the security directorates). The percentage of the complaints about torture or ill-treatment in extra-custodial places is high.

In that context an estimation of a yearly average of 3000 complaints surely is not an overestimation.

19. Filing a complaint does not necessarily mean that a case is opened for torture. The case can be considered under Article 96 Turkish Criminal Code– voluntary injury, for instance (see *infra* No. 7). Or competence can be denied, etc. It is the prosecutor who decides, not the complainant. We notice that an average of 1421 cases for torture were opened annually. If we estimate the number of complaints yearly at estimated 3000, then half of the complaints are opened under torture.
20. Remarkably, the number of cases opened have clearly declined since 2015. Compared to 2013, the number of 2018 is down by nearly 50%. There is no indication that the number of cases of torture dropped in this period. On the contrary, the number of allegations went up markedly. The only explanation that is plausible is a reduced will to prosecute torture on the part of the prosecutors. If we stick with the number of 3000 complaints yearly (and for the period 2015-2018 that is probably an underestimation), the percentage of cases opened dropped to less than one third. It should, of course, be borne in mind that the international obligation is for all cases to be examined thoroughly.
21. When a case is opened this does not automatically lead to an indictment. On average 177 indictments were rendered annually. This is 12% of the cases opened and 6% of the estimated number of complaints.
22. Finally on average 13 imprisonments were decided. This is 1% of the indictments and 0.5% of the estimated complaints.
23. To this diagram we need to add that under Article 96 Turkish Criminal Code (torment/deliberate injury – not amounting to torture) on average 1500 cases were opened annually in the period 2013-2018, leading to 532 indictments and 238 imprisonments. An important number of these cases most probably should have been investigated as torture cases. The sanction for torment is lower than for torture and

suspension of pronouncement of the verdict is possible. Note that if we add these cases opened to the cases on torture, we also arrive at 3000 cases opened annually.

24. Some reports (for instance in the conclusions and recommendations of the UN Committee on the third periodic report of 20 January 2011) mention the tendency that, when confronted with complaints of torture or ill-treatment, police officers would often resort to counter charges, using Article 265 Turkish Criminal Code: using violence or threats against a public official to prevent them from carrying out their duty. By doing so, the reports suggest that pressure or intimidation is directed toward the victims, or the relatives of the victims, not to file a complaint. In this context it is interesting to compare the cases about torture and the number of cases about Article 265 *leg cit*<sup>21</sup>. For this comparison we have added the numbers of torment/deliberate injury to the ones of torture. For the whole period 2010-2019, for torture and deliberate injury there are in total 28,768 cases concerned and for Article 265 *leg cit* there are 1,723,767 (!) cases; 60 times more.
25. Finally in the yearly reports HRA mentions that in 2018 160 persons "*notably students, journalists and political activists*" stated that they were subjected to torture and ill-treatment due to attempts to force them to become informants. For 2019 this was 71 persons, but in addition, the media mentioned 66 other persons.
26. Although exact figures cannot be given, due to the complete denial of these acts by the government and the non-prosecution of these acts as shown above, it is clear that we are confronted with *multiple acts* of torture, meaning: "*more than a few, several or many*". There is no doubt that the number of acts of torture simply can be qualified as high. To answer the question if these acts are more than a mere aggregate of random acts, we refer to II.2.2.

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<sup>21</sup> Data from the official website of the Ministry of Justice.

### II.1.3. APPLICATION TO THE TURKISH SITUATION: ENFORCED DISAPPEARANCE.

27. With regards to internal abductions, Turkey denies any state implication and also denies the existence of this phenomenon. In the report '**Abductions in Turkey Today**', the author could, after an extensive examination of the suspicious disappearances in Turkey, distinguish 25 cases in which it is beyond any reasonable doubt that an abduction organized by the Turkish state has taken place. It is however clear that many cases of forced disappearance have not yet come to the attention of international organizations, NGOs or newspapers and go unnoticed. In that regard it is particularly remarkable that only two abductions of a Kurdish person could be identified, while already in July 2016 the UN Working Group on Enforced or Involuntary Disappearances expressed its concerns that *"situations such as the current one in the south-east are conducive to human rights violations, including enforced disappearances"*<sup>22</sup>.
28. The Turkish government is much more open about its responsibility in terms of extraterritorial abductions. Our own investigations in the report '**Abductions in Turkey Today**' allowed us to identify 68 cases of extraterritorial abductions. Turkish officials however have repeatedly claimed that Turkey was involved in more than 100 international abductions. For instance, Turkish Foreign Minister Mevlüt Cavusoglu confirmed that 104 Gülenists from 21 countries were abducted and brought back to Turkey as part of the Turkish government's global manhunt.<sup>23</sup> Deputy Foreign Minister Yavuz Selim Kiran stated that this happened to more than 100 Gülenists<sup>24</sup>.

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<sup>22</sup> Report of the Working Group on Enforced or Involuntary Disappearances in the context of migration

(A/HRC/36/39/Add.2) of 28 July 2017, No. 33; Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Turkey (A/HRC/33/51/Add.1) of 27 July 2016, No. 11.

<sup>23</sup> U.S. Department of State, 2018 Country Reports on Human Rights Practices: Turkey, 28 June 2019. (<https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/turkey/>); Sabah, '52 FETÖ'cü 83 ülkede', 15 November 2018 (<https://www.sabah.com.tr/gundem/2018/11/15/452-fetocu-83-ulkede>).

<sup>24</sup> Hurriyet, Bakan Yardımcısı açıkladı: 100'ün üzerinde FETÖ teröristi getirildi, 24 February 2019 (<https://www.hurriyet.com.tr/gundem/bakan-yardimcisi-100un-uzerinde-feto-teroristi-ulkemize-getirildi-41128404>).

29. In February 2021, Freedom House published a report of NATE SCHENKKAN and ISABEL LINZER: *"Out of sight, not out of reach"*. Concerning the abductions operated by the Turkish state, the report states the following:

*"The Turkish state's current campaign of transnational repression is remarkable for its intensity, its geographic reach, and the suddenness with which it escalated. Since the coup attempt against President Recep Tayyip Erdoğan in July 2016, the regime has pursued its perceived enemies in at least 31 different host countries spread across the Americas, Europe, the Middle East, Africa, and Asia. The campaign is also notable for its heavy reliance on renditions, in which the government and its intelligence agency persuade the targeted states to hand over individuals without due process, or with a slight fig leaf of legality. Freedom House catalogued 58 of these renditions since 2014. No other perpetrator state was found to have conducted such a large number of renditions, from so many host countries, during the coverage period—and the documented total is almost certainly an undercount."<sup>25</sup> (Underlining added).*

30. An extensive examination of the suspicious disappearances in Turkey identifies 25 cases in which it is beyond any reasonable doubt that an abduction organized by the Turkish state has taken place. Members of the government themselves confirm that more than 100 Gülenists were abducted and brought to Turkey. Freedom House qualifies this activity by saying; *"no other perpetrator state was found to have conducted such a large number of renditions, from so many host countries, during the coverage period"*. Therefore it is justified to say that we are confronted with *multiple acts* of forced disappearance, meaning: *"more than a few, several or many"*. There is no doubt that the number of acts of forced disappearance simply can be qualified as high. To answer the question if these acts are more than a mere aggregate of random acts, we refer to II.2.2.

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<sup>25</sup> Schenkan, N. and Linzer, I., *Out of Sight, not out of reach*, Freedom House, February 2021, 38.

## II.2. THE ATTACK MUST BE “WIDESPREAD OR SYSTEMATIC”.

### II.2.1. DEFINITION WITHIN THE ROME STATUTE.

31. An “attack” for the purpose of crimes against humanity must be “widespread or systematic”. These requirements apply disjunctively,<sup>26</sup> and meet a certain threshold in terms of its magnitude – the *widespread* nature of the attack – or in terms of its organized nature – the *systematic* nature of the attack.<sup>27</sup> TRIFFTERER and AMBOS refer to the UNWCC: “speaking of crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied ... endangered the international community or shocked the conscience of mankind”<sup>28</sup>

32. Widespread” and “systematic” are relative notions. As the International Criminal Tribunal for the Former Yugoslavia stated:

*“430. The widespread or systematic nature of the attack is essentially a relative notion. The Trial Chamber must first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon this population, ascertain whether the attack was indeed widespread or systematic.”<sup>29</sup>*

33. The notion of a “widespread” attack relates to its large-scale nature and the number of victims, not each act separately must be widespread. In other words, the widespread character of an attack can be the cumulative result of a large number of single acts. METTRAUX, referring to the jurisprudence, summarizes as follows: “*The attack may be*

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<sup>26</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, para. 94.

<sup>27</sup> METTRAUX, G., *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 266.

<sup>28</sup> Triffterer, O. and Ambos, K. (eds), *The Rome Statute of the International Criminal Court, A Commentary*, München, 2016, 3rd edition, C.H.Beck, 156.

<sup>29</sup> International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Kunarac e.a.*, Trial judgement, 22 February 2001, para 430.

*widespread because of the cumulative effect of a series of acts or, as has been suggested, because of the effect of a single act of extraordinary magnitude”<sup>30</sup>*

34. In the Gbagbo case the ICC pointed it out as follows:

*222. According to the established jurisprudence of the Court, the term “widespread” connotes the large-scale nature of the attack and the number of targeted persons. In the present case, Pre-Trial Chamber III has previously adopted the approach followed by Pre-Trial Chamber II, according to which the term “widespread” encompasses the large-scale nature of the attack, in the sense that it “should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims” and that this assessment is not exclusively quantitative or geographical, but must be carried out on the basis of the individual facts. (...) (Underlining added)*

*224. The Chamber considers that the attack referred to above was large-scale in nature, as it:*

*(i) involved a large number of acts;*

*ii) targeted and victimised a significant number of individuals;*

*(iii) extended over a time period of more than four months; and*

*(iv) affected the entire city of Abidjan, a metropolis of more than three million inhabitants.*

*Considering the cumulative effect of this series of violent acts, the Chamber is of the view that there are substantial grounds to believe that the attack was “widespread” within the meaning of article 7(1) of the Statute.<sup>31</sup>*

TRIFFTERER and AMBOS rightly point to the fact that in the original Draft Code of the International Law Commission (“ILC”) the required multiplicity of victims was addressed with the term “mass scale”, but that this term deliberately was replaced by the term “large scale” afterwards. McCORMACK is somehow critical towards the “massive” exigence: “*The multiple*

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<sup>30</sup> METTRAUX, G., *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 272, with reference to the jurisprudence.

<sup>31</sup> *Prosecutor v. Gbagbo*, Decision on the confirmation of Charges against Laurent Gbagbo, ICC – 0211-01/11-656-Red, 13 June 2014, Nrs. 222 and 224.

victims requirement, however, is a much lower threshold than that required to prove 'massive, frequent large scale action'<sup>32</sup>

35. As a conclusion it seems appropriate to define "widespread" as "**massive, frequent, large scaled<sup>33</sup>, directed against a multiplicity of victims whereby the assessment must be carried out on the basis of the individual facts**".
36. The notion of "systematic" refers to the non-coincidental repetition of crimes.<sup>34</sup> METTRAUX enumerates a large number of factors judged to be relevant to establish that the attack was "systematic" in the jurisprudence. Between those enumerated, we want to emphasize the following factors, which especially could be relevant for the Turkish situation: existence and repetition of patterns of criminal acts, in particular, through the repetition of crimes over a long period of time or throughout distinct geographical locations; repetition and multiplication of discriminatory acts directed at certain members of the population; presence and use of propaganda by the perpetrators; planned and organized nature of the attack; the aim of the operation, in particular when a criminal purpose has been established; consequences of the attack upon the targeted population; existence of public statements or political views underpinning the events; existence of a plan or policy targeting a specific group of individuals; means and methods or modus operandi; campaign of violence, fear and intimidation; the discriminatory character of the crimes and the coincidence between the crimes and an underlying political agenda..<sup>35</sup>

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<sup>32</sup> McCormack, T.L., Crimes Against Humanity, in McGoldrick, D, Rowe, P. and Donnelly, E. (eds) The Permanent International Criminal Court.; Legal and Policy Issues, 2004, Hart,, 182.

<sup>33</sup> We do not keep "carried out collectively with considerable seriousness" as an essential element as it does not seem to be adapted to the specific situation we are looking at. "Carried out collectively" would also mean that a consistent series of consecutive acts never could be "widespread". There is no reason to accept this kind of interpretation: "*The attack may be widespread because of the cumulative effect of a series of acts*" (METTRAUX, G., *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 272) ).

<sup>34</sup> METTRAUX, G., *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 272-273.

<sup>35</sup> METTRAUX, G. *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 275, 278-281.

37. In the already cited Gbagbo case the ICC took the following position:

*“223. The alternative requirement that the attack be “systematic” has been consistently understood in the jurisprudence of the Court as pertaining to the organised nature of the acts of violence and the improbability of their random occurrence. Further, according to the jurisprudence of the Court, the systematic nature of an attack can “often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis”.*

*225. Further, the Chamber notes the evidence demonstrating that preparations for the attack were undertaken in advance and that the attack was planned and coordinated. In addition, the acts of violence analysed by the Chamber reveal a clear pattern of violence directed at pro-Ouattara demonstrators or activists, and more generally against areas whose inhabitants were perceived to be supporters of Alassane Ouattara. On this basis, the Chamber concludes that there are also substantial grounds to believe that the attack was “systematic”, within the meaning of article 7(1) of the Statute”.<sup>36</sup>*

38. The requirements of “widespread” or “systematic” are to be assessed relative to the civilian population that is alleged to have been subject to the attack.<sup>37</sup>

39. In some cases, small scale attacks were accepted as being “widespread” in relation to their results. In the Galic case for instance, the International Criminal Tribunal for the Former Yugoslavia<sup>38</sup> made it clear that the shelling and sniping of Sarajevo was part of a sustained and deliberate “campaign” to terrorize the civilians of Sarajevo.

40. As a conclusion it seems appropriate to define “systematic” as: “a non-coincidental repetition of crimes” or as the “improbability of their random occurrence”.

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<sup>36</sup> Prosecutor v. Gbagbo, Decision on the confirmation of Charges against Laurent Gbagbo, ICC – 0211-01/11-656-Red, 13 June 2014, Nrs. 223 and 225.

<sup>37</sup> METTRAUX, G. International Crimes, Volume II: Crimes against Humanity, 2020, Oxford University Press, 269.

<sup>38</sup> (ICTY) Prosecutor v Stanislav Galić (Trial Chamber Judgment), Case No IT-98-29-T (5 December 2003), 208. In a national Dutch case (Wijngaarde e.a. v. Bouterse) the court decided that the torture and summary execution of 15 prominent political opponents in Suriname by the former leader of Suriname could constitute a crime against humanity.

## II.2.2 APPLICATION TO THE TURKISH SITUATION: TORTURE.

41. As already mentioned, the term “widespread” is a relative notion. The quantitative importance of the acts must be assessed in relationship to the targeted group. In the torture report we pointed out that the main targeted groups are people in detention or custody, who are supposedly linked to the Kurdish movement or to the Gülen movement. Taking in account the number of 3000 complaints a year, it is above all reasonable doubt that towards these groups the acts of torture are “massive, frequent, large scaled and directed against a multiplicity of victims”.
42. This conclusion is confirmed by the jurisprudence of the European Court of Human Rights (“ECtHR”), where Turkey has a massive number of convictions for violation of Article 3 European Convention on Human Rights (“ECHR”) (counted in average per year, there are more convictions by the ECtHR than by domestic courts in Turkey). In the same sense can we refer to the reports of the European Committee for the Prevention of Torture, of the UN Committee against Torture, of the European Commissioner for Human Rights, of the UN Special Rapporteur on Torture, and the reports of the OHCHR, all cited in the report ‘**Torture in Turkey Today**’. As just one of the many citations that could be used, we refer to the report of the OHCHR of March 2018:

*“OHCHR documented the use of different forms of torture and ill-treatment in custody, including severe beatings, threats of sexual assault and actual sexual assault, electric shocks and waterboarding. Based on accounts collected by OHCHR, the acts of torture and ill-treatment generally appeared to aim at extracting confessions or forcing detainees to denounce other individuals. It was also reported that many of the detainees retraced forced confessions during subsequent court appearances. On the basis of numerous interviews and reports, OHCHR documented the emergence of a pattern of detaining women just before, during or immediately after giving birth. In almost all cases, the women were arrested as associates of their husbands,*

*who were the Governments' primary suspects for connection to terrorist organizations, without separate evidence supporting charges against them"* <sup>39</sup>

43. Taking in account the numbers compared to the targeted group and taking in account the seriousness of the acts and the high impact on the targeted group, it is our opinion that torture can be said to be widespread in Turkey.
44. Is the torture committed systematic? As we know, the Turkish government simply denies the presence of torture in Turkey. Hence, to answer the question, we basically need to prove *the organized nature of the acts of violence and the improbability of their random occurrence*. As the government completely denies the existence of torture, the proof necessarily needs to be found in a more indirect way, by emphasizing the improbability (or even more: the impossibility) that the acts of torture occur in a random way.
45. In our opinion, decisive elements in this context are:
  - a) The massive numbers of victims during a long period;
  - b) The specific targeting;
  - c) The existence of recurring patterns;
  - d) The existence and the use of specialized teams.
46. As previously indicated, the number of complaints for torture has been very high during a long period already. A haphazard emergence of high volumes of torture theoretically is possible. If, however, these figures stay elevated during a longer period, it is very difficult, if not impossible, to consider them anymore as being the result of a coincidence. In the report '**Torture in Turkey Today**', we concluded: "*Consequently, we can establish without doubt and with absolute clarity that the frequent use of torture of certain groups of people does not constitute a spontaneous reaction of certain police officers*". This conclusion seems to stand beyond any reasonable doubt.

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<sup>39</sup> Office of the United Nations High Commissioner for Human Rights, Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East January – December 2017, Nrs. 77-78.

47. The targeted group is very clear: opponents of the governmental policy are targeted, more especially persons allegedly belonging to the Gülen movement or the Kurdish movement. If torture would occur in a haphazard way, it is improbable that some, quite specific groups would be especially targeted during a long period and certainly not these groups. If the acts of torture would be haphazard, no specific group would be targeted and if any, it would rather be a group of violent criminals, child abusers, sexual offenders, who “traditionally” (and unfortunately), are targeted in prisons or in police stations.
48. In our report ‘**Torture in Turkey Today**’ recurring patterns were discovered. These patterns were also mentioned in the report of the OHCHR, cited above and described as follows: *“the emergence of the pattern of detaining women just before, during or immediately after giving birth. In almost all cases, the women were arrested as associates of their husbands, who were the Governments’ primary suspects for connection to terrorist organizations, without separate evidence supporting charges against them”*. Another pattern is mentioned in the yearly reports of HRA. In 2018, 160 persons *“notably students, journalists and political activists”* stated that they were subjected to torture and ill-treatment due to attempts to force them to become informants. For 2019 this related to 71 people, however the media also mentioned an additional 66 other people. Appropriately, we refer to our report ‘**Torture in Turkey Today**’: *“Moreover, there seems to be a consistent pattern, whereby first the person concerned (mainly men) he alone is dealt with. If the torture does not provide the desired results, the security officers threaten to get the spouse of the detained person involved”*. Recurring specific patterns of torture, as described above, do not match with a spontaneous, unorganized way of torturing.
49. The existence and the use of specialized teams is also an indication of the existence of a systematic practice. We refer to the report ‘**Torture in Turkey Today**’: *“We note that in the testimonies of the victims, remarks are put forward which indicate that specialized persons took the matter in their own hands, with reference often made to officers of M.I.T. It is repeatedly shown in testimonies that the perpetrators are trained*

*and master their craft such that the victim does not get killed and the torture practices can continue. In the two latest CPT reports (visits of 2017 and 2019) reference is made to the mobile intervention teams (Yunus) who are allegedly "specialized" in the ill-treatment of persons taking in custody. It is absurd to consider as realistic that this situation would occur in a "spontaneous, haphazard" way.*

50. **Our conclusion is clear and simple: torture in Turkey, as described in our report '*Torture in Turkey Today*', is also systematic.**

### **II.2.3. THE APPLICATION TO THE TURKISH SITUATION: ENFORCED DISAPPEARANCE**

51. Widespread is a relative notion. In the report '***Abductions in Turkey Today***', as far as the internal abductions are concerned, it is stated: *"an extensive examination of the suspicious disappearances in Turkey has allowed us to identify 25 cases in which it is beyond reasonable doubt that an abduction organised by the Turkish state has taken place"*. Each case study mentioned in the report is based on at least three different sources.
52. Our investigation also allowed us to identify 63 cases of international abductions. However, Turkish governmental officials have repeatedly claimed that Turkey was involved in more than 100 international abductions.
53. To evaluate if the presence of some type of acts is widespread, we need to take into account the nature of these acts. It is reasonable to argue that a widespread pattern of abductions does not need elevated numbers to be considered as widespread. For instance, torture needs high numbers to be considered as widespread. Although the impact of torture on each victim and on each family of the victim is massive and persisting, the "chilling effect" of abductions on the victim, on his/her family, knowing at least torture will follow and perhaps the person will never return, but also on the targeted group as a whole, is even higher. The abductions create the feeling that no

person belonging or supposedly belonging to the targeted group, can feel free and safe in his or her own country or abroad.

54. However, we acknowledge that the qualification of the internal and/or international abductions executed by the Turkish authorities as widespread, how important they may be, within the context of the Rome Statute is disputable.
55. Crimes against humanity, within the context of the Rome Statute, must be widespread OR systematic. Within the framework of the Rome Statute, "systematic" means "a non-coincidental repetition of crimes" and the "improbability of their random occurrence".
56. The evaluation, if the abductions are "non-coincidental" or if a "random occurrence is improbable" need to be executed separately for the internal abductions and the extraterritorial abductions.
57. For the evaluation of the internal abductions, we need to take in account the following elements. First of all, abductions are by nature non-coincidental, because the execution of abductions need an important preparation and organization.
58. Moreover, in the report '**Abductions in Turkey Today**', a certain pattern in the execution of the abductions has been established. We can summarize the findings of the report as follows.
  1. The abductions were carried out in such a way that it is clear that the perpetrators were not worried about an intervention by the law enforcement authorities.
  2. Many abductions were the result of large-scale kidnapping operations: some with a group of almost 40 people with many witnesses being present, some involved 4 cars who followed and abducted the victims, in another case 2 cars were involved.
  3. The abductions often took place in the middle of the day, or in very busy streets in busy districts, in front of crowded shopping malls, as if it was meant to "show" clearly that the possibility of being abducted is real for those who belong to the targeted group.

4. Consequently many people witnessed those abductions. The abductors also did not seem concerned by the fact that plenty of security cameras managed to film the abductions and notably recorded the number plates of the vehicles with which they committed the abductions.

5. The abductions were consistently carried out in a very similar manner. The cars of the abductees were blocked by the same type of vehicles, often with a car accident being provoked. The abductors then put a bag over the heads of the abductees and pushed them into a black VW Transporter van.

6. All abductees were considered by the Turkish state as political opponents – either as members of the Gülen movement or of the PKK.

7. The fact that the Turkish state is involved with these abductions is supported by a wide variety of evidence. Reference can be made to various statements made by people who were initially abducted but then resurfaced and were finally able to make statements. Moreover, as evidenced by CCTV footage and eyewitnesses, the abductors frequently wore clothes or badges indicating that they worked for the Turkish police forces or the Turkish secret services. In some cases, the abductors did not hesitate to either present themselves as being police officers or behaved as such.

59. The evaluation of the extraterritorial abductions must be developed in another way. As indicated in the report on abductions, it is important to note that, in the context of extraterritorial abductions, Turkey has never denied its involvement. For instance, Turkish Foreign Minister Mevlüt Çavuşoğlu confirmed that 104 Gülenists from 21 countries were abducted and brought back to Turkey as part of the Turkish government's global manhunt. Similarly, Deputy Foreign Minister Yavuz Selim Kiran stated that this happened to more than 100 Gülenists. Ismail Hakki Pekin, former head of the Turkish Armed Forces Intelligence Department, also confirmed that, unless the followers of the Gülen movement are *"returned to Turkey by force, they must be exterminated wherever they are, just like ASALA or the MOSSAD did with the former Nazis"*. The presidential spokesperson Ibrahim Kalin furthermore publicly stated that

operations abroad against the Gülen movement were being carried out *"under clear instructions"* from President Erdogan. He also stated on 21 December 2018, during a press conference, that the government would continue its operations against the Gülen Movement, similar to the one in Kosovo. Vice President Fuat Oktay declared that supporters of the Gülen movement *"would never be left alone"* anywhere in the world.

60. The United Nations has noted the approach being taken by the Turkish state to abduct its citizens from abroad. In July 2019, the UN Working Group on Enforced or Involuntary Disappearances rang the alarm bell while writing: *"One such development is the increasing use of extraterritorial abductions, as the Working Group observed before the General Assembly in 2018. (...) China and Turkey continue to seek the cooperation of other States to arrest, often in undercover operations, Uighurs and alleged supporters of the Hizmet/Gülen movement respectively, living outside the country. The allegations received by the Working Group indicate that individuals often disappear during these operations or once they arrive in the country of destination."*<sup>40</sup> In 2018 too, the UN Working Group expressed its concerns in that respect: *"The Working Group is concerned at the allegations concerning the practice of extraterritorial abduction of individuals allegedly belonging to and/or sympathizers of the Hizmet/Gülen movement, as pointed out in a number of communications (see A/WGEID/114/1, paras. 7 and 145)."*<sup>41</sup> Similarly, in a recent letter written to Turkey by the UN Working Group on Enforced or Involuntary Disappearances and three UN Special Rapporteurs it was stated: *"Turkish authorities have not only acknowledged direct responsibility in perpetrating or abetting abductions and illegal transfers, but have also vowed to run more covert operations in the future"*<sup>42</sup>.

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<sup>40</sup> UN Working Group on Enforced Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances (A/HRC/42/40) of 30 July 2019, No. 56.

<sup>41</sup> UN Working group on Enforced Disappearances, Report of the Working Group on Enforced Disappearances or Involuntary Disappearances (A/HRC/39/46) of 30 July 2018, No.136.

<sup>42</sup> Letter sent by the UN Working Group on Enforced Disappearances; Special Rapporteur on the human rights of migrants, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to Turkey on 5 May 2020 (Reference: AL TUR 5/2020).

61. **Our conclusion is that internal and extraterritorial abductions in Turkey are without any doubt to be evaluated as systematic within the framework of the Rome Statute.**

### **II.3. DIRECTED AGAINST ANY CIVILIAN POPULATION.**

#### **II.3.1. DEFINITION WITHIN THE ROME STATUTE.**

62. The phrase “*directed against*” a civilian population requires that the civilian population was the primary object of the attack and not just an incidental victim of that attack.<sup>43</sup> It was the intention to attack the civilian population. The ICC Appeals Chamber considered in that regard in its Judgement of 30 March 2021 in the case of Mr Bosco Ntaganda:

*“Article 7 of the Statute requires a finding that the attack was ‘directed against any civilian population’ and does not require a separate finding that the civilian population was the primary object of the attack. This means no more than that the attack targeted the civilian population; it is not required that the main aim or object of the relevant acts was to attack civilians. An attack directed against a civilian population may also serve other objectives or motives. The question of whether an attack was directed against a civilian population is essentially a factual issue.”<sup>44</sup> (Underlining added).*

63. The term “civilian” population refers to those individuals not involved in any form of military activity or armed resistance.<sup>45</sup> This requirement clearly reflects that the definition of crimes against humanity was constructed to make a difference with war crimes.

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<sup>43</sup> G. METTRAUX, *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 233.

<sup>44</sup> Judgment on the appeals of Mr. Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’ ICC-01/04-02/06-2666-Red, 30 March 2021, para. 7.

<sup>45</sup> Decision on the Prosecutor’s Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18, 22 May 2018, para. 45.

*"What the requirement of an attack against a civilian population intends to remove from the realm of crimes against humanity is the situation where civilians are merely collateral or incidental victims of an otherwise legitimate military attack, i.e., a situation where they are not the primary target of the attack".<sup>46</sup>*

64. Also, the term "any" must be placed in the evolution from war crimes to crimes against humanity. This evolution had as a consequence that the crimes against humanity could also be committed against the own population. "Any" reflects this evolution: it is not limited to "one side" as war crimes were and are applicable for any nationality.

65. The term "*population*", seems to indicate that a group is targeted not each individual as such and that this group must form a sufficiently stable and identifiable group, either geographically or as a result of certain common features (nationality, ethnicity, race or religion).<sup>47</sup> The common stance taken in the jurisprudence and the legal doctrine is that the fact that attackers specifically target certain groups of individuals *within* the population (e.g. Members of particular communities or affiliations), does not exclude the possibility that the attack was directed against the civilian population.

*"For the same reason, the targeting of members of particular communities or affiliations could still lead to the conclusion that the attack is directed against a civilian population"<sup>48</sup>.*

TRIFFTERER and AMBOS go a step further:

*"Population refers to a multiplicity of persons sharing common attributes"<sup>49</sup>*

WERLE and JESSBERGER share the same opinion:

*"any group of people linked by shared characteristics that in turn make it the target of an attack"<sup>50</sup>*

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<sup>46</sup> METTRAUX, G., International Crimes, Volume II: Crimes against Humanity, 2020, Oxford University Press, 237

<sup>47</sup> METTRAUX, G., International Crimes, Volume II: Crimes against Humanity, 2020, Oxford University Press, 247.

<sup>48</sup> G. METTRAUX, International Crimes, Volume II: Crimes against Humanity, 2020, Oxford University Press, 235.

<sup>49</sup> Triffterer, O. and Ambos, K. (eds), The Rome Statute of the International Criminal Court, A Commentary, München, 2016, 3rd edition, C.H.Beck, 172.

<sup>50</sup> Werle, G. and Jessberger, F., Principles of International Criminal Law, 2014, 3<sup>rd</sup> edition, UOP, 334.

66. So for example, in the “Decision on the confirmation of charges against Laurent Gbagbo”, the ICC considered that an attack directed against a civilian population had taken place since the acts of violence were carried out by pro-Gbagbo forces and directed against civilians believed to be Ouattara supporters.<sup>51</sup> Furthermore, in the Judgement in the case of Hisssein Habré, the Extraordinary African Chamber established the attack directed against a civilian population on the following basis:<sup>52</sup>

*“L’ensemble des éléments de preuve démontrent que dès les premières semaines d’existence du régime de Hisssein Habré jusqu’à sa chute, la population civile du Tchad – et plus particulièrement, les opposants politiques au régime de Hisssein Habré ou ceux perçus comme tels, les populations civiles du Sud et des ethnies Hadjerai et Zaghawa – a été victime d’une attaque à grande échelle qui a fait des milliers de victimes. La répression frappait de manière indiscriminée tout membre de ces groupes, hommes, femmes et enfants. Elle a consisté en des actes de violences répétés, délibérés et réguliers, dont des arrestations, détentions au secret et dans des conditions effroyables, sévices de toutes sortes, disparitions et exécutions.”*

Free translation:

*“All the evidence shows that from the first weeks of the existence of Hisssein Habré’s regime until its fall, the civilian population of Chad – and more specifically, the political opponents of Hisssein Habré’s regime or those perceived as such, the civil populations of the South and of the Hadjerai and Zaghawa ethnic groups – were the victims of a large-scale attack that resulted in thousands of victims. The repression was indiscriminate against any member of these groups, men, women and children. It consisted of repeated, deliberate and regular acts of violence, including arrests, incommunicado detention in appalling conditions, abuse of all kinds, disappearances and executions.”*

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<sup>51</sup> Decision of the Confirmation of Charges against Laurent Gbagbo, ICC-02/11-01/11-656-Red, 12 June 2014, paras. 209, 210, 211.

<sup>52</sup> Chambre Africaine extraordinaire d’assises, Prosecutor v. Hisssein Habré, 30 May 2016, 1392.

67. **The conclusion is that the attack must be directed (intention) against any civilian population (not necessarily against all the civilian population), which means a clearly defined and stable group with common characteristics that in turn make it the target of an attack<sup>53</sup>, so the acts surely are not merely directed against randomly selected individuals.**

### **II.3.2. APPLICATION TO THE TURKISH SITUATION: TORTURE.**

68. Are the acts of torture in Turkey directed towards “any civilian population”? In the report ‘**Torture in Turkey today**’ we have identified 5 targeted groups of whom two are in the heart of our investigation:

- 1) People who are presumed to be linked with or to be supportive to the Kurdish movement (especially the PKK or other leftist groups). This group has been the object of torture with varying intensity. The varying intensity is linked to the presence of a state of emergency in the regions concerned and to whether or not the violent conflict has flared up.
- 2) People presumed to have something to do with the Gülen movement. This group has mainly been subjected to torture since the attempted coup d’état of July 2016.

Immediately linked to these categories are a) Persons, presumed members of the PKK, of far left-wing organizations and of the Gülen movement who were abducted, in Turkey or abroad, and tortured after their abduction, and b) The wives of arrested men, where a practice of imprisoning these women shortly before childbirth has grown. Today it is taken into account that about 800 young children are in prison.

Related to the two categories mentioned, are also those people targeted for arrest with the intention of “convincing” them to become police informants. This group seems to have become larger in recent years. For the sake of completeness, the two other groups, where we do not

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<sup>53</sup> There has been some discussion if an attack against a civilian population requires necessarily that civilians are targeted because of some distinguishable characteristic of the civilian population. We do not enter into this decisions as it is useless for our report. See, for a critical overview: METTRAUX,G, *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 242-245.

claim, in this report, that they have to be considered as crimes against humanity, are people suspected of “ordinary” crimes, especially aggravated crimes or sexual crimes (against minors) and juveniles who are locked up in a closed shelter/juvenile prison and who suffer from violent illegal punishment.

69. **Taking into account the formulated remarks and the cited literature and jurisprudence, it is hard not to see that these groups must be considered as being in accordance with “any civilian population”. The victims of the abductions are surely not randomly selected persons but belong to two groups (Gülen movement and Kurdish movement) that are critical towards the government and are tortured for that reason.”**

### II.3.3. APPLICATION TO THE TURKISH SITUATION: ENFORCED DISAPPEARANCE.

70. Are the acts of abduction executed by the Turkish government directed towards “any civilian population”?

71. In the report ‘**Abduction in Turkey Today**’ we could define the targeted groups as follows.

a) During the 1980s and 1990s, Turkey was confronted with many state-sponsored abductions and disappearances. Human rights organizations estimate that up to 3,500 people forcibly disappeared, with around 450 cases being confirmed. The UN Working Group on Enforced or Involuntary Disappearances registered 214 cases during those years. The victims were nearly exclusive Kurdish persons allegedly linked to the PKK or other (far) left groups.

b) For the abductions of the last years, the composition of the group changed somehow, because the political situation also changed. For that period, we can summarise the report ‘**Abductions in Turkey Today**’ as follows:

*“All abductees were considered by the Turkish State as political opponents – either as members of the Gülen movement, or of the PKK. Even before their abduction, many of the victims were the object of a criminal investigation for the alleged membership of*

*these organisations. Moreover, an important number of abductees knew in advance that they were the object of an arrest warrant and went into hiding out of fear of being tortured by the authorities. Others worked at institutions considered to be linked to the Gülen movement and were dismissed from their jobs following the 15 July 2016 events. Finally, the case of Hıdır Çelik stands out as he seems to have been caught in the midst of violent clashes between the armed forces and the PKK in Diyarbakır's Hazro district. The Turkish authorities seemed to have considered that he was a PKK member and involved with these clashes. In any event, it is clear that Mr. Çelik was considered to be an "opponent" of the Turkish State. Lider Polat was, as a youth leader of HDP, also considered to be a political opponent of the current regime in Turkey."*

72. The targeted group for the extraterritorial abductions is nearly completely – to our knowledge, with only one exception – composed of persons (supposed to be) linked with the Gülen movement. A large number of them were responsible for "Gülen schools" in the country they lived.
73. To be in accordance with the Rome Statute, the attack must be directed (intention) against any civilian population (which does not mean all the civilian population), which means a clearly defined and stable group with common characteristics, so the acts surely are not merely directed against randomly selected individuals. As was stipulated above this criterion is present in our case. The victims of the abductions are surely not randomly selected persons, but belong to two groups (Gülen movement and Kurdish movement) that are critical towards the government and are abducted for that reason.

#### **II.4. THE ATTACK MUST BE COMMITTED "PURSUANT TO OR IN FURTHERANCE OF A STATE OR ORGANIZATIONAL POLICY TO COMMIT SUCH ATTACK"**

##### **II.4.1. DEFINITION WITHIN THE ROME STATUTE.**

74. According to Article 7 (2) (a) of the Rome Statute, the attack against any civilian population must be committed pursuant to or in furtherance of a state or

organizational policy to commit such attack. According to the Elements of Crimes, it is understood that “policy to commit such attack” requires that the state or organization actively promote or encourage such an attack against a civilian population.

75. The policy requirement has *“often been justified in the literature on grounds that it would help distinguish between what is of concern to the international community on the one hand and, on the other, the sort of crimes that should remain the exclusive concern of domestic jurisdictions”*<sup>54</sup>. In this context the ICC stated clearly that the policy requirement *“ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern”*<sup>55</sup>. As Cupido explains: *“With the removal of the war nexus and the recognition of crimes against humanity as an autonomous international crime, the legal elements excluding isolated, random and individually committed crimes from the crimes against humanity concept had to be sought elsewhere”*<sup>56</sup>

There is an ongoing discussion<sup>57</sup> about the nature of the policy – requirement. Is it an element *“from which the systematic nature of an attack may be inferred”*<sup>58</sup> as the prosecutor in the Kenya case stated and what also is the opinion of an important part of the academia, or is it *“a separate contextual requirement to crimes against humanity”*<sup>59</sup> as Hansen states, one out of five

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<sup>54</sup> METTRAUX, G, International Crimes, Volume II: Crimes against Humanity, 2020, Oxford University Press, 292.

<sup>55</sup> ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, in the case of The Prosecutor v. German Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges, 30 September 2008, §396.

<sup>56</sup> Cupido, M., The policy underlying crimes against humanity: practical reflections on a theoretical debate, Criminal Law Forum, 2011, 279.

<sup>57</sup> For an overview of this discussion, see: Cupido, M., The policy underlying crimes against humanity: practical reflections on a theoretical debate, Criminal Law Forum, 2011, 275-281 and METTRAUX, G, International Crimes, Volume II: Crimes against Humanity, 2020, Oxford University Press, 289 and more specifically footnote 407.

<sup>58</sup> As previously held by Pre-Trial Chamber III, the reference to a wide spread or systematic attack has been interpreted as excluding isolated or random acts from the concept of crimes against humanity. In this regard, the adjective “widespread” refers to “the large-scale nature of the attack and the number of *targeted persons*”, while the adjective “systematic” refers to the “*organised nature of the acts of violence and the improbability of their random occurrence*”. The Chamber, moreover, opined that the existence of a State organisational policy is an element from which the systematic nature of an attack may be inferred”. (ICC, Office of the prosecutor, Situation in the Republic of Kenya: Request for Authorisation of an Investigation Pursuant to Article 15 of the Rome Statute, 26 November 2009. §79).

<sup>59</sup> Hansen, T., The policy requirement in crimes against humanity: lessons from and for the case of Kenya, Georges Washington International Law Review, 43, no1 (2011), 39.

contextual elements to define a crime against humanity as applied for instance by the Pre-Trial Chamber II in the same case<sup>60</sup>.

76. Although it is certainly an interesting and important discussion, as for our report we will take in account the heaviest burden of proof, which means that we will consider the policy requirement as a specific contextual element needed to be present to consider an attack as a crime against humanity, this discussion is not relevant for our report.

77. Defining term of "policy" in a transparent and verifiable way is not an easy task. *"Our difficulty is that 'policy' is rather a loose word in English and is inclined to be used by people when they want to get out of expressing a concrete meaning"*<sup>61</sup>.

78. METTRAUX summarizes the jurisprudence of the ICC as follows: *"From this, the ICC developed a notion of "policy" that revolves around four main features (which have been given different weight and importance by different chambers):*

- (i) The attack must be thoroughly organized and follow a regular pattern.*
- (ii) It must be conducted in furtherance of a common policy involving public or private resources.*
- (iii) It can be implemented either by groups who govern a specific territory or by an organization that has the capacity to commit a widespread or systematic attack against a civilian population*
- (iv) It need not be explicitly defined or formalized".* <sup>62 63</sup>

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<sup>60</sup> "Further, Article 7(2)(a) of the Statute imposes the additional requirement that the attack against any civilian population be committed "pursuant to or in furtherance of a State or organizational policy to commit such attack" (ICC, Pre-Trial Chamber III, Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the situation in the Republic of Kenya, 31 March 2010, §83).

<sup>61</sup> Minutes of Conference Session of July 19, 1945, cited in METTRAUX, G. International Crimes, Volume II: Crimes against Humanity, 2020, Oxford University Press, 292, footnote 420.

<sup>62</sup> G. METTRAUX, International Crimes, Volume II: Crimes against Humanity, 2020, Oxford University Press, 298 with reference to ICC, Pre-Trial Chamber III, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11, 15 November 2011, para 43.

<sup>63</sup> The requirement "involving public or private resources" (ii) is requirement stems from footnote 6 of the Elements of Crimes that suggests that the policy must also be implemented by State or organizational action, which has been

79. The Elements of Crime in footnote 7 state that *“Such a policy may, in exceptional circumstances, be implemented by deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.”* The existence of a policy appears to imply a certain level of planning of the attack, whereby this certain level of planning also seems to be a sufficient element of proof. *“An attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy the policy criterion”*.<sup>64</sup> The policy does not have to have foreseen each of the specific crimes and acts of violence that formed part of the attack, but its implementation must have reasonably involved the commission of the acts of violence against the civilian population.<sup>65</sup>

#### **II.4.2. APPLICATION TO THE TURKISH SITUATION: TORTURE**

80. For this report concerning the Turkish situation, it is our intention to prove a state policy, not an organisational policy. The discussion about the definition of “organisational” by this is not relevant for our report.

81. The acts of torture described in the report *‘Torture in Turkey Today’* take place in prisons, police stations and (secret) detention locations by law enforcement officials, mainly police and gendarmerie officers and officers of the secret services. The term “state” is not limited to the governmental level, but to all levels of the state, so also including for instance the law enforcement officials. Further we will indicate that also governors, the parliament, the government and the judiciary actively participate or

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interpreted by one ICC Chamber as requiring that the implementation of the policy must involve public or private resources (Decision on the confirmation of charges in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, 30 September 2008, para. 396).

<sup>64</sup> Decision of the Confirmation of Charges against Laurent Gbagbo, ICC-02/11-01/11-656-Red, 12 June 2014, paras. 209, 210, 215-216 and to ICC, Pre-Trial Chamber III, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d’Ivoire, ICC-02/11, 15 November 2011, para 43.

<sup>65</sup> G. METTRAUX, *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 300.

“organize” the policy on torture. So, also the question “if” and to what extent the “deliberate failure to take action” or “the absence of governmental action” is sufficient to prove a state policy, is irrelevant.

82. The policy of the Turkish state can be summarized as follows:

by torturing the persons who are allegedly linked to the Gülen movement or the Kurdish movement, which they all indicate as terrorists, the Turkish state wants to make them confess and aims to physically punish them. The state also aims to extract from them information – false or true – about other persons who on their turn will be tortured, etc... All these persons then will be condemned for long prison sentences, based upon declarations done under torture. The ultimate hope of the government seems to be the annihilation of both movements, and to create a deterrent effect on other (alleged) members of these movements, but that is the political long-term ambition, not the concrete intention. The concrete intention is torturing to punish and to extract real or false information, leading to long prison sentences.

83. The next questions is, whether this policy is “organized”, “promoted”, “encouraged” and how? We perceive different levels of this “organisation”, “promotion” and “encouraging”.

84. At the level of the legislator important steps have been taken in that direction. As a first element the legislator has installed a large possibility of impunity of state officials. We summarize the findings of the report ‘**Impunity in Turkey Today**’ on this topic in the following paragraphs.

85. Turkey’s broad-reaching Anti-Terrorism Law<sup>66</sup> offers only a vague definition of terrorism, lacking the level of legal certainty required by international human rights standards. The ECtHR has most recently condemned Turkey’s legal framework on

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<sup>66</sup> The Law on Fight against Terrorism, No. 3713, adopted on 12 April 1991, published in the Official Gazette of Turkey on 12 April 1991 and amended in 1995, 1999, 2003, 2006 and 2010

terrorism in two important judgments. In *Imret v. Turkey and Işıkırık v. Turkey*<sup>67</sup> the Court held that Sections 6 and 7 of Article 220 of the Turkish Criminal Code imputing membership of an illegal organisation to the mere fact of a person having acted ‘on behalf of’ that organisation or for having ‘aided an illegal organisation knowingly and willingly’ respectively, were not ‘foreseeable’ in their application since they did not afford the applicants legal protection against arbitrary interference with their rights to freedom of assembly and association under Article 11 ECHR. This Anti-Terrorism Law has been used widely and arbitrarily to designate and criminalise many instances of peaceful activity of political opponents, human rights defenders and journalists as terrorist activity (in particular for alleged “membership of a terrorist organisation”); as per the succinct conclusion of an Amnesty International report, “*when correctly viewed, everyone’s a terrorist*” in post-coup Turkey<sup>68</sup>.

86. A second element contributing to promote torture, in a nearly direct way, is the continuing existence of legislation creating a system of administrative authorization, by which impunity of perpetrators of torture are assured of impunity. Under the Law No. 4483 on the Prosecution of Civil Servants and Other Public Officials, Turkish civil servants, including police cannot be prosecuted without the permission of relevant administrative authorities for crimes that are not excluded from the scope of the law and that have been committed in the course of the civil servant’s duties. While the crime of torture is excluded from the scope of the law – meaning that prosecutors do not need an authorisation to investigate, the distinction between ‘judicial and administrative law enforcement’ gives rise to conflicting practice. The duty of the administrative law enforcement is to prevent the disturbance of public order (such as maintaining public order, crowd control, etc.), whereas the judicial law enforcement is tasked with the duty to collect criminal evidence in the event of any act that may be considered a crime, to apprehend the perpetrators and deliver them to judicial authorities, and to ensure the conditions for a sound investigation. An authorisation

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<sup>67</sup> ECtHR, *Imret v. Turkey* (No. 2), App. No. 57316/10, 10 July 2018, para. 55 and ECtHR, *Işıkırık v. Turkey*, App. No. 41226/09, 14 November 2017, para. 41,

<sup>68</sup> Amnesty International, ‘Punishment Without Trial: Pre-Trial Detention in Turkey’ 5 May 2017, available at [amnestyusa.org/punishment-without-trial-pre-trial-detention-in-turkey/](https://www.amnestyusa.org/punishment-without-trial-pre-trial-detention-in-turkey/).

by the highest-ranking civil administrator must be issued for crimes committed by security forces during the execution of their administrative law enforcement duties. For crimes committed during their judicial law enforcement duties, such authorisation is not needed. Such a vague and abstract distinction is very difficult to maintain in practice in terms of the structure, organisation and duties of the law enforcement agencies. Most often, the investigations into crimes allegedly committed by security officers are hindered by subjecting them to an administrative authorisation, thereby contributing to the climate of impunity in the country. This procedural protection has the effect of considerably delaying if not removing certain police misconduct cases from the judicial process entirely.

87. The Turkish Law No. 2937 of 2011 on the State Intelligence Services and the National Intelligence Agency (MIT) – as amended by the Law No. 6532 of 2014 gives MIT personnel effective immunity from persecution unless the head of the intelligence agency issues an authorisation. The public prosecutor thus has no authority to initiate direct criminal investigations. Since 2012, the MIT has allegedly been involved in a high number of crimes, including enforced disappearances, torture and ill-treatment. Such an authorisation is also required by the President to put the Chief of the General Staff and Chief of Staff of the Land, Sea and Air Forces on trial for crimes they allegedly committed in the course of their duties under the Turkish Law No.353 on Military Criminal Procedure Law.
  
88. Importantly, the Turkish Law No. 6722 of 2016, which amended the Law No. 5442 on Provincial Administration, granted Turkish security forces a *de facto* immunity from prosecution for acts carried out in the course of their operations in the Turkish South-east (especially in 2015 and 2016). The law applies retroactively and introduces the requirement to seek authorisation from relevant authorities (in particular ministries) before any public officials taking part in counter-terrorism operations can be prosecuted for any offences committed while carrying out their duties. This legislation has received harsh criticism from a wide swath of international community. The UN Special Rapporteur, Nils Melzer criticized the legislation noting it has the potential of

“rendering investigations into allegations of torture or ill-treatment by the security forces involved more difficult, if not impossible”<sup>69</sup> .

89. Also, the Emergency Decrees increased the risk of impunity. Decree No. 667 of 22 July 2016 granted full immunity from legal, administrative, financial and criminal liabilities to state officials who would otherwise be subject to criminal investigation and prosecution. Article 37 of Decree No. 668 and its subsequent amendment, (Article 121 of) Decree No.696, extended this immunity to civilians – those ‘who have adopted decisions and executed decisions or measures with a view to suppressing the coup attempt and terrorist actions performed on 15/7/2016 and the ensuing actions’ ... ‘without having regard to whether they held an official title or were performing an official duty or not’. This effectively prevented accountability for any and all abuses that might have been perpetrated during this time, and also raised concerns of pro-state vigilantism. These decrees were later approved by the Turkish Parliament as Laws Nos. 6749, 6755 and 7079 and added to Turkey’s broad counter-terrorism arsenal. An application on the constitutionality of these clauses was dismissed by the Constitutional Court.
90. The legislator cannot be considered to be ignorant of the consequences this legislation has. In the different reports made for the Turkey Tribunal, the authors have cited international institutions and the ECtHR who clearly warned the legislator about the fact that this kind of legal dispositions have an immediate impact on the persistence of torture. It is not the only element of course, but it is a way to make the above defined policy work. That is the reason why we can and must consider this legislation as element of proof of the “promoted”, “encouraged” or “organized” state policy. It could be argued that it is an indirect proof. We do not agree on that. The impact of the legislation is direct and predictable and the intention to let the

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<sup>69</sup> See, Report of the Special Rapporteur supra n. 51 at para. 69. The CoE Human Rights Commissioner, Dunja Mijatovic similarly noted it “further strengthened the shield of impunity” in Turkey. See COE, Human Rights Commissioner Third party intervention by the Council of Europe Commissioner for Human Rights, CommDH(2017)13 25 April 2017 para. 32, available at <https://rm.coe.int/168070cff9>.

perpetrators unpunished and by this promoting torture as legitimate, seems to us undisputable.

91. At the governmental level the "official rhetoric" is a zero tolerance towards Torture. However, from the very first days following the 2016 attempted coup, disturbing images have fuelled allegations of torture and ill-treatment of detainees in Turkey and have been widely reported by the media and international organisations. Despite the fact that the Turkish government strenuously denied these claims (in official occasions), avowing their commitment to "zero tolerance for torture" and labelling them part of a "misinformation campaign", they have failed to adequately respond to the allegations. Responding to a July 2016 Amnesty International report detailing allegations of torture and ill-treatment, for example, the then Turkish Minister of Justice Bekir Bozdağ, said in an interview, the transcript of which was later posted on the ministry's website, that "Whoever says that there is torture in Turkey's prisons is lying, defaming. There is no possibility that we have torture in our prisons"<sup>70</sup>. Former Prime Minister Binali Yıldırım similarly denied such allegations<sup>71</sup>.
92. In the context of specific allegations: the official denial of any possibility of torture and the refusal of any investigation into these allegations, next to political motivation, have an immediate impact on the perpetrators who by this receive the clear message that they will not be accused nor condemned. It is an active way to encourage torture towards the targeted groups.
93. It should also be noted that on some non-official occasions, such as television interviews and rallies, the Government officials have appeared to openly encourage torture and ill-treatment, thus contributing openly to the climate of impunity and promoting by this the acts of torture. For instance, President Erdogan at a rally on 4 April 2017 said:

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<sup>70</sup> See, "Bozdağ: Cezaevlerinde İşkence Kesinlikle Yoktur" (There is definitely no torture in prisons"), Ministry of Justice website posting, 2 August 2016, available at <http://www.basin.adalet.gov.tr/Etkinlik/bozdag-cezaevlerinde-iskence-kesinlikle-Yoktur>.

<sup>71</sup> See, "Turkish Premier Demands US Help with Gulen", Wall Street Journal, 26 July 2016, available at <http://www.wsj.com/articles/turkish-premier-demands-u-s-help-with-gulen-1469555265>

*"We are purging every Gülenist in the army, in the police and in state institutions, and we will continue cleansing [these organisations of] them because we will eradicate this cancer from the body of this country and the state. **They will not enjoy the right to life.** They divided this nation, this Ummah [Islamic nation]. Our fight against them will continue until the end. We won't leave them wounded"<sup>72</sup> (Underlining added).*

Similarly, the then Economy Minister, Nihat Zeybekci said of the coup plotters: *"We will put them into such holes [jails] for punishment that they won't even be able to see the sun of God as long as they breathe. They will not see the light of day. They will not hear a human voice. They will beg for death, saying 'just kill us'"<sup>73</sup> (Underlining added).*

94. The difference between the official statements about zero tolerance and deviating communication who encourage or even praise unlawful acts, has also been pointed out by the UN Office of the High Commissioner for Human Rights in the report of March 2018:

*"Thousands of uncensored images of torture of alleged coup suspects in degrading circumstances were circulated widely in Turkish media and social networks after the coup, along with statements against opponents of the Government"<sup>74</sup>.*

95. Specific attention should be given to the press conference of President Erdogan on 5 July 2021 regarding the abduction of Mr. Inandi from Kyrgyz Republic to Turkey. During this press conference the president showed the picture of Mr. Inandi with clear signs of torture on his right hand. This interpretation has been confirmed by Dr. Fincanci, a reputed authority on examining victims of torture. The message was clear: the president showed he was able to abduct who he wanted to abduct, and the

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<sup>72</sup> 'President Erdogan: Gülenists will not enjoy right to life in Turkey' Turkey Purge, 5 April 2017 available at

<https://turkeypurge.com/president-erdogan-gulenists-will-not-enjoy-right-to-life-in-turkey>

<sup>73</sup> "Economy Minister Says Government will Make Coup Plotters Beg For Death", Turkish Minute, 1 August 2016, available at <https://www.turkishminute.com/2016/08/01/economy-minister-says-govt-will-make-coup-plotters-beg-for-death/>.

<sup>74</sup> Office of the United Nations High Commissioner for Human Rights, Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East January-December 2017, March 2018, para 80.

abducted persons could not trust that he would not be tortured. It is hardly possible to have a more clear and open acceptance of torture.

96. Finally, we want to pay attention to the letter of August 2016, reproduced in Appendix 5 of the report '**Torture in Turkey Today**.' In this classified letter, sent by the General Director of Security, the security services, awaiting the visit of the CPT, are ordered "*within this scope, the sport halls and the like used as detention centres should not be used as much as possible, current laws and international standards should be followed in detention actions and processes, and the regularisations/arrangements to make all other detention centres appropriate for the aforementioned visit should be immediately realised*". It is evident that the central security administration, under the direct authority of the government, was trying to hide as much as possible the unlawful acts and by that was actively covering up these acts.
97. At the judicial level, we refer to the report '**Torture in Turkey Today**'. Despite numerous complaints (estimated an average of 3000 a year), documented and confirmed by official international reports, the number of inquiries, the number of indictments, the number of prison sanctions are extremely low and impossible to evaluate them as in line with the international standards. As highlighted by the ICJ in a report of June 2016, transfers of judges between judicial positions in different regions of Turkey were being applied as a hidden form of disciplinary sanction and as a means to marginalize judges and prosecutors seen as unsupportive of Government interests or objectives.
98. This finding concurs with the numerous refusals of the governors to start an inquiry and with the extreme length of procedures based on complaints against torture. The government actively promoted this absence of judicial reaction. As stated in the report '**Judicial Independence & Access to Justice**': "*Arrest and detention of judges and prosecutors, who adopted decisions or performed investigations disliked by the Government, happened much before the attempted coup d'état; the charge was the same, before and after July 2016 "being a member of a terrorist organisation"*". After the failed coup however, the intensity of the governmental action increased spectacularly.

One day after the attempted coup d'état, 2745 judges and prosecutors were purged. The policy oriented against the critical, in that moment mostly alleged Gülen members, what was started in 2013, was well prepared and the failed coup d'état was an excellent excuse (as President Erdogan said: a gift of God) to eradicate this group from the judiciary and by that weakening, if not destroying the judicial control on torture imposed on this group. Finally, more than 4000 judges and prosecutors were dismissed and 2450 judges and prosecutors were arrested.

99. Finally at the operational level of the security services, the recruitment of specialists, the creation of specific and specialised infrastructure, the elaboration of tactical moves towards the wives of the accused, the absence of disciplinary sanctions and the refusal by the governors to allow the prosecution of the persons accused of torture, is a clear indication that torture is actively promoted and encouraged state officials.
100. **The overall conclusion is that the Turkish state developed a policy of torturing persons allegedly linked to the Gülen movement or the Kurdish movement, to make them confess, to physically punish them, to extract information – false or true – about other persons, so that they afterwards can be condemned to long prison sentences. Every level of the state: legislator, government, governors, the judicial system and the security services organize, encourage and actively promote, in a direct or indirect way this policy. The requirements foreseen in Article 7(2) are fulfilled.**

#### **II.4.3. APPLICATION TO THE TURKISH SITUATION: ENFORCED DISAPPEARANCE.**

101. The policy of the Turkish state on enforced disappearance can be summarized as follows: by abducting, depriving them of their freedom and meanwhile torturing the persons who are allegedly linked to the Gülen movement or the Kurdish movement, which they all indicate as terrorists, the Turkish state wants to make them confess, aims to physically punish them and afterwards condemn them to long prison

sentences. The state aims to extract information -false or true- about other persons, who then will be tortured and/or condemned to long prison sentences also.

102. To evaluate the existence of a policy concerning forced disappearance, we need to differentiate between the internal and the extraterritorial abductions.
103. The Turkish government has continuously denied any involvement in internal abductions. Any state implication has been denied. Our investigation in the report '**Abductions in Turkey Today**', based for each case on at least three different witnesses, has allowed us to distinguish 25 cases in which it is beyond any reasonable doubt that an abduction organised by the Turkish state has taken place. It is realistic to state that this number is an underestimation.
104. The policy of forced disappearance is not a new phenomenon. Turkey has indeed a long history in this. Human Rights organisations estimate that during the 1980s and de 1990s up to 3500 persons forcibly disappeared, with among 450 cases confirmed. After a period where this illegal actions strongly diminished, the abductions are back as a regular state practice.
105. Because of the denial by the government of any involvement, even the denial of the existence of abductions, and taking in account the by nature secret character of abductions, to proof the presence of state policy, much the same elements will be taken in consideration as under II.2.3 (systematic character). In its case law the ICC developed some elements contributing to the proof a policy. We need to take in account that if abductions, which are complex actions, are executed by state officials, by that fact alone also important public resources are used (which means that this resources must be foreseen or at least approved) and that some coordination is needed. One of the typical coordination activities is also the way how abducted persons are "hand over" to police station, with a recurring pattern of "coincidental" apprehending of the "suspect". Making available sufficient resources and assuring the coordination for instance by organizing a recurring pattern of handing over "suspects"

to the police station: these are two ways to “actively promote or encourage” as mentioned in the Elements of Crimes.

106. The disappearance of persons is a fact that will normally alarm security services in every country. This statement is strengthened when witnesses or CCTV footage testify that the disappearance was forced by violence, in quite some cases by persons wearing police cloths or declaring to be policemen. This modus operandi was described in our report '**Abductions in Turkey Today**'. This report also clearly pointed out that no conviction ever occurred, and that no real investigation was started. The wives of the victims were not allowed to speak with their husband alone, the victims were not allowed to have their own lawyer, the victims and their family were threatened, ... If a small offense now and then happens and the security officers and the judicial apparatus do not react, we cannot easily deduct from these facts a policy of the authorities not to react or even stronger: a policy to promote these offenses. However, when very important crimes as forced disappearances/abductions often occur and the security officers and the judicial apparatus never react, we must qualify this attitude as a clear way of promoting/encouraging these forced disappearances/abductions.
107. We need to stress a very import declaration by a member of the Turkish parliament who was a member of the ruling AKP party. Indeed, in May 2020 the involvement of the Turkish state and the control over the execution of these internal abductions was confirmed by a video interview given by Mustafa Yeneroğlu, member of Turkish parliament and former chair of the parliament’s Committee on Human Rights Inquiry. At that time he was a member of the ruling AKP party. He stated:  
*“The abduction cases began at the time when I was chair of the Committee on Human Rights Inquiry. I talked to relevant people then, telling them that unless those people turned up within three weeks, I would do my part and raise the issue on different platforms. At the time we resolved it and those people all reappeared here and there, at police stations. I know exactly how that happened, how it developed, and by whom it was done. If I did not know, I would not be speaking this assertively”.* (Underlining added)

108. **Our conclusion is that the policy of the Turkish state on internal enforced disappearance, is promoted and encouraged in a direct and indirect way. Abductions need a complex form of coordination of different services and require substantial resources, which are elements of promotion or encouragement. Normally abductions would cause intensive investigations. In Turkey abductions go together with an extreme form of impunity with negating all elements of proof, with refusing any investigation and with controlling the possible consequences of the abductions by legally and extra-legally limiting possible revendications of the victims and/or their family.**
109. The evaluation of a policy of the extraterritorial abductions is much easier. The government itself has openly declared to be responsible for the abductions and to go further with it as long as needed. In the context of international abductions, Turkey has never denied its involvement. For instance, Turkish Foreign Minister Mevlüt Çavuşoğlu confirmed that 104 Gülenists from 21 countries were abducted and brought back to Turkey as part of the Turkish government's global manhunt. Similarly, Deputy Foreign Minister Yavuz Selim Kiran stated that this happened to more than 100 Gülenists. Ismail Hakki Pekin, former head of the Turkish Armed Forces Intelligence Department, also confirmed that, unless the followers of the Gülen movement are *"returned to Turkey by force, they must be exterminated wherever they are, just like ASALA or the MOSSAD did with the former Nazis"*. The presidential spokesperson Ibrahim Kalin furthermore publicly stated that operations abroad against the Gülen movement were being carried out *"under clear instructions"* from President Erdogan. He also stated on 21 December 2018, during a press conference, that the Government would continue its operations against the Gülen Movement, similar to the one in Kosovo. Vice President Fuat Oktay declared that supporters of the Gülen movement *"would never be left alone"* anywhere in the world.
110. The United Nations has noted the approach being taken by the Turkish state to abduct its citizens from abroad. In July 2019, the UN Working Group on Enforced or Involuntary Disappearances rang the alarm bell while writing: *"One such development*

*is the increasing use of extraterritorial abductions, as the Working Group observed before the General Assembly in 2018. (...) China and Turkey continue to seek the cooperation of other States to arrest, often in undercover operations, Uighurs and alleged supporters of the Hizmet/Gülen movement, respectively, living outside the country. The allegations received by the Working Group indicate that individuals often disappear during these operations or once they arrive in the country of destination.”<sup>75</sup>. In 2018 too, the UN Working Group expressed its concerns in that respect: “The Working Group is concerned at the allegations concerning the practice of extraterritorial abduction of individuals allegedly belonging to and/or sympathizers of the Hizmet/Gülen movement, as pointed out in a number of communications.”<sup>76</sup> Similarly, in a more recent letter written to Turkey by the UN Working Group on Enforced or Involuntary Disappearances and 3 UN Special Rapporteurs it was stated: “Turkish authorities have not only acknowledged direct responsibility in perpetrating or abetting abductions and illegal transfers, but have also vowed to run more covert operations in the future”<sup>77</sup>.*

- 111. Our conclusion is that the policy of the Turkish state on extraterritorial enforced disappearances, is promoted and encouraged in a direct and openly way by the government itself, who even seems to take pride in it.**

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<sup>75</sup> UN Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances (A/HRC/42/40) of 30 July 2019, at 56.

<sup>76</sup> UN Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances (A/HRC/39/46) of 30 July 2018, at 136.

<sup>77</sup> Letter sent by the UN Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the human rights of migrants, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to Turkey on 5 May 2020 (Reference: AL TUR 5/2020).

### III. COMMITTING CRIMES LISTED IN ARTICLE 7 OF THE ROME STATUTE

112. As mentioned above, in order to constitute a crime against humanity, the acts of violence committed as part of a widespread or systematic attack directed against any civilian population must fall within (one of) the categories of offences listed in Article 7 (1) of the Rome Statute. For the purposes of this report, only the underlying offences of torture and enforced disappearance of persons are discussed.

#### III.1 TORTURE

113. Article 7(2)(e) Rome Statute defines torture as follows: *"The intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."*

114. Our report '**Torture in Turkey Today**' departs from the definition of torture as stated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). The definition in the Rome Statute is broader than the definition of the CAT Convention, as there is no obligation regarding the purpose of torture. Thus, what the report identifies as torture is undoubtedly also covered by the concept of torture within the meaning of the Rome Statute. The Rome Statute also, at least according to Rodley, does not need – as seems to do the ECHR as interpreted by the ECtHR- *"a need for an aggravation of the pain or suffering"*<sup>78</sup>.

115. The findings of the report are based nearly exclusively on reports of international institutions. Here, we cite only two of them. The other reports all point in the same direction.

116. **European Committee for the Prevention of Torture:** During the visit from 10 to 23 May 2017 *"the CPT's delegation received a considerable number of allegations from*

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<sup>78</sup> Rodley, N., The definition of Torture in International Law, Current Legal Problems, 55 (2002), 467-493.

*detained persons (including women and juveniles) of recent physical ill-treatment by police and gendarmerie officers, in particular in the Istanbul area and in south-eastern Turkey. Most of these allegations concerned excessive use of force at the time of or immediately following apprehension (...), as well as beatings during transportation to a law enforcement establishment. In addition, many detained persons claimed that they had been physically ill-treated inside law enforcement establishments (in locations which were apparently not covered by CCTV cameras), with a view to extracting a confession or obtaining information or as a punishment. (...) In Istanbul, the delegation received detailed and consistent accounts from detained persons (including women), interviewed independently of each other, that they had been taken by police officers to a partly derelict building in the city centre, where they were subjected to heavy beatings and severe sexual humiliation, in particular by officers of a mobile intervention unit (so-called "Yunus")<sup>79</sup>.*

117. **The special UN Rapporteur on Torture:** *"According to numerous consistent allegations received by the Special Rapporteur, in the immediate aftermath of the failed coup, torture and other forms of ill-treatment were widespread, particularly at the time of arrest and during the subsequent detention in police or gendarmerie lock-ups as well as in improvised unofficial detention locations such as sports centres, stables and the corridors of courthouses."<sup>80</sup>*

*"The Special Rapporteur received numerous testimonies of torture and other forms of ill-treatment of both male and female individuals suspected of being members or sympathizers of the PKK and other groups affiliated with the Kurdish insurgency. Most instances of ill-treatment were alleged to have been inflicted upon apprehension and arrest, as well as during transit to the detention location, predominantly by the special operations teams of the police or by the gendarmerie. Ill treatment was also alleged to have occurred during interrogations in the early hours and days of detention in holding cells"<sup>81</sup>.*

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<sup>79</sup> CPT/Inf (2020)22, No.12.

<sup>80</sup> A/HRC/37/50/Add.1, No. 26.

<sup>81</sup> Ibidem, No 30

118. **Our conclusion is that the acts of torture as described in the report ‘Torture in Turkey today’ are in line with the definition of Torture in the Rome Statute.**

### III.2. ENFORCED DISAPPEARANCE

119. For the definition of Enforced Disappearance, we need to refer to Article 7 (2) of the Statute and to the Elements of Crimes.

120. Article 7(2) defines enforced disappearance as follows:

*“Enforced disappearance of persons means the arrest, detention or abduction of persons by or with the authorization, support or acquiescence of a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time”.* The requirement: *“for a prolonged period of time”* is specific to the Rome Statute.

121. The elements of crimes further specify enforced disappearance as follows.

*Crime against humanity of enforced disappearance of persons*<sup>8283</sup>

1. *The perpetrator: (a) Arrested, detained*<sup>8485</sup> *or abducted one or more persons; or (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.*

2. *(a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or (b) Such refusal was preceded or accompanied by that deprivation of freedom.*

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<sup>82</sup> Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose.

<sup>83</sup> This crime falls under the jurisdiction of the Court only if the attack referred to in elements 7 and 8 occurs after the entry into force of the Statute.

<sup>84</sup> The word “detained” would include a perpetrator who maintained an existing detention.

<sup>85</sup> It is understood that under certain circumstances an arrest or detention may have been lawful.

3. *The perpetrator was aware that:*<sup>86</sup> (a) *Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons*<sup>87</sup>; or (b) *Such refusal was preceded or accompanied by that deprivation of freedom.*
4. *Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.*
5. *Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.*
6. *The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.*
7. *The conduct was committed as part of a widespread or systematic attack directed against a civilian population.*
8. *The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.*

122. Two basic elements seem to define "enforced disappearance". *"Two different strands of action fulfil the elements of the specific crime of enforced disappearance. The first strand of action consists of the deprivation of liberty, whereas the second strand of action is the refusal to inform about the fate and the whereabouts of the victim"*<sup>88</sup>. METTRAUX adds a third element: *"the offence requires proof of an element of special intent to remove the victim from the protection of the law for a prolonged period of time"* also as essential<sup>89</sup>.

123. For the purpose of our report, some elements of the definition seem to be evident. In the case of abductions, the deprivation of liberty is clear. The Rome Statute requires

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<sup>86</sup> This element, inserted because of the complexity of this crime, is without prejudice to the General Introduction to the Elements of Crimes.

<sup>87</sup> It is understood that, in the case of a perpetrator who maintained an existing detention, this element would be satisfied if the perpetrator was aware that such a refusal had already taken place.

<sup>88</sup> Ott, L. *Enforced Disappearance in International Law*, 2011, Intersentia, 165. See also: METTRAUX, G. *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 719.

<sup>89</sup> G. METTRAUX, *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 719.

that the “*arrest, detention or abduction*” is carried out “*by, or with the authorization, support or acquiescence of a State or a political organization.*” The notions “authorization”, “support” or “acquiescence” apply alternatively and are to be interpreted broadly. “Authorization” is to be understood as consent with a particular conduct, whilst “acquiescence” would cover situations where a state or organization learns of the commission of such acts committed by officials or associates and fails to adopt any measures to prevent, stop or punish such acts. “Support” could refer to any form of assistance, such as the provision of resources or facilities, logistical support or intelligence.<sup>90</sup> In the case reported in ‘**Abductions in Turkey Today**’, the role of the state is clear. However, do the investigated acts correspond with the requirement of a “prolonged period of time”?

124. For the internal abductions, there does not seem to be any doubt concerning the time the victims disappeared. The shortest period is 41 days, most victims disappeared for months some are still missing since long time.
  
125. For the extraterritorial abductions, the period of incommunicado in general is shorter. So the question is what must be understood under “prolonged period of time”. OTT states it as follows: “*By using this formulation, the Rome Statute excludes cases of disappearance, where the intention is directed towards releasing the detained after a short period of time*”<sup>91</sup> And further: “*Neither the Statute nor case law and literature provide for interpretative clues on what could be understood as “prolonged”. Since the risk of maltreatment or killing is the highest during the first hours and days after the initial deprivation of liberty, the time frame conceived as “prolonged” must be interpreted as short as possible. In order to define the cases in which the International Criminal Court will have jurisdiction, HALL suggests taking the internationally recognized law and standards in the time period during which governments can deny family, lawyers and doctors information on a detained person, as reference point. Today there is international consent that a person deprived of his or her liberty must have*

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<sup>90</sup> METTRAUX, G., *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 725-726.

<sup>91</sup> Ott, L. *Enforced Disappearance in International Law*, 2011, Intersentia, 186

*contact with the outside world 'without delay' and even in exceptional circumstances, denying such access to the outside world for more than 24 to 48 hours would violate the rights of the person detained. Since these reference periods have found international acceptance and have proved to be viable and there is thus no reason to form new standards*<sup>92</sup>.

126. It seems appropriate to apply a teleological interpretation of the requirement. In the extraterritorial abductions, the period of incommunicado seems always to be depending on the possibility to avoid any judicial procedure by the victim in the country of his residence that could prohibit the abduction towards Turkey. Once the victim arrives in Turkey, the government proudly announces the abduction and breaks the silence. However also in that case the victim will not necessarily appear in a very short way for a judge, but often will be kept in custody without lawyer designated by himself, without a medical expertise that could prove him/her being tortured, In all cases the "period" is sufficiently "prolonged" to annihilate any judicial protection and by this to "remove him from the protection of law" in a definitive and decisive way, because once abducted to Turkey the abducted loses any possibility to enjoy the judicial protection in the country of residence, that could have kept him/her out of the control of the Turkish state. A specific element in all this, is the fact that several abducted victims had obtained or applied for a refugee status, where the expulsion of refugees to their country of origin in international law is strictly regulated.
127. The second element is the refusal to give information. According to OTT some scholars "argue that the refusal is only given if the information about the fate and whereabouts of the person was specifically asked for by family members, counsel, etc."<sup>93</sup> Although the author does not seem to accept this interpretation, in any of the cases reported, one way or another action was taken by (some of) the named actors. The approach of METTRAUX seems to us the most logical one: "As a matter of human rights law, whether or not the victim's family lodges a formal complaint, State authorities are duty-

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<sup>92</sup> Ott, L. Enforced Disappearance in International Law, 2011, Intersentia, 187

<sup>93</sup>Ott, L. Enforced Disappearance in International Law, 2011, Intersentia, 178.

*bound to commence without delay an impartial and thorough investigation ex officio into the victim's disappearance. ... 'Refusal' to provide information about the fate of the victim could, therefore, be inferred not only from the response given to request for information but also from the general conduct of those concerned, including efforts to dissimulate the circumstances of the disappearance and fate of the victims, evidence of a policy of silence, or threats to victims, their relatives, or their representatives".<sup>94</sup>*

128. **Our conclusion is that the extraterritorial abductions described in the report 'Abductions in Turkey Today' are in line with the definition of enforced disappearances in the Rome Statute.**

### **III.3 OTHER CRIMES NOT TAKING IN ACCOUNT IN THIS REPORT, AS CRIMES AGAINST HUMANITY, BUT PART OF THE CONTEXTUAL SITUATION.**

129. In Article 7 (1) of the Rome Statute "*imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law*" is also defined as a crime against humanity, on the condition of course that all elements of the "chapeau" are met. In our report we will not further examine if the massive deprivation of ten thousands of people without due process, in Turkey must be considered as a crime against humanity. International reports and the ECtHR have been very critical. We refer also to the report '**Judicial Independence & Access to Justice**'. At this point, it is worth mentioning that the Working Group on Arbitrary Detentions (WGAD) of United Nations Human Rights Council, in a recent Opinion, has issued the following statement: "*In the past three years, the Working Group has noted a significant increase in the number of cases brought to it concerning arbitrary detention in Turkey. The Working Group expresses its concern over the pattern that all these cases follow and recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity. In almost all cases of re-arrest, decisions to re-*

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<sup>94</sup> METTRAUX, G., *International Crimes, Volume II: Crimes against Humanity*, 2020, Oxford University Press, 723.

arrest have been triggered either by an AKP politician's statement or by a message from a pro-Erdogan journalist posted online. In this context it seems reasonable to take in account that, the absence of the rule of law, the deterioration of the independence of the judiciary and the high numbers of persons with long imprisonment sanctions without due process, are important contextual elements to evaluate the facts of torture and enforced disappearance as being in accordance with the requirements of the Rome Statute or not. The impact of the described acts of torture and abduction is indeed much more intensive when there is no real, independent judicial remedy left. Our conclusion necessarily needs to take in account these contextual elements. We cannot judge acts without taking in account the context in which these acts are committed.

#### IV. CONCLUSION

130. "There are several good reasons why the ICC should only deal with the gravest of all crimes, and not a broader spectrum of human rights abuses"<sup>95</sup>. As HANSEN states: "There is some merit in claiming that we must uphold high thresholds for international crimes, exactly in order not to confuse these serious threats to humanity with other crimes"<sup>96</sup>.
131. We agree completely with the citations above. In this report we have for each element examined thoroughly if the facts are in correspondence with the Rome Statute and the Elements of Crimes. We have not looked at the competence of the ICC neither to the individual responsibility of the alleged perpetrators. That will come later.
132. For now, our investigation is limited to the question put forward in the beginning of this report: do we need to qualify the acts of torture, the national and the

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<sup>95</sup> Hansen, T., The policy requirement in crimes against humanity: lessons from and for the case of Kenya, *Georges Washington International Law Review*, 43, no1 (2011), 31.

<sup>96</sup> Hansen, T., The policy requirement in crimes against humanity: lessons from and for the case of Kenya, *Georges Washington International Law Review*, 43, no1 (2011), 35.

extraterritorial abductions, as described in the reports brought before the Turkey Tribunal, as crimes against humanity, according to the Rome Statute?

133. The answer to this question, based on the detailed analysis of the different components of the definitions in the Rome Statute and the Elements of Crimes is affirmative. All elements are present. The acts of torture and the abductions can be qualified as an "attack", meaning: a course of conduct, involving the multiple commission of acts. The attack is "widespread" (torture) or "systematic" (torture and abductions) and are "directed against any civilian population". The attack is committed pursuant to or in furtherance of a state or organizational policy to commit such attack. And the acts of torture and the abductions correspond to the definition of these crimes in the Rome Statute. We also take in account the massive number of imprisonments in breach of the international recognised standards and the absence of the independence of the judiciary and the rule of law, which means that the impact of the described facts is much more intense than in a "normal situation".
134. **As said above, we fully agree with the opinion that the ICC should only deal with the gravest of all crimes and that the evaluation if facts constitute crimes against humanity must be strict. But we can't deny the reality neither.**

**The facts of torture and the abductions described in our reports, are crimes against humanity.**



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