REPUBLIC OF TURKEY
COURT OF CASSATION

TURKISH LEGISLATION AND CASE-LAW OF THE TURKISH COURT OF CASSATION IN THE CONTEXT OF EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR) AND DECISIONS OF EUROPEAN COURT OF HUMAN RIGHTS (ECtHR)

A COMPARATIVE STUDY OF TERRORIST OFFENCES, CRIMES AGAINST HUMANITY, AND GENOCIDE

(TURKEY'S PRESENTATION AT
THE SEMINAR OPENING OF JUDICIAL YEAR 2016 OF
EUROPEAN COURT OF HUMAN RIGHTS)

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Strasbourg 2016

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PRESENTATION PLAN

PART I: TERRORIST OFFENCES

INTRODUCTION

On applications to the European Court of Human Rights regarding terrorist attacks or attempts, the right to life of suspects or arrestees was discussed, and it was noted that this right would be protected pursuant to ECHR Article 2. In this context, particularly the incidents of enforced disappearance, killing or disappearance of civilians in armed conflict were often the subject-matters of ECtHR decisions. In addition, Articles 3, 5, 6 and 8 of the Convention were frequently discussed subjects in applications associated with terrorism.

While the "Background paper for the seminar Opening of Judicial Year January 2016", in point 3 of the "Introduction" section, gives examples of terrorism incidents in Europe, it fails to mention any event from Turkey which has recently been subject to acts of terrorism more violent in quality and quantity. It is deemed beneficial to provide brief information on the terrorism phenomenon in Turkey in order to obtain a holistic perspective on terrorism and strike a balance between individual freedoms and public good.

The second section dwells on how national security, public safety and terrorist offence are defined in laws and court decisions.

The third section discusses the implementation and abuse protection measures including electronic communication applied in cases of terrorist offences.

The fourth section explains whether evidence can be acquired in violation of Articles 3, 5, 6 and 8 of the

Convention; and if so, under what circumstances such evidence may be used.

I- OVERVIEW OF TERRORISM PHENOMENON IN TURKEY

The Republic of Turkey has for 93 years since its foundation experienced the threat of terrorism partly descending from the Ottoman era, and partly associated the reactions to the "Founding Philosophy of the Republic", and partly arising from the peculiarities of the geographic region. In general terms, periods in which Turkey has not experienced imminent and violent terrorism incidents have been exceptions.[1]

A chronological glance at the recent history of Turkey reveals that Turkey had to deal with the Armenian Terrorism in the period of 1970-1980[2], the ideological terrorism of armed conflicts between the right and the left in the same decade which culminated in the revolution of the 12 September 1980, the religious fundamentalist terrorism of 1990-2000, and finally the ethnical divisive terrorism ongoing since 1984. In recent years, the "global terrorism" activities

[1] Turkey and Terrorism (report in Turkish), a publication of the Union of Bar Associations of Turkey, Ankara 2006, p.531.

[2] The origins of the Armenian terrorism dates back to the end of the World War I due to the series of assassinations where in fact Talat Pasha, the former Minister of Interior of the Ottoman Empire was killed in Berlin on 15 March 1921, the former Minister of Foreign Affairs Sait Halim Pasha was killed in Rome on 6 December 1921, and Ottoman Statesmen Bahaeddin Shakir Bey and Cemal Azmi Bey were killed in Berlin in 1922. See Heath W. Lowry, Nineteenth and Twentieth Century Armenian Terrorism: "Threads of Continuity", (International Terrorism and The Drug Connection, Symposium on International Terrorism, 17-18 April 1984, Ankara, Turkey, pp.71-83), p.77.

of Al-Qaida and other organizations acting in concert with it have been threatening Turkey. On the other hand, ISIL (self-named "Islamic State of Iraq and the Levant") which has found a peculiar niche for itself due to the turmoil in Turkey's immediate neighbours Iraq and Syria has become a serious danger to Turkey. In the recent terrorist attacks, 34 civilians died and more than 100 injured on 20 July 2015 at Suruc district of Sanliurfa; 107 died and more than 500 injured in a bombing attack on 10 October 2015 outside Ankara Railway Station. While wounds inflicted by these attacks were not fully healed, a similar incident occurred in Paris on 13 November 2015 leaving 140 dead and many more injured.

The terrorism threat to Turkey, as briefed above in Turkey's recent past and today, has two distinctive characteristics. The first is that almost all known types of terrorism including ethnical, religious fundamentalist or ideological have appeared and are at work simultaneously in Turkey. The second is that all terrorism threats to Turkey enjoy a strong external support (or from more than one source).[3] Terrorism activities claimed tens of thousands of lives, many more injuries, and population movements in the past 40 years. More important than the direct and indirect losses[4] of hundreds of billions of dollars is the fact that it is

[3] Turkey and Terrorism, pp.531-532.

[4] Indirect losses included [depressed] direct investments and other aid which Turkey would have otherwise received. Turkey experienced in the past 40 years an annual average of 40.6 domestic terrorism incidents, and 6.50 transnational terrorism incidents, and ranks 7th in the list of countries which experienced terrorism most. See Subhayu Bandyopadhyay, Todd Sandler, Javed Younas: The Toll of Terrorism, Finance & Development, June 2015 (International Monetary Fund), p.26.

simply impossible to compensate for the emotional suffering caused by traumas to human victims of terrorism incidents.

Another aspect of damages inflicted by terrorism on Turkey is that terrorism has weakened the "intelligence and power of intellect" of the society through systematic killing of researchers, journalists and authors who have the power to influence large masses by their pioneering and superb ideas. The failure to apprehend almost none of the perpetrators of these acts indeed indicates that the issue is far complex and intricate. In various instances, the targets of terrorist acts are the members of the judiciary as in the recent case of 31 March 2015 when Mehmet Selim Kiraz, a Public Prosecutor at Istanbul, was martyred in his office.

While in the past the active terrorist manpower of IRA and ETA was estimated around 200 to 400, Red Brigades 50 to 70 and the Japanese Red Army Faction 20 to 30; today, the number of militants of PKK and ISIL which are the current threats to Turkey are expressed in tens of thousands[5]. This in fact clearly indicates that extent of terrorism threats to which Turkey is exposed.

As summarized above, Turkey is under such an intensive terrorism attacks that is beyond comparison with other European countries both in terms of her losses and suffering to date and of the quantity and quality of the ongoing terrorism threat. Therefore, the Turkish Court of Cassation has significant experience on terrorist offences.

The protection of people against terrorism and the protection of human rights are not alternatives to one another. Human rights are not barriers to effective anti-

[5] Turkey and Terrorism, p.131.

terrorism strategies. Terrorism seriously jeopardizes human rights. States are under obligation to protect everyone under their jurisdiction against acts of terrorism.

II- DEFINITIONS OF NATIONAL SECURITY, PUBLIC SAFETY AND TERRORISM

1- Definitions of National Security, Public Safety and Terrorism in Legislation

Article 1 of the Law on Combating Terrorism (LCT) defines that "Terrorism is any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of pressure, force and violence, terror, intimidation, oppression or threat."

Article 2 of LCT defines **terrorist offenders** providing that "(1) Any member of an organization, founded to attain the aims defined in Article 1 (above), who commits a crime in furtherance of these aims, individually or in concert with others, or any member of such an organization, even if he does not commit such a crime, shall be deemed to be a terrorist offender. (2) Persons who are not members of a

terrorist organization, but commit a crime in the name of the organization, are also deemed to be terrorist offenders."

Article 3 of LCT regards certain Articles of the Turkish Criminal Code as terrorist offences providing that "302, 307, 309, 311, 312, 313, 314, 315 and 320 and the first paragraph of Article 310 of the Turkish Criminal Code No. 5237 of 26/9/2004 are terrorist offences."

Article 4 of LCT includes a catalogue of offences which shall be considered terrorist offences if they are committed with the intents described in Article 1 of LCT.

The criminal laws contain no provision defining the concepts of "national security" or "public safety". The content of such concepts is defined by scientific opinions and judicial practice.

2- Definitions of National Security, Public Safety and Terrorism in the Case-law of the Court of Cassation

As described in two decisions of the Court of Cassation quoted below, the concepts of "national security", "public safety" and "terrorism" are defined to the characteristics of the case at hand by a holistic consideration of the fundamental rights in the Constitution of the Republic of Turkey, the criteria in the European Convention on Human Rights and in the decisions of the European Court of Human Rights.

The matter was explained as follows in a decision of the Court of Cassation:

"Democracy as a fundamental feature of the European public order is the sole polity model designed by and

compatible with the European Convention on Human Rights. Political parties are the essential elements of democratic political life as emphasized in Article 68/2 of our Constitution. – While freedom to become a party member and engage in political activities within a political party is under the freedom of assembly and association, the collective exercise of such freedom is also associated with the freedom of expression. - … The abuse of the freedom to become a party member and engage in political activities as recognized by Article 68 of our Constitution and Article 11 of the European Convention on Human Rights is prohibited by Article 14/2 of our Constitution and Article 17 of the European Convention on Human Rights. For any activity to be considered within the context of the freedom of political activity and association and to **enjoy the protection afforded by the Constitution and the Convention**, one needs to examine the context in which it is exercised as well as **its relation with coercion and violence**, whether the method employed and the goal pursued are compatible with laws and democratic rules, and whether it has any structural connection with any terrorist organization in terms of purpose or method, and to take into account the **distinction made by the European Court of Human Rights** in "Sadak v. others". (Court of Cassation 9th Criminal Chamber, dated 22.01.2014, no.2013/7004 E, 2014/632 K.).

The decision of another chamber of the Court of Cassation describes the conditions of membership in a terrorist organization following the assessment of various views in the doctrine:

"A review of the views in the doctrine concerning the intent component in the crime of aiding an organization indicates that crimes which clearly include such expressions as "knowingly", "while in knowledge of", "while knowing" cannot be committed through probable intent. (Prof.Dr. İzzet ÖZGENÇ, TCC General Provisions, 7th Edition, p. 241). – Even if the person does not know about the specific act committed by the organization, he must know that it is a terrorist organization and his aid will be used in the benefit of the organization and he must act through such will. Aid provided on humanitarian considerations shall not constitute aiding the organization. Not all types of aid should be considered crimes. (Prof.Dr. A. Caner YENİDÜNYA – Research Assistant Zafer İÇER, Establishing an Organization to Commit Crimes, 1st Edition, p. 56). – A general intent is not sufficient to constitute the mental element of the crime of aiding an organization. It is a crime committed through specific intent. The perpetrator must act with the intent to contribute to the realization of the organization's goal. (Asst.Prof.Dr. Namık Kemal TOPÇU, Organized Crimes and Terrorist Offences, p. 164). – It is necessary to have aided knowingly and intentionally an organization established to commit crimes. In other words, the act of aiding must have been committed while in knowledge of the fact that the organization is established to commit crimes. The expression "knowingly" in this paragraph refers to the direct intent. Where the aid is not directly to the organization but to the members of the organization, the perpetrator must also know that the aided persons are members in an organization established to commit crimes. It is necessary to consider the aid provided to

the members of an organization as aid to the organization at the same time. However, this aid must be in the nature that serves to achieve the goal of an organization. (Prof.Dr.İzzet ÖZGENÇ, Criminal Organizations, 7th Edition, pp. 38-39). – The act of possessing explosives of the defendant who was understood not to be a member in the armed organization, and who knew the purpose of the organization and that the said explosives would be used in the activities of the organization, constitutes the crime defined in Article 315 of TCC that regulates a special form of aiding an armed organization. (Court of Cassation 9th Criminal Chamber, dated 05.11.2009 and no. 2009/10374 E- 2009/11111 K.). – Considering the views in the doctrine as mentioned above, and the past practices of the Court of Cassation 9th Criminal Chamber; there is a commonly shared opinion that the crime of aiding criminal organizations or armed terrorist organizations can only be committed through direct intent; the aid must serve to achieve the goal of the organization; while the aid to members of an organization is considered as aid to organization, the perpetrator must know the organization in which the aided persons are members and further that the aid must be made not on humanitarian considerations but with the purpose of achieving the goals of the organization. - … Turkish criminal law treats the elements of an armed terrorist organization as follows; number of members: at least 3 members (LCT Article 7/1, TCC Articles 220-314). – **Purpose and motive**; a terrorist organization operates to a political end. In Turkish criminal law, terrorist organizations operate with the aim of changing the characteristics of the Republic as specified in the Constitution,

its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health. (LCT Article 1). **– Method**; a terrorist organization operates by means of pressure, force and violence, terror, intimidation, oppression or threat. (LCT Articles 1-7). – **Fitness-for-purpose**; the terrorist organization by its structure, membership, equipment and materials must be fit for the committing the intended crimes. (TCC Article 220). – **Equipment and materials**; the terrorist organization is an armed organization. (LCT Article 7; TCC Article 314). – **Organizational membership**; refers to joining the organization, committing oneself to the organization and placing oneself under the hierarchical power that controls the organization. Organizational membership is a continuous offence. Becoming a member in the organization means that the person becomes by his own consent integrated in the hierarchical structure of the organization. He must establish an organic bond with the organization and participate in its activities. Organic bond is a bond that is live, permeating, effective and keeps the actor disposed and available to receive orders and instructions, and defines the hierarchical status of the actor; it is the most important element of membership. Mere feeling of sympathies for the organization shall not constitute this crime. – The established practice of the Court of Cassation 9th Criminal Chamber is that the

constitution of the crime of being a member in an armed organization requires the establishment of an organic bond with the organization, and the presence of actions and activities of continuity, diversity and intensity. …" (16th Criminal Chamber, dated 30.04.2015, no. 2015/3344 E, 2015/926 K).

III- INTERCEPTION OF COMMUNICATIONS IN TERRORIST OFFENCES AND ASSURANCES AGAINST THE ABUSE OF THIS PROTECTION MEASURE

This matter is treated in the practice of the Court of Cassation as follows:

"… It is an indicator of rule of law that fundamental rights and freedoms are not restricted when security is ensured. Therefore, the interception of communications which restricts the freedom of communication and privacy is required to meet strict conditions in the Criminal Procedure Code. The means used by the practitioners to reach a legitimate end must also be legitimate. The idea that "if I tap and track many persons, I will identify the offenders" is not a mode of behaviour acceptable in democratic societies. The individual right to be forgotten is a universal right." (16th Criminal Chamber, dated 30.04.2015 no. 2015/3344 E, 2015/926 K).

The Criminal Procedure Code (CPC) Chapter Five "Scrutiny of Communications through Telecommunication" addresses this issue. The first paragraph of Article 135 "Interception, Tapping and Recording of Communication" of CPC provides that

"In the investigation and prosecution of a crime, where there is reason for the existence of strong suspicion based on concrete evidence that the crime has been committed and there is no other means to obtain evidence, by a decision of the heavy penal court, or of the Public Prosecutor in cases where delay would be detrimental, the communications through telecommunications of a suspect or defendant may be intercepted, tapped and recorded and signal information be assessed…" Pursuant to this paragraph, the interception of communications is, as a rule, possible by a decision of the heavy penal court which is composed of three judges. Where delay would be detrimental, the Public Prosecutor may decide to intercept the communications with immediate submission to the court.

The second paragraph of Article 135 of CPC prevents general tapping.

The third paragraph of Article 135 of CPC provides that "(3) The communications between the "suspect or defendant" with persons who may abstain from standing as a witness cannot be recorded. Where this is understood after the recording, the records shall be immediately destroyed." Thereby, the purpose is to prevent tapping which shall not constitute evidence while privacy of personal and family life is assured.

The practice of the Court of Cassation is as follows: "… Since the communications intercepted between A.Y. and M.Y. during the tapping activity on whom an investigation is being conducted as suspects have occurred between persons who may abstain from standing as witness, these cannot be recorded and must immediately be destroyed pursuant to

Article 135/2 of CPC…" (16th Criminal Chamber, dated 4.5.2015, no. 2015/252 E, 2015/1078 K).

The fourth paragraph of Article 135 of CPC establishes legal time limits on tapping, providing that the interception of communications may be decided only for a certain duration even with the decision of a judge. The interception of communications with indefinite time is prohibited even it is based on the decision of a judge.

The sixth paragraph of Article 135 of CPC allows tapping only in reference to the specific case. This provision prohibits general and non-specific interception of communications.

The seventh paragraph of Article 135 of CPC provides that "(7) The decision taken and actions conducted pursuant to the provisions of this Article shall be kept confidential during the measure." Thereby, privacy of personal and family life is protected while public safety is ensured.

The eighth paragraph of Article 135 of CPC allows decisions of interception of communications only for offences explicitly listed in the law including terrorist offences. In clearer words, it is not possible to obtain evidence of every crime type through interception of communications.

The ninth paragraph of Article 135 of CPC provides that "(9) No one may tap or record the communications through telecommunication of another except based on the principles and procedures laid down in this Article." In clearer words, the interception of communications cannot be effected by the decisions of administrative authorities. Similarly, the evidence obtained through the pre-emptive tapping (tapping for intelligence purposes) which is conducted with not existing investigation is not fit for use to prove any offence. (Decision

of 17.5.2011, no. 2011/93-95 E.K. of the General Assembly of Criminal Chambers).

A special provision ensures the protection of the defence rights in respect of interception of communications. Article 136 "Defence Attorney's Office and Place of Establishment" provides that "(1) Article 135 shall not apply to the telecommunication devices at the office, residence and establishment place of the defence attorney for the offence charged to the suspect or defendant." According to this provision, the use of interception of communications measure is prohibited about the attorneys of the defendants or suspects.

Article 137 "Implementation of Decisions, Destruction of Communications Content" requires that, in order to prevent the records of interception of communications from being used for other purposes, the records relating to the interception of communications must be destroyed where a decision of non-prosecution is returned or the decision of the Public Prosecutor is not upheld by the judge. In addition, where this occurs, the person on whom the measure of interception of communications has been implemented shall be informed.

For terrorist offences, where there is reason for the existence of strong suspicion "based on concrete evidence" and there is no other means to obtain evidence, the activities in public places and the workplace of the suspect or defendant may be monitored by technical devices, audio or video recording may be obtained. (CPC Art.140).

IV- OBTAINING EVIDENCE CONTRARY TO ARTICLES 3, 5, 6 AND 8 OF ECHR FOR TERRORIST OFFENCES

1- Chance Evidence in Scope of ECHR

Article 138 "Chance Evidence" of CPC provides that "(1) Where, during the execution of the protection measures of search or seizure, any evidence is obtained which is not associated with the ongoing investigation or prosecution but gives rise to the suspicion that another crime has been committed, such evidence shall be taken under protection and the incident shall immediately be notified to the Public Prosecutor. – (2) Where, during the execution of scrutiny of communications through telecommunication, any evidence is obtained which is not associated with the ongoing investigation or prosecution but gives rise to the suspicion that a crime enumerated in the sixth paragraph of Article 135 has been committed, such evidence shall be taken under protection and the incident shall immediately be notified to the Public Prosecutor." The law allows the use of evidence obtained by chance in this manner. However, this is not in violation of Articles 3, 5, 6 and 8 of ECHR because such evidence is ultimately detected on the basis of judge's decision. In addition, such evidence has legal value in terms of offences for which the measure of interception of communications can be applied.

The practice of the Court of Cassation is as follows:

"Where the "evidence obtained by chance" during the execution of scrutiny of communications through

telecommunication which is not associated with the ongoing investigation or prosecution but may give rise to the suspicion that another crime has been committed relates to the catalogue offences enumerated in Article 135/8 of CPC, they can be used as evidence in the investigation and prosecution. However, in the light of explicit provision of Article 138/2 of CPC, the records relating to an offence not included in the catalogue offences cannot be used as evidence. The law legitimizes the use of scrutiny of communications through telecommunication only in respect of types of crime of certain seriousness; for other crimes, holds superior the good arising from the protection of privacy and confidentiality of communications." (16th Criminal Chamber, 2015/1114 E, 2015/622 K).

2- Evidence Obtained in Violation of Article 3 of ECHR

ECHR Article 3 provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 17 of the Constitution of the Republic of Turkey provides that "Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence. The corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent. **No one shall be subjected to torture or mal-treatment; no one shall be**

subjected to penalties or treatment incompatible with human dignity."

The second paragraph of Article 148 "Prohibited Procedures of Taking Statement and Interrogation" of CPC provides that "No unlawful interest may be promised. – **(3) Statements obtained through prohibited methods cannot be evaluated as evidence even if they have been given with consent.** – (4) The statement taken by the law enforcement without the presence of a defence attorney cannot be the basis of a verdict unless confirmed by the suspect or defendant before the judge or court." This provision is explicit; and there is no legal provision that constitutes an exception to this Article in terms of terrorist offences. Therefore, it is not possible to use the evidence obtained through prohibited methods as evidence for any offence including terrorist offences.

According to subparagraph (b) of the first paragraph of Article 230 of CPC, the judge must demonstrate in his verdict the "discussion and evaluation of evidence, indication of those evidence serving as the basis of verdict and those rejected; and in this context the evidence obtained through unlawful methods and included in the file" if any in the file. CPC Article 289/1-i provides that "i) That the verdict is based on evidence obtained through unlawful methods" which is a definitive reason for overturning. In clearer terms, the verdict of conviction cannot be returned based on evidence obtained through unlawful methods. There is no exception to this rule in respect of terrorist offences. According to the practice of the **Court of Cassation quoted below, the statement by a secret witness shall not be sufficient evidence for**

conviction. In addition, no conviction can be returned based on the evidence obtained through tapping of a person on whom there has been no decision of interception of communications. The decision is as follows:

"… since, while there was no decision of interception of communications duly obtained on the defendant; the same Court by its decisions of 2013/2324 and 3668 decided to extend the measure by one month at each time mentioning that the defendant used the said line; however the tape recordings which were obtained during the term of initial measure decisions and taken as the basis of the verdict were in the nature of unlawful evidence because they were not based on any decision of measure implemented on the defendant; and further, because the communications between the defendant and the defendant's siblings A.Y.Y. and M.Y. who were under investigation as suspects of another file that were intercepted during the tapping activity on the latter were indeed between the persons who might abstain from standing as witness, they could not be recorded and must immediately be destroyed pursuant to CPC Article 135/2; the defendant sustained at all phases that the tapped lines and recorded communications did not belong to him; in addition, it was understood that the statement by the secret witness alone could not be accepted as the convicting evidence; it is incorrect to convict the defendant, instead of acquitting him, of the charged offence without considering that other evidence could not be obtained which was sufficient, beyond all doubt, definitive and convincing to convict him of the commission of the offence of aiding an armed terrorist

organization …" (16th Criminal Chamber, dated 4.5.2015 no. 2015/252 E, 2015/1078 K).

The Turkish Criminal Code defines "torture" as a serious crime; and if the victim has incurred permanent damage as a result of such crime, the penalty shall be aggravated. In addition, no statute of limitations shall apply to the crime of torture. (TCC Art. 96/last).

3- Evidence Obtained in Violation of Article 5 of ECHR

The first paragraph of Article 91 of CPC provides that "(1) If the person apprehended according to the Article above is not released by the Public Prosecutor, a decision of detention may be issued to complete the investigation. The duration of detention cannot exceed twenty four hours excepting the time required for taking him to the judge or court nearest to the place of apprehension. The time required for taking him to the judge or court nearest to the place of apprehension cannot exceed twelve hours."

The third paragraph of Article 91 of CPC addresses the duration of detention in collective commission of crimes including terrorist offence. Accordingly, "For crimes committed collectively, due to the difficulty in collecting evidence or the high number of suspects, the Public Prosecutor may issue a written order to extend the duration of detention by one day each time for a total of three days. The order to extend the duration of detention shall immediately be notified to the detainee." The fourth paragraph of the same Article allows a maximum of 4 days for

the duration of detention in case of disruption of public order due to widespread incidents of violence.

The first paragraph of Article 100 of CPC provides that "Where "concrete evidence" exists indicating strong suspicion of guilt and there is a reason for arrest, a decision of arrest may be made about the suspect or the defendant. Where the importance of the matter is not commensurate with the anticipated penalty or the security measure, a decision of arrest cannot be made". In addition, where there is strong suspicion in respect of terrorist offences, it may be considered that there is reason for arrest.

4- Evidence Obtained in Violation of Article 6 of ECHR

Turkey adopted the conventions on human rights and freedoms of the United Nations and ECHR; and recognized the individual right to apply to ECtHR. These conventions include the right to fair trial and the presumption of innocence as its requirement, right to remain silent, equality of arms and right to defence. These provisions have become, pursuant to Article 90 of the Constitution of the Republic of Turkey, mandatory components of Turkish domestic law. The provisions of the said conventions are directly applied by the Court of Cassation and courts, and used as underlying norms by the Constitutional Court.

However, the right to fair trial should not be perceived as a deficiency in combating terrorism which has today become a global threat; and it should be possible to resort to certain special protection measures in respect of serious crimes by

protecting the fundamental human rights. In this context, Article 20 of LCT provides certain supplementary protection to public servants who combat terrorism. However, the witness testimony by those who enjoy such protection is not alone sufficient for conviction.

Two decisions relating to the practice of the Court of Cassation are provided as follows:

"Since, it is contrary to law to convict the defendant, instead of acquitting him, of the charged offence without considering the provision in Article 9/8 of the said Law that the statement of the witness for whom the protection measure was implemented pursuant to subparagraphs "a" and "b" of Article 5/1 of the Law No. 5726 on Witness Protection would alone not constitute the basis of the verdict, and further that, other than the said statement, there was no evidence which was sufficient, beyond all doubt, definitive and convincing to convict him of the commission of the offence as charged; and the appeals of the defendant's attorney were considered appropriate; the verdict BE OVERTURNED for this reason". (9th Criminal Chamber, 2013/14311 E, 2014/11178 K).

"While the defendant S.B. who was apprehended in the context of the investigation was convicted due to the statement of the secret witness "S." named person, whose knowledge and statement were referred to in another investigation file, that the defendant S.B. was among the persons who perpetrated the act of throwing explosives to Siteler Police Centre on 14.12.2011 and 18.12.2011 in the

photograph identification report with witness statement made before the Public Prosecutor during the inquiries about the defendant whether he was involved in other crimes in previous dates; according to the imperative provision in Article 9/8 of the Law No. 5726 on Witness Protection that "the statement of the witness for whom the protection measure was implemented pursuant to subparagraphs (a) and (b) of Article 5/1 of this Law would alone not constitute the basis of the verdict"; in light of the fact that there was no other evidence obtained; it is contrary to law to convict the defendant, instead of acquitting him, of the charged offence without considering that there was no evidence, other than the mere statement of the secret witness, to constitute the basis of conviction." (16th Criminal Chamber, dated 29.4.2015 no 2015/1399 E, 2015/1060 K).

5- Use of Evidence Obtained in Violation of Article 8 of ECHR

ECHR Article 8 addresses the respect for private and family life.

The approach of the Court of Cassation to this issue is as follows.

"Pursuant to Article 8 of the European Convention on Human Rights which is considered a part of our domestic law pursuant to Article 90/last of the Constitution, everyone has the right to respect for his private and family life, his home and his correspondence. An interference by a public authority with the exercise of this right is possible if and only if it is in

accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. On the other hand, the use of evidence obtained in violation of the individual rights of privacy and freedom of communications guaranteed by Article 8 of the Convention in an investigation or prosecution can violate the right to fair trial as laid down in Article 6 of the Convention." (16th Criminal Chamber, no.2015/1114 E, 2015/622 K).

In the context of the explanation provided for ECHR Article 3, the use of evidence obtained in violation of ECHR Article 8 is prohibited in respect of terrorist offences.

PART II: CRIMES AGAINST HUMANITY AND GENOCIDE

INTRODUCTION

Humanity as a term is a broad concept. Therefore, the criminalization of the type "crimes against humanity" as a category distinct from war crimes has taken a long time due to objections from the states; and historically, it has developed through the statutes of various international courts unlike other international crimes.

In the Turkish legal practice, there is no corpus of court precedents on "crime of genocide" and "crimes against humanity". Therefore, this paper is limited to providing information on the relevant legislation.

The United Nations Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly of the United Nations on 9 December 1948 and Resolution No. 260A(III); and Turkey acceded to it without reservations by the Law No. 5630 of 23/3/1950. The ratifying Law entered into force through publication in the Official Gazette of 29/3/1950 issue 7469.

Article 1 of the Convention provides that "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." Article 3 lists the punishable acts; and Article 5 requires the Contracting Parties to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the Convention, and in particular, to provide

effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article 3.

The last paragraph of Article 90 of the Constitution of the Republic of Turkey provides that "International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."

I- TURKISH LEGISLATION ON GENOCIDE AND CRIMES AGAINST HUMANITY

1- Genocide and Crimes Against Humanity in the Turkish Criminal Code

The Turkish Criminal Code (TCC) No. 5237 of 26.9.2004 addresses "genocide" and "crimes against humanity" in Chapter One "Genocide and Crimes Against Humanity" of Part One "International Crimes" of Book One "Special Provisions".

Article 76 "Genocide" of TCC provides that:

"(1) The commitment of any of the following acts through the execution of a plan with intent to destroy in whole or in part a national, ethnical, racial or religious group against members of such group constitutes the crime of genocide:

a) Deliberate killing.

b) Causing serious bodily harm or mental harm to persons.

c) Deliberately forcing the group to live in conditions that will bring about the destruction of the group in whole or in part.

d) Imposing measures intended to prevent births within the group.

e) Forcibly transferring children of the group to another group.

(2) A perpetrator of the crime of genocide shall be imposed aggravated life imprisonment. However, the provisions of actual concurrence as the number of identified victims shall apply to the crimes of deliberate killing and deliberate injuring in the context of genocide.

(3) For these crimes, security measures shall be imposed on legal persons.

(4) No statute of limitations shall apply to these crimes."

Article 77 "Crimes Against Humanity" of TCC provides that:

"(1) The commitment of any of the following acts against any section of the society with political, philosophical, racial or religious motives in a systematic manner according to a plan constitutes a crime against humanity:

a) Deliberate killing.

b) Deliberate injuring.

c) Torture, persecution or enslavement.

d) Depriving persons of liberty.

e) Human experimentation

f) Sexual assault, sexual exploitation of children.

g) Forced pregnancy.

h) Forced prostitution.

(2) In case of subparagraph (a) of the first paragraph, the perpetrator shall be imposed aggravated life imprisonment; for the acts in other subparagraphs, prison sentence of not less than eight years. However, the provisions of actual concurrence as the number of identified victims shall apply to the crimes of deliberate killing and deliberate injuring under subparagraphs (a) and (b) of the first paragraph.

(3) For these crimes, security measures shall be imposed on legal persons.

(4) No statute of limitations shall apply to these crimes."

Article 78 "Organization" of TCC provides that:

"(1) A person who sets up or manages an organization to commit the crimes written in the articles above shall be imposed prison sentence of ten to fifteen years. Those who are members in such organizations shall be imposed prison sentence of five to ten years.

(2) For these crimes, security measures shall be imposed on legal persons.

(3) No statute of limitations shall apply to these crimes."

Since genocide and crimes against humanity threaten peace and security in the world and concern the entire international community, and the wrongdoing involved in these crimes are far heavier than other crimes, they are

addressed in the initial articles of special provisions in the Turkish Criminal Code.

2- Protection Measures in the Criminal Procedure Code Against Genocide and Crimes Against Humanity

a) Arrest

The first paragraph of Article 100 "Reasons for Arrest" of the Criminal Procedure Code No. 5271 of 4.12.2004 (CPC) provides that "(1) Where "concrete evidence" exists indicating strong suspicion of guilt and there is a reason for arrest, a decision of arrest may be made about the suspect or the defendant. Where the importance of the matter is not commensurate with the anticipated penalty or the security measure, a decision of arrest cannot be made". However, the third paragraph of the same Article provides that "(3) Where reasons for strong suspicion exist that genocide and crimes against humanity (Articles 76, 77 and 78) have been committed, a reason for arrest may be considered to exist." According to these provisions, the existence of strong suspicion of genocide and crimes against humanity is sufficient for arrest; the existence of concrete evidence and other reasons for arrest need not exist.

b) Seizure

Article 128 "Seizure of Immovable Property, Rights and Claims" of CPC provides that "(1) The assets of a suspect or defendant may be seized where a reason for strong suspicion based on "concrete evidence" exists that the crime being investigated or prosecuted has been committed or the assets

have been obtained through these crimes." Pursuant to point 1 of subparagraph (a) of the second paragraph of Article 128 of CPC, the protection measure above shall also apply in case of genocide and crimes against humanity.

The first paragraph of Article 248 "Coercive Seizure and Guarantee Paper" of CPC provides that "(1) In order to ensure that the fugitive defendant appear in court, the defendant's properties, rights and claims may be seized by court decision in proportion to the purpose and an administrator shall be appointed as necessary for administration. The decision of seizure and appointment of an administrator shall be notified to the defendant's attorney." Pursuant to point 1 of subparagraph (a) of the second paragraph of Article 128 of CPC, the protection measure above shall also apply in case of genocide and crimes against humanity.

II- RIGHTS OF VICTIMS IN CRIMINAL PROCEDURE CODE

Article 237/1 of CPC provides that "(1) The victim, natural and legal persons incurring damage from the crime and those who are financially liable may become participants in the public case by notifying their complaint at any phase of the prosecution at the court of first instance until a verdict is returned." In addition, the first paragraph of Article 239 of CPC provides that "(1) Where the victim or the person harmed by the crime participates in the case, he may request that the bar association assign an attorney for him in case of sexual assault crimes or any crime requiring more than five years of prison as the lower limit." Thereby, in cases of

genocide and crimes against humanity, victims are provided attorney services free of charge. Article 243 of CPC provides that "Inheritors may participate in the court to follow up the rights of participant."

Article 260 of CPC provides that "Legal venues are open for the Public Prosecutor, suspect, defendant, those who have obtained the capacity of participant under this Law, those whose request of participation has not been decided, rejected or those who have been harmed by the crime to such extent that they could have obtained the status of a participant against the decisions of the judge and the court."

CPC allows, as noted above, "victims" or "those harmed by the crime" to participate in the court. The content and limits of these concepts are defined by court decisions on the basis of circumstances of the case at hand.

III- STATUTE OF LIMITATIONS AND AMNESTY FOR CRIMES AGAINST HUMANITY AND GENOCIDE

The fourth paragraph of Article 76 "Genocide" of the Turkish Criminal Code (TCC) allows no statute of limitations for the crime of genocide. In clearer terms, these crimes shall never lapse due to time limits. The same rule applies to "crimes against humanity" (TCC Art. 77/3). Similarly, the crimes committed by those who set up an organization or participated in such an organization shall not lapse (TCC, Art.8).

There is no substantive rule that limits general amnesty in the international instruments to which Turkey is a party. Article 87 of the Constitution confers the power of general

and special amnesty on the Turkish Grand National Assembly (TGNA). There is no special clause in Turkish domestic law on the amnesty for "genocide and crimes against humanity". Further, TCC holds no exceptional provision on general amnesty in respect of "genocide" and "crimes against humanity" (Art. 65, 74). However, as noted in the Introduction to this paper, Turkey has undertaken to punish these crimes pursuant to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide. It is beyond the purview of this paper what position TGNA may take on the matter of pardoning these crimes in light of such commitment.