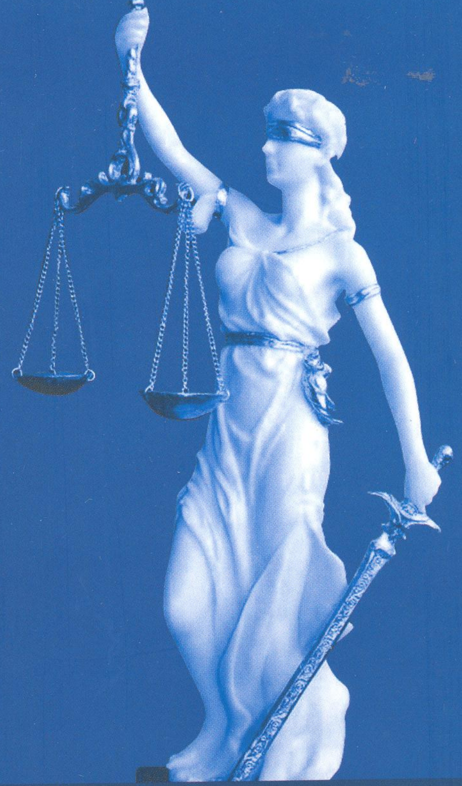
A STUDY ON TURKISH CRIMINAL TRIAL SYSTEM



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ANKARA BAR PUBLICATION

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ON TURKISH CRIMINAL TRIAL
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A STUDY
ON TURKISH CRIMINAL TRIAL
SYSTEM

ACKNOWLEDGEMENTS
and
A FEW REMARKS

To prepare on a regular basis “Country Law Study for Turkey” is among the responsibilities assumed by our office in accordance with the Agreement Between the Parties to the North Atlantic Treaty Organization Regarding the Status of Their Forces (NATO SOFA) of 19 June 1951. Republic of Turkey being a member of the North Atlantic Treaty Organization has ratified the NATO SOFA through Law No 6375 on 10 March 1954. In that respect the first Country Law Study for Turkey was prepared by late Mustafa Ovacık, Esq, the first Turkish Legal Advisor of the then Joint United States Military Mission for Aid to Turkey (JUSMMAT) in 1969 and who was my dear “Master” when I started to work in the same office with him, then, as a brand new lawyer. I remember him with due respect and admiration for his fine professionalism and great command in the English language. I am full of thanks to him even if in memory; for his setting the first example of this Study so masterfully.

The Country Law Study I did on my part for the first time was in 1987 under the auspices of the then Col (R) Randy Harshman, who was then the precious head of our legal office at JUSMMAT. Taking this opportunity I would like to thank Randy Harshman with all my heart, who has been and is a true light for me all these years for his great guidance and true friendship.

Over the years the existing Country Law Studies were updated whenever major amendments were introduced into the Turkish system of criminal procedure .Except in 2004 I had to write a new book due to the substantial changes Turkey made under the EU harmonization packages. However, the Turkish

criminal system as a whole; both from the aspects of the substantive law and the law of procedure; was changed once again and this time completely and entered into effect as of 2005. This left me no choice to update our existing book of 2004 but to write a new one "from the scratch"!

This freshly written Country Law Study for TURKEY 2008 is my latest and the last product in my capacity as the Turkish Legal Advisor to the United States of America Office of Defense Cooperation in Turkey (ODC T) prior to my departure from the office. Getting ready to ask for the great permission from my beloved work to retire to a new horizon of beautiful Life on 7 July 2008; I had to put all my efforts to be able to complete this study in time. Not to leave it unfinished; was my goal and if you will, it was indeed a matter of principle; a matter of professional responsibility for me.

I first started to work on the new book when Lt Col Mike Apol was the head of our office. How much I appreciate the way he enabled me to do my academic research freely as the nature of the study required. Besides the other responsibilities as the legal advisor I have to take care of both in and outside of the office, to be also able to complete this study needless to say, demanded a lot of time and concentration… Due to her great understanding and support Maj Lisa Faye Willis, the current Staff Judge Advocate of ODC T and the head of our office, made it possible for me to have the concentration I needed these last few months to work on the book almost without break. If it was not for her consideration to open my way in this regard; I really do not know how and when I could have finished it! I am grateful to you my "Lisa Binbaşım"as we say in Turkish when we are addressing an officer in the rank of Major. I am indeed very happy to say that it is now complete. I do hope it serves the purpose if ever the need arises to resort to it. If any mistakes and or omissions are observed; all the responsibility for these unintentional mishaps rests with me and I say "mae culpa"!

I would, therefore, like to express as it comes from my heart, my profound appreciation and thanks to each and every one of you my dear friends whether you are near or far for extending to me your kind support during my work on the book…

and;

My heartfelt thanks go to all my Teachers during all the years of my schooling and to my dear Professors at the Ankara University Law Faculty for their precious contributions to my life and personality.

and;

I would also like to express my profound thanks to the Honorable Yekta Güngör Özden, my Master, the then former President of the Constitutional Court of the Republic of Turkey with whom I had completed my apprenticeship period to become a full-fledged lawyer at the time the Honorable Özden was a member of the Ankara Bar Association; for his great professional and personal guidance for me and setting a sterling-silver example of a true defender of Justice…

and;

I would like to extend my thanks from the bottom of my heart to you Mualla (my Mili) Gökhan, my sweet sister; to you LtCol Apol, the previous dear head of our office; to you Maj Lisa Faye Willis, the dear current head of our office; to you Mehmet Nur Tanışık, my true friend and dear colleague; and to you dear Tammy Walker, our special sparkle in the office; and to you dear Bercis Göydün de Herrero, my true friend that we are blessed to share together all these magnificent years from our childhood on; to you dear Anne-Liis Koluman for your wonderful friendship full of light; to you dear Zeynep"Gökhan"Öztürk, our precious niece; indeed to you all, once again my thanks with all my heart for all your wonderful considerations and understanding and the sunshine like smiles during all these months that gave me encouragement and a fresh breath concerning the birth of "my book"; that I must confess I came to look upon as my own precious baby…

and;

Thank you most deeply "Eternal Friend"; for the strength and the perseverance…

Ankara, 19 June 2008

A FURTHER ACKNOWLEDGEMENT TO THE ANKARA BAR ASSOCIATION

To V. Ahsen Coşar, Esquire, the President of the Ankara Bar Association and in his person to the Ankara Bar Association Executive Board I would like to express my thanks with all my heart for the decision rendered by them to publish this study of this member of the Ankara Bar under their auspices. It is my sincere hope that the book would be able to serve to a wider circle as a source of reference in the English language about the current criminal trial system in Turkey with an emphasis on the constitutional safeguards granted and the rights extended to the suspect and the accused when subjected to criminal process in our country.

Dr. Sezer Gökhan, Attorney-at-Law

Ankara, 12 August 2009

COUNTRY LAW STUDY
FOR TURKEY 2008
INTRODUCTORY REMARKS

The original **Turkish Code of Criminal Procedure** was accepted on 4 April 1929 and entered into effect as of 20 April 1929. It was adopted from the German Code of Criminal Procedure of 1877 as amended in 1926 because at that time it was considered as a liberal system of criminal investigation and trial in the international domain[1]. Thus the Turkish Code of Criminal Procedure with its amendments over the years remained in effect for almost 76 years. Since, the main purpose of the law of criminal procedure is to reach to "the substantial truth" and this could only be attained in harmony with the "right of fair trial" which emphasizes the human rights and freedoms it could be indicated that even though the original Turkish Criminal Code of Procedure (TCCT) despite the amendments made to that end in some parts, seemed to be not sufficiently serving to the purpose any longer. Nevertheless, it should be proper to state here that to the extent feasible the previous system of the TCCP through major amendments did contain some of the safeguards in harmony with the EU standards. However, under the developments taking place in the society; the type of offenses committed and the peculiarities contained in them; the awareness and the importance attached to the concepts of human rights; the supremacy of law; and right to fair trial made it imperative for a new criminal procedural code as well as a new criminal code to be prepared in Turkey. Therefore, in line with the harmonization of the Turkish legislation with the European

1 GÖLCÜKLÜ, Prof Dr Feyyaz, "Criminal Procedure", Introduction to Turkish Law, edited by ANSAY,Tuğrul and WALLACE, D.Jr. 4th Ed Netherlands, 2002, p 196 et seq

Union (EU) "acquis"[2] new Codes for Criminal Trial and for Punishments, respectively were prepared. It must be stated here that the new criminal-justice system provides an entirely new modality both from the aspect of substantive law and the law of procedure.

To this end the title of the abolished Code of Criminal Procedure is changed to read: **"Code of Criminal Trial**". The new Turkish Code of Criminal Trial (TCCT) under Law No. 5271 has entered into effect on 1 June 2005 following its promulgation in the Official Gazette of the Republic of Turkey dated 17 December 2004; No, 25673.

It must be noted here that the changes that took place in the Turkish legal system did not only involve the criminal procedure and the Turkish Criminal Code; but a series of laws have also been introduced into the criminal law system. To wit: Law on the Execution of Punishments and Security Measures; Law on Misdemeanors; Law on the Organization, Duties and Jurisdiction of Courts of First Instance and Regional Courts of Justice.

The Country Law Study for Turkey 2008 is geared towards providing an explanation of the criminal trial system that currently exists in Turkey with an emphasis on the constitutional safeguards granted and the rights extended to the suspect/accused when under criminal process in Turkey. For this purpose, the present Study contains five parts.

The First Part states the constitutional safeguards extended to everyone in general and those extended to the suspect/accused in particular.

The organization and the Jurisdiction of the Turkish Courts/Judges with emphasis on the Criminal Courts, as well as the status of the Public Prosecutor ;under the new arrangement are dealt with in Part Two. A section in this part contains Defense Procedure.

Part Three is on Criminal Process. In this part the two phases of the Criminal Process are elaborated on. The Investigation phase and the Criminal Prosecution (Trial) are explained. The concept of Evidence is discussed under a separate title due to the cardinal importance it has in the sound flow of the criminal process from all respects. The lawfulness or otherwise the unlawfulness; the weighing and the admissibility of evidence by the Judge/Court are dealt with as provided by the system. Under the heading of the

2 The entire acquisition in effect within the European Union contains such instruments as the treaties establishing the Union, the law developed by the organs of the Union, common policies, agreements concluded with third countries, and the obligations assumed. There are almost thirty different chapters having acquisition provisions starting from free circulation of commodities to external relations. Uluslararasi İlişkiler Sözlüğü, DAĞ, Ahmet Emin, 2004 p.16

Protective Measures which are temporary in nature; Apprehension/Detention and Arrest are explained. Which is followed by section on Visitation of the confined person in a penal institution/detention facility is also dealt with in this part due to its direct relevancy to person under detention or arrest. Judicial Control which is also a protective measure is a new mechanism introduced into Turkish Criminal Process to enable the process to run without distortion to the extent feasible. The group of measures under this heading enumerated by the law are interim measures and are not rigid in nature as arrest is and therefore, do not entail depriving the individual of his/her personal liberty. Posting of Guaranty, Search and Seizure, Undercover Investigator (a new institution) and payment of compensation by the State to individuals under prosecution subjected to unlawful treatment are also dealt with in this Part.

Legal Remedies are explained in the final Part Five of the Study.

Because of their relevancy there are two enclosures of this Study submitted for the information of the Reader. These are the two treaties concluded between and ratified by the Republic of Turkey and the United States of America in 1980. Respectively they are: the Treaty on Prisoner Transfer and Enforcement of Penal Judgments and the Treaty on Extradition of Offenders and Mutual Assistance in Criminal Matters.

The author of this Study would like to submit to the information of the dear Reader that the translations of the relevant Articles contained in the new Turkish Code of Criminal Trial and the Turkish Criminal Code which are cited in this Study are rendered by the author herself. The author hopes that they are clear enough and therefore, the Study renders harmony in comprehension. The responsibility rests with the author/translator if any unintentional confusion seems to appear due to rendering a subject of this caliber in a tongue other than one's mother tongue.

THE CHANGES INTRODUCED BY THE NEW TURKISH CODE OF CRIMINAL TRIAL

We must point out that the New Turkish Code of Criminal Trial contains seven books and a total of 335 articles. The titles of the books are as follows: first book: "General Provisions"; second book: "Investigation"; third book: "Prosecution"; fourth book: "Victim, Complainant, Party under financial obligation, Intervenor"; fifth book: "Special Trial Procedures"; sixth book: "Legal Remedies"; seventh book: "Trial Expenditures and Miscellaneous Provisions".

In order to have an idea as to what the new system of criminal trial contains; stated below is a synopsis of the changes introduced[3]:

1. In order to render effective speed to the operation of justice **the courts are authorized to carry out service of process directly**. (Art 36)
   In the old system it was done through the office of the Public Prosecutor.
2. **The actions concluded by the Judge or by the Court not having jurisdiction** are dealt with separately and in order to erase any misconceptions both in the jurisprudence and in the area of implementation such actions **are deemed not valid**. (Art 7)
3. **The Code contains a specific category of punitive provisions pertaining to disciplinary confinement, per se** but not to offenses or confinement in the sense of the criminal law. (Arts 60/1, 203/3)
4. **Exception is granted regarding denial of motion to disqualify a Judge** in order to render effective speed in justice by allowing this kind of legal remedy. (Art 31)
5. **Witness subpoena have been rearranged in harmony with the European Convention of Human Rights.** (Art 43) The rule has been and is to subpoena witness to court However, it is made possible now to invite the witness to court through various other means such as telephone, telegram, fax and electronic mail so as to render speed to the process of justice..
6. **New arrangements made for testimony with respect to matters involving State secrecy.** (Art 47) In such instances where matters of State secrecy are involved the witness shall testify only before the Judge or panel of Judges without the participation of the court recorder.
7. **Protection of the security of the witness is provided.** (Art 58) If grave danger would arise in the event the identity of the witness is revealed for the witness or for his next of kin, the identity of the witness shall be kept confidential.
8. New arrangements are made regarding the following issues: **Physical examination of the suspect or the accused and taking sample from the physical body; physical examination of other persons; examination of women; molecular medical examinations; and establishment of physical identity** (Art 82)

3 ÇOLAK, Dr Haluk-TAŞKIN, Dr Mustafa: Açıklamalı-Karşılaştırmalı-Uygulamalı Ceza Muhakemesi Kanunu Ankara 2005 pp 55-60

9. **Public Prosecutor and the Police according to the circumstances are authorized to conduct on site inspection having accused participate,** is a new process provided by the Code. (Art.85)

10. **Reasons for arrest are reduced and circumstances where reasons for arrest are presumed to exist are enumerated in strict order.** (Art 100)

11. **Judicial control is introduced into the system as a new institution.** (Arts 109-115) Where reasons for arrest indicated by the Code do exist, with respect to such offenses, the limits of the punishment of which is specified in the Code, the Court may rule the suspect to be subject to judicial control rather than be arrested during the investigation.

12. **In instances where delay is deemed prejudicial search and seizure may be conducted by the Police upon Court ruling or upon written order of the Public Prosecutor. The power bestowed upon the Police Chief or the officers in such instances is curtailed by virtue of the law.** (Arts 119/1, 127/3)

13. **With respect to certain type of offenses, documents containing information regarding the incident of offense cannot be withheld from the Court based on the assertion that they involve State secrecy.** (Art 125)

14. **New institutions are introduced into the system within scope of Protective Measures. Those of interest to our subject matter are as follows:**

    - **Seizure of real property, rights and payments in connection of certain types of offenses** (Art 128)
    - **Search, copy and seizure of computers and computer programs and logs** (Art 134)
    - **Determination, monitoring and recording of communication (Art 135)**
    - **Evidence obtained by chance** (Art 138)
    - **Assigning undercover investigator** (Art 139)
    - **Technical surveillance** (Art 140)

15. **Rearrangement of rules pertaining to payment of compensation due to Protective Measures** (Arts 141-144)

This subject was previously arranged by Law No 466 on the Payment of Compensation

to Persons Unlawfully Apprehended or Arrested. However, the TCCT set forth the specific provisions to that end and therefore, abrogated the aforementioned Law No.466. Accordingly, the computation of the amount of compensation shall be based upon the general provisions of the law of compensation. The State shall resort to the public official for abuse of official duty in exercising the protective measure and collect the amount of compensation the State had to pay from the subject official.

16. Mandatory Defense Counsel (Art 150)

Mandatory defense counsel is also provided by the new system but with a larger scope. By virtue of the law the following shall benefit from this institution:

- If suspect or the accused state that he cannot afford defense counsel, if he so desires a defense counsel shall be designated.
- If the suspect or the accused has not yet attained 18 years of age; or he is deaf and dumb or he is so disabled that he cannot defend himself and there is no defense counsel; irrespective of any request by him to that effect; a defense counsel shall be designated.
- Where there is no defense counsel for the suspect or the accused concerning whom there is investigation or prosecution for an offense the ceiling punishment of which is imprisonment of five years, at the minimum; irrespective of any request by him to that effect a defense counsel shall be designated.

17. Secrecy of Investigation is clearly provided (Art 157)

Except the provisions set forth otherwise by the Code, and provided that the right to defense would not be jeopardized the procedural actions are conducted in secrecy during the investigative phase. Those that violate the secrecy of investigation are sanctioned in accordance with the provisions of Turkish Criminal Code No.5237.

18. Judicial Police (Arts 164-167)

In accordance with the new set-up by the Code; the actions concerning investigation shall initially be conducted by the judicial police under the order and instructions of the Public Prosecutor. The Judicial Police carry out the orders issued by the Public Prosecutor concerning judicial matters.

Chief Public Prosecutors at the end of each year shall prepare an evaluation report for the heads of the judicial police at the locality and have them dispatched to the territorial governor.

19. Public Prosecutor to Exercise Discretionary Power in the initiation of public prosecution (Arts 171, 173/5)

By virtue of the Code, discretionary power in requesting for commencement of the public prosecution is granted to the Public Prosecutor under specific conditions. The Public Prosecutor may not request for commencement of the public prosecution where there are conditions for the implementation of provisions regarding effective regret as a personal reason which leads to cancellation of the punishment or where there exists personal reasons of non-punishment.

In instances where the Public Prosecutor exercises his discretion not to initiate public prosecution, exception cannot be taken against this decision. However, exception can be resorted to in respect to other decisions of the Prosecutor not to prosecute.

20. Sending back the Indictment (Art.174)

The Court after having reviewed all the documents within the prescribed time of period concerning the investigation phase may render decision to send back the indictment to the Office of the Chief Public Prosecutor by indicating the incomplete and erroneous points thereby if the indictment is found not to contain the points set forth by the Code.

21. Cross Examination (Art 201)

The cross-examination is now introduced into the Turkish system. The Public Prosecutor, defense counsel or attorney-at-law representing the other party in harmony with the discipline of the trial may pose questions directly to the accused, intervenor, witnesses, expert witnesses, to other persons subpoenaed to the trial. On the other hand, however, both the accused and the intervenor may pose questions through the presiding Judge or the Judge, accordingly. The presiding Judge shall determine whether a question is proper or not where there is objection taken against the subject question. If need be the concerned may pose their questions once again.

In a multi-Judge Court the member Judges shall pose their questions to the persons stated afore.

22. Informing the Accused present at the trial the legal remedies available for him, the competent authority and the prescribed time within which to resort to legal remedies(Arts 231,232)

In accordance with the Constitutional Amendment [4] the State is obliged to inform the concerned persons the legal remedies, the competent authority and the periods within which to resort to in connection with the acts of State. Thus, the new Code contains the same provision.

23. Request by the victim and the complainant to have the Bar appoint an attorney for him (Art 234)

This is a new institution introduced into the Turkish system as previously this right has been granted to the suspect/ accused under the conditions prescribed by the Code.

24. Arrest in Absentia is abolished except regarding fugitives (Arts 246, 248/5)

25. New arrangements made regarding trial of fugitives (Arts 247, 248)

26. Arrangements made regarding the investigation and prosecution of legal entities (Art 249)

27. Arrangements made regarding trial of specific offenses (Art 250 & ff)

Following the abolition of State Security Courts in Turkey[5], the offenses within scope of trial jurisdiction of these courts which can be termed as offenses against the indivisible integrity of the State, the free democratic order, and internal and external security of the State, namely offenses of terrorism are now transferred for trial by Heavy Criminal Courts[6]. The respective Heavy Criminal Courts are assigned by the High Council of Judges and Prosecutors; itself a Constitutional organ within the Turkish Judiciary.[7]

28. Conciliation Board (Arts 253-255)

Conciliation is set up as a new institution in the Turkish Criminal system. The provisions concerning the substantive criminal law of the Conciliation are arranged in the New Turkish Criminal Code. But the provisions and the rules as to the procedure of conciliation, in other words as to how the conciliation would be implemented is provided in the New TCCT.

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4 Art 40/2, Tr Const as amended by Art 16, Law no.4709 of 3 October 2001

5 Law No. 5170; Official Gazette of 22 May 2004, No. 25496

6 In order to correspond to the Turkish terminology of "Ağır Ceza Mahkemesi"; the phrase of "Heavy Criminal Court" is employed in this Study as a 'term of art'. Please note that; the reason why it is preferred in lieu of the terminology of "High Criminal Court" provided by Mustafa Ovacık, Esq. for "Ağır Ceza Mahkemesi" in his Law Dictionary (Tr - Eng p.7); is solely for purposes of avoiding any confusion the terminology of "High Criminal Court" may lead to in light of the concept of "High Courts" as set forth and referred to by the Constitution of the Republic of Turkey such as the "High Court of Appeals".

7 Art 159, Tr Const

29. Appeal at First Degree Appellate Court (İstinaf) (Arts272-285)

Appeal to be taken before the first degree appellate courts, also termed intermediate appellate courts, is re-introduced into the Turkish Criminal system as a legal resort. The TCCT sets forth as to the nature of decisions against which appeal can and cannot be taken before the first degree appellate courts. The first degree appellate courts are under the High Court of Appeals (Supreme Court of Cassation) which is the court of last legal resort.. To this end, it must be stated that, TCCT indicates the decisions against which appeal can be taken before the Supreme Court of Appeals.

30. Mandatory Response to letter by Judicial Authority regarding Investigation and Prosecution (Art 332)

A prescribed time of ten days is set up for response to be submitted for the concerned party to a written request regarding information issued by the Public Prosecutor, by the Judge or the Court during investigation and prosecution.

31. Certain institutions of Criminal Procedure are abolished

The following institutions of the criminal procedure are abolished by the new Code: Initiation of personal action; for the criminal court of peace to render decision of conviction without holding a trial regarding misdemeanors only upon review of the file; restitution of forfeited rights; urgent exception as an ordinary legal resort and correction of decision as an extraordinary legal resort.

PART I
THE CONSTITUTION OF THE REPUBLIC OF TURKEY

General Remarks

The current constitution of the Republic of Turkey dates back to 1982, which replaced the 1961 Constitution. Since then some amendments have been and are still being made to it. For purposes of our study it should be mentioned that following the EU Helsinki Summit of December 1999, at which time Republic of Turkey and the EU signed the document of candidacy for accession, Turkey has amended its Constitution and other pertinent laws and regulations to allow the decisions given by the European Court of Human Rights (ECHR) to be implemented in Turkey.[8]

In accordance with the principle set forth in Article 2 of the Constitution; the Republic of Turkey is a democratic, secular, and social State governed by the rule of law. The State bears in mind the concepts of the public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Mustafa Kemal Atatürk.

The Turkish State, with its territory and nation, is an indivisible entity. Its language is Turkish. …Its capital is Ankara.

8 ÜNAL, Dr iur Şeref, Turkish Legal System and The protection of Human Rights, SAM PAPERS No 3/99 Ankara, April 1999 pp 43-44

By virtue of Art 4 there are "Irrevocable Provisions" of the Constitution. To wit: the provisions in Art 1stating that the Turkish State is a Republic; the provisions in Art 2 on the characteristics of the Republic such as being a democratic, secular and social State governed by the rule of law…and the provisions of Art 3 on the integrity of the State, its official Language, Flag, National Anthem and Capital shall not be amended nor shall their amendment be proposed.[9]

The Republic of Turkey through its Constitution adopted the principle of separation of powers which reflects the basic constitutional requirement in contemporary democracies.[10]

The sovereignty is vested fully and unconditionally in the nation and the people exercise their sovereignty directly through elections and indirectly through authorized organs of the State within the constitutional frame work.[11] These organs are the legislative, executive and judiciary branches of the government. Legislative power is vested in the Turkish Grand National Assembly (TGNA) (Türkiye Büyük Millet Meclisi /TBMM) which is the supreme power of the land and it cannot be delegated. Executive power and functions are exercised and carried out by the President of the Republic and the Council of Ministers. The Judicial power is exercised by independent Courts.[12]

To this end it must be stated that the provisions of the Constitution are fundamental legal rules binding upon the legislative, executive and judicial organs and the administrative authorities as well as other institutions and individuals. Because of the supremacy of the Constitution, laws of the land shall not be in conflict with the Constitution.[13]

9 Art 4 Tr Const
10 TURKEY-2002, published by the Directorate General of press and Information of the Prime Ministry, Ankara 2002, p 150 et seq
11 Art 6 Tr Const
12 Arts 7, 8 and 9 Tr Const
13 Art 11 (1) (2) Tr Const

SECTION 1
THE CONSTITUTIONAL GUARANTY OF THE FUNDAMENTAL RIGHTS AND FREEDOMS

The Constitution of the Republic of Turkey contains all the fundamental rights and freedoms that reflect the norms of contemporary rules. The Constitution emphasizes that everyone has inherent fundamental rights and freedoms which are inviolable and inalienable. In return for these constitutional rights and freedoms the Constitution mandates that the individual has certain duties and responsibilities towards the society, his family and other individuals.[14]

The fundamental rights and freedoms may only be restricted under the explicit conditions set forth by the Constitution and done through a law promulgated to this effect. Their essence may not be violated when regulated by law. The constitutionality of laws as far as their form and essence are concerned can be examined through the legal control mechanism exercised by the Constitutional Court of the Republic of Turkey.[15]

1. Equal protection of Law

The Constitution grants to individuals equal protection of law. Provisions of Art 10 reads:

“All individuals are equal without any discrimination before the law, irrespective of language, race, color, gender, political opinion, philosophical belief, religion and sect, and any other considerations.

“No privilege shall be granted to any individual, family, group or class.

“State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.”

2. Status of Aliens

Foreigners who are within the boundaries of the Republic of Turkey do enjoy all the fundamental rights and freedoms by virtue of the Constitution. However, they are expected to respect national unity, territorial integrity, sovereignty and the independence of the Republic of Turkey in their interactions in Turkey. Art 16 of the Constitution states: “The fundamental rights and freedoms of aliens may be restricted by law in a manner consistent with international law.”

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14 Art 12 Tr Const
15 Arts 13 and 148 Tr Const

3. Independence of the Judiciary

In accordance with the fundamental rule set forth by the Constitution, the independent Courts are the only judicial organs that exercise judicial power on behalf of the Turkish Nation.[16] Therefore, Turkish Judges discharge their duties independently. The Judge renders his judgment in accordance with the Constitution, law and his inner conviction in conformity with the law. No recommendations, suggestions, order or instructions may ever be given to Courts or Judges in the exercise of judicial power on behalf of the Turkish Nation.[17]

Court decisions have a binding effect on the Legislative, and Executive organs and the Administration. These organs and the administration shall neither change them in any respect, nor delay their execution in any way.[18]

4. Law Making Procedure

By virtue of the Constitution it is among the functions and powers of the Turkish Grand National Assembly to enact, amend and repeal laws.[19] Because Turkey has adopted the rule of supremacy of the Constitution, laws thus enacted cannot contradict the letter and spirit of the Constitution. Only the persons or organizations that are indicated in the Constitution are empowered to submit contentions of unconstitutionality of laws before the Constitutional Court.[20]

- **Introduction of Draft Bills and Proposals of Laws**

The Council of Ministers and deputies are empowered to introduce laws. The procedure and principles relating to the debating of draft bills and proposals of law in the Turkish Grand National Assembly is regulated by the Rules of Procedure.[21]

- **The Promulgation by the President of the Republic**

The law adopted by the Grand National Assembly as the legislative organ is presented to the President of the Republic for promulgation. The President of the Republic promulgates the law within fifteen days as of the date of adoption by the Grand National Assembly. However, if the President considers the law (either in part or in entirety)

16 Art 9 Tr Const
17 Art 138 (1) (2) Tr Const
18 Art 138 (4) Tr Const
19 Art 87 (1) Tr Const
20 Arts 148 & 150 Tr Const
21 Art 88 Tr Const

unsuitable for promulgation; together with his justification he may revert it for further consideration by the legislative organ within the same prescribed period. If the legislative organ adopts the law without changing it, the President then promulgates it. If the legislative organ makes a new change in the law that was referred, the President once again refers the law back to the legislative organ. However provisions relating to Constitutional amendments are reserved.[22]

• Entry into Effect

The laws enter into effect as of the date indicated in the particular provision contained in the text of the law. In the absence of such a provision, the law enters into effect after lapse of forty-five days as of the date of its publication in the Official Gazette.[23] It is imperative to publish laws in the Official Gazette in order to render them to be binding on everyone. In addition to laws, international treaties and agreements, regulations, by-laws, governmental decrees having force of law, decisions of the Constitutional Court and the Court of Jurisdictional Disputes and Uniformity decisions of the Higher Courts are published in the Official Gazette. The Official Gazette of the Republic of Turkey

("T.C. Resmi Gazete") is a publication of the State as its name connotes under the Office of the prime Minister. The establishment was founded in 1920 in Ankara and has been continuously published since 1927.[24]

SECTION 2
CONSTITUTIONAL RIGHTS and FREEDOMS

1. Rights and Duties of the Individual, in general[25]

(1) Personal Inviolability, Material and Spiritual Entity of the Individual

Everyone has the right to life and the right to protect and develop his/her material and spiritual entity. The physical integrity of the individual shall not be violated except un-

22 Art 88 & Art 4 Tr Const on "Irrevocable Provisions" of the Constitution
23 GÖZÜBÜYÜK, Prof Dr A. Şeref, Hukuka Giriş ve Hukukun Temel Kavramları, 18th Edition, Ankara 2003 p.44
24 KARAYALÇIN, prof Dr Yaşar, Hukukta Öğretim-Kaynaklar-metod, problem Çözme. Genişletilmiş 2 nci Baskı, Ankara 1981 p. 25
25 Art 17 (1) (2) Tr Const

der medical necessity and in cases prescribed by law, and shall not be subjected to scientific and medical examinations without his or her consent. No one shall be subjected to torture or ill treatment; no one shall be subjected to penalties or treatment incompatible with human dignity.

(2) Prohibition of Forced Labor

Forced labor is prohibited. Work required of an individual while serving a prison sentence or under detention, services required from citizens during state of emergency, and physical and intellectual work necessitated by the requirements of the country as a civic obligation do not come under the description of forced labor, provided that the form and conditions of such labor are prescribed by law.[26]

(3)Personal Liberty and Security

Everyone has the right to liberty and security of person. No one shall be deprived of his her liberty except in the following cases under the procedures set forth by law:

- Execution of sentences restricting personal liberty and the implementation of security measures[27] decided by court order;
- Apprehension and detention of an individual under a court ruling or an obligation designated by law;
- Execution of an order for purpose of educational supervision of a minor or for bringing him/her before the competent authority;
- Execution of measures taken in conformity with the relevant legal provision for the treatment, education or correction of persons of unsound mind, in institutions;
- To take under protection of an alcoholic, drug addict, vagrant or a person spreading contagious disease when such persons constitute a danger to the public;
- Apprehension and detention of a person entering or attempting to enter illegally into the country or for whom a deportation or extradition order has been issued.

Individual against whom there is strong evidence indicating that he/she committed an offense; can be arrested only by a decision of a Judge solely for purposes of preventing

26 Art 18 (1) (2) Tr Const

27 The term employed by the Constitution as "security measure" (in Turkish Güvenlik Tedbiri) is used as "protective measure" (Koruma Tedbiri) in the New Turkish Code of Criminal Trial. They connote the same. ÇOLAK-TAŞKIN op cit p 290

escape, or preventing the destruction or alteration of evidence as well as under other circumstances prescribed by law which necessitate detention. Apprehension of a person without a decision by Judge is only possible when a person is caught in the act of committing an offense or in cases where delay is likely to thwart the course of justice. Circumstances for such action are defined by law.[28]

The detained or arrested person shall be promptly notified of the grounds for his arrest or detention and the charges against him/her. In cases of offenses committed by more than one person this notification shall be made, at the latest, before the individual is brought before the Judge.

The person arrested or detained shall be brought before the Judge within forty-eight hours and in cases of offenses committed collectively this period is four days. However, the travel time to take the individual to the court nearest to the place of arrest, are excluded from the time thus prescribed, respectively. No one can be deprived of his/her liberty without decision of a Judge after expiration of the prescribed period by law. These periods may be extended during a state of emergency, under martial law or in time of war.

The next of kin of the accused shall promptly be notified of his apprehension or arrest.

Persons under detention shall have the right to request a trial within a reasonable time or be released during the investigation or prosecution. Release may be made conditional upon submittal of guarantee by the accused regarding his presence for trial proceedings and for the execution of the judgment.

Person deprived of his/her liberty under any circumstances is entitled to apply to the appropriate judicial authority for a speedy conclusion of proceedings regarding his/her situation and for his/her release, where the restriction places upon them is not lawful.

Damages suffered by persons subjected to treatment contrary to these principles shall be compensated by the State in accordance with the general principles of the Law of Compensation.[29]

(4)Privacy and Protection of Private Life

Everyone has the right to demand respect for his or her private and family life. Privacy of an individual and family life cannot be violated.

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28 Art 19 (2) Tr Const & Art 90 TCCT
29 Art 19 Tr Const

Unless a decision duly passed by a Judge in connection with the protection of national security, public order, to prevent offense being committed, to protect public health and public morals, or to protect the rights and freedoms of others, and unless there exists a written order of an authority empowered by law in connection with the same reasons whereby a delay is deemed prejudicial, neither the person nor the private papers, nor belongings of an individual can be searched, nor can they be confiscated.

The decision of the competent authority is submitted for approval by the Judge within twenty-four hours. The Judge pronounces his decision within forty-eight hours as of the confiscation. Otherwise, the seizure shall automatically terminate.[30]

(5)Inviolability of the Domicile

The domicile of an individual shall not be violated. However, for reasons stated in the above cited constitutional provision a domicile may be entered or searched or the property therein seized only upon decision duly passed by Judge. Likewise, the decision of the competent authority in the event delay would be prejudicial has to be submitted within twenty-four hours for approval by Judge. The judge pronounces his decision within twenty-four hours as of the seizure. Otherwise, the seizure shall automatically terminate.[31]

(6) Freedom of Communication

Everyone has the right to freedom of communication. Secrecy of communication is fundamental.

If there is no order issued by Judge; communication cannot be impeded or its secrecy violated. The decision of the competent authority where delay is deemed prejudicial shall be submitted within twenty-four hours for approval by Judge. The Judge pronounces his decision within forty-eight hours. Otherwise, the decision shall automatically terminate.

Public establishments, concerning which exceptions to this rule shall apply, shall be indicated by law.[32]

(7) Freedom of Residence and Movement

Everyone has the right to freedom of residence and movement. However, this freedom

30 Art 20 Tr Const
31 Art 21 Tr Const
32 Art 22 Tr Cont

may be restricted by virtue of law under the following conditions, only:

- To prevent offenses;
- To promote social and economic development;
- To ensure sound and orderly urban growth;
- To protect public property.
- To investigate and prosecute an offense;

Turkish citizens may not be deported, or deprived of their right of entry into their homeland.[33]

(8) Freedom of Religion and Conscience

Everyone has the right to freedom of conscience, religious belief and conviction. Acts of worship, religious services, and ceremonies shall be conducted freely, provided that they do not violate the provisions of Art 14 of the Constitution. Art 14 pertains to the "Prohibition of Abuse of Fundamental Rights and Freedoms". Accordingly the Constitution does not tolerate the exercise of this fundamental right "*inter alia*" of freedom of religion and conscience in a manner to constitute acts aiming to violate the indivisible integrity of the State with its territory and nation, or to destroy the existence of the democratic and secular Republic of Turkey based on human rights.

The Constitution provides that no one shall be compelled to worship or to participate in religious ceremonies and rites, to reveal religious beliefs and convictions or be blamed or accused because of his/her religious beliefs or convictions. In accordance with the constitutional safeguard, no one shall be allowed to exploit or abuse religion or religious convictions, for purposes of personal or political influence, or even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets.

The final provision of the Constitution is important as far as religious proselytizing is concerned as it is not allowed in Turkey.

(9) Freedom of Thought and Opinion

Everyone has the right to freedom of thought and opinion as well as the right to express and disseminate his/her thoughts and opinions.[34]

33 Art 23 Tr Const
34 Arts 25 & 26 Tr Const

However, the freedom of expression and dissemination of thought may be restricted under the circumstances enumerated in the Constitution such as to provide performance of trial function in accordance with due process of law.[35]

2. Rights and Duties Regarding the Suspect/Accused, in particular

(1) Freedom to Claim Rights

Everyone has the right of litigation either as plaintiff or defendant before the courts through lawful means and procedure, and the right to a fair trial.[36]

(2) Guaranty of Lawful Judge

No one may be tried by any judicial authority other than a legally designated court. Extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court shall not be established.[37]

(3) Principles Regarding Offenses and Punishments[38]

No one shall be punished for any act, which did not constitute a criminal offense under the law in force at the time it was committed. No one shall be given a harder punishment than was applicable at the time the offense was committed.

The above provisions shall also apply to the statute of limitations on offenses and punishments and on the results of conviction.

Punishments and security measures (protective measures) in lieu of punishments shall be prescribed by law.

No one shall be deemed guilty until proven guilty in a court of law.

No one shall be compelled to make a statement that would incriminate himself or his next of kin, or to present such incriminating evidence.

Findings obtained unlawfully cannot be accepted as evidence by the court of law.[39]

Criminal responsibility shall be personal.

No one shall be deprived of his/her personal liberty because of non-compliance with a contractual obligation.[40]

35 Art 26 (2) Tr Const
36 Art 36 Tr Const; Last phrase added by Art 14 of Law No 4709 of 3 Oct 2001
37 Art 37 Tr Const
38 Art 38 tr Const
39 Para added to Art 38 Tr Const by Art 15 of Law No 4709 of 3 Oct 2001
40 Para added to Art 38 Tr Const by Art 15 of Law No 4709 of 3 Oct 2001

Punishment of death and punishment of general confiscation shall not be imposed.[41]

The Administration shall not impose any sanction resulting in restriction of personal liberty. Exceptions to this provision may be introduced by law regarding the internal order of the Armed Forces.

No citizen shall be extradited to a foreign country on account of an offense except required by the obligations assumed as being party to the International Criminal Court.[42]

(4) Right to Prove an Allegation

In libel and defamation suits involving allegations against persons in the public service in connection with their duties, the defendant has the right to disprove the allegations. A plea for presenting proof shall not be granted in any other case unless proof would serve the public interest or unless the plaintiff consents.[43]

(5) Protection of Fundamental Rights and Freedoms[44]

Everyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities.

The State, pertaining to its transactions, is required to provide clear information to the concerned persons on the legal remedies available; the competent judicial authority to be addressed to; and the prescribed period of time within which application has to be made.[45]

Damages suffered by any person through unlawful treatment by public officials shall be compensated by the State. The State reserves the right of recourse against the responsible public officer.

3. Constitutional Rule Regarding International Treaties and Agreements[46]

Treaties and agreements concluded with foreign States and international organizations on behalf of the Republic of Turkey, is subject to adoption by the Turkish Grand National Assembly by a law approving ratification. Through the law approving ratification, the subject international instrument becomes part and parcel of the Turkish laws.

41 Para added to Art 38 Tr Const by Art 5 of Law No 5170 of 7 May 2004
42 Para added to Art 38 Tr Const by Art 5 of Law No 5170 of 7 May 2004
43 Art 39 Tr Const
44 Art 40 Tr Const
45 Para 2 added to Art 40 Tr Const by Art 16 of Law No 4709 of 3 Oct 2001
46 Art 90 Tr Const

However, agreements in connection with the implementation of an international treaty, as well as other agreements, the nature of which is specified by the Constitution, do not require approval by the Turkish Grand National Assembly. Agreements resulting in amendments to Turkish laws shall be subject to ratification.

- **No appeal on Unconstitutionality:** It is important to note that international agreements duly put into effect, carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements on the contention that they are unconstitutional. In other words, international agreements duly put into effect, and thus become part and parcel of internal law; yet, to a certain extent enjoy supremacy over the internal law. To this end the amended paragraph 5 of Art 90 of the Constitution reads: "In the event of dispute arising from different provisions on the same topic contained respectively by the laws of Turkey and the international agreements duly put into effect; the provisions of the international agreement shall be taken as basis."[47]
- **Specific Reference to the Binding Force of International Instruments on Human Rights:** Some of the provisions of international agreements and declarations have their reflections in the Turkish Constitution and some even constitute the basis for certain provisions of the internal law of Turkey. The UN Declaration of Human Rights (1949), the European Charter on Human Rights and Protection of Fundamental Freedoms, ratified by Turkey in 1954, can be cited here. Turkey has accepted international review of the issues in the field of human rights. To this end, in1987 Turkey granted the right of individual application by the Turkish citizens to the European Commission of Human Rights. Furthermore, the compulsory jurisdiction of the European Court of Human Rights has been recognized in Turkey as of 1989.[48]

47 Art 7 of Amending Law No 5107 of 7 May 2004
48 ÜNAL op cit 14

PART II
THE ORGANIZATION and JURISDICTION OF COURTS and THE STATUS OF THE PUBLIC PROSECUTOR

In general

The Constitution states that the organization, functions and jurisdiction of the courts, their functioning and trial procedures shall be regulated by law. (Art 142, Tr. Const.)

The courts in Turkey are re-organized as of September 2004 in accordance with Law No. 5235[49], the title of which reads: "Organization, Functions and Jurisdiction of First Degree Courts of General Jurisdiction and Regional Courts of General Jurisdiction." The Law also arranges the organization, functions and jurisdiction of the Office of Chief Public Prosecutors.

SECTION 1
COURT STRUCTURE

Law No 5235 provided a three-layered court system in the following order: (a) t first degree courts of general jurisdiction; (b) the regional courts of general jurisdiction (intermediary courts); (c) the High Court of Appeals.

49 Law No.5235, Date of acceptance: 26 September 2004; Entry into effect: 1 April 2005

1. Lower Courts of General Jurisdiction

a. First degree courts of general jurisdiction are divided into two categories as civil and criminal courts which have competency to try cases in light of respective facts and the law.[50]

b. Second degree courts of general jurisdiction which are newly introduced into the system are called regional courts of general jurisdiction. These intermediary courts are the first degree appellate courts.[51]

2. High Courts

- The High Court of Appeals also referred to as Court of Cassation is the last instance for review [52] and is located in Ankara, the capital city of the Republic of Turkey.
- The Constitutional Court which has competence over the issues of constitutionality has further competence as the Supreme Court of the Republic of Turkey to try the president of the Republic, the Ministers and high level officials for impeachment.
- A separate system exists for Administrative Jurisdiction as well as the Military Jurisdiction.
- Last but not the least among the category of high courts there is the Court of Jurisdictional Disputes to solve questions of competency which may arise among the courts of different jurisdictions in trying cases.[53]

3. Independence of the Courts

Independence of the Courts in Turkey is provided by the Turkish Constitution. The pertinent constitutional provision in part, reads:

"Judges shall be independent in the discharge of their duties; they shall

50 Art 2, Law No 5235; TOROSLU, Prof Dr Nevzat –FEYZIOGLU, Prof Dr Metin, Ceza Muhakemesi Hukuku, Ankara 2002 p 25

51 Art 3, Law No 5235. The organization of regional courts of general jurisdiction throughout Turkey is not yet completed. When the organization is done and the courts start to function it shall be promulgated through the Official Gazette. Final paragraph, Ministry of Justice Decision of 15 May 2007, No.206 published in the Official Gazette of 5 June 2007, No. 26543

52 Art 154, Tr Const

53 Arts 146-153; 155; 156-157;158 Tr Const.

give judgment in accordance with the Constitution, law and their personal conviction conforming with the law.

"No organ, authority, office, or individual may give orders or instructions to Courts or Judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions."[54]

In light of the provisions of the Constitution Judges and Public Prosecutors shall serve as judges and public prosecutors of courts of justice and of administrative courts. These duties shall be carried out by professional judges and public prosecutors.[55]

4. Mandatory Response to Letter of Inquiry by Judicial Authorities

It is imperative to respond to written request by the Public Prosecutor, Judge or the Court for information to be furnished in connection with the offense under pending investigation or prosecution. The addressee of the judicial request has to furnish subject information within ten days.

If there is impossibility to do so within the prescribed time, the subject entity advises the requesting judicial authority again within ten days about the reasons for not being able to comply with the request on time and the date on which such response shall be submitted.

The judicial note requesting information contains warning that non compliance entails imposition of criminal sanction. The sanction is imprisonment in accordance with Art 257 of the TCC.

5. Judicial Vacation

Courts handling criminal matters in Turkey are closed for vacation from 1 August to 5 September each year. However the High Council of Judges and Public Prosecutors decides on the manner of handling matters of Investigation and Prosecution regarding suspect or accused persons who are under arrest as well as other matters of urgent nature.

During the judicial vacation both the Regional Courts of General Jurisdiction and the High Court of Appeals handles judgments which pertain to accused persons under arrest and matters covered by the Law of Procedure on the Trial of Flagrant Offenses.[56]

54 Art 138 (1) (2) Tr Const
55 Art 140 Tr Const
56 Art 331 (1) (2) (3) TCCT

SECTION 2

CRIMINAL COURTS

In general

Criminal courts are categorized as (i) Criminal Court of Peace; (ii) Basic Criminal Court; (iii) Heavy Criminal Court;[57] (iv) Other Criminal Courts with special jurisdiction.[58]

Ministry of Justice upon view received from the Supreme Council of Judges and Prosecutors sets up the courts throughout Turkey. Criminal Courts are set up at the capital cities of each province[59]. As far as counties are concerned courts therein shall be set up by taking into consideration the geographic conditions as well as the density of the work load involved. The criminal courts of general jurisdiction are referred to after the name of the province or county they are located.[60]

Ministry of Justice is the competent authority to determine the subject-matter jurisdiction of the criminal courts of general jurisdiction based on the maximum punishment stated by the law for the offense irrespective of the relevant matters of mitigation or aggravation. [61]

Following is the structural order of the criminal courts and their respective areas of jurisdiction in accordance with Law No. 5235:

1. First Degree Criminal Courts (Basic Trial Courts)

A. Criminal Court of Peace (Sulh Ceza Mahkemesi)

Criminal court of peace is a one-Judge trial court[62] and has competence to apply the punishment of imprisonment up to two years (two years inclusive) and punishment of fine in connection with the pertinent imprisonment; punishment of fine, per se; and security measures.[63]

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57 Please see foot note number 6 on p. 21 regarding the explanation given in connection with the preferred use of "Heavy Criminal Court" as a term of art in this Study.

58 Art 8, Law No 5235 provides for other criminal courts to be organized by special laws as required.

59 Province (il): the largest administrative division of Turkey. Turkey is divided into eighty-one provinces. Provinces are divided into counties (kaza); and counties into townships. OVACIK, Mustafa, Türkçe-İngilizce Hukuk Sözlüğü 2.Baskı, Ankara 1986

60 Art 9/6, Law No 5235

61 Arts 9,& 10, Law No 5235

62 Art 9/2 Law No. 5235

63 Art 10, Law No.5235

B. Basic Criminal Court (Criminal Court of First Instance) (Asliye Ceza Mahkemesi)

Basic criminal court is a one-Judge trial court[64]. Public Prosecutor also attends the trial. Basic criminal courts have jurisdiction over cases and matters which are not included into the subject matter jurisdiction of Criminal Courts of Peace and Heavy Criminal Courts.[65]

C. Heavy Criminal Court (Ağır Ceza Mahkemesi)

Heavy Criminal Courts are combined courts. The Court convenes under the Presiding Judge together with two member Judges[66]. The Public Prosecutor attendes the trial. The heavy criminal court has jurisdiction over matters of punishments of aggravated imprisonment for life, imprisonment for life, and imprisonment for more than ten years besides other matters for which they are empowered by law to deal with[67]. Due to a change introduced to the respective article of the Law new categories of offenses are included into the trial jurisdiction of the heavy criminal courts through enumeration of the corresponding article of the new TCC. They are as follows: plundering (Art 148, TCC); extortion (Art 250/1 and 2, TCC); forgery on official documents (Art 204, TCC); aggravated swindling (Art 158, TCC); fraudulent bankruptcy (Art 161, TCC).[68] However, through further amendment the subject-matter jurisdiction of the Heavy Criminal Courts is restricted with respect to the offense of forgery over official documents. To this end only second paragraph of Art 204 remained within scope of jurisdiction of the court rather than covering the article in its entirety.[69]

D. Courts with Special Jurisdiction

In order to give an idea as to the courts with special subject-matter jurisdiction the following can be mentioned as examples: courts dealing with offenses committed through press; traffic courts; courts with trial jurisdiction over offenses involving foreign exchange; courts dealing with smuggling offenses; courts dealing with offenses affecting consumers, juvenile courts of first instance and heavy criminal juvenile courts; military courts and military discipline courts; courts of martial law, tax courts; family courts, etc.[70]

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64 Art 9, Law No 5235
65 Art 11, Law No.5235
66 Art 9/3, Law No.5235; TOROSLU-FEYZIOGLU op cit p 25
67 Art 12, Law No 5235
68 Art 10 of Amending Law No 5328 of 31 March 2005
69 Art 3 of Amending Law No 5348 of 11 May 2005
70 KUNTER, Prof Dr Nurullah-YENISEY,Prof Dr Feridun-NUHOĞLU, Doç Dr Ayşe:

2. Regional Courts of General Jurisdiction (First Degree Appellate Courts) (Bölge İstinaf Mahkemeleri)

Regional Courts of general jurisdiction are organized as the First Degree Appellate Courts. Their location is determined by the Ministry of Justice upon affirmative view received from the Supreme Council of Judges and Public Prosecutors by taking into consideration of the geographical conditions of the regions and the density of respective work load.[71] The Supreme Council of Judges and Public Prosecutors will render decision upon Ministry of Justice proposal, to establish or change the area of jurisdiction of the regional court as well as to abolish it.The respective decisions mentioned above by the Ministry of Justice and the Supreme Council of Judges and Public Prosecutors are promulgated in the Official Gazette of the Republic of Turkey.[72]

However, it must be noted that the organization of the regional courts, or in other words, first degree appellate courts, is not yet completed throughout the country. Therefore, they do not function yet.[73]

Suffice it to mention here that the composition of the court consist a Presiding Judge who represents the court of appeals of first degree. There is the council of the presiding judges of the panels, that is, the civil and criminal panels; the office of the Chief Public Prosecutor of the regional court, the justice commission of the regional court of general jurisdiction and directorates.[74]

SECTION 3
STATUS OF THE PUBLIC PROSECUTOR IN THE TURKISH SYSTEM

1. The Authority to Prepare Indictment/Professional Lawyer

In accordance with the Turkish system the office of the Public Prosecutor is the authority to carry out the accusatory part of the public prosecution[75]. Public Prosecutors are

Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku Ondördüncü BAsı Istanbul 2006 pp150-159; ÇOLAK-TAŞKIN, op cit p 76; TOROSLU-FEYZIOGLU, op cit p 27

71 Art 25, Law No. 5235; TOROSLU-FEYZIOGLU op cit pp 25-26

72 Art 25, Law No 5235

73 Ministry of Justice decision of 15 May 2007, No 206 published in the Official Gazette of 5 June 2007 No 26543

74 Art 26, Law No.5235

75 Art 170, TCCT

professional lawyers.[76] At every province and county where there is a court there is also established the office of the Chief Public Prosecutor. The office of the Chief Public Prosecutor is referred to after the name of the location his office is organized. At the office of the Chief Public Prosecutor, besides the Chief Public Prosecutor there is adequate number of Public Prosecutors. Upon proposal by the Ministry of Justice through the decision by the Supreme Council of Judges and Public Prosecutors one or more than one deputy-Chief Public Prosecutor will be appointed.[77]

2. Functions of the Chief Public Prosecutor

- Conduct investigation or have investigation conducted in order to determine whether there are grounds to initiate public prosecution;
- To follow trial functions on behalf of the Public, to participate in the trials and when necessary to resort to legal remedy by virtue of law;
- To carry out necessary formalities with respect to the execution of finalized court judgments and do the relevant follow-up;
- Perform other duties bestowed upon by law.[78]

3. Duties of the Public Prosecutor

- To carry out formalities concerning judicial function, attend trials, resort to legal remedy;
- To carry out judicial and administrative duties assigned by the Chief Public Prosecutor;
- To represent the Chief Public Prosecutor, when necessary;
- To fulfill other duties bestowed upon by law.[79]

SECTION 4
DEFENSE PROCEDURE

1. Selection of Defense Counsel by the Suspect or the Accused

In light of the constitutional right to defend oneself[80], the suspect or the accused may

76 Art 140 Tr Const
77 Art 16, Law No.5235
78 Art 17, Law No.5235
79 Arts 20, 21,22, Law No 5235
80 Art 36 Tr Const

receive assistance from one or several defense counsels at every phase of the Investigation and Criminal Prosecution (Trial). If suspect or the accused person has a legal representative[81] this person may also retain defense counsel for the suspect of the accused.[82]

Defense Counsel is an attorney-at-law who is qualified to defend the suspect or the accused during criminal action.[83]

During the Investigation phase at most three lawyers can be present at the time of taking statement.[84]

By operation of law, the defense counsel has the right to have audience with the suspect or the accused, to be together with him/her during the time his/her testimony is taken and during the interrogation and to extend legal assistance to him/her at every phase of the Investigation and Criminal Prosecution. The law clearly states that this right cannot be barred, cannot be restricted.[85]

2. Appointment of Defense Counsel by the Court[86]

If the suspect or the accused asserts that he/she is not able to retain a defense counsel the Court or the Judge will have counsel appointed for him/her through the respective Bar Association.[87]

Under one of the following conditions the Court appoints defense counsel for the suspect or the accused without the requirement for the suspect or the accused to make request to that end:

- The suspect or the accused is under 18 years old; or,
- He/she is deaf and dumb; or,
- He/she is so disabled, such as mentally deranged, that he is in no condition to defend himself; and,
- He/she has no defense counsel; or

81 Legal Representative is the one, who by operation of law, stands in the place, and represents the interests of another person. OVACIK Mustafa, Türkçe-İngilizce Hukuk Sözlüğü, Ankara 1986 p 136
82 Art 149 (1) TCCT
83 Art 2 (c) TCCT
84 Art 149 (2) TCCT
85 Art 149 (3) TCCT
86 Art 150 (1) (2) (3) TCCT
87 Art 156 TCCT

- The maximum punishment is at least imprisonment for five years and more involving the offense under investigation or prosecution.

3. Dereliction of the Appointed Counsel[88]

The defense counsel, as a rule cannot abuse his/her duty. Attorneys who neglect or abuse in fulfilling their duty shall be punished for dereliction and abuse of duty in accordance with Art 257 of the Turkish Criminal Code.[89] Public Prosecutor shall demand before the Court for the appointed defense counsel to be barred from acting in his/her capacity to defend the accused. The Court renders decision promptly. Exception can be taken against the decision to bar the attorney to act as defense counsel. In accordance with the Court decision the attorney can be barred for one year from performing his/her duty as defense counsel limited to the offense which is the subject of the pending prosecution.

The Judge or the Court who appointed the defense counsel who does not attend the hearing or withdraws in an untimely manner from the trial or avoids in performing his duty shall promptly appoint another defense council. Under such condition, the Court either rules for intermission or postpones the hearing to a further date. The hearing will definitely be postponed if the newly appointed defense counsel asserts that he/she has not sufficient time to prepare the defense.

4. Examination of Case File by the Defense Counsel[90]

During the investigation the defense counsel can examine the case file and receive copies of documents he/she deems necessary, contained therein without payment of any charges. However, if it is considered prejudicial regarding the purpose of the investigation for the defense counsel to examine the case file and obtain copies of documents contained thereby, his/her power to do so may be curtailed by the decision of the Justice of the Peace upon demand by the Public Prosecutor. It must be noted that, this preclusion is not applicable with respect to the record of testimony of the apprehended person or the suspect and expert reports and records pertaining to other procedural transactions the concerned persons are authorized to attend.

During the trial phase; the defense counsel can examine the case file and the preserved evidence as of the date the Court accepted the indictment and is entitled to receive

88 Art 151 TCCT as amended in part by Law No 5353 of 25 May 2005
89 Art 62 of Law on Attorneyship as amended by Law No 5728, Official Gazette of 8 February 2008, No. 26781
90 Art 153 TCCT

copies of all the records and documents contained in the file without payment of any charges.

5. Audience with Defense Counsel[91]

The suspect or the accused in pre-trial or post-trial confinement may at any time confer with his/her counsel without the requirement for submittal power of attorney in a place secure enough for others not to hear the conversation which takes place between them. The correspondence between the subject person and his/her defense counsel cannot be subject to inspection.

SECTION 5
INTERROGATION and TAKING TESTIMONY

In general

It must be noted that, interrogation and testimony are two different avenues of procedure. In accordance with the Turkish system, the Judge is the sole authority who is authorized to interrogate the accused.[92] The Public Prosecutor is not authorized to interrogate the accused irrespective of the fact that the matter is ***flagrante delicto*** (flagrant offense) or, delay will be prejudicial. Under such circumstances the Justice of the Peace is resorted to for purposes of conducting the interrogation of the accused.[93] The Public Prosecutor is authorized to take the testimony of the suspect during the investigation phase.[94]

In accordance with the provisions of Art 145 of the TCCT, the person whose testimony shall be taken or who is going to be interrogated is summoned before the competent judicial authority that is, the Judge or the Public Prosecutor. The summons contains in clear terms both the reason for it and a warning that noncompliance results to be brought in by force.[95]

The person brought in by force shall be promptly brought before the Judge or the Public

91 Art 154 TCCT
92 Art 2 (h) TCCT, & Art 192 (1) TCCT
93 FEYZİOGLU, Doç Dr Metin: Tanıklık ve Dürüst Muhakeme (Testimony and Fair Trial) Ankara 1998 p 31; TOROSLU-FEYZİOGLU, op cit pp 188-189
94 Art 2 (g) TCCT
95 Art 146 (1) TCCT

Prosecutor in accordance with the phase of the criminal proceeding being investigation or the prosecution. If this is not feasible then he/she shall be taken before the Judge or the Public Prosecutor at most within twenty four hours except time for travel.[96]

1. Procedure concerning Testimony and Interrogation

The Code enumerates as the imperative steps to be complied with as far as taking testimony and conducting interrogation is concerned. The procedure provided by the Turkish Code of Criminal Trial corresponds with the procedure set forth by the ***European Convention on Human Rights in Art 6, para. 3*** under the title line ***"Right to a Fair Trial".*** As mentioned in this study previously it should be noted here once again that the concept of "fair trial" is referred to and provided by the Turkish Constitution in Art 36 as far as every one is concerned.[97] In light of the fact that Turkey is a party to the European Convention on Human Rights and Fundamental Freedoms the concept of "Fair Trial" among other rights provided by the Convention has acquired its place in the Turkish system as an indispensable safeguard for the accused person.[98]

The mandatory Turkish procedure in this respect is as follows:[99]

- Identity of the suspect or the accused is established; the Code bestows upon the suspect or the accused the responsibility to state correct information about his identity.
- The offense he/she is accused of is explained.
- He/she is informed that he/she is entitled **to have the assistance of defense counsel**. He/she is also informed that if he is not able to retain a defense counsel he/she is entitled to have the assistance of counsel appointed by the Bar for his/her defense. Furthermore, he/she is informed that the defense counsel may be present during the time his/her testimony is taken or during his/her interrogation. The counsel shall not be required to promptly submit the power of attorney but on the other had he/she is obliged to submit it in due time, without delay.
- The apprehended person is informed that he/she is entitled **to inform any of his/her relatives about his/her apprehension.** If the apprehended person is a **foreign national,** provided that he/she does not protest in writing, **the consular**

96 Art 146 (4) TCCT
97 Art 36 Tr Const; this Study: section on the Constitutional Safeguards regarding the Accused
98 FEZİOGLU, Doç Dr Metin op cit pp 9-13
99 Art 147 TCCT

officer of the State he/she is a national of, shall be informed of his/her status. [100] It is natural that the foreign national is also entitled to inform his/her relatives about his/her apprehension by virtue of the spirit of the subject provision.

- He/she is informed that he/she is entitled **to remain silent** by virtue of law about the offense he/she is accused of.
- He/she is informed that he/she may ask for the collection of exculpatory evidence in order to exonerate himself/herself. He/she is given the opportunity to clear away the reasons of suspicion against him/her and to assert issues in his/her own favor.
- Information is obtained about his/her personal and economic background.
- Technical means may be resorted to at the time of recording the testimony or conducting the interrogation.
- The testimony and the interrogation are recorded. The subject record must contain the following information:
    1. The place and date the procedure with respect to taking the testimony or conducting the interrogation is done.
    2. The names and titles of the persons present during the respective procedure; clear identity of the person who testified or who was interrogated.
    3. Whether the above mentioned procedural requirements are met; if not, the statement of reasons for non compliance.
    4. Comment to the effect that the contents of the records are read by the person who made the testimony or who was interrogated and by his/her defense counsel who attended the relevant procedure with the subject person and that their signatures are obtained thereby.
    5. In the event of refusal to sign, the reasons for refusal.

2. Prohibited Methods of Taking Testimony and Interrogation

The testimony and answers must be freely given. Physical or psychological intrusions such as abusive treatment, torture, giving medication, exhaustion, deception, applying physical force or threat, or using certain other devices which hamper the free will of

100 Art 95 (1) , (2) TCCT

the subject person cannot be done during taking of the testimony or at the time of the interrogation.[101]

Furthermore, no unlawful benefit can be offered.[102] Also, a matter of equal importance is evidence obtained through the use of forbidden methods, cannot be taken into consideration by the Court as valid evidence even with the consent of the subject person.[103]

Any testimony taken by the judicial police in the absence of the defense counsel cannot be taken as basis for the judgment unless verified by the suspect or the accused.[104]

If need arises to take once again the testimony of the suspect for the same incident this procedure can only be carried out by the Public Prosecutor but not by the judicial police.[105]

101 Art 148 (1) TCCT
102 Art 148 (2) TCCT
103 Art 148 (3) TCCT
104 Art 148 (4) TCCT
105 Art 148 (5) TCCT

PART III
CRIMINAL PROCESS

In general

Turkey accepted the mixed system adopted by the Continental Europe regarding criminal proceedings. It is the combination of accusatorial and inquisitorial systems. Accordingly there is cooperation among the accusation, the defense and the respective judicial examination, or in other words, the trial process. The Judge as opposed to the accusatorial system is not required to render decision in accordance with the accusation and the defense. Likewise, as opposed to the inquisitorial system, he does not have the sole authority to investigate and gather evidence, ex officio. Therefore, the system regards the adjudication as a colloquium where all the parties involved in the trial participate, but it is not at all a dialogue between the parties, nor a monologue by the Judge.[106]

The following are the main characteristic features of the system:

1. There should be accusation. The Judge cannot handle the matter ex officio. The accusation is done by the Office of the Public Prosecutor as the representative of the State in the Judicial Branch on behalf of the Public.
2. There are two phases of the criminal proceedings. a) Investigation, and b) Criminal Prosecution (Trial). During the Investigation phase the proceedings are carried out in writing and in secrecy. The Criminal Prosecution (the Trial phase), on the other hand, however, is held in the presence of the interested parties orally and publicly.

The accused enjoys constitutional safeguards.[107]

106 TOROSLU-FEYZIOGLU, op cit p.43
107 TOROSLU-FEYZIOGLU, op cit pp 43-44

SECTION 1
THE INVESTIGATION

1. Definition: In accordance with the definition given by the TCCT the investigation phase is the time that starts running from the time the competent authorities are informed of a suspicion that an offense is committed until the time the indictment is accepted to initiate the public prosecution.[108]

2. Rule of Secrecy and Exception to the Rule regarding Defense Counsel: The investigation phase is held in secrecy. However, it is important to note that, the suspect is allowed to receive assistance from defense counsel, at every phase of the investigation. Therefore, the defense counsel shall be present at every phase of the investigation. To this end; he/she shall have audience with the suspect who is under detention or arrested. The defense council shall be present during the interrogation of the suspect and at the time the suspect's statement is taken either by the judicial police or before the Public Prosecutor. There is no impediment for the counsel to provide legal assistance to the suspect which is a right granted to him/her because of his/her status to carry out the defense before the accusation.[109]

3. The Role of the Public Prosecutor: By virtue of the Turkish system the Public Prosecutor is the legal officer who represents the State in criminal proceedings. Therefore, he/she is the competent judicial authority to investigate and reveal the offenses.[110] When the Public Prosecutor receives information that an offense is committed or becomes aware through other means leading to the impression that an offense is committed, starts at once to investigate into the matter to find out the truth about it. He/she conducts the investigation to decide whether or not there is justification to request initiation of the public prosecution.[111]

Therefore, in order to find out the truth about the matter and to be able to attain the concept of "fair trial" the Public Prosecutor is required to gather and preserve evidence both in favor of and against the suspect either ex officio or through the judicial police under his authority. To this end the Public Prosecutor is also required to protect the rights of the suspect during the investigation.[112]

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108 Art 2/1 (f), TCCT; ÇOLAK-TAŞKIN, op cit p 70
109 Art 149, TCCT
110 TOROSLU-FEYZIOGLU, op cit p 46
111 Art 160/1, TCCT
112 Arts 160/2, and 161 TCCT

4. Judicial Police: The judicial police are required to inform at once the Public Prosecutor under whose orders they work the incidents they are dealing with, the persons apprehended and the measures applied. The judicial police are also compelled to carry out the orders given by the Public Prosecutor regarding the judicial system without delay.[113]

5. Orders by the Public Prosecutor: The Public Prosecutor issues his/her orders in writing to the judicial police. However, where delay is prejudicial, he/she gives his/her orders orally. The oral order shall be converted into and conveyed as written order in the shortest time possible.[114]

To this end other public officials are also required to provide at once information and documents in connection with the investigation at hand to the Public Prosecutor upon his/her request.[115]

6. Failure in judicial duty: Both the judicial police and other public officials who either abuse or are negligent in fulfilling the orders issued by the Public Prosecutor as well as those who abuse and fail in carrying out the duties imposed upon them by virtue of the law in connection with the judicial system are sanctioned in accordance with their respective status.[116]

7. Recording of the Investigation procedures: All the procedures complied with during the investigation phase have to be recorded. Such as, taking statement of the suspect, the hearing of the witnesses and the expert witness, or procedures complied with at the time of the inspection conducted at the locality where the offense is committed or at the time of examination. Therefore; at such instances during the investigation a court recorder (recording clerk) is present besides the Public Prosecutor or the Justice of the Peace. Where delay is prejudicial, another person can be given the duty to act as recorder but under oath. The minutes shall be signed by the judicial police officer, the Public Prosecutor or the Justice of the Peace and the court recorder. [117]

To this end, the minutes shall also contain the name and signature of the attorney at law who is authorized to participate in certain procedural steps in his capacity as defense counsel or representative. In fact, the minutes contains the name of the location where and the time during which the procedure is carried out and the names of all the parties participated in or concerned with the subject procedure.[118]

113 Art 161(2), TCCT
114 Art 161 (3), TCCT as amended by Law No 5353 of 25 May 2005.
115 Art 161 (4), TCCT
116 Art 161(5) TCCT, as amended by Law No 5353 of 25 May 2005: and Art 161(6), TCCT
117 Art 169 (1), (2) TCCT
118 Art 169 (3),(4) TCCT

Furthermore, the relevant parts of the minutes are read to those present during the procedure or are given to them to read in order to have their approval. Having this fact included into the minutes their signatures are received on the subject document. In the event of abstention from putting signature on the minutes the reason for it is stated thereby.[119]

8. Use of Interpreter if Suspect/Victim does not understand Turkish: The Code of Criminal Trial provides for use of interpreter in the event the suspect or the victim does not understand Turkish. This is a long standing rule which exists as a natural and mandatory requirement inherent in the system of fair trial in order to be able to attain the truth soundly. At this phase either the Judge or the Public Prosecutor appoints an interpreter in order to enable the suspect to comprehend the essential points contained in the procedure. If the suspect or the victim is handicapped such as deaf and dumb, the interpreter will help him comprehend the essential points concerning him /her in the procedure.[120]

SECTION 2
THE CRIMINAL PROSECUTION
(PUBLIC PROSECUTION or (CRIMINAL PROCEEDING or TRIAL)

A. 1. Definition: The period which starts from the time the Court rules that the indictment is admissible until the time the judgment rendered by the Court becomes final and binding, constitutes the phase of criminal prosecution (criminal proceeding, trial)[121]. Following the completion of the Investigation, which is the first phase of procedure; the Criminal Prosecution constitutes the second part of the procedure.

2. Duty and Discretion of the Public Prosecutor to Prepare the Indictment to have Public Prosecution Initiated: In accordance with Art 170 of the TCCT the criminal prosecution is initiated based upon indictment prepared by the Public Prosecutor.

119 Art 169 (5), (6) TCCT
120 Art 202 (3) TCCT
121 Art 2 (1-f) TCCT

Based on the discretion of the Public Prosecutor, if the evidence gathered during the investigation phase is of such nature as to constitute sufficient suspicion, or, in other words if it can be termed as incriminating evidence; at the conclusion of the investigation phase, the Public Prosecutor prepares his indictment. The indictment is submitted to competent court for the initiation of the public prosecution. The court having received the indictment together with the attached documents renders its decision as to whether the indictment is admissible.[122]

There are two further circumstances where the Public Prosecutor is entitled to exercise his/her discretionary power not to request for the initiation of the public prosecution. To wit: where there are conditions to implement the provisions regarding effective regret which leads to revoking the person's punishment, or where there is reason to implement provisions for personal non-punishment.[123]

3. Indictment: The indictment of the Public Prosecutor is addressed to the competent court having jurisdiction to hear the matter at hand. The Indictment must contain the following information[124]:

- The identity of the suspect,
- The defense counsel,
- The identity of the victim of the act of homicide, the victim of the offense, or the person who suffered damage,
- The attorney or the legal representative of the victim or the person who suffered damage,
- The identity of the informant, provided that it is not prejudicial to reveal the subject identity,
- The identity of the complainant,
- The date the complaint made,
- The offense, the suspect is accused of and the applicable articles of the Code,
- The place, the date and the time the imputed offense,
- The evidence pertaining to the offense,

122 Art 174 TCCT
123 Art 171 TCCT
124 Art 170 para 3 & ff TCCT; ÇOLAK-TAŞKIN op cit pp 576-582

- Whether or not the suspect is under arrest, and if under arrest; the dates and the durations of custody and arrest,
- Explanation of the events that constitute the offense at hand and statement of the connection with the existing evidence shall be presented,
- In the conclusion part of the indictment not only the matters which are against the suspect but matters which are also in favor of the suspect shall be stated,
- Furthermore, the Public Prosecutor shall state clearly in the conclusion of his indictment as to which punishment and security measure set forth by the pertinent code he requests to be adjudged in connection with the offense committed.

4. Consequences of the Initiation of Public Prosecution[125]: The rule to the effect that "no public prosecution can take place without trial" governs the Turkish system. Therefore, once the public prosecution or criminal prosecution, if you will, is initiated and is being heard before the court; no second prosecution to that end can be initiated as a result of the rule of "pending trial".

The competent court attains jurisdiction as to place and as to subject-matter through initiation of the public prosecution.

The status of the suspect changes into the status of the accused. As of the initiation of criminal proceeding the subject person is now charged of an offense through the indictment accepted by the competent court. Thus, he/she is no longer considered as a suspect in the eye of the law.

5. Decision Not to Prosecute ("nollo prosequi"): The Public Prosecutor shall decide not to prosecute ("nollo prosequi") under the following conditions: (a) if no evidence could be obtained at the conclusion of the investigation to constitute sufficient proof to initiate public prosecution; or (b) if there is impossibility to prosecute such as statute of limitations becomes applicable regarding the offense at the time of the investigation[126] or if the suspect or the accused dies[127]. The subject decision is notified to the person suffered damage, and to the suspect who was previously interrogated or whose statement was already taken. The decision indicates the existence of the right to take objection and the authority to whom and the duration within which objection can be taken.[128]

125 Arts 2 and 173 TCCT; ÇOLAK-TA:KIN p. 579
126 Art 66 TCC
127 Art 64 TCC
128 Art 172 (1) TCCT

Following decision not to prosecute is rendered unless new evidence is discovered no other public prosecution for the same act can be initiated.[129]

6. Objection taken to Decision Not to Prosecute ("nollo prosequi"): The person, who suffered damage because of the offense, can take objection to the decision not to prosecute within fifteen days as of the date of notification of the subject decision to him/her. The competent authority is the presiding Judge of the Heavy criminal Court nearest to the area of jurisdiction of the Heavy Criminal Court where the Public Prosecutor is who rendered the subject decision has his post. A petition has to be submitted to indicate the justification and the evidence based on which public prosecution must be initiated[130]. The Presiding Judge based on the review will decide either to refuse the petition or to approve it. If petition is refused the relevant decision will contain the justification for refusal. The person taking objection shall be sentenced to pay the pertinent costs. The file goes back to the Public Prosecutor who in turn notifies the person taking the objection and the suspect. If the Presiding Judge approves the petition the Public Prosecutor will have to prepare the indictment accordingly and submit it to the court.[131]

On the other hand, however, where there are conditions by operation of the law for the Public Prosecutor to exercise his discretion not to prosecute, as mentioned above; these provisions shall not be applicable.

If new evidence is obtained requiring initiation of public prosecution after the objection has been refused, only upon decision by the Presiding Judge of the Heavy Criminal Court who ruled on the initial petition, the Public Prosecutor can request for commencement of the public prosecution.[132]

7. Sending back the Indictment to the Office of the Chief Public Prosecutor: The new Criminal Code of Trial introduced into the Turkish system the institution of sending back indictment to the office of the Chief Public Prosecutor. The raison d'etre for this avenue is to provide a complete investigation based on indictment that is free of error or omission. The system aims for speedy trial. Through this new institution it is aimed that the court would not unnecessarily loose time in looking out for further evidence which could have been gathered at the time of the investigation by the Public Prosecutor to establish the culpability.[133] Therefore, the court having subject-matter

129 Art 172 (2) TCCT
130 Art 173 (1)(2) TCCT
131 Art 173 (3) TCCT as amended by Law No 5353 0f 25 May 2005
132 Art 173 (6) TCCT, ÇOLAK-TAŞKIN, op cit p 586
133 Art 174 (1) TCCT

jurisdiction and jurisdiction as to place examines the indictment and if it comes upon any omissions or errors contained thereby sends back the indictment to the office of the Chief Public Prosecutor.

The period prescribed by the law for the court to examine the indictment is fifteen days as of the date of submittal to the court the indictment and all the documents concerning the investigation. At the termination of this period the court decides either to accept or to return the indictment to the office of the chief Public Prosecutor.[134]However, if the indictment is not returned within fifteen days and no decision relevant to the issue is rendered the indictment is deemed as accepted by the court.[135]

The indictment shall be sent back to the office of the Chief Public Prosecutor under the following conditions:[136]

- Indictment does not contain, in proper the required information and points indicated in Art 170, TCCT; or,
- The substantive evidence which constitutes proof that offense is committed, even though exists not collected; or,
- In accordance with the facts which are clearly indicative that the issue can be settled through payment in advance or through conciliation but these avenues were not resorted to.

The indictment shall not be sent back because of the errors made thereby in the legal qualification of the offense.[137] As it is this qualification does not bind the court in rendering its judgment.

The Public Prosecutor having his/her indictment sent back by the court completes the omissions and corrects the errors. Following these retouches if the matter in its present state does not render any justification for initiation of public prosecution, the Public Prosecutor will decide not to prosecute (nollo prosequi). If not, the indictment as retouched shall be dispatched to the competent court.[138]

The Public Prosecutor can take exception with the Court's decision to send back his indictment to him.[139]

134 Art 174 TCCT
135 Art 174 (3) TCCT
136 Art 174 (1-a,b,c) TCCT
137 Art 174 (2) TCCT
138 Art 174 (4) TCCT
139 Art 174 (5) TCCT

B. Main Steps of the Public Prosecution

There are four main steps of the public prosecution and they are as follows[140]:

1. Preparation for Trial;
2. The Trial;
3. Judgment;
4. Legal Remedies.

1. Preparation for Trial

When the court rules the indictment is admissible the public prosecution commences. The Court sets forth the trial date and summons persons whose presence at the trial are imperative.[141]

The summons contains the warning that failure to appear at the hearing without excuse will render the subject person to be brought to court by force.[142]

As a normal consequence of the principle of "speedy trial" all evidence must be gathered both against and in favor of the accused at the investigation phase and submitted to the Court in order to save the Court further effort and time to gather more evidence once the trial commences. However, if any omissions are noted in this regard, the competent Court can order to have what is missing completed prior to the commencement of the trial.

The idea for the preparation for trial prior to its commencement is to conduct the trial without break. However, it must be noted that due to the excessive work load of the Courts this ideal aim is not yet realized in Turkey even though the legal mechanism is now provided by the law.

Among the preparations for the trial the following can be cited[143]:

1. The Presiding Judge, if necessary may appoint defense counsel for the accused.
2. The Court may deem additional evidence is needed to be produced at the trial besides the evidence submitted already by the Public Prosecutor. The Presiding Judge orders production of such evidence.
3. The Presiding Judge decides the hearing date in line with the date of entry of the

140 TOROSLU-FEYZIOGLU, op cit pp 271-304
141 Art 175 (1),(2) TCCT
142 Art 176 (2) TCCT
143 KUNTER-YENİSEY-NUHOĞLU, op cit p 1180; ÇOLAK-TAŞKIN, op cit p 595

all the cases into the Court's docket and by taking into consideration as to the time each would take to hear, he decides on the hour the hearing of the respective case shall commence[144].

4. Special effort shall be put into deciding on the trial date so as to make all concerned, that is the accused, witnesses, experts, technical advisors to be able to be present at the trial.
5. Taking witness statements, conducting examinations at the scene, and obtaining expert examinations through letter rogatory[145]have to be completed prior to commencement of trial.

2. Notification of the Indictment and the Summons to the Accused[146]

The indictment is served to the accused together with the summons[147].

Summons to be served to the accused, not under arrest contains warning that not appearing at the hearing without excuse will cause him to be brought before the Court by force. [148]

In instances where the hearing can be held without the presence of the accused, the summons contains the clarification that the hearing shall be conducted even if the accused is not present. Such instances are if the punishment prescribed for the offense requires only payment of judicial fine by itself or combined with other punishment or confiscation.[149]

Summons to be served to the accused, under arrest is done through notification of the date of the hearing. The accused is asked as to whether he/she has any request towards asserting his/her defense during the hearing and if so, to state what constitutes the contents of his/her request. The defense counsel is also summoned together with the accused. In order to perform this procedure the accused is taken to the official in the penal institution he/she is incarcerated to record his/her request. [150]

144 Turkish Law No 7201 (1959) on Service of Process, Art 62; KUNTER-YENISEY-NUHOGLU, op cit p 1181 fn (19)

145 Letter Rogatory is "a letter from one court to another court in an independent jurisdiction, requesting that a witness resident in the latter's area of jurisdiction be examined upon interrogatories contained in the letter". OVACIK, Mustafa:Türkçe-İngilizce Hukuk Sözlüğü (Turkish-English Law Dictionary) 2nd Ed. Ankara 1986 p.122

146 Art 176 TCCT

147 Art 176 (1) TCCT

148 Art 176 (2) TCCT

149 Art 195 TCCT

150 Art 176 (3) TCCT

It is imperative that there shall be a minimum period of one week between the service of the summons and the date of the hearing.[151] In other words a period over this minimum period of time can be rendered by the Judge. This provision was also contained in the previous Turkish Code of Criminal Procedure[152] abrogated in 2005. To this end mention must be made here to the rule adopted by the European Convention on Human Rights of 1950 under the title "Right to a Fair Trial".[153] The subject provision of the Convention reads in part: "Everyone charged with a criminal offense has the following minimum rights: … 'b' to have adequate time and facilities for the preparation of his defense". It can be seen that both the internal law of Turkey in this regard and the respective rule of the European Convention on Human Rights are in harmony.

3. Request by the Accused for Collection of Defense Evidence

The accused requests collection of defense evidence, such as citation of witnesses and experts (expert-witnesses) by submitting a petition to that effect to the Court at least five days prior to the date of trial, indicating the facts concerning the mentioned evidence.[154]

The Court's decision rendered either to accept or to refuse the request shall promptly be informed to the accused. In the same line when such requests of the accused are accepted, notice thereof is given to the Public Prosecutor.[155]

4. Direct Invitation of Witnesses by the Accused

In the event that the Court denies an application for invitation of a witness or an expert, the accused may himself/herself bring the person to the Court without submitting any further application. The subject person or persons are heard in the Court.[156]

5. Notification of the Accused and Public Prosecutor of Names and Addresses of Experts and Witnesses

Within reasonable time the accused shall notify the Public Prosecutor of the names and

151 Art 176 (4) TCCT
152 Art 210 (1) TCCP reads: "The time between service of the summons which shall be served in accordance with the preceding article, and the trial should not be less than one week."
153 Art 6 "Right to a Fair Trial": European Convention on Human Rights and the Protection of Fundamental Freedoms, Council of Europe, Registry of the European Court of Human Rights, September 2003, pp 5-6
154 Art 177 (1) TCCT
155 Art 177 (2), (3) TCCT
156 Art 178 TCCT

addresses of experts and witnesses who have been invited directly by the accused or will be brought to court by him.

The Public Prosecutor as well shall within reasonable time notify the accused of the names and addresses of experts and witnesses invited by the Presiding Judge or by himself, other than those mentioned in the indictment and at the request of the accused.[157]

6. Hearing of Witnesses and Experts through Delegated Judge or Letter Rogatory

The rule is to hear the witnesses and experts during the hearing. However due to some impediment this may not always be possible. They are heard, therefore, by the Court where they respectively are. This could be done through delegation given to the pertinent Court. To this end, if the presence of a witness or an expert at the trial becomes impossible for a long time or for an indefinite period of time because of illness, defect or any other reason, the Court may conduct the hearing of such person through a delegated Judge or letter rogatory (an interrogatory commission).[158]

Furthermore, if technical equipment is available at the Court to provide instant audio-visual communication; statements of the witnesses and experts can be taken by resorting to these means.[159]

7. Notification of Dates regarding the hearing of Experts/Witnesses

The Public Prosecutor, the accused and the defense counsel, the victim and his/her attorney-at-law, shall be notified of the date on which the experts and witnesses will be heard. Copy of the minutes shall be given to the Public Prosecutor and the defense counsel.[160]

The accused under arrest is entitled to be present only at the courthouse of the place of his/her imprisonment. On the other hand however, if the Judge deems imperative for the accused under arrest to be present at subject procedure, he/she may so order.[161]

C. Main Characteristics of Trial Procedure

In accordance with the Turkish system main characteristics of trial can be summed up as follows[162]:

157 Art 179 (1), (2)
158 Art 180 (1) TCCT
159 Art 180 (5) TCCT
160 Art 181 (1) TCCT
161 Art 181 (3) TCCT
162 KUNTER-YENISEY-NUHOGLU op cit pp 1185-1187; TOROSLU-FEYZIOGLU op cit pp 277-281; TAŞKIN-ÇOLAK op cit p 605 and ff

Trial procedure is oral: During the trial all procedural transactions are conducted orally; the accused, witnesses and experts are examined by the Court. Also, as newly accepted by the Turkish system the cross examination now takes place during the trial among the persons attending the trial.[163] Records are read aloud. The final judgment rendered is also read aloud and explained orally.[164]

Trial is public: The Turkish Constitution mandates that trials are open to the public. The court may decide to conduct all or in part of the trial in closed session (in camera) only in cases where absolutely required for reasons of public morality or public security. Special provisions govern trial of minors.[165] The decision of the Court for the closed session shall contain statement of justification.[166]

With respect to **trial in closed session("trial in camera")** which constitutes the exception to the rule stated above, the law provides for certain people to be able to attend trial held in closed session. These persons are warned not to release the contents of the closed session. Likewise, the contents of such session shall not be released through the media. It is also possible for the Court to rule partial prohibition for the media concerning release of the contents of the trial which is held in public but affects national security, public morals or personal respectability, dignity and individual rights.[167]

- **Trial is held in the Presence of the Parties ("Face-to-Face" /"In Praesentia",):** Parties have to be present during the trial. The trial procedures shall be conducted directly before the parties. In order to attain the truth about the matter under trial, the parties as a result of the rule of contradiction, assert their respective arguments in the presence of each other or in other words "in praesentia". The exceptions to this rule can be cited as the Public Prosecutor not attending trial at the Criminal Court of Peace by virtue of the law; in certain instances the system provides for trial to be conducted in the absence of the accused; in specified instances it is feasible for witness and expert statements to be taken through delegation to a Judge or letter rogatory to a Court in another jurisdiction[168].
- **Direct access to Evidence:** The Court must have direct access to all evidence. The Code of Criminal Trial states: The Judge can render his/her decision only based

163 Art 201 (1), (2) TCCT
164 Arts 191 and 231 (1) TCCT
165 Art 141 (1), (2) Tr Const; Art 182 (1), (2) TCCT
166 Art 141 (3) Tr Const; Art 182 (3) TCCT
167 Art 187 (1) (2) (3) TCCT
168 KUNTER-YENISEY-NUHOGLU op cit p 1186

upon evidence submitted to and argued before him/her. The Judge, by virtue of the law considers the evidence asserted before him/her freely attributing credence to the best of his/her conscience.[169] In other words, "in the law of evidence the system of the "intimate conviction" of the trier of fact has been adopted."[170]

- **Trial to take place without Interruption:** The trial is held without interruption in the presence of the Judge or Judges who will take part in formulating the judgment. In cases of necessity however, the trial may be adjourned or suspended in a manner so as to render it possible to complete the trial in a reasonable time frame.[171]

  It is noteworthy to point out that, the accused is entitled to request postponement of the trial in the event that the minimum period of one week prescribed by Art 176 (4) TCCT, to exist between the date of service of summons and the date of trial is not complied with.[172]

  As mentioned previously, trials unfortunately cannot be held uninterruptedly in Turkey due to the excessive work load of the Courts. Therefore, trials can only be completed in several hearings. [173]

D. Persons whose presence is mandatory at the Trial:

Judge: It is mandatory for the Judge or Judges, according with the composition of the Court, to attend the trial who will take part in formulating the judgment.[174]

It constitutes violation of law if the Court is not composed of as mandated by the law. Therefore, this point is among the lawful reasons for appeal.[175]

Public Prosecutor: Public Prosecutor or Public Prosecutors as the case may require, attend trial as representatives of the State as a normal consequence of the principle of "in praesentia". Only at the trial before the Peace Criminal Court

Public Prosecutor does not participate.[176]

169 Art 217 (1) TCCT
170 The American Series of FOREIGN PENAL CODES / 5 THE TURKISH CODE OF CRIMINAL PROCEDURE; New York Univ. Press, NY 1962 p 6
171 Art 190 (1) TCCT
172 Art 190 (2)
173 TOROSLU-FEYZIOGLU op cit p 281
174 Art 188 (1) TCCT
175 Art 289 (1) TCCT
176 Art 188 (2) TCCT

The absence of the Public Prosecutor whose presence otherwise is imperative constitutes violation of law and is among the lawful reasons for appeal.[177]

Defense Counsel: Defense counsel attends trial by virtue of the law. There can be several defense counsels for the same accused attending the trial.[178]

Court Clerk: Record of trial is taken by the Court Clerk and is signed by the Judge or the Judges, and the Court Clerk, himself. If it contains any witness or expert statements it must also be signed by the concerned. The record of trial taken by the Court Clerk constitutes an official representation of the proceedings during the trial and is considered as true, until proven otherwise.[179]

The Court Clerk has to be impartial like the Judge. Therefore, the same provisions which are applicable for Judges regarding prohibitions, objections, and other impediments to cause them to refrain from attending the trial are applicable to the Court Clerks as well[180].

Accused: By virtue of the law no hearing shall be held regarding the accused person who is not present at the trial.[181] On the other hand, however, the law provides with the exceptions to this rule in the following terms:

1. Trial in Absentia: either upon motion by the accused or by court's own motion ("sua sponte"), the accused may be excused from attending the hearing under the circumstances state by the law {Art 196, TCCT};
2. The punishment the accused is indicted with is either only payment of judicial fine or combined with other sanction; or confiscation as to property or monetary gains {Art 195, TCCT};
3. In light of the evidence gathered it is obvious that the accused will not get conviction but will be subject to a different procedural measure {Art 193 (2) TCCT};
4. Where accused made escape {Art 194 (2) TCCT};
5. Where accused is sent out of the court room because of contempt to court or

177 Art 289 (1- a, e) TCCT
178 Arts 188 (1) and 189 TCCT
179 OVACIK, Mustafa: Ingilizce-Türkçe Hukuk Sözlüğü, 2nci Baskı, Ankara 1986 p 62
180 Arts 222 and 32 TCCT
181 Art 193 (1) TCCT

is placed under disciplinary incarceration for the same reason {Arts 203, 204 TCCT};

6. Where there is concern that in the presence of the accused either his/her accomplice or any one of the witnesses will not tell the truth; then the accused will be taken out of the court room {Art 200 (g) TCCT};
7. Where accused is fugitive and decision to that effect is rendered by the trial Court {Art 247 (h) TCCT};
8. With respect to the trial of accused persons of organized crime; where a great number of accused are involved; those the presence of whom is not required at that particular hearing before the Court; the Court rules to excuse them to be present at that particular session {Arts 250 and 252 (1) TCCT}.

Legal Representative and Spouse of the Accused: Apart from the defense counsel, any legal representative the accused may and his/her spouse, if any are entitled to attend the trial.[182]

The Intervenor and his/her Attorney-at-Law: They are also entitled to attend the trial.[183]

E. Commencement of Trial

The trial commences with the roll call of the Presiding Judge regarding the accused, and his/her defense counsel, the witnesses and the experts who have been summoned. The accused will be admitted into the court room free of handcuffs. The presiding Judge by reading the decision that indictment is accepted announces that the trial has commenced.[184]

The witnesses are taken out of the court room. Then the following procedure takes place:[185]

a) The identity of the accused is established in clear terms; he/she is asked to give information as to his/her personal and economic status;

b) The indictment is read;

182 Art 155 (1) TCCT
183 Art 239 TCCT
184 Art 191 (1) TCCT
185 Art 191 (2) (3) TCCT

c) The accused is informed that he/she is entitled not to give any explanation as to the offense he /she is accused of. The rights granted to him/her under Art 145 TCCT are also read to him.

d) When the accused informs that he/she is ready to elaborate, he/she is interrogated in accordance with the procedure.[186]

• The Duty of the Presiding Judge

The Presiding Judge conducts the trial, questions the accused and provides for the evidence to be presented.[187]

If an interested party objects to a ruling by the Presiding Judge pertaining to a measure in the administration of the trial, the Court decides on this matter[188].

• Absence of the Accused at the Trial

In principle no trial can take place where the accused is not present. However, the Code provides for exceptions where the accused may be excused from attending.[189]

To wit: where the offense involves punishment either only of fine or combined with other measure, or if it involves confiscation.

With respect to the accused who has not attended trial without valid excuse, the Court rules for him to be brought by force.[190]

In light of the evidence collected the Court reaches to a conclusion that a decision other than conviction has to be rendered pertaining to the accused, the Court concludes the action even without having the accused interrogated.[191]

F. Trial in Absentia

In accordance with the Turkish system trial in absentia can be granted under the conditions specified by the Code. These are as follows:[192]

- First and foremost the accused must be interrogated by the Court on the merits of the case;

186 Art 191 (3/a,b,c,d) TCCT
187 Art 192 (1) TCCT
188 Art 192 (2) TCCT
189 Art 195 TCCT
190 Art 193 (1) TCCT
191 Art 193 (2) TCCT; Art 194 TCCT
192 Art 196 (1) TCCT

- Either the accused himself/herself or his /her defense counsel, provided he/she is specially delegated to submit such request; may request to be excused to attend the trial.
- The accused may be interrogated by a Judge at a different jurisdictional area through letter rogatory except for offenses the minimum punishment of which is five years of more. At the time of interrogation the rogatory Judge asks the accused whether he prefers to make his statement before the Court handling the case.[193]
- The Presiding Judge thus reads the records of interrogation at the trial held in absentia.[194]
- Where obtaining statement by the accused through use of technical devices which render possible the simultaneous visual and audio communication; this modality can be resorted as well.[195]
- The accused may not be brought to the trial for the reason that he/she is either hospitalized or transferred to another detention facility located outside the area of jurisdiction of the actual Court handling the trial. In such an instance the Court may excuse the accused to attend the session or sessions provided that he/she has been already interrogated on the merits of the case[196]
- If the accused is going to be abroad at the date set forth for the hearing, either the date of the hearing shall be moved back so that he /she can be interrogated on the merits or his/her interrogation shall be carried out through letter to the rogatory Judge abroad.[197]

In this regard the following must be noted:

- The Court may rule at any time for the accused to be present at the trial or be brought by force or be brought based on decision to apprehend him/her in the event he/she is fugitive.[198]
- The defense counsel of the accused is entitled to be present at all the sessions where accused is granted trial in absentia.[199]

193 Art 196 (2) TCCT
194 Art 196 (3) TCCT
195 Art 196 (4) TCCT
196 Art 196 (5) TCCT
197 Art 196 (6) TCCT
198 Art 199
199 Art 197 TCCT

- The accused may request for reinstatement in cases tried in the absence of the accused where he is not excused from being present in court on his own request. The purpose is to enable the accused to set aside the result of the passing the limitation period upon a showing of legal grounds for reinstatement.[200]

G. Cross Examination

In principle the interrogation of the accused is done by the Presiding Judge or the Judge.[201] However, the new Turkish Code of Criminal Trial adopted the Cross Examination procedure.[202] Therefore, if it is a combined court the member Judges, now can also ask questions directly to the accused and the other persons who attend the trial.[203] These persons besides the accused are the intervenor, the experts and other persons summoned to the trial. In the same manner the Public Prosecutor, the defense counsel or the attorney-at-law as the representative of the victim can abiding by the trial discipline, ask questions to the accused and the others summoned To this end, the expert too may ask questions to the accused but only through permission by the Presiding Judge or the Judge. In the same manner both the accused and the intervenor, may ask questions either through permission by the Presiding Judge or the Judge to all the persons mentioned above. In the event the question asked is objected, the Presiding Judge shall decide as to whether it is necessary to pose the subject question.[204]

H. Use of an Interpreter

If the accused or the victim does not understand Turkish an interpreter appointed by the Court shall inform him/her of the essential points contained in the accusation and defense.

If the accused or the victim is handicapped, the essential points of the accusation and defense shall be conveyed in a manner to enable him/her to comprehend them.

These provisions of the law are also applicable during the investigation phase concerning the suspect, the victim or the witnesses. At the investigation phase either the Judge or the Public Prosecutor appoints interpreter.[205]

200 Art198 (1) (2) TCCT
201 Art 191 (1) TCCT
202 Art 201 (1) TCCT
203 Art 201 (2) TCCT
204 Art 201 (2) Final sentence TCCT
205 Art 202 (1)(2)(3) TCCT

I. Order and Discipline of the Trial

The Presiding Judge maintains the order and discipline of the trial. The Presiding Judge or the Judge may remove from the courtroom any person, violating the discipline of the trial in a manner not to have him deprived of his right to defense. If the person resists or causes commotion at the time he/she is being removed from the court room, can be promptly punished by disciplinary incarceration for four days. This sanction however, is not applicable to attorneys-at-law. In the same line, minors are not subject to disciplinary incarceration.

• Removal of Accused from the court room

The accused is removed from the court room when it is understood that his/her presence would endanger the orderly conduct of the trial. If the Court by taking into consideration the contents of the case file deems that the presence of the accused is not imperative from the aspect of his/her defense, conducts and concludes the session in the absence of the accused. However, if the accused does not have defense counsel, the Court requests that defense counsel be appointed by the Bar. The procedures carried out in the absence of the accused shall be explained to him/her when he/she is admitted back to the trial by Court decision.[206]

J. Evidence

• Introduction of Evidence

Evidence including testimony, documents, and tangible objects; that tend to prove or disprove the existence of an alleged fact[207] are not admissible by the Court if obtained unlawfully. On the other hand, however, the imputed offense can be proved only based upon evidence obtained lawfully. These two aspects of the evidence appear in the Turkish system as the consequence of the constitutional safeguard established for the fundamental rights and freedoms of the individual. It is a *sine quo non* rule (an indispensable rule) as far as achieving fair trial is concerned.[208]

It must be noted that, the new Turkish Code of Criminal Trial rather than dealing with Evidence in one particular section deals with it in a scattered manner through its various articles. This is especially true when unlawfully obtained evidence is concerned.[209]

206 Art 204 TCCT
207 Black's Law Dictionary 7th Ed USA, p.576
208 KUNTER-YENİSEY-NUHOĞLU op cit pp 1030-1075
209 KUNTER-YENİSEY-NUHOĞLU op cit p. 1030

In accordance with the Turkish criminal process; evidence is introduced following the interrogation of the accused. The absence of the accused without legitimate cause despite the summons; does not preclude introduction of the evidence before the Court. When the accused later returns to the trial he/she is informed of the evidence thus introduced.[210]

Under the following circumstances the Court rejects receiving any evidence desired to be introduced:

- If the evidence is obtained unlawfully.
- If the incident sought to be proved through the evidence has no effect on the decision.
- If the request is made solely towards prolonging the prosecution.

The Public Prosecutor and the accused or his/her defense counsel may jointly decide not to have a certain witness to testify or certain evidence introduced.[211]

The witnesses who have testified can leave the court room only upon permission by the Presiding Judge or the Judge.[212]

By virtue of the law, after hearing of the accomplice of the accused, the witness and the expert and reading of any document; the intervenor, or his/her representative, the Public Prosecutor, the accused and his/her defense counsel shall be asked as to what they have to say respectively about the subject evidence thus introduced and weighed.[213]

Prior to rendering the judgment the last word shall be given to the accused present at the trial.[214]

• Discretion in Weighing the Evidence

The Judge renders his/her judgment only upon the evidence submitted and weighed during the trial. The Judge is entitled to freely asses the evidence according to his/her discretion conforming with the law. In order to prove the imputed offense all kinds of evidence can be resorted to provided that it is obtained lawfully.[215]

210 Art 206 (1) TCCT as amended by Law No.5353 of 25 May 2005
211 Art 206 (2 / a-b-c) TCCT
212 Art 208 TCCT
213 Arts 214 , 215 and 216 TCCT
214 Art 216 (3) TCCT
215 Art 217 TCCT

This is the natural outcome of the principle of *In Dubio Pro Reo; i.e.* "in case of doubt the response is in favor of the defendant".[216]Indeed the Judge must be thoroughly convinced about the guilt of the accused person in order to convict him. Otherwise, if there is any doubt about the accused being guilty he/she cannot be convicted. This is where the importance of the sufficient evidence comes towards establishing the guilt of the accused and thus, his/her conviction.

It must be noted that, the Turkish Constitution provides the following rule: "No one shall be guilty until proven guilty in a court of law."[217] This arrangement is in parallel line with the arrangement provided by the European Convention on Human Rights in this regard.[218]

The Turkish system mandates that the evidence be correct, just and fair. In other words it must be obtained through lawful means as mandated by the law. Any evidence obtained unlawfully is not accepted by the Turkish system and is not admissible before the Court.[219]

K. Trial Record; Its Contents and Conclusive Force

Trials are recorded and are signed by the Presiding Judge, or Judge and the recording Clerk. Where technical devices are used to have procedures taking place during the trial recorded; they are promptly converted into transcripts and arranged as records. In the same manner these records are signed respectively by the aforementioned.[220]

- **Contents of the Record:** The title line of the record contains the name of the trial court; date of the hearings; names of the Judge, the Public Prosecutor and the recording Clerk, respectively. The record will also contain:
- Names of the accused, defense counsel, intervenor, his/her attorney. Legal representative, expert, interpreter, technical advisor, who attended the hearing;
- All the points that reflect the trial process and conclusions thereby, and thus, basic rules required by the concept of "fair trial" are abided by;
- Explanations given by the accused;

216 Law Dictionary with Pronounciations, Second Ed. BALLENTINE, Prof James A., 1948 Ed. Rochester, N.Y. p 637
217 Art 38 (4) Tr Const
218 Art 6 (2) European Convention on Human Rights
219 ÇOLAK-TAŞKIN, op cit p 661
220 Art 219 TCCT

- Witness statements;
- Explanations given by the expert and technical advisor;
- Documents which are read or rejected to be read at the trial;
- Requests, if rejected, the pertinent justification;
- Decisions given;
- Judgment rendered.[221]
- **Conclusive Force of the Record:** The trial record is the sole document through which it can be proven as to whether or not the trial was fair. The only objection which can be raised against the record is that it has been false.[222]

L. Conclusion of the Trial

The presiding Judge or the Judge announces the conclusion of the trial. Following this announcement the judgment is rendered. The judgment will entail either acquittal; or no grounds for punishment; or conviction; or imposition of protective procedural measures; or rejection or abatement of the criminal prosecution.[223]

1. Nature of the decisions rendered:

Acquittal: Acquittal shall be adjudged under the following conditions:

1. the imputed act is not defined by the law as an offense;
2. it is proved that imputed offense is not committed by the accused;
3. there is no intention or negligence attributable to the accused as far as the imputed offense is concerned;
4. a reason compatible with the law exists even if the imputed offense was committed by the accused;
5. it was not proved that the imputed offense was committed by the accused.[224]

• **Decisions on No grounds for Punishment:** Under the following conditions decision on no grounds for punishment shall be rendered concerning the accused, who is found

221 Art 220 TCCT
222 Art 220 TCCT
223 Art 223 (1)
224 Art 223 (2) TCCT

not negligent:

1. where the accused is minor; or mentally ill; or deaf and dumb; or temporary reasons exist for non-punishment;
2. the imputed offense was committed either because of mandatory compliance with order issued unlawfully; or because of necessity, or under force or threat;
3. the imputed offense is committed during the legitimate self defense but because of agitation or fear or confusion the ratio of proportionality was exceeded;
4. a certain mistake was made which eliminated negligence.[225]

• **Decision of No Confinement:** Under the following conditions the accused will get no conviction:

1. effective regret;
2. existence of reasons for personal non-punishment;
3. mutual insult;
4. the degree of unfairness stemming from the committed offense is very minor.[226]

• **Conviction:** Based on sufficient evidence where it is proved that the accused has committed the imputed offense, the accused will get conviction.[227]

• **Protective Procedural Measure in lieu of Criminal Conviction:** According to the nature of the criminal prosecution the Judge may rule for the accused to comply with a protective procedural measure rather than to convict him/her to a penal punishment. Sometimes the judgment may entail the accused to be both convicted to penal punishment as well as to comply with a protective measure.[228]

• **Decision to Reject Public Prosecution:** In accordance with the universally accepted rule of *Non Bis in Idem*; "not twice for the same"[229] or, in other words "double trial prohibition"[230] which has been and is also accepted by the past and present Turkish

225 Art 223 (3) TCCT as amended by Law no 5353 of 25 May 2005
226 Art 223 (4) TCCT
227 Art 223 (5) TCCT
228 Art 223 (6) TCCT
229 BALLENTINE, Prof James A: Law Dictionary with Pronunciations, Rochester NY 1948 p 874
230 GÜLŞEN, Yrd Doç Dr Recep: Yeni Türk Ceza Kanunu ve Milletlerarası Ceza Hukuku Bağlamında "Non Bis In Idem" İlkesi Internet: www.akader.net/ sbard/sayılar/2005 Eylül p 375

criminal-justice system[231], where there is a judgment or a pending case for the same act concerning the same accused; the decision shall be rendered to reject the action.[232]

• **Abatement of Action:** Where there is reason to decide the abatement of the action in accordance with the TCC or if it becomes obvious that the condition requiring for the commencement of the investigation or the public prosecution is not going to be materialized the Court decides to abate the action. On the other hand, however, if commencement of the investigation or the public prosecution is subject to a suspensive condition; the Court decides to suspend the action until the condition is realized. Objection can be taken with this decision.[233]

2. Votes for Decision and Judgment

Decisions and judgments are rendered in unanimity or by the majority of the court. Reasons for dissenting votes must be entered on the record.[234]

M. Discretion of the Court

The Court renders its judgment based only on the original charge the elements of which are stated in the indictment and with respect to the perpetrator. The Court, is not however, restricted by the claims and defenses as far as its own assessment of the offense is concerned.[235]The Court is empowered to exercise its discretion in conformity with the law.

N. Change in the Nature of the Offense

Unless the accused is previously notified of a change in the legal nature of the offense he/she was accused of having committed and is given an opportunity to make his/her defense, he/she cannot be convicted in accordance with any article of Law, but only with those applicable to the offense the legal elements of which are indicated in the indictment. The same rule applies where there appear for the first time during the trial reasons to render aggravated punishment or circumstances which call for the applica-

231 TOROSLU-FEYZİOĞLU op cit p 299; ERSOY, Prof Dr Yüksel: Ceza Hukuku Ders Notları, Genel Hükümler, Anakara Üniversitesi Siyasal Bilgiler Fakültesi Ders Notları, Ankara 1994 pp 30-31;
232 Art 223 (7) TCCT
233 Art 223 (8) TCCT
234 Art 224 (1), (2) TCCT
235 Art 225 (1), (2) TCCT; General Board of the Criminal Panels of the Supreme Court of Appeals; Docket No. 69/3-69, Decision No.37; as cited by TAŞKIN-ÇOLAK op cit p 673 fn 618

tion of protective measures besides the punishment to be rendered.

In instances where additional defense is required, upon request made to this effect, the accused shall be given a definite period of time to prepare his/her additional defense.

The defense counsel shall also be notified about the situations mentioned above. The defense counsel is also entitled to the same rights in this regard granted to the accused, himself/herself.[236]

O. Decision and Judgment

1. Final Judgment The Judge renders the final decision and judgment. Where the court is combined, Judges render the final decision and respective judgment through deliberation. The deliberations are chaired by the presiding Judge.[237]

The judgment has to contain the following points:

• On Conviction:

1. views asserted respectively in the accusation and the defense;
2. debates and assessment made of the evidence introduced to the court; the evidence upon which the judgment is based; and evidence which is rejected, indication of the unlawful evidence, separately contained in the case file;
3. the opinion formed by the Court; the act by the accused which constitutes the offense; and its assessment and the statement of the punishment in accordance with the order and the rules set forth by Arts 61 and 62 of the TCC; statement of the protective procedural measure decided upon by the Court in lieu of penal sentence; or the procedural protective measure adjudged together with the penal sentence in accordance with Art 53 and the following of the TCC.
4. The justification concerning suspension of the punishment; conversion from punishment of imprisonment into punishment of fine; or into any one of the procedural measures or application of additional protective measures or acceptance or rejection of requests, if any, to this end.[238]

• On Acquittal:

The justification on acquittal decision shall contain the legitimate grounds it was based upon in accordance with the provisions of para.2 of Art 223 TCCT.[239]

236 Art 226 (1), (2), (3), (4) TCCT
237 Arts 227 (1) and 228 TCCT
238 Art 230 (1) TCCT
239 Art 230 (2) TCCT

• On Non Punishment Decision:

The justification of the decision on non punishment shall indicate the grounds on which the decision is based in accordance with paras. 3 and 4 of Art 223 TCCT.[240]

• Other Decision or Judgment

Where any decision or judgment is rendered other than the ones mentioned above, such as decision to reject the case or abatement of the action or decision on non-jurisdiction; the reasons for it have to be stated in the justification, thereby.[241]

2. Pronouncement of the Judgment

At the end of the trial the Presiding Judge or Judge reads the judgment entered into the record and explains the main parts of the justification. All the persons present in the court room stand while the judgment is pronounced.

If the accused is present during the pronouncement of the judgment, notice of his /her right to resort to legal remedy is orally given to him/her, together with the information as to the competent authority to be resorted to and the lawfully prescribed time within which such application can be admissible.

The accused who got acquittal shall be informed of his/her right to demand compensation if he/she was subjected to unlawful detention or arrest.[242]

3. Contents of the Judgment

As an act of sovereignty the Turkish Courts try cases and render decisions and judgments on behalf of the Turkish Nation. Therefore, in the very first line of the judgment it is stated that the judgment is given "on behalf of the Turkish Nation".[243]

1. In the preamble of the judgment the following information shall be stated:[244]
2. name of the Court which rendered the judgment;
3. names of the Presiding Judge, member Judges or the Judge, Public Prosecutor, and recording Clerk and intervenor, victim, his/her attorney, legal representative and the accused and his/her identity and his/her defense counsel;
4. place, date and hour the offense took place except the case where acquittal is rendered;

240 Art 230 (4) TCCT
241 Art 230 (4) TCCT; ÇOLAK-TAŞKIN op cit p 684
242 Art 231 (1) (2) (3) (4) TCCT
243 Art 232 (1) TCCT; TOROSLU-FEYZIOGLU op cit p 300
244 Art 232 (2) TCCT

5. respective dates and duration in which the accused was in custody or under arrest, and as to whether he is currently under arrest.

- In the event the justification is not entered into the record in entirety, it shall be included into the case file within fifteen days at most as of its pronouncement. The decision and the judgment are signed by the Judges who participated in rendering it.[245]
- The judgment must contain in the main part, the following points[246]:

1. statement of the nature of the decision rendered in accordance with the provisions of Art 223 TCCT;
2. articles of the Law applied in the matter tried;
3. amount of the punishment adjudged;
4. available legal remedy, if any; whether or not payment of compensation is available for unlawful treatment; the competent authority to be addressed and the prescribed period of time in this respect;
5. Copies and summaries of the judgment are signed by the Presiding Judge or the Judge and the recording Clerk. The official court seal is affixed thereto.[247]

SECTION III
OUT of COURT SETTLEMENT (CONCILIATION)

For purposes of attaining out of court settlement between the perpetrator and the victim, a new institution called “Conciliation” is introduced into the Turkish system. The offenses whereby conciliation can be resorted to are enumerated in the Turkish Criminal Code.[248]

• The Conciliation Procedure[249]

Conciliation can be resorted to only with respect to offenses the prosecution of which

245 Art 232 (3) (4) TCCT
246 Art 232 (3) (4) (5) (6) TCCT
247 Art 232 (7) TCCT; The American Series of Foreign Penal Codes 5 Turkish Code of Criminal Procedure, New York University, New York 1962, p 92
248 Art 73 (8) TCC; ÇOLAK-TAŞKIN op cit pp 727 and 730
249 Art 253 TCCT

is subject to filing complaint by the plaintiff. Therefore, it is only possible with offenses arising out of minor disputes such as insult, threat, or inflicting simple injury[250]. Based on this type of differentiation as far as the nature of the offenses are concerned, the lawmaker has sought to allow more time to the Courts to deal with more grave matters and attain speedy trial.

The Public Prosecutor, by taking into consideration the state of the investigation he is conducting, if sees that there is a chance for the two sides to reach an understanding between themselves towards reparation of the damage done he/she invites the perpetrator and asks whether he/she accepts the responsibility arising out of the offense.

Therefore, as a first step it must be noted that the perpetrator must acknowledge the offense he/she has committed and his/her responsibility arising thereby. But on the other hand, if the perpetrator alleges that he/she has not committed the offense he/she is accused of, then the rules of criminal prosecution become applicable. The perpetrator will be referred to the competent judicial authority in accordance with the due process of law for the matter to be clarified.

To have conciliation put into effect the perpetrator must accept to cover the damage both material and for suffering and pain arising out of the offense either in entirety or to a great extent. To this end, both the perpetrator and the victim must come to a just agreement on their own free will.

The formal acceptance by the perpetrator of his/her responsibility arising out of the offense and his/her commitment to cover damages shall be informed to the victim or his/her attorney or his/her legal representative by the Public Prosecutor.

The conciliation reached between the perpetrator and the plaintiff shall be established either by the Public Prosecutor or the Judge. As a result of the conciliation reached between the parties during the investigation phase; the Public Prosecutor shall not prepare his/her indictment to request from the Court the initiation of the public prosecution. The conciliation attained between the parties at the time of the trial, this will entail for the Judge to rule abatement of the action.[251]

In the event that there are several perpetrators of the same offense; only the person who agrees to conciliation benefits from it.[252]

250 Art 73 (8) TCC
251 Art 254 TCCT; ÇOLAK-TAŞKIN op cit pp 730-731
252 Art 255 TCCT

PART IV
PROTECTIVE MEASURES

In general

The criminal prosecution which is of public nature, is geared to attain the truth. To this end protective measures are part and parcel of the system. In order to have orderly administration of judicial examination, or in other terms, the trial; resort to these measures which are temporary in nature, is compulsory. It must also be noted that these measures even if temporary in nature nevertheless restrict the personal liberty of the suspect which is under constitutional safeguards. Therefore, to maintain balance is important, between the constitutional rights of the individual whether a suspect or accused and the lawful implementation of these measures. This is the objective of the TCCT. The protective measures by virtue of the law are such as to have suspect or accused be present during trial; to prevent obstruction of justice, namely to be able to preserve evidence intact, without any distortion to it. Implementation of such measures may necessitate enforcement against persons or objects. In other words, to bear fruit effectively, the protective measures contain sanction of enforcement.[253]

Protective measures contained in the Turkish system can be stated as **apprehension**, **detention, arrest**, **judicial control**, **search and seizure**, **monitoring concerning telecommunication**, **undercover investigator**, **conducting surveillance through technical devices**.

253 ÇOLAK, Dr Haluk – TAŞKIN, Dr Mustafa: Ceza Muhakemesi Kanunu (Code of Criminal Trial), Ankara, 2005 p. 290 & ff.

SECTION 1
APPREHENSION and DETENTION

A.1. Apprehension is resorted to against a person who is under the suspicion of committing an offense where his personal liberty is temporarily restricted in accordance with the provisions of the TCCT. This measure is resorted to either to establish the identity of the person or to carry out arrest. Even though no warrant of arrest issued by the Judge yet this measure is resorted to not as a punishment but as a protective measure in order to have proper administration of criminal procedure.

The procedures pertaining to apprehension and keeping under surveillance are carried out in accordance with the Regulation on Apprehension, Detention and Taking Statements.[254]

- **Apprehension Procedure:** In accordance with the provisions of Art 90 of the TCCT under the specified conditions everybody is authorized to apprehend. To wit:
- If person is caught in the act of committing an offense (*in flagrante delicto;flagrant offense*);
- If there is possibility for the person to make an escape who is being pursued for committing red handed offense (*in flagrante delicto; flagrant offense*) or if it is not possible to establish his/her identity immediately.

In principle, **the Public Prosecutor issues order of apprehension or in his/her absence the Police Chief is authorized to do so**. However, the Code authorizes the police to exercise this power by himself/herself where delay is detrimental. But the police have

254 Official Gazette dated 1 June 2005 Number 25832

to inform the Public Prosecutor immediately both about the person who is apprehended either by a third party or by the police and the relevant incident.

In instances where the offense the investigation and prosecution of which is subject to filing complaint; is committed red handed (*in flagrante delicto; flagrant offense*) against minors, or persons who cannot properly conduct themselves due to physical or mental illness, or physical disability or feebleness; the apprehension of the perpetrator is not subject to filing complaint. The police apprehend the suspect, ex officio.

The police following apprehension, takes measures in order to prevent the person to make an escape, or to inflict harm to his own self or to others; such as applying handcuffs[255], and only immediately after that he reads the legal rights to the apprehended person.[256]

The police carry out the procedures in accordance with the order issued by the Public Prosecutor[257]. The Public Prosecutor based on the information submitted to him/her by the police either decides to have the person placed under detention or have him/her released.

In the event the purpose for issuing apprehension order is done away with as a result of carrying out the procedure concerning the subject of the apprehension order, the Court, Judge or the Public Prosecutor shall demand the police to return the apprehension order.

2. Detention

Detention as an interim measure is applied to as a consequence of apprehension. However, the person under detention is neither under arrest nor is convicted. Therefore, he/she is not to be placed in a prison. Person under detention is taken into custody in the detention facility (*nezarethane*) allocated in the police station until he/she is arrested or released upon decision by the Judge. This temporary measure has to be applied in such a way so as not to harm the health of the subject person. By virtue of the law the detained person has to be taken before the Judge as soon as feasible.

The person apprehended, if not released by the Public Prosecutor may be detained in order to have the investigation completed. The period of detention shall not to exceed twenty-four hours as of the time of apprehension save the time necessitated to take the

255 Art 93 / 1 TCCT
256 Art 90 / 4, TCCT as amended by Law No. 5353 (25 May 2005)
257 Art 90 / 5, TCCT as amended by Law No.5353 (25 May 2005)

person before the Judge or the court nearest to the place of apprehension. The required time to take the person before the Judge or court nearest to the place of apprehension is not to exceed twelve hours by all means.[258] However, where offense is committed jointly, this period may be extended by the Public Prosecutor for up to three days, at most; every time not to exceed by one day because of the difficulty in collecting the evidence or because of the multiple suspects.[259]

A person shall be detained in custody if it is necessitated by the nature of the investigation or there exist signs that give pause to think that the person has committed the offense.

The apprehended person, his/her defense counsel, or his/her legal representative, his/her spouse or his/her relatives by blood either of first or second degree may resort immediately to the Justice of the Peace and take exception to the written decision of the Public Prosecutor concerning apprehension, detention and extension of the detention period. The Justice of the Peace reviews the file and makes his/her decision promptly and at most prior to the conclusion of twenty-four hours. If the Justice of the Peace is of the conviction that the apprehension, detention and the extension of detention is proper he rejects the application. Thus the detention continues. If not, the Justice of the Peace decides that the apprehended person shall immediately be arraigned before the Public Prosecutor.[260]The Public Prosecutor either releases the suspect or requests Justice of Peace render warrant of arrest regarding the suspect.

The person who is released because of the termination of the period of detention or decision by the Justice of the Peace shall not be subjected to apprehension for the same reason unless new and sufficient evidence are found for the act that necessitated the apprehension and decision rendered by the Public Prosecutor.[261]

The detained person shall be released, promptly if no evidence is obtained to indicate that he committed the offense at the conclusion of 24 hours. The suspect to be released under these circumstances shall not be interrogated. However, if there are evidence that indicate the suspect did commit the offense he/she is arraigned before the Justice of the Peace to be interrogated at the conclusion of these periods, namely the 24 hours or the extended period.[262]

258 Art 91 / 1 TCCT as amended by Law N.5353 (25 June 2005)
259 Art 91 / 3 TCCT
260 Art 91 / 4 TCCT
261 Art 91 / 5 TCCT
262 Art 91 / 6 TCCT

The Code mandates the presence of the defense counsel during the interrogation of the suspect before the Justice of the Peace irrespective of the fact as to whether the suspect requires his/her presence or not.[263]

• Inspection of Proceedings regarding Detention

The person apprehended and detained cannot be placed in detention house (*tutukevi, tevkifevi*) concerning persons under trial, nor to prison facility (*cezaevi*) where convicts serve their prison term because he/she is neither arrested nor convicted. Therefore, he/she is placed in the detention facility (*nezarethane*) located at the police station or gendarmery station.[264] The police take statements of the suspects preferably in a separate room allocated for this purpose within the detention facility. During this time; such proceedings of investigation as confrontation, verification of the statement made by the suspect at the location where offense committed, and establishment of identification shall be carried out by the police.

In accordance with Art 92 of the TCCT; the Chief Public Prosecutor or the Public Prosecutor appointed by him shall inspect the detention facility where persons are taken into custody, the room, if any allocated for taking statements, the condition of the detainees, the reasons for and the duration of respective detention, all records and proceedings regarding detention.

The conclusions are entered into the Registration Book regarding Persons taken into Custody.

3. Arraignment of Apprehended Person before the Court

If the person who is apprehended during the investigation or prosecution based on decision issued by the Judge or the court, cannot be arraigned before the competent Judge or the court within the lawfully prescribed time of 24 hours, at the latest; shall within the same time be taken before the Justice of the Peace, nearest to the location.[265]

4. Notice to the Relatives

When the suspect or the accused is apprehended and detained in custody or the detention period is extended, by order of the Public Prosecutor his/her state shall be notified to a relative of his/her or a person whose name given by him/her without delay. This

263 Art 91 / 6 TCCT
264 KUNTER – YENİSEY: Ceza Muhakemesi Hukuku, Ikinci Kitap, İstanbul 2003, p. 707 and ff.
265 Art 94 TCCT

notification should be recorded and entered into the case file for evidentiary purposes.

If **a foreigner is apprehended or detained in custody** provided that he/she did not reject in writing, his status shall be notified to the consulate of the State he is a citizen of.[266] We must also point out that, his/her relatives or a person named by him/her shall also be notified upon order of the Public Prosecutor of his/her status by virtue of paragraph 1 of Art 95, TCCT.

5. Record of Apprehension

A record of apprehension has to be prepared in accordance with the provisions of Art 169 of the TCCT which mandates that all the steps of the investigation have to be recorded. Because of the importance the following information does have for evidentiary purposes as to the manner the apprehension is carried out these points are included into the contents of the subject record. This way it is possible to find out for instance the state the apprehended person was in health wise at the time of and following right after the apprehension; as to whether the time involved to take the subject person before the competent Judge is compatible with the lawfully prescribed time, etc. Therefore, the record of apprehension has to provide with the following points of information[267]:

- Reason for apprehension;
- Conditions under which apprehension took place;
- Place of apprehension;
- Time of apprehension;
- Person who carried out apprehension;
- Name of the police officer who recorded the incident of apprehension;
- That the rights of the person apprehended are thoroughly read to him/her.

6. Apprehension Order and Grounds[268]

Apprehension order can be issued at every phase of the criminal procedure that is both during the Investigation and the Prosecution. If the suspect does not appear before the judicial authority even though he/she is summoned or having him/her summoned is not possible; upon request by the Public Prosecutor the Justice of the Peace shall issue criminal process (warrant of apprehension) to compel the suspect to answer for what he/she is suspected of.

266 Art 95 /1 & 2 TCCT
267 Art 97 TCCT
268 Art 98 TCCT

The warrant of apprehension is issued with respect to the following group of fugitives:

- During the Investigation Phase: The Public Prosecutor conducts the Investigation Phase. Therefore, with respect to the suspect who is fugitive, the warrant of apprehension shall be issued upon request of the Public Prosecutor by the Justice of the Peace.
- During the Phase of Prosecution: The warrant of apprehension shall be issued pertaining to the fugitive accused either by the Judge, ex officio, (of its own motion) or upon request by the Public Prosecutor. However, if the fugitive is abroad the Justice of the Peace or the Court shall issue arrest warrant by virtue of the provisions of Art 248 / 5, TCCT but not warrant of apprehension.
- Suspect or accused even if apprehended makes escape from the custody of the police: In such an instance, both the Public prosecutor and the police are authorized to issue warrant of apprehension based on the original process which had already been issued by the Judge. However, if the suspect or the accused while in custody manages to escape, the law does not mandate that the Judge issue a new process but warrant of arrest issued either by the Public Prosecutor or the police suffice.
- Escapees from the Prison or the Penal Institution: The same procedure shall apply for such escapees and the warrant of apprehension issued by the Public Prosecutor or the police shall suffice.

7. Contents of the Warrant of Apprehension:

The warrant of apprehension shall include the following points in accordance with the final para. of Art 98 TCCT:

- Clear definition of the physical appearance of the person;
- His/her identity, if known;
- The offense he/she is accused of;
- Place where he/she will be dispatch

8. The Regulation on Apprehension/Detention and Taking Statements

As required by the provisions of Art 99, TCCT in order to render proper implementation of the measure of apprehension and detention in accordance with due process

of law the new Regulation on Apprehension, Detention and Taking Statements[269] has entered into force in the summer of 2005. This new regulation has abrogated the Regulation of 1 October 1998 on the same subject having the same title.[270]

The above mentioned provisions of the Code set forth as to what points the Regulation has to arrange:

- The physical conditions of the detention facility where the persons taken in custody shall stay;
- The officer under whose care this person shall be entrusted;
- The manner the medical examination shall be conducted;
- The manner of keeping the records and books pertaining to detention procedures;
- Which records shall be written down at the time the detention has begun and at the time it is terminated;
- Which documents shall be given to the person held in custody;
- The rules the police have to abide by when in the process of apprehension.

SECTION 2
ARREST

In general

Arrest is a preventive measure of most grave nature in comparison with all the other temporary measures of criminal procedure restraining personal liberty. Where no final judgment of imprisonment is yet rendered a suspect or an accused person can be temporarily deprived of his personal liberty based upon arrest warrant issued by Judge. As its nature connotes it is a preventive measure which may be resorted to only when

269 Official Gazette dated 1 June 2005 Number 25832

270 Art 32, The Regulation of 2005. YENİSEY, Prof Dr Feridun – NUHOĞLU Doç Dr Ayşe, Soruşturma Evresi Cep Kanunu 9. Bası İstanbul 2006, pp. 615-639

required by the conditions in order to fulfill the purpose sought by the criminal trial. Needless to say, criminal trial is geared to attain the truth and to effect the execution of the court judgment.[271]

The provisions of the TCCT on arrest are stated in Arts 100 through 104. It must be noted that the provisions arranged by the TCCT in this respect are in harmony with both the provisions of Art 19 of the Turkish Constitution on "Personal Liberty and Security" and the provisions of the European Convention on Human Rights".[272]

The most important difference between detention as a result of apprehension and arrest is that arrest can only be executed upon warrant of arrest issued by Judge. The duration with respect to arrest is and can be longer than the duration of detention which is 24 hours, in principle.[273]

1. Discretion by Judge to render decision to Arrest

The Judge as an independent and impartial judicial authority has discretion either or not to render decision to arrest. In other words, the Judge is not obliged to issue warrant of arrest even if the conditions set forth by the law for arrest exist. As a result of the value recognized by the Turkish System of Criminal Trial to human entity the reasons for arrest are not classified as mandatory in the TCCT. Under such conditions the Judge takes into consideration only as to whether or not it is really necessary to arrest the person, in question. That is why it can be stated that arrest is not mandatory but is a discretionary institution in Turkey.[274] The Judge taking into consideration all the points governing the incident at hand resorts to arrest as a final measure.

2. Conditions for Arrest

Conditions for arrest can be stated under four categories in accordance with Art 100, TCCT. To wit:

1. Existence of facts indicative of strong suspicion of the commitment of an offense;
2. Existence of a reason for arrest;

271 TOROSLU, Prof Dr Nevzat – FEYZİOĞLU, Metin: Ceza Muhakemesi Hukuku, 5th Ed. Ankara 2006, p. 212 & ff.
272 ÇOLAK – TAŞKIN, op cit p. 319 & ff
273 Art13, REGULATION regarding Apprehension, Detention and Taking Statement (Off. Gzt: 1 June 2005 -25832)
274 ÇOLAk-TAŞKIN op cit. p. 320 and ff.

3. Respect to the rule of proportionality in imposing the measure of arrest;
4. The punishment provided by law for the committed offence must be confinement and the maximum limit of which must be more than one year.

(1) Strong Suspicion regarding Commitment of Offense (Art 100/1, TCCT)

The existence of strong probability indicative that the person in question has either committed the offense or is an accomplice in light of the information/evidence, direct or indirect obtained as a result of the pertinent investigation; constitutes "strong suspicion regarding the offense".[275]

(2) Reason for Arrest (Art 100/2, TCCT)

Reasons for arrest can be considered to exist under either one of the situations provided:

1. There should be concrete evidence giving way to the suspicion that the suspect or the accused would escape;
2. There should be strong suspicion to indicate that the conduct of the suspect or the accused is geared to destroy, conceal or alter the evidence; or that he /she attempts to exert pressure over the witness, victim or others who are connected to the court such as judges, prosecutors, counsels, expert witnesses.

(3) Incidents leading to assumption that Reasons for Arrest Exist (Art 100/3, TCCT)

Commitment of any one of the offenses stated below lead to the assumption that reasons exist to render decision of arrest:

- Offenses stated by the Turkish Criminal Code:
  1. Genocide and offenses against humanity (Arts 76,77,78);
  2. Felonious homicide (Arts 81,82,83);
  3. Torture (Arts 94,95);
  4. Sexual assault (except para1, art 102);
  5. Sexual abuse of children (Art 103);
  6. Manufacture of and trade in narcotics and stimulatory substances (Art 188)
  7. Offenses against the security of the State (Arts 302,303,304,307,308);
  8. Offenses against the Constitutional Order and the Functioning of this Or-

275 KUNTER-YENİSEY-NUHOĞLU op cit p. 780

der (Arts 309, 310, 311. 312, 313, 314, 315).

- Offenses of smuggling of firearms defined in Law No. 6136 on Firearms and Knives and Other Instruments;
- Embezzlement defined in paras. (3) and (4) of Art 22 of Banking Law No 4389;
- Offenses defined in Smuggling Law No 4926 calling for punishment by confinement;
- Offenses defined in Arts 68 and 74 of Law No 2863 on the Protection of Entities of Culture and Nature;
- Offense of willfully setting forest fire (arson) defined in paras. 4 and 5 of Art 110 of Forestry Law No 6831.

It must be indicated that commitment of any one of these offenses do not mandate rendering decision of arrest. As far as rendering decision of arrest with respect to investigation and prosecution of these offenses is concerned, there should be evidence indicating that strong suspicion exists regarding the commitment of the subject offense.

(3)The Rule of Proportionality

Besides the above mentioned conditions the rendering of decision to arrest must be proportionate with the gravity of the offense committed. The balance has to be kept intact by weighing together the commitment of the offense of which the suspect or the accused is under strong suspicion and the intervention to his/her personal liberty through rendering decision to arrest him/her. If the measure of arrest would constitute a grave sanction then it will not be implemented. The Judge has the sole discretion to take into consideration the rule of proportionality with respect to the importance of the issue and how strong is the suspicion indicating that the act was committed. This rule of proportionality is taken into consideration by the Judge when rendering the initial decision to arrest as well as rendering decision as to whether the arrest should continue. If the Judge comes to conclusion that the implementation of the measure of arrest is not proportionate with the offense committed he/she is not obliged to render decision to arrest the suspect or the accused. If what is sought by arrest can be achieved by implementing other preventive measures introduced by the TCCT such as judicial control, the Judge will not render decision to arrest.[276]

276 TOROSLU-FEYZİOĞLU, op cit pp 212-216; Çolak-Taşkın op cit pp 319-327

(4) Situations where arrest decision cannot be rendered (Art 100/4 as amended by Law No 5353/ Art 11 of 25 May 2005)

With respect to offenses the punishment of which is imprisonment less than one year no decision of arrest can be rendered. Also for offenses the punishment of which is judicial fine alone, no decision of arrest can be rendered.

In the event of both fine and punishment restricting liberty is provided for the offense then the maximum punishment restricting personal liberty shall be taken into consideration as to whether it is above or below one year.

It must be noted that this is an absolute prohibition by virtue of the law not to render decision of arrest under the circumstances mentioned above.[277]

3. Arrest Procedure (Art. 101, TCCT)

During investigation phase decision to arrest is rendered by the Justice of the Peace upon Public Prosecutor's demand. In exceptional instances where the Justice of the Peace exercises power granted to the Public Prosecutor, demand by the Public Prosecutor is not required and the Justice of the Peace ex officio renders decision to arrest. (Art 101/1, TCCT)

During the phase of prosecution the competent Court may render decision to arrest either ex officio or upon demand. (Art 101/1, TCCT)

The decision to arrest can be rendered only in the presence of the suspect or the accused brought before the Court provided that the suspect or the accused is not escapee abroad. [278](Art 101/2, TCCT)

The decision to arrest must contain legal grounds. Explanation in detail must be stated as to the legal and factual reasons that necessitated the rendering of the decision to arrest. According to the procedure, the contents of the decision to arrest shall be orally conveyed to the suspect or the accused person first, and then a written copy shall also be given to him/her. (Art 101/2, TCCT)

When arrest is demanded the suspect or the accused person shall benefit from the institution of mandatory defense counsel. Thus, the suspect or the accused shall benefit from the professional services of a defense counsel appointed either by him/her or by the local bar association. (Art 101/3, TCCT)

277 ÇOLAK-TAŞKIN, op cit p 326
278 ÇOLAK-TAŞKIN, op cit p 326

4. Notice to relatives of the person in pre-trial confinement about the decision to arrest him

The Judge renders decision to inform a relative of the arrested person or someone named by this person about the decision to arrest him/her and let him/her remain under arrest in pretrial confinement. If it is deemed that it will not jeopardize the purpose of the investigation the arrested person in pre-trial confinement shall be allowed to convey this information himself.

If the arrested person in pre-trial confinement is a foreigner the Consulate of the country he/she is a citizen of shall also be notified of the decision of arrest as well as to a relative of his/her, or a friend named by him/her. But if the arrested person of foreign nationality does not wish the Consulate to be notified no information shall be conveyed to the subject mission. (Art 107, TCCT)

5. Appraisal by the Public Prosecutor about the continuation of pre-trial confinement during Investigation Phase

In accordance with provisions of para 2, Art 103, TCCT, the Public Prosecutor may ex officio release the suspect if he/she deems that continuation of arrest is no longer necessary and likewise resort to judicial control is not called for. Furthermore, the suspect shall also be released if decision not to prosecute is rendered.

But on the other hand, if the Public Prosecutor deems arrest is no longer necessary but judicial control should commence he/she has to obtain decision to that effect from the Justice of the Peace. In this case, the suspect shall be asked as to what to his/her view on the demand by the Public Prosecutor regarding resort judicial control. The suspect himself/herself or his/her defense counsel may also apply to the Justice of the Peace in order to be released from pre-trial confinement and placed under judicial control.[279] Thus, the suspect would enjoy more freedom within the bounds of the judicial control, and not at all will he/she be as gravely restricted as under arrest.

By virtue of the law, the Justice of the Peace will render his/her decision within three days. Exception can be taken with Justice of the Peace decision. (Art 105, TCCT)

6. Request for Release by Suspect or Accused

At every phase of the investigation/prosecution the suspect or the accused can file request before the Court of competent jurisdiction to be released from pre-trial confine-

279 Art 103 (1) TCCT; KUNTER-YENİSEY-NUHOĞLU op cit pp 802-803

ment. (Arts 103/1 and 104/1) If the case file is with the Regional Court of General Jurisdiction or with a chamber of the High Court of Appeals or before the General Assembly of Criminal Chambers of the High Court of Appeals the decision to this effect shall be rendered by respective Court. The respective Court based on the review made on the file and upon receiving the opinion of the Public Prosecutor shall render its decision. (Art.104/3, TCCT) The relevant decision has to be issued within three days by virtue of the law. Exception can be taken with the subject decision. (Art 105, TCCT)

7. Obligation of the Person Released

The person prior to his/her release is required to leave his/her address and telephone number, if any to the Court of competent jurisdiction or to the director of the detention institution where he/she was kept under pre-trial confinement.

The address given by the person constitutes valid address for service of process. A written warning shall be given to the person to inform him/her that the address he/she gave shall constitute valid address for purposes of service of process; and that he/she is required to notify the court through proper means change of address, if any; and if not service of process shall be made at the initial address given by him/her. (Art.106, TCCT)

8. Review of the status under confinement

Where there is no longer any necessity to keep the suspect/accused under pre-trial confinement the measure of arrest will come to an end. If any one of the conditions requiring arrest is no longer valid, the person under pre-trial confinement shall be released. But under necessity, decision can be rendered by the Judge or the Court for the continuation of pre-trial confinement.

(A) During the investigation phase: the Justice of the Peace at intervals of thirty days reviews the status under pre-trial confinement as to whether or not it should continue. By virtue of the law the Public Prosecutor has to request the Court every thirty days to review the status of the person under pre-trial confinement. However, the suspect himself/herself too may request the Justice of the Peace to take his/her status into consideration as to whether or not to continue with his/her pre-trial confinement. (Art.108/1, TCCT)

As mentioned above, if the Public Prosecutor comes to the conclusion that it is neither necessary to keep the suspect under pre-trial confinement nor the commencement of judicial control, the Public Prosecutor is authorized to release ex officio the suspect. (Art 103/2, TCCT)

(B) During the prosecution phase: The trial court at every hearing will take into consideration as to whether the accused shall remain under pre-trial confinement. If the reason for arrest becomes no longer valid during the period between the two hearings decision shall be rendered promptly based on the review to be made. The Court prior to rendering its decision will obtain respective opinions of the Public Prosecutor, the accused and the defense council. The statutory period of thirty days to review at the latest the status under pre-trial confinement shall apply for pre-trial confinement during the prosecution phase. (Art 108/3, TCCT)

(C) During the judicial recess: The Supreme Council of Judges and Public Prosecutors sets the procedure as to how this review pertaining to the status under pre-trial confinement will be carried out. (Art 331/2, TCCT)

The suspect and the accused may take exception with the decision rejecting release from pre-trial confinement. (Art.104/2, TCCT)

9. Statutory periods regarding pre-trial confinement

The Turkish Code of Criminal Trial through Art 102 sets forth the maximum periods regarding pre-trial confinement within two categories. To wit: period of pre-trial confinement with respect to offenses within jurisdiction of Heavy Criminal Court; and period of pre-trial confinement with respect to offenses outside the jurisdiction of Heavy Criminal Court.

i) Accordingly; for offenses the trial of which is **not within jurisdiction** of the Heavy Criminal Court the maximum period of pre-trial confinement is **six months**. However, this period under necessity may be extended four more months only upon justification stated to that end. (Art 102/1, TCCT)

ii) For offenses **within jurisdiction** of Heavy Criminal Court the maximum period of pre-trail confinement is **two years**. This period may be extended provided justification is stated to that end. The period of extension in total may not exceed three years. This means that the total period of pre-trial confinement as extended may not exceed five years for offenses under Heavy Criminal Court jurisdiction. (Art 102/2, TCCT)[280]

The decisions for extension are made by taking into consideration the opinions of the Public Prosecutor, the suspect or the accused and defense council. As indicated above these decisions have to contain pertinent justification. (Art 102/3, TCCT)

280 TOROSLU-FEYZIOGLU, op cit pp 221-222

10. Arrest Decision put into effect

Person arrested is placed in the detention facility. If there is no separate detention facility the arrested person shall be placed in a different section of the prison allotted for the persons who remain in pre-trial confinement. Women, minors and juveniles (completed 18 years of age but not completed 21 years of age) are kept in separate locations.[281]

The administration of the detention facility has to see the arrest decision rendered by the Judge prior to admitting the arrested person into the facility. The administration has to notify the authority which rendered the arrest decision the date and the hour the person admitted into the detention facility.[282]

It is possible that the person under pre-trail confinement may work in the confines of the detention facility.

The written communication and telephonic communication under pre-trial confinement may be restricted by the Public Prosecutor during the investigation phase and by the Court during the prosecution phase under specified conditions.

The communication between person under pre-trial confinement and his/her defense counsel shall not be obstructed. Likewise, having audience with the defense counsel provided the order of the facility is abided by shall not be subject to any restrictive imposition.[283]

SECTION
VISITATION of the CONFINED PERSON IN PENAL INSTITUTION/DETENTION FACILITY

Visits to the confined are conducted in accordance with the rules set forth by the Regulation pertaining to Visitation of Persons in Pre-trial and Post-trial Confinement.[284] This instrument has entered into effect in 2005 and is current. Arts 83 and 116 of Law No 5275 on the Execution of Punishments and Security Measures constitute the legal basis for the Regulation on Visitation.[285].

281 Art 111, Law No 5275 on the Execution of Punishments and Security Measures
282 Art 112, " " "
283 Art 114, Law No 5275
284 YENİSEY, Prof Dr Feridun-NUHOĞLU, Doç Dr Ayşe; Soruşturma Evresi Cep Kanunu İstanbul Ocak 2006 pp 724-738
285 Art 1, Regulation on the Visitation of Confined Persons; Official Gazette, dated 17 June

Penal institutions and detention facilities are under the Directorate General of Penal Institutions and Detention Facilities of the Ministry of Justice. [286]

In connection with our study it should suffice to mention here that the Regulation also contains specific provisions to arrange the visitation to foreign national persons in pre-trial and in prost-trial confinement in Turkey.

Persons who can visit: Accordingly, besides the members/officials of the diplomatic and consular mission of the State the foreigner is a national of[287], persons who are allowed to visit the subject foreign national are his/her respective family members (carrying the same family name); next of kin; and close friends. In order permission for them to be issued, it is required that they must be identified properly as set forth in detail in Art 27 of the Regulation.

With respect to persons other than the ones stated above, the foreigner in pre-trial or post-trial confinement is entitled to give the names of maximum three persons to the administration of the penal institution/detention facility in order for them to visit him/her under the permission by the Public Prosecutor. It is important to note that the names of these persons cannot be changed except under conditions of necessity. These persons can visit the confined person for a period of not less than half an hour and not more than one hour during the working hours. [288]

Application regarding Visitation: Under the Regulation it is required that these persons have to submit their request for visitation a week prior to the Office of the relevant Chief Public Prosecutor. The prescribed period of time to submit visitation request can be shortened under urgent and reasonable conditions.[289]The request shall contain information on the clear identity of the applicants and photocopies of the respective identification cards or the passports. Furthermore the person in confinement prior to visitation shall verify whether these are the persons that are his/her next of kin or not.[290]

Conditions and Duration of Visit: On a regular basis, foreign nationals too, enjoy the right of "free-visitation" (açık görüş hakkı).[291]"Free visitation takes place under the surveillance of the officials in a particualr area allotted for thsi purpose once a month

2005, No 25848
286 Art 4 (1) Regulation on the Visitation of Confined Persons
287 Arts 28, 29, 33 Regulation on Visitation
288 Art 27 (1) (2) Regulation on Visitation
289 Art 27 (4) Regulation on Visitation
290 Art 27 (10) Regulation on Visitation
291 Art 27 (5) Regulation on Visitation

between 0900 and 1700 hours. The duration of visit will not exceed one hour.[292]

During public and religious holidays, the foreign nationals in pre-trial or post-trial confinement are also allowed to receive visitors.[293]

Visitation by Defense counsel: Visit by the defense counsel is arranged under two categories. To wit: Visit by Defense Counsel to the Person in Pre-trial confinement; and; Visit by Defense Counsel to the Person in Post-trial Confinement (the Convict).

- Visit of the person in pre-trial confinement during Investigation Phase: The person in pre-trial confinement can have audience with his/her defense counsel any time without the requirement for the defense counsel to submit power of attorney under conditions of "free visitation". During this Investigation phase at most three lawyers can visit the person in pre-trial confinement. The visitation takes place in an area where they are visible to the officials of the facility but their conversation shall not be audible to the officials and to others in the area. During the investigation phase the detained person can be visited only by three lawyers at the most.[294]
- Visit to the person in Post-trial confinement (the convict): The convict and his/her attorney-at-law, provided he/she submits his/her power of attorney; may have audience in the special place allotted for during the working days except the holidays under conditions of "free visitation". The special place allotted for having audience is situated in such a way that the lawyer and his/her client is visible to the officials for purposes of security but the conversation taking place between them shall not be audible to the officials. [295]

Visit by Notary Public: The person in pre-trial or post-trial confinement is allowed to benefit from the services of a Notary Public who may come to the confinement institution to see the person in confinement provided that he/she submits his/her identity and the subject of visit is in connection with issues covered by Notary Public. Such visit takes place during the working hours, except the holidays under the supervision of the administration, and subject to conditions of "free visitation".[296]

Visit by Religious Officials: The Regulation allows visit by religious officials upon per-

292 Arts 13 & 17 Regulation on Visitation
293 Art 13 Regulation on Visitation
294 Art 19 Regulation on Visitation
295 Art 20 Regulation on Visitation
296 Art 22 Regulation on Visitation

mission by the Ministry of Justice to foreign persons under pre-trial or post-trial confinement on the condition that the foreign person consents to such visit. In the event the concerned person does not give his/her consent to such visit, this fact is recorded.[297]

Visit by Medical Doctors: Permission by the Ministry of Justice for a foreign medical doctor can be given to visit a foreign national in pre-trial confinement or post-trial-confinement only under exceptional conditions where medical treatment not possible in Turkey or due to a necessity for reasons of health. Other than these two conditions a foreign medical doctor cannot be given permission to enter into the facility for purposes of rendering medical treatment.[298]

In general, persons under pre-trial and post-trial confinement enjoy visitation rights provided that they comply with the overall order of the penal institution/detention facility. However, receiving visitors may be banned or restricted by the Public Prosecutor at the investigation phase and by the Court at the prosecution phase for purposes of conducting the investigation or the prosecution soundly.[299]

SECTION 4
JUDICIAL CONTROL

In general

The measure of judicial control is introduced to the Turkish Criminal Law System for the first time. It is a temporary measure of criminal procedure and not as rigid as arrest in the sense of depriving the individual of his/her personal liberty. It still imposes certain restrictions over the personal liberty of the individual but is implemented without having the individual placed in detention facility. By virtue of the law it is considered as an alternative to arrest consisting of a group of measures which render more freedom to the suspect/accused person as provided by Art 109, TCCT.[300]

The purpose of implementing any or several measures of judicial control is geared to provide for the suspect or the accused a means of corrective nature as far as their present and future conduct in life is concerned.

297 Art 31 Regulation on Visitation
298 Art 32 Regulation on Visitation
299 Çolak-Taşkın op cit p 333
300 KUNTER-YENİSEY op cit pp 762-771;TOROSLU-FEYZİOĞLU, op cit p 225; ÇOLAK-TAŞKIN, op cit p 353

No definite period of time is prescribed for the duration of the judicial control measure. As a matter of fact, the duration depends on the circumstances governing the specific case and the response by the suspect/accused under the subject measure. Therefore, when the circumstances no longer require such measure to apply it will be removed by order of the competent authority which will be dealt with in detail later.

1. Judicial Control Measures

Judicial Control Measures are provided by Art 109, TCCP[301]. They are as follows[302]:

- Prohibition to Travel Abroad,
- To report on regular basis to places specified by Judge for specified durations of time; such as attending to an educational institution; reporting to police station at regular intervals,
- To comply with the judicial control measure in order to answer to calls by Authorities and Persons prescribed by Judge and when necessary, to comply with the judicial control measure concerning his/her professional/occupational activities or concerning the continuation of education; such as to receive psychological treatment, or to receive some vocational education etc.,
- Not to drive any kind of vehicle or some of these vehicles; when required to turn in driver's license to the office of the court recorder in return of receipt,
- In order to be free from addiction to alcohol, and in especial to narcotics, stimulatory and volatile substances (essential oils) to be subject to measures of treatment and Examination including admittance to hospitalization and to accept these,
- Taking into consideration the financial state of the suspect to arrange the payment to be made by him/her either in entirety or in installments; the amount of which will be decided by the Judge upon request by the Public Prosecutor. In the previous Code this was termed as "bail" for the suspect or accused person to pay in order to be released from pretrial confinement, if not on his/her own cognizance. Please note that, even though under the provisions of this new article the term "payment" is not specified as to what it constitutes, but in light of Art 113, TCCP it is understood that the general term of "payment"

301 ÇOLAK-TAŞKIN, op cit pp 351-352
302 ÇOLAK-TAŞKIN, op cit pp 357-360 ; TOROSLU-FEYZİOĞLU, op cit p 225

connotes to the money to be deposited by the suspect or the accused in order to render his/her presence at every stage of the procedural steps, at the time the judgment is executed, or in order to have him/her meet the other obligations that will be adjudged.

- Not to possess or carry firearms, when deemed necessary to turn the licensed firearms to Judicial Safe-keeping in return of receipt;
- Having money attached to serve as real or personal guaranty the amount and the payment of which shall be decided by the Judge upon request by the Public Prosecutor in order to secure the rights of the victim (injured party),
- To post pecuniary guaranty concerning proper fulfillment of obligations assumed by the suspect or the accused pertaining to familial obligations and orderly payment of alimony adjudicated for him/her to pay.

2. Authority to render decision for Judicial Control

Judicial control measure can be rendered at any phase of the criminal procedure; that is, both at the time of the investigative phase and at the phase of the prosecution. (Art 110, TCCT)

Investigation phase: Upon request by the Public Prosecutor the Justice of the Peace of the local Peace Criminal Court shall render decision to implement any or several judicial control measure/measures regarding the suspect. It is noteworthy that, at this phase the Judge on his/her own motion cannot render decision to implement judicial control measure concerning the suspect. The demand by the Public Prosecutor to that effect is a must.

Justification: When the Public Prosecutor demands for the implementation of judicial control measure; he/she has to state the reasons for and justification as to why the suspect has to be placed under the judicial control measure. Furthermore he/she has to state down clearly as to which measure or measures have to be implemented regarding the suspect. It is important to note that, when the Public Prosecutor is demanding for arrest he/she also has to state together with the relevant justification as to why judicial control measure is not deemed sufficient in lieu of arrest. (Art 101, TCCT)

On the other hand however, the Public Prosecutor may request implementation of judicial control in lieu of arrest regarding which he requests the Court to rescind.

At the Investigation phase upon request by the Public Prosecutor the Judge may decide

either one of the following in connection with the judicial control measure:

- May impose one or several new obligations;
- May rescind the obligations either in entirety or in part;
- May change the obligations either in entirety or in part;
- May temporarily relieve the suspect to comply with some of these obligations.

In other words, the Judge based upon request by the Public Prosecutor may decrease or increase these obligations or may change them or rescind them altogether.

However with respect to suspects under judicial control measure, in accordance with the provisions of Art 103/2, TCCT the Public Prosecutor may rescind ex officio the judicial measure concerning the suspect if he/she is of the opinion that the subject measure or arrest is no longer necessary. In accordance with the last sentence of Art 103/2 where decision not to prosecute is rendered the suspect is set free.

Prosecution phase: The competent Court handling the case is authorized to render decision to apply judicial control measure or measures concerning the accused. This decision can be rendered either ex officio by the Judge of the competent Court or upon request by the Public Prosecutor. The Judicial Control measure can also be decided to be applied concerning the accused person even at the appellate phase of the prosecution before the First Degree of Appellate Court.

It is important to note that decision to apply Judicial Control over the suspect/accused has to be rendered by Judge only.

3. Revocation of Judicial Control Measure

In accordance with Art 111, TCCT the suspect or the accused has the right to request the Judge for revision or revocation of the judicial control measure. The Judge/Court decides on the request after receiving opinion of the Public Prosecutor in that regard. The Prosecutor may render his/her opinion in writing. The Judge renders his/her decision without holding hearing. But if the Judge deems necessary the Public Prosecutor, the defense counsel and the representative may be heard. The Judge has to render his/her decision concerning the request within five days in accordance with Art 110/2 of TCCT.

Upon review of the objection regarding the judicial control measure the Judge may rule either one of the following conditions:

- May impose one or several obligations;

- May rescind the obligations in entirety or in part;
- May change the obligations either in entirety or in part;
- May temporarily relieve the subject person from complying with some of these obligations. (Art 110,TCCT)

4. Taking Exception: In accordance with Art 111/2, TCCT, it is possible to take exception with the decisions rendered in connection with judicial control measure when such measure at the time it will be initially implemented. Furthermore, exception can also be taken when Judge refuses the request made by the suspect, the accused or the defense counsel in order to have the judicial control measure in question to be revoked, or changed or reduced.

Apart from the special provision of the law providing that exception can be taken with Judge's decision on judicial control measure; the Turkish Criminal Trial System also prescribes that exception can be resorted to against decisions rendered by Judge, in general. Accordingly, the following parties/persons are authorized to take exception with decisions rendered by Judge/Court, in general:

- Public Prosecutor;
- Suspect or the accused;
- Defense Counsel of suspect or accused;
- Legal Representative of suspect or accused;
- Spouse of suspect or accused
- Intervenor;
- Representative of Intervenor;
- Persons sustained damages to such extent due to the offense that would qualify them as intervenor and also person whose request for admission as intervenor has not yet been decided upon. (Art 220, TCCT)

5. Noncompliance with the Measures:

Art 112, TCCT mandates that suspect or accused who intentionally disregards the impositions under the Judicial Control measures shall be arrested immediately irrespective of the period of imprisonment he/she may be sentenced with.

As is known, the conditions for arrest are set forth in Art 100, TCCT. According to the most recent amendment in 2006 of this provision arrest cannot be ruled for offenses the maximum punishment of imprisonment of which is not more than one year. However, in the event of such intentional noncompliance with the imposed measure of judicial control; the suspect or the accused person shall be put under arrest right away even if the period of imprisonment he/she shall be sentenced with would be less than one year.

During the Investigation the Public Prosecutor would determine as to whether or not the suspect is complying with the prescribed measure. If the Prosecutor establishes noncompliance he/she then requests Judge to issue warrant of arrest regarding the suspect. During the Prosecution phase the Court either upon request by the Prosecutor or on its own motion would determine as to whether or not the impositions are being complied with. If noncompliance is established then the Judge would issue warrant of arrest. It must be noted that at every incident of noncompliance the Judge is not obliged to render arrest warrant. By virtue of the law the Judge is bestowed upon with discretionary power. Therefore, it is up to the Judge to evaluate the specific situation and decide accordingly.

Arrest as Sanction of Noncompliance and the Competent Judicial Authority to issue warrant of arrest: The competent judicial authority to render warrant of arrest at the time of the Investigation is the Justice of the Peace; and during the phase of Prosecution it is the Judge of the court having jurisdiction to hear the case in question.

By virtue of the law, exception can be taken against the warrant of arrest.

SECTION 5
POSTING of GUARANTY[303]

1. Nature of the Measure:

Even though posting of guaranty is already provided for among the enumerated judicial measures in Art 109 of the TCCT, the Code in Art 113 and the following set forth separate provisions as to the nature and mechanism of this particular judicial measure.

Posting of Guaranty is resorted to in lieu of arresting the suspect and or the accused.

The Judge determines the amount of the guaranty to be posted including as to wheth-

303 KUNTER-YENİSEY-NUHOĞLU op cit pp 765-769

er it shall be posted all at once or in installments and if so, how many installments by taking into consideration the financial status of the suspect and or the accused person.

2. Obligation

The suspect and or the accused who posted guaranty is then under the obligation to be present at every procedural step he is ordered to be present, to fulfill all the obligations he/she has undertaken, and has to report for execution in the event he/she gets conviction. Otherwise, the guaranty posted shall be impounded as revenue to the State Treasury.

3. Allocation of the posted Guaranty:

The guaranty posted can be used to cover expenses incurred by the intervenor, the damage arising out of the offense, payment of alimony if the subject matter of the litigation is nonpayment of alimony, relevant expenses incurred by the State and punishments of fine. However, in order for these to be implemented the judgment of conviction pertaining to the accused person must be final and binding.

The decision on the posting of guaranty must contain in clear terms as to which one of those points and in which amount the guaranty posted will correspond.

In principle, if the suspect and or the accused consents for payment of the amount that would cover the damage incurred by the victim or the amount of unpaid alimony to the one entitled to receive it, then decision shall be rendered to that effect by the Public Prosecutor at the time of the investigative phase or, if it is during the prosecution the Court would render decision for payment.

4. Return some portion of guaranty to the Suspect/Accused

The accused shall receive back a portion of the guaranty he/she posted provided that was present at every procedural step he/she was ordered to be present, and fulfilled all the undertakings he/she was obliged to, and reported for execution of the sentence. In accordance with Art 114, TCCT the second portion of the [304]guaranty that is not yet given to the aggrieved party (the victim of the offense) or the party who is to benefit from alimony shall also be returned to the suspect or the accused in the event decision not to prosecute is rendered or decision of acquittal is given. Under the provisions of Art 115, TCCT the public expenses and the fines are also deducted form the posted guaranty. The remaining amount shall be returned to the suspect or the accused.

304 TOROSLU-FEYZİOĞLU op cit p. 242

SECTION 6
SEARCH, SAFEKEEPING
(Voluntary Release of item) and SEIZURE

In accordance with the Turkish criminal trial; search, safekeeping and seizure constitute a tripod. Search is conducted in order to find a person who is hiding or to obtain an object which is concealed. Safekeeping is holding an object came upon as a result of the search through voluntary delivery by the person who possesses it to the official in charge.[39] Seizure is imposed where the object is in the open and is forcibly taken by the police or other authorized government officials.[305] The new system incorporated two types of searches into the TCCT. To wit: i) Search conducted for Judicial Purposes and ii) Search conducted for Preventive Purposes.

1. Search

In principle, search in itself is a restrictive measure as far as privacy of individual life, family life and inviolability of domicile and freedom of communication are concerned. The raison d'etre (reason for existence) regarding search is stated by the respective provisions of the Turkish Constitution.[306] To this end unless there exists a decision duly passed by a judge in cases explicitly defined by law, and unless there exists an order of an agency authorized by law in cases where delay is deemed prejudicial, neither the person nor private papers, nor belongings of an individual shall be searched, nor they shall be seized|; no domicile may be entered or searched or the property therein seized; no communication shall be impeded nor its secrecy be violated.

In light of the provisions of the TCCT[307] the existence of "reasonable doubt" is a must in order to conduct search. Only when there is reasonable doubt indicating that the suspect or the accused can be apprehended or the evidence of the offense can be obtained; the body of the person, his/her property, domicile, work place or other area that the person would reasonably be expected to consider as private can be searched. Reasonable doubt must be based on tangible evidence.[308]

305 Such as gendarmerie, coastal guard and customs guard officials: Art .4 Definitions; Regulation on Judicial and Preventive Searches-Official Gazette of 1 June 2005 No. 25832; Yenisey-Nuhoğlu op cit p 642

306 Arts 20, 21, 22 Tr. Const.

307 Art 116 and the ff.,TCCT

308 Artuç, Mustafa-Gedikli, Cemil: Yeni Ceza Adalet Sistemi, Ankara 2006, p 494 and the ff.

Search can be conducted also on other persons; on their body, property, domicile, work place or other area they would reasonably be expected to consider as private for the sole purpose of being able to apprehend the suspect or the accused or to be able to obtain the evidence of the offense.[309]

• Prohibition regarding Night-time Search

In accordance with the provisions of Art 118/1, TCCT search cannot be conducted during night time at the domicile, at work place and other private areas. Night-time is that period of time which starts one hour after sunset and lasts until one hour before sunrise.[310] In other words search has to be commenced at day time. However, the search that starts at day time may continue into night hours in order to be completed.

• Exception

- Under the following conditions search can be conducted even at night time[311]:
- In flagrante delicto (in the very act of, flagrant offense), or immediately after, the commission of the offense;
- In instances where delay is detrimental;
- To be able to retrieve the person who ran away after being apprehended or taken into custody;
- To be able to retrieve the suspect or the accused who ran away.

• Search Warrant[312]

The Judge is the competent judicial authority to issue search warrant. Search is conducted by the police officers. In instances where delay is detrimental the Public Prosecutor is authorized to issue written order to that effect. On the other hand, however, if it is not possible to contact the Public Prosecutor to this end, by obtaining the written order of the Chief Police Officer, the police officers may conduct the search. It must be noted that at the domicile, work place and in private areas search can be conducted only upon search warrant issued by the Judge or upon written order rendered by the Public Prosecutor. It is mandatory to promptly submit report to the Office of the Chief Public Prosecutor in connection with the search conducted on written order issued by the Chief Police Officer.

309 Art 117 / 1, TCCT
310 Art 6 /1 (e) ,TCC
311 Art 118/2, TCCT
312 Art 119/1, TCCT

The search warrant or the written order has to contain in clear terms the following information[313]:

- The act which cause the search;
- The person to be searched, the address of the domicile or the other area where search shall be conducted, or the belongings;
- The period the warrant or the written order will be valid.

At the conclusion of the search a record of search has to be prepared and shall contain the clear identities of the persons who prepared the subject record.[314]

In the event that the Public Prosecutor is not participating in the search conducted

at the domicile, work place or other private area either two of the neighbors or two members of the district alderman's office shall attend.[315]

Searches to be conducted at military areas shall be carried out by the military authorities upon request and participation by the Public Prosecutor.[316]

• Persons to be present during Search

The owner of the property where search shall be conducted or the possessor of the goods can be present during the search. If not, a representative will attend. Explanation shall be given as to the purpose of the search. The attorney of the subject person can also attend the search and he shall not be obstructed to do so.[317]

• Document to be issued at the conclusion of the Search

As mentioned above in accordance with Art 119/3 TCCT, a record of search has to be prepared. This document must contain besides the clear identities of the officers who conducted the search, the names of the persons present during the search and the result of search.

Following the conclusion of the search if the person subjected to search requests, a document in particular shall be issued to him/her containing the legal justification for search, and if the search has been conducted in connection with the suspect or the

313 Art 119/2, TCCT
314 Art 119/3, TCCT
315 Art 119/4, TCCT
316 Art 119/5, TCCT
317 Art 120/1, 2, 3, TCCT

accused, the type of the act under investigation or the prosecution shall be indicated thereby. This person shall also be given a book containing the list of goods either seized or taken into safekeeping. If nothing is found which justifies the suspicion at the end of the search a document stating this fact shall also be given to the person in question. The subject person's statement and allegation shall take place in these documents about the ownership rights over the goods taken into safekeeping.[318]

• Examination of Personal Papers and Documents

The papers and documents of the person subjected to search can only be examined either by the Public Prosecutor or by the Judge.[319] In order to secure that fact, the envelope/package containing these papers and documents may be signed or sealed by the possessor or by his/her representative should they choose so.[320] The time and date to examine the papers and documents shall be conveyed to the possessor, his/her representative, defense counsel, or attorney. If they do not appear on time, the Public Prosecutor shall start to examine them. As a result of the examination those papers and documents which are found not relevant to the offense under investigation or prosecution, shall be returned to the concerned party.[321]

In instances where the minimum punishment for the offense under prosecution is 5 years or more by virtue of the law, material classified as containing confidential State information cannot be withheld from the Court. Such classified material can only be examined by the Court. The parties are not allowed to examine these documents. On the other hand, however, any information contained therein that clarifies the imputed offense shall be entered into record.[322]

2. Safekeeping/ confiscation of items or income

In accordance with Art 123 TCCT any items or income that will be of value as evidence can be taken into safekeeping of items voluntarily given to the officials. However, if the possessor of such items or income does not voluntarily relinquish them such items shall be confiscated. Public Prosecutors and police officers are authorized to enforce the procedure to take into safeguard or to confiscate the items which are deemed to constitute evidence based on decision rendered by the Judge. In instances where delay is deemed detrimental written order issued by the Public Prosecutor will serve the purpose.

318 Art 121/1, 2, TCCT
319 Art 122/1, TCCT
320 Art 122/2, TCCT; TOROSLU-FEYZİOĞLU, op cit p. 241
321 Art 122/2 & 3, TCCT
322 Art 125/1,2,3, TCCT

• The Sanction

By virtue of the provisions of Art 124 TCCT persons who own or possess such items which would serve as evidence are obliged to submit or to show them upon demand by the authorized officials. In the event of resistance such persons shall be punished by disciplinary incarceration not to exceed 3 months and payment of expenses incurred due to resistance to relinquish them.

3. Seizure

The Judge is the competent judicial authority to render decision to seize.[323] In cases where delay is detrimental the Public Prosecutor or the police may seize. However, the police must have written authorization by the Police Chief when reaching to the Public Prosecutor is not feasible at that time. However, if the procedure to seize is carried out without decision by Judge, the action has to be submitted within 24 hours for approval by the Judge. The Judge has to render the respective decision within 48 hours as of the seizure. If not, seizure becomes null and void by itself (automatically).[324]

The Public Prosecutor may also request the Judge to render decision to lift up the seizure where conditions do not compel the continuation thereby.[325]

In accordance with the principle set forth in Art 121/3, TCCT the procedure to seize is recorded and signed by the concerned. List of contents are logged and the seized items are taken under seal. The aggrieved party who suffered because of the offense is informed of the seizure right away[326].

Where seizure has to be carried out in a military place; it shall be done so upon demand and participation by the Public Prosecutor next to the military authorities.[327]

• Seizure of Mail

In accordance with the provisions of Art 129, TCCT all kinds of mail (postal items) handled either by official organizations such as PTT or by private courier companies may be seized based on Judge's decision, if there is suspicion that it constitutes evidence of the offense under investigation or prosecution. To this end, such mail or boxes can only be opened before the Judge or the Public Prosecutor.

323 Art 20/2 Tr. Const; Art 127/1 TCCT
324 Art 127/3 TCCT
325 Art 127/4 TCCT
326 Art 127/5 TCCT
327 Art 127/6 TCCT

Mail or boxes regarding which decision not to open or not to seize is rendered has to be returned immediately to the concerned party in accordance with para 4 of Art 129 TCCT.

Seizure of postal items shall be informed to the concerned as long as such notification will not jeopardize the purpose of the investigation or the prosecution.[328]

- **Release of the seized item**

In light of the provisions of Art 131/1 TCCT seizure as a temporary measure lasts until the completion of the trial. Therefore, at conclusion of the trial the seized item is either confiscated or released to be returned to the possessor. However, it is possible to have the release of such item prior to rendering the final judgment where it is deemed that no further need exits to keep the item under seizure for purposes of the prosecution.

4. Resort to Computer Generated Evidence

The new TCCT took within its scope computer generated evidence in harmony with the rapid technical developments in this domain. Therefore, through the provisions of Art 134 of the TCCT search, copy and seizure regarding computers, computer programs, and logs are included as obtaining new category of evidence into the Turkish system.

It must be noted however, that such procedure is applicable only during investigation of an offense. During the trial this procedure cannot be resorted to. The reason for this lies in the fact that the trial begins only when all the evidence is collected during the investigation phase and deemed sufficient to initiate the public prosecution.

Another important point to be taken into consideration as far as computer generated evidence is concerned is that resort to such category evidence is done only when there is no other available evidence. In other words, resorting to computer generated evidence constitutes the best evidence under the rule of "last resort". Therefore, where it is feasible to obtain evidence through other means and no matter how difficult this proves to be, resort to computer generated evidence is not permissible under the Turkish system. To this end the Judge takes into consideration whether the evidence is obtained through the computer search is compatible with the rule of last resort or not. The compliance with the rule of last resort constitutes safeguard with respect to the inviolable right of

328 TOROSLU-FEYZİOĞLU op cit pp 245-246

the person to privacy of individual life under the Turkish Constitution (Art 120).[329]

Upon demand by the Public Prosecutor decision to resort to computer generated evidence is rendered by the Judge. It must be noted that, the Judge cannot render such decision ex officio because this measure can be resorted to only during the investigation and the investigation phase is conducted by the Public Prosecutor as indicated before.

The competent judicial authority to render the decision upon Public Prosecutor's demand is the Justice of the Peace in the area where investigation is conducted.

This measure is applicable to the computer used by the suspect. The term "to use" is employed by the law maker specifically in order not to restrict the scope of the measure with the computer owned by the suspect. In any event, the suspect may not necessarily use his personally owned computer for purposes of evading from the prosecution. [330]

5. Monitoring conversations conducted on telecommunication devices

Art 135, TCCT as amended[331] provides with the measure of monitoring conversations conducted on telecommunication devices including mobile phones. In order to be able to resort to this measure it is imperative that there should be strong suspicion that an offense is committed and that there is no possibility whatsoever to obtain evidence through other means. Under these circumstances upon decision to be rendered by the Judge the conversations of the suspect or the accused can be detected, wiretapped, recorded and the signal data can be appraised (deciphered).

The competent judicial authority during the investigative phase is the Justice of the Peace and during the prosecution it is the Court to render decision to resort to monitoring. However, in instances where delay is deemed detrimental the Public Prosecutor is authorized to decide to monitor the conversations of the suspect or the accused conducted on telecommunication devices.

The decision to monitor rendered by the Public Prosecutor is subject to Judge's approval. Therefore, the Public Prosecutor has to submit his decision immediately for approval by the Judge. The Judge has to make his decision within 24 hours as of the submittal. The measure shall cease to be effective where the Judge does not render the respective decision within the prescribed period of time or where he renders decision not to approve the Public Prosecutor's decision.

329 ÇOLAK-TAŞKIN op cit p.434 and the ff.; TOROSLU-FEYZİOĞLU op cit p.248
330 " " op cit p. 435
331 Law No 5353 of 25 May 2005

The duration of this measure to monitor is for three months, at the most. Under necessity it can be extended for one more month. With respect to offenses under investigation or prosecution which involve organized crime this period can be extended several times by Judge's decision each extension not to exceed one month.

This measure is applicable only to offenses enumerated in the Code which are under investigation or prosecution.[332]

The conversations of the suspect or the accused with persons who by virtue of the law enjoy the right to refrain from giving testimony cannot be recorded. However if done so by mistake and when this fact is later realized, the tape records shall be deleted immediately in accordance with para.2 of Art 135, TCCT.

In instances where decision not to prosecute is rendered or where there is no decision made by the Judge to monitor the conversations of the suspect or the accused tape recordings of the conversations shall be deleted within a period of ten days. The respective proceedings shall be recorded.

In accordance with Art 137/3, TCCT under the circumstances mentioned above the Public Prosecutor shall inform in writing within fifteen days, at the most as of the conclusion of the investigative phase the concerned party the reason for the measure, its scope and duration and the respective result. However, it must be noted that no information on the measure shall be conveyed to the concerned party because of the fact that the measure has to be conducted in secrecy by virtue of Art 135/5,TCCT .

6. Evidence obtained by Chance during Search, Seizure and Monitoring

Art. 138 /1& 2, TCCT deals with the situation of evidence discovered by chance leading to another offense committed. During the implementation of search or seizure or monitoring evidence may be discovered by chance which leads to the suspicion that another offense has been committed other than the offense under investigation or prosecution. The respective police authorities have to preserve the evidence or have to seize it if the possessor does not comply with the orders to turn it to the police. Following which the police have to immediately notify the Public Prosecutor of this development.

It is important however, to note that with respect to suspicion of evidence of another offense has been committed discovered by chance through monitoring conversations

332 Art 135/6 as amended by Law No 5363 of 25 May 2005; ARTUÇ, Mustafa-AKKAYA, Çetin "2006 İçtihatlarıyla TCK- CMK- CGIK" Ankara 2007 p.913

through the telecommunication devices the type of the offense in question has to be taken into consideration. If the suspected offense, the evidence of which is discovered by chance falls under the category of offenses where monitoring conversations through telecommunication devices is provided by the law, the evidence shall be preserved and the situation shall be conveyed to the Public Prosecutor immediately (Art 138/2, TCCT).

SECTION 7
UNDERCOVER INVESTIGATOR

1. Conditions for Appointment

Art 139 of the TCCT sets forth the conditions where "undercover investigator" shall be appointed. Accordingly the conditions stated below have to be met in order to appoint the undercover investigator;

1. There should be reasons leading to strong suspicion that the offense under investigation has ,
2. There should be no other way to attain evidence,
3. Appointment by Judge's decision, or in instances where delay would be detrimental by Public prosecutor's decision,
4. Only for offenses enumerated by the law,
5. Public officials qualify for the mission.

2. Offenses Necessitating the Appointment

Offenses enumerated by law in appointing undercover investigator are as follows:

a) Turkish Criminal Code (TCC)

1. production and sale of narcotics or stimulants (Art 188),
2. establishing organization to commit crime (Art 220, except paras. 2-8),
3. armed crime organization (Art 314) or to provide arms to such crime organizations (Art. 315).

b) Offense of smuggling of arms as defined by Law on Firearms and Knives and other Instruments (Art 12).

c) Offenses as defined by Arts 68 and 74 of Law on the Protection of Cultural and Natural Entities.

The undercover investigator is not allowed to commit offense in the performance of his/her mission. But on the other hand, however, he/she shall not be held liable for the offenses committed by the crime organization he/she was involved with as secret investigator.[333]

SECTION 8
PAYMENT OF COMPENSATION BY THE STATE TO PERSONS TREATED UNLAWFULLY WHILE UNDER PROSECUTION

The law maker taking into consideration that the individuals may sustain damages intangible and material because of unlawful implementation of any one of the protective measures set forth a specific provision in Art 141TCCT whereby compensation of such damages shall be claimed from the State. Payment of compensation to persons unlawfully treated while under prosecution had already been provided by the Turkish Constitution of 1961.[334] In 1964 under a special Law No. 466 the State put the system into implementation however with the fundamental change of the Turkish Criminal system both in substance and in procedure Law No 466 was abrogated. The new TCCT provides for the mechanism of payment compensation by the State to persons subjected to unlawful treatment while under criminal process.

1. Conditions for Payment of Compensation:

The individuals under the following circumstances may claim for payment of damages they sustained (Art 141/1, TCCT):

1. apprehended, arrested or continuation of his/her arrest is ruled against the conditions set forth by the laws,
2. not taken before the Judge within the legally prescribed period of time regarding detention,
3. arrested without reminding him/her of his/her lawful rights, or even if remind-

333 ÇOLAK-TAŞKIN, op cit pp. 468-472; TOROSLU-FEYZİOĞLU, op cit p. 250
334 CENTEL, Doç Dr Nur: Ceza Muhakemesi Hukukunda Tutuklama ve Yakalama İstanbul 1992 pp 225 & ff; KAVALALI, A Mümin-ÜNVER M NaciŞ Hukukumuzda Yasa Dışı Yakalanan veya Tutuklananlara Tazminat Verilmesi Ankara 1990, pp 163 &ff

ed, non compliance with his/her wish to benefit from his/her lawful rights,

4. even though lawfully arrested but not taken before the Judge within the prescribed period of time or no decision is rendered within this period of time,
5. even though apprehended or arrested lawfully; decision not to prosecute him/her or decision to his/her acquittal is rendered,
6. period of detention or arrest is more than the time he/she spent in conviction or the punishment for the offense he/she is convicted is only payment of fine. Thus, he/she was sentenced to payment of fine,
7. written explanation, or if not possible immediately, then, oral explanation of the reasons for apprehension or arrest was not conveyed to the person at the time of his/her apprehension or arrest,
8. not conveying information to his/her relatives about his/her apprehension or arrest,
9. the decision to search regarding the person involved is effected heedlessly,
10. unlawful confiscation of his/her property and other possessions where the conditions do not call for such measure; or necessary measures of protection of the same are not taken; or his/her confiscated property and other possessions are used outside of the purpose of the measure or they are not returned on time to the person in question.[335]

In the same line, the Code in Art 144 specifies as to the conditions where compensation cannot be claimed.

In accordance with Art 142 /1 TCCT, the request for the payment of compensation should be made within three months as of the finalization of the pertinent judgment has been served to the concerned person or in any event within one year as of the date the judgment became final.

2. Competent Court:

Art 142/2 TCCT states that the competent court to render decision on the request for payment of compensation is the Heavy Criminal Court at the location where the person who sustained damages resides. But in the event there is no Heavy Criminal Court at

335 TOROSLU-FEYZİOĞLU op cit pp 251-255

that location then the Heavy criminal Court nearest to that location will have jurisdiction over the matter.

3. Trial Procedure:

The court holds hearing following all the necessary investigation is done as to the authenticity of the claim. The person requesting compensation and the representative of the State Treasury are summoned based on explanation given in the summons. If they do not appear at the hearing decision can be rendered in absentia. It is possible to take appeal with the decision by the claimant, the Public Prosecutor or the State Treasury Representative before the first degree appellate court. The appellate review shall be done on the basis of priority and urgency. [336]

4. Taking back of the Compensation paid:

The State under two conditions takes back the compensation paid. The first condition is where the initial decision not to prosecute pertaining to the person to whom compensation is paid is revoked and public prosecution is commenced and the person gets convicted. Second condition is where the de novo prosecution (new trial) is activated and the acquittal decision pertaining to the subject person is revoked and he/she gets conviction. Under these circumstances the amount of the compensation corresponding to the period of conviction shall be taken back. Written request by the Public Prosecutor and decision by the Court which rendered judgment for payment of compensation is required to that end. Exception can be taken against this decision. State resorts to officials who are liable in the payment of the subject compensation by being negligent in the performance of official duty. Likewise, the State resorts to those who did false representation about the offense or the person who was taken into custody or arrested because of false representation to collect the amount of compensation to the person in question.[337]

5. Constitutional Rule:

The 1982 Constitution of the Republic of Turkey provides the same rule for payment of compensation to persons who are unlawfully subjected to the measures of protection. The amended final paragraph of Art 19 states: "Damages suffered by persons subjected to treatment contrary to the safeguards provided by the Constitution shall be compen-

336 Paras 3, 4, 5, 6, 7, 8 Art 142 TCCT; ÇOLAK-TAŞKIN op cit 484-500
337 Art 143 TCCT

sated by the State according to the general provisions of the law of compensation."[338]

Within the Turkish legal system, this rule is considered as an extension of the Constitutional safeguard as stated in Art 2. The article in part reads: "the Republic of Turkey is a democratic, secular …State governed by the Rule of Law… respecting human rights…" The title of the above sited Art 19 reads: "Personal Liberty and Security".

Whoever is treated unlawfully as explained in the above paragraphs is entitled to request and collect damages from the State whether national or foreigner.

338 Art 4, Amending Law No. 4709 (3. October 2001)

PART V
LEGAL REMEDIES

In General

The Turkish system provides legal remedies **against Court decisions** where there is violation of the law. Violation of the law can come up where there is an issue of proof or where there is an issue of law. In order to have such violations of law corrected, resort to legal remedies before the competent legal authority is made available by the system.[339]

Legal remedies are divided into two categories: a) ordinary legal remedies; and,

b) extraordinary legal remedies.

Ordinary Legal Remedies: Resorted to against court decisions which are not yet final and binding. They are: i) Exception, ii) First Degree Appeal; and, iii) Appeal.

Extraordinary Legal Remedies: Resorted to against court decisions which are final and binding. They are: i) Exception by the Chief Public Prosecutor of the High Court of Appeals; ii) Reversal by Written Order; and, iii) New Trial (*Trial de Novo*).

To this end it must be mentioned that a Court decision becomes final and binding in accordance with one of the conditions indicated below:

- Decision passed through appellate review of the High Court of Appeals; or,
- Decision has not been appealed within the statutory period to make an

339 Art 260 TCCT; EREM, Prof Dr Faruk: Ceza Yargılaması Hukuku, Ankara 1986 p 511; TOROSLU-FEYZIOGLU op cit p.306

appeal; or;

- Judgment attains finality at the time of pronouncement because appeal is not granted by virtue of law.[340]

Right to Resort to Legal Remedies

In light of the general provisions concerning legal remedies, whether ordinary or extraordinary; the Public Prosecutor, suspect, accused, the intervenor and the aggrieved party even if not has attained the status of intervenor before the court are entitled to resort to legal remedy against court decisions.[341]

The defense counsel of the suspect or the accused and the attorney representing the plaintiff may also resort to legal remedy provided this is not against the explicit desire of the subject persons.[342]

The legal representative and the spouse of the suspect or the accused may resort to legal remedy within certain prescribed periods. The same procedure applies whether the resort is made by the accused or by those qualified to resort to legal remedy on his/her behalf.[343]

The Criminal Code of Trial provides a special arrangement for the suspect or the accused under arrest to exercise his right to resort to legal remedy. Accordingly, he/she can exercise his/her right to this end by making a declaration either orally or in writing to the recording clerk or to the director of the penal institution where he/she is kept under arrest.[344]

By virtue of the Turkish system the Public Prosecutor may resort to legal remedy also in favor of the accused.[345] The decision against which resort is made to legal remedy by the Public Prosecutor may be reversed or changed in favor of the accused. When the Public Prosecutor resorts to legal remedy in favor of the accused, the new judgment to be rendered cannot contain punishment heavier than the punishment adjudged by the previous judgment.[346]

340 GÖKHAN, Dr Sezer, The Country Law Study For Turkey, Ankara 2004. pp.50-51
341 Arts 260 -266 TCCT
342 Art 261 TCCT
343 Art 262 (1) TCCT
344 Art 263 TCCT
345 Art 260 (3) TCCT
346 Art 265 TCCT

If an error is made in the course of resorting to legal remedy which is admissible, does not prejudice the rights of the applicant. In such a case, the authority to whom application is submitted will forward it to the competent authority.[347]

SECTION 1
ORDINARY LEGAL REMEDIES

1. EXCEPTION

Exception can be taken against the decisions by the Judge and against the Court decisions as indicated by the Law.[348]

Court Decisions against which Exception can be taken: Following are the court decisions whereby exception can be taken against them:[349]

- Arrest decision rendered by Court;[350]
- The Court decision on denial of motion to disqualify Judge;[351]
- Court decision to implement measure of Judicial Control;[352]
- Court decision to send back the Indictment;[353]
- Court decisions rendered concerning the fugitives.[354]

The Code states in detail the applicable procedure and the authorities reviewing exceptions.[355]

Postponement of Execution: As far as the effect of the exception on decisions is concerned it should be noted that submission of a petition of exception does not postpone the execution of the decision against which the exception is taken. However, the authority against whose decision exception is taken or the authority which is to review the exception may order the postponement of the decision.[356]

347 Art 264 TCCT
348 Art 267 TCCT
349 ÇOLAK-TAŞKIN op cit p 750
350 Art 101 (5) TCCT
351 Art 28 TCCT
352 Art 111(2) TCCT
353 Art 174 (4) TCCT
354 Art 248 (8) TCCT
355 Art 268 TCCT
356 Art 269 TCCT

Decision Regarding Exception: Except as otherwise prescribed by Law, decisions on exceptions are given without hearing. However, if necessary the Public Prosecutor, and then the defense counsel and the attorney for the plaintiff may be heard. Where the exception is found valid, the authority reviewing it may also consider the merits. The decision on Exception is given as soon as possible. The decisions on exception are final. Exception can be taken against decision of arrest given by the authority for the first time.[357]

2. FIRST DEGREE APPEAL (INTERMEDIATE APPEAL)

The new Criminal Code of Trial re-introduced into the system the First Degree Appellate Review which was abolished in 1924[358]. Through this avenue appeal can be taken with final decisions rendered by basic Courts in order to have errors or violations on the points of law contained thereby, corrected. On the other hand, however, appeal is automatic with respect to judgments entailing punishment of imprisonment for fifteen years and above before the Regional Courts of General Jurisdiction.[359]

The appeal at this level entails review of the appealed matter both from the aspects of review on the merits and the legal findings.[360]

By virtue of the law, appeal is possible with court rulings rendered before the final judgment which were taken as basis to this judgment, as well as other court decisions concerning which no resort to legal remedy is provided. Thus, such rulings and decisions can be appealed together with the judgment of the basic court.[361]

However, the following Court decisions cannot be appealed:

- Conviction judgments involving punishment of judicial fine for two thousand liras (inclusive);
- Acquittal judgments for offenses the maximum punishment of which is judicial fine computed on the basis of five hundred days;
- Judgments which are stated as final in the laws.[362]

In the pertinent part of this study it is indicated that the organization of the regional

357 Art 271 (1) (2) (3) (4) TCCT
358 KUNTER-YENİSEY-NUHOĞLU op cit p 1335
359 Arts 272 – 285 TCCT
360 KUNTER-YENISEY-NUHOĞLU op cit pp 1334-1335
361 Art 272 (2) TCCT
362 Art 272 (3) TCCT

courts, or in other words, first degree appellate courts, is not yet completed throughout the country. For that reason, these courts do not function yet. Therefore, the above information will suffice to give the reader an idea that the system contains the intermediate appellate review.

3. APPEAL

Appeal is a formal request for review and reversal of Court judgments by the High Court of Appeals as the last judicial remedy, on the grounds that the judgment is rendered contrary to law.[363] This fact constitutes violation of law. Erroneous application or non-application of a legal rule is defined as violation of law.[364]

Violation of Law:

The circumstances, which are considered and termed as an "absolute violation of law", are enumerated in the Code of Criminal Trial in the following order:[365]

- Failure to convene the court in accordance with the provisions of the law.
- Concurrence of a Judge, in passing on the judgment, who is prohibited by operation of the law to perform his/her duty as Judge.
- Concurrence of a Judge in passing on the judgment although he/she is challenged due to substantial doubt and concurrence of a challenged judge in passing on the judgment by way of unlawful rejection of the challenge.
- When the Court finds itself competent from the point of jurisdiction to hear a trial in violation of law.
- Conducting the hearings in the absence of the Public Prosecutor or of persons whose presence is required by law.
- Violations of principles of open session in a judgment passed as a result of hearing in the presence of the parties.
- A judgment that does not include justification for the result reached.
- The restriction of the right to defense, by a Court decision, on points which are important for the judgment.

363 Art 288 (1) TCCT
364 KUNTER-YENISEY-NUHOÜLU op cit p 1407; Art 288 (2) TCCT
365 Art 289 TCCT

- Judgment is based on evidence obtained through unlawful methods.

In this respect it is important to note that violations of the rules that are in favor of the accused do not give the Public Prosecutor a right to have the judgment reversed against the accused.[366]

Decisions which can be subject to Appeal:

The Code of Criminal Trial in Art 286 enumerates the Court decisions/judgments with which appeal can be taken and those with which appeal cannot be taken. Decisions given before the judgment and forming basis for the judgment may be appealed together with the judgment.[367]

Conditions for and Period of Appellate Request:

Appeal must be made by filing a petition to the Court, which rendered the judgment within seven days after pronouncement of the judgment or by making a declaration to the recording clerk. The clerk enters the declaration into the record and the record will be approved by the Judge. If the persons required to be present at the trial but are not present at the time the judgment is pronounced, the statutory period of seven days starts as of the date the copy of the judgment is duly served to the concerned.[368] Suspect or the accused under arrest exercise his/her right to take appeal with the Court decision or judgment in accordance with the provisions indicated in Art 263 of the Turkish Code of Criminal Trial.[369]

Effect of an Appellate Petition

The appellate petition filed within the period set forth prevents the judgment from becoming final. If the judgment has not been explained to the Public Prosecutor and the concerned parties together with its justification, they will be so notified within seven days after the Regional Court of General Jurisdiction has knowledge of the appeal.[370]

Contents of Appellate Petition

The reasons for appeal shall be contained in the appellate petition. The reason for appeal shall be on the legal points concerning the judgment.[371]

366 Art 290 TCCT
367 Arts 286 & 287 TCCT
368 Art 291 (1), (2) TCCT
369 Art 291 (1) TCCT
370 Art 293 (1) (2) TCCT
371 Art 294 TCCT

If the reasons for appeal are not included in the appellate petition, an additional appellate brief containing the reasons shall be submitted to the regional court of general jurisdiction which rendered the appealed judgment within seven days either as of the expiration of the period set forth for appellate petitions or, as of the notice of the judgment together with the justification. The Public Prosecutor has to clearly indicate in his appellate petition as to whether his appeal is in favor of the accused or against him/her.

If the appeal was made by the accused, the additional brief shall be signed by him/she or by his/her defense counsel.[372]

Refusal of an Appellate Request by the Trial Court:

The Court which issued the judgment shall reject the appeal petition under the following conditions:

- If the appeal is filed following the expiration of the prescribed period for appeal petition, or
- If appeal is taken from a non-appealable judgment, or
- If the person is not entitled to take appeal but had appealed, nevertheless.

The party whose appeal petition was rejected, may within seven days as of the date of notice of the Court decision to him, request that the High Court of Appeals rule on the issue. Under this condition the case file is sent to the High Court of Appeals. However, execution of the judgment cannot be delayed for such a reason.[373]

Filing of Response:

The copy of the appellate petition together with the additional brief, if any, which had not be rejected under the above mentioned circumstances, will be served to the opposing party. The opposing party may submit his response in writing within seven days as of the service of notice to him.[374]

Submission of the Case File to the High Court of Appeals

At the lapse of the period for filing the response the Chief Public Prosecutor of the Regional Court of General Jurisdiction refers the case file to the Chief Public Prosecutor of the High Court of Appeals. If there are points in the written recommendation of

372 Art 295 TCCT
373 Art 296 (1)(2) TCCT
374 Art 297 (1) TCCT; GÖKHAN op cit p 55

the Chief Public Prosecutor of the High Court of Appeals to be construed as affecting adversely one of the parties; the accused, his defense counsel, the intervenor, and his/her attorney shall be notified in writing. The concerned party can submit his response within seven days from receipt of the notification.[375]

Rejection of the Appellate Request by the High Court of Appeals

If the High Court determines that the provisions pertaining to the submission of the appellate petition are not abided by or the judgment is of non-appealable nature, or the person taking appeal is not entitled to do so, or the appeal petition does not contain the reasons for appeal, the appellate request is rejected.[376]

Hearing during Review of the High Court of Appeals pertaining to Major Offenses

The High Court of Appeals conducts its review regarding judgment pertaining to major offenses by conducting a hearing either upon request made in the appellate petition of the accused or on its own motion *(sua sponte)*. The accused, his counsel, intervenor, and his/her attorney are notified as to the date of the hearing. Either the accused himself/herself or his/her counsel may be present at the hearings.

If the accused is under arrest, he/she cannot make a request for being present at the Court.[377]

At the hearings held before the High Court the accused has the last word.[378]

Decision on the Appeal

The High Court does not confine its consideration only to the matters raised in the appellate petition or brief. The pertinent chamber also takes into consideration any omissions indicated in the appellate brief regarding trial procedures when conducting its review.[379]

Appellate review is followed by a decision by the High Court of Appeals, which is in principle, either to affirm or to reverse the trial Court judgment. In an exceptional manner; however, a restorative decision may be rendered following the reversal. There is also the abatement decision the High Court may render, should the circumstances

375 Art 297 (2) (3) TCCT GÖKHAN op cit p 55
376 Art 298 TCCT
377 Art 299 TCCT
378 Art 300 (2) TCCT
379 Art 301 TCCT

so require.[380] All the decisions rendered by the High Court have to contain grounds as mandated by Art 141 of the Turkish Constitution.[381]

It is important to note that if the judgment is appealed only by the accused or by the Public Prosecutor or by the legal representative or the spouse on his/her behalf, the newly passed sentence cannot exceed the sentence set forth in the first judgment.[382]

In the event the trial Court persists in its original judgment the High Court reverses the law provides for the concerned party to take appeal from this decision. However, the Court is bound by the decision which is final and binding rendered by the General Criminal Board of the High Court.[383]

SECTION 2
EXTRAORDINARY LEGAL REMEDIES

1. Exception by the Chief Public Prosecutor of the High Court of Appeals[384]

The Chief Public Prosecutor of the High Court of Appeals is entitled to protest either on his own motion or upon request the decision given by one of the Criminal Departments of the High Court of Appeals at the General Criminal Board of the High Court of Appeals within thirty days after the court decree has been submitted to him/her. The protest which pertains to both the substantive and procedural law aspects of the decision be in writing and shall contain justification.

There is no limitation of time when the protest is made in favor of the accused.

2. Extraordinary Appeal

If the Minister of Justice is informed as to the violation of law in the decisions or judgments given by Judges or courts which become final without review by the First Degree Appeal Court or by the High Court of Appeals, he/she may issue a written order to the office of the Chief Public prosecutor to apply to the High Court of Appeals for the reversal of the decision or judgment. The written order of the Minister of Justice contains

380 KUNTER-YENISEY-NUHOĞLU op cit pp 1451-1462
381 YURTCAN, Prof Dr Erdener op cit pp 731-788
382 Art 307 (4) TCCT
383 Art 307 (3) TCCT; ÇOLAK-TAŞKIN op cıt p 815
384 Art 308 TCCT

the legal grounds for the reversal.

In the like manner the Chief Public Prosecutor of the High Court of Appeals is also empowered to resort on his own motion to the criminal panel of the High Court through written request where there are legal grounds either to abolish the punishment given to the accused or punishment of a lighter nature should have been given.[385]

The Chief Public Prosecutor states the legal grounds for the reversal in his/her written recommendation to the pertinent criminal panel of the High Court.

The criminal panel of the High Court may reverse the decision or the judgment if it finds the legal grounds valid.[386]

No decision of persistence can be rendered by the trial Court upon the decision of reversal by the High Court.[387]

3. New Trial

A judgment which becomes final and binding but at the same time contains judicial error may be amended through resort to avenue of New Trail (*Trial de Novo*). The New Trail may be either in favor or against the accused depending on the grounds leading to it.[388]

A. Reasons For New Trial

i) Reasons for New Trial in Favor of the Accused[389]

- Submission of false documents during trial that have affected the judgment rendered;
- Any witness or expert who has been heard under oath has testified or used his/her vote deliberately or negligently against the accused contrary to the facts in a way affecting the judgment;
- Except error caused by the accused personally, if any one of the Judges participating in the judgment, while performing his/her duty, has committed an error calling for a criminal prosecution or conviction against the accused;

385 Art 310 TCCT; Art 309 (4-d) TCCT
386 Art 309 TCCT
387 Art 309 (5) TCCT
388 Art 311 (1) TCCT
389 Art 311 (1/a,b,c,d,e,f) TCCT

- The judgment of the Criminal Court is based upon judgment given by a civil Court and the subject judgment is reversed by another judgment which became final;
- New facts or new evidence which are presented, when taken into consideration either solely or together with the previously submitted evidence, are of a nature to require the acquittal of the accused; or the application of a provision of law involving a lighter punishment.
- The European Court of Human Rights through its finalized decision establishes that the criminal judgment was given in violation of the Convention on Human Rights and Fundamental Freedoms or its supplemental protocols and that the judgment was based on this violation. In this case the request for New Trial can be made within one year as of the date the judgment of the European Court of Human Rights has become final and binding.[390]

(ii) Reasons for a New Trial Unfavorable for the Accused

A case which has been concluded by final judgment, may, under the following circumstances, be tried anew by way of New Trial against the accused or the convicted person:[391]

- A document, which during the trial, was used in favor of the accused or the convicted person and which had an effect on the outcome of the judgment, is fraudulent;
- It is discovered that a witness or expert who was heard under oath has testified or used his vote, deliberately or negligently, in favor of the accused or the convicted person, contrary to the fact in a way to affect the judgment;
- Any of the Judges participating in the judgment has committed a negligent act in favor of the accused or the convicted person during the performance of his/her duty that requires a criminal prosecution and punishment pertaining to his/her own self;
- Accused has made a reliable confession before the Judge pertaining to the offense after he/she has been acquitted.

390 Art 311 (2) TCCT
391 Art 314 (1) TCCT

B. Circumstances which do not Permit a New Trial

- A new Trial is not permissible for the changing of the punishment if the change is to be made within the limits of the same article of law.
- If there is another avenue to remedy the error, New Trial cannot be resorted to.[392]

C. Decision on New Trial request

A request for s New Trial can be by submitting petition to the Court which has rendered the subject judgment.[393] The request shall contain the legal grounds for it and the evidence based upon.[394]The Court decides on the admissibility of the request without holding a hearing.[395]

D. Invalidity of a New Trial Request and Procedure

If the request for a new trial is not made in accordance with the procedures set forth by the law or if no legal reason has been indicated to justify a new trial or any evidence to confirm it, the request is rejected as not being valid.

Otherwise, notice of the request for a new trial is given to the Public Prosecutor and the pertinent party within seven days in order to assert their own opinions.

Exception can be taken with the decisions rendered in accordance with this provision of the law.[396]

E. Collection of Evidence

If the Court accepts the request for new trial, the Court either on its own motion collects the evidence or may order for the collection of evidence, if necessary, through an interrogatory commission. Provisions applicable to the Investigation phase shall apply in this procedure as well. Following the collection of evidence both the Public Prosecutor and the convicted person are invited to state their views and considerations within seven days.[397]

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392 Art 315 (1) (2) TCCT
393 Art 318 (1) TCCT
394 Art 317 (2) TCCT
395 Art 318 (3) TCCT
396 Art 319 TCCT
397 Art 320 TCCT

F. Rejection of Request for a New trial on the Basis of No Grounds; Otherwise Acceptance of the Request

i) Rejection of the Request

If the reasons presented for a new trial are not found sufficient or if the circumstances specified in sub-paras (a) and (b) of para 1 of Art 311 and sub-para (a) of para 1 of Art 314 of the TCCT are understood to have no bearing on the judgment previously given, the request for a new trial is rejected due to lack of a legal basis without having a hearing.[398] This can be so when the evidence submitted is false or the statements made by witness or the experts are distorted.

ii) Acceptance of the Request

If it is understood that the request was submitted in accordance with the procedure, the evidence is proper and in light of the collected evidence the request is not baseless, the Court decides for a new trial. Under this condition the Court also decides for holding a hearing.[399]

Exception can be taken with the above stated decisions given by the Court.[400]

G. Judgment Given at the conclusion of the New Trial

At the conclusion of a new hearing the Court either approves or annuls the previous judgment, and in a latter case, gives a new judgment.[401]

It must be noted that if the request for a new trial is made in favor of the convicted person, the new judgment given upon this request cannot contain a punishment heavier than the punishment prescribed by the previous judgment.[402]

Another point of importance contained in this respect is that if the new judgment given is for acquittal or that there are no grounds for imposing punishment; the convicted person is entitled to receive from the State payment of pecuniary and intangible damages he/she has suffered because of the execution of the previous judgment in entirety or in part.[403]

398 Art 321 (1) TCCT
399 Art 321 (2) TCCT
400 Art 321 (3) TCCT
401 Art 323 (1) TCCT
402 Art 323 (2) TCCT
403 Art 323 (3) TCCT; Arts 141-144 TCCT

CONCLUDING REMARKS:

The Constitution of the Republic of Turkey declares its respect to human rights as a democratic, secular and social State governed by the rule of law. What connotes human rights we believe is stated in clear terms by the following definition: "human rights are individual rights and freedoms that are held or exercised primarily in relation to the State."[404] Within this context comes up the protection of the fundamental rights of the individual subjected to criminal proceeding in accordance with the constitutional safeguards provided in Turkey.

In light of this study, it can be observed that both the Constitution and the new Turkish Criminal Code and the Code of Criminal Trial provide safeguards for the protection of the fundamental rights of the individual, in general; and the suspect /'individual subjected to criminal proceeding' /convict, in particular. From the aspect of the criminal procedure we are able to observe the mechanisms for **due process** and **fair trial** are provided in a sound manner by the current criminal system for all concerned whether a citizen of Turkey or a foreign national when prosecuted in Turkey.

In relation to our study mention must be made that North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA), ratified by Turkish law No 6375 **provides for a prompt and speedy trial for a member of a force or civilian component or a dependent who is prosecuted**. To this end the current Turkish system meets all these safeguards the subject person under prosecution, is entitled to by virtue of Art VII, 9 (a) of the NATO SOFA[405]. These entitlements are stated by NATO SOFA in the following order[406]:

1. "To a prompt and speedy trial;
2. "To be informed, in advance of trial, of the specific charge or charges made against him/her;
3. "To be confronted with the witnesses against him/her; (the current Turkish system provides cross-examination, in all respects, not constricted only to witnesses)
4. "To have compulsory process for obtaining witnesses in his/her favor, if they

404 Definition by Jack DONNELLY: the Concept of Human Rights, London 1989 p 45 as cited by ÜNAL, Dr iur Şeref op cit p 5

405 FEYZİOĞLU op cit p1

406 International Agreements Handbook 5th Ed 2007 Compiled by Colonel Christopher C. LOZO, January 2007 pp. 176-177

are within the jurisdiction of the receiving State;

5. "To have legal representative of his/her own choice for his/her defense; or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;
6. "If he/she considers it necessary, to have the services of a competent interpreter; and,
7. "To communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such representative present at his trial."

The Turkish system both from the aspect of criminal law and criminal trial is in harmony with the standards set forth by the European Convention of Human Rights in light of all the substantial changes taking place in the domain of Turkish Laws and Regulations since 198,1990,1992,2004 and 2005, respectively. The new Turkish Code of Criminal Trial and the new Turkish Criminal Code speak for themselves. For instance the death penalty was abolished in Turkey in time of peace. On the other hand, however, it is interesting to note that there are still some countries in the world where death penalty exists.[407] Furthermore, Turkey has recognized the jurisdiction of the European Commission of Human Rights and the compulsory juris[408]diction of the European Court of Human Rights as of 187 and 1990, respectively.

Another aspect of vital importance in the Turkish system is that "the Turkish Courts (by virtue of the Constitution) are **independent and impartial.** "Their status is external to other political and 'special powers' in a given state. This status enables the judges to resist improper external pressures without fear or penalty and render their decisions with impartiality and neutrality." [409]

The Turkish Constitution does not tolerate the abuse of fundamental rights and unlawful treatment by holders of public office. Therefore, as mandated by the Turkish Constitution everyone whose fundamental rights and freedoms impaired is entitled to request prompt access to the competent authorities. Both the Constitution and the Criminal Trial Code provide for any person who suffered damage both physically and mentally through unlawful treatment by holders of public office, the right to be

407 In 2000 death penalty was abolished in Turkey. However, since mid 1980s as a matter of practice death penalty had not been executed in the country. GÖKHAN, op cit p 77
408 GÖKHAN, op cit p 77
409 ÜNAL op cit pp 10-11

compensated for by the State.

I would like to conclude this study by citing some of the well-known and well established principles that govern the Turkish Criminal trial system[410]:

- Suspect/accused person enjoys the presumption of innocence until proven guilty;
- "Nullum Crimen Sine Lege, Nulla Poena Sine Lege". No one shall be punished or subjected to security measure for an act, which is not expressly defined by the law as an offense at the time such act was committed;
- No one shall be punished or subjected to security measure otherwise than as specified by law.
- Through the regulatory acts of the Administration no offense or punishment can be imposed (decreed).
- Analogy cannot be resorted to in the implementation of provisions of laws containing offenses and punishments. Provisions containing offenses and punishments cannot be interpreted broadly so as to lead to analogy.

Last but not the least I would like to conclude this study by stating that the Turkish Criminal System provides for equality before Justice and Law. In the application of the Criminal Code all individuals are equal without any discrimination before the law and no privilege shall be granted to any one; irrespective of race, language, religion, sect, nationality, color, gender, political or other opinions and considerations, philosophical belief, national or social origin, birth, economic and other social status.411

The famous philosopher George Bernard Shaw said: "In the right note one can say anything and everything; however in the wrong note one cannot say even the right thing"!

I hope and trust that the outcome of this Country Law Study for TURKEY 2008 says what needs to be said in the right note…

Dr Sezer GÖKHAN, Attorney-at-Law
Ankara, 9 June 2008

410 Art 2 Turkish Criminal Code No.5237 of 29 september 2004
411 Art 3 (2) TCC; ÖZENÇ, İzzet: Türk Ceza Kanunu Gazi Şerhi (Genel Hükümler) Ankara 2005, pp. 68-70

ENCLOSURES

TREATY ON THE ENFORCEMENT OF PENAL JUDGMENTS BETWEEN THE REPUBLIC OF TURKEY AND THE UNITED STATES OF AMERICA

The United States of America and the Republic of Turkey,

Considering that mutual cooperation in combating crime and the establishment of a mechanism promoting social rehabilitation of offenders based on the principles of mutual respect for each other's jurisdiction and of the mutual recognition of the validity of penal judgments as a basis for incarceration of an offender in his home country would also contribute to the development of friendly relations between their states have decided to conclude a treaty on the Enforcement of Penal Judgments, and, to that end, have appointed as their plenipotentiaries:

Ronald I. Spears, Ambassador of the United States of America by the President of the United States of America,

Ildeniz Divanlıoğlu, Director General of Consular Affairs of the Ministry of Foreign Affairs, by the President of the Republic of Turkey,

Who, having communicated to each other their respective full powers, which were found in good and due form, have agreed as follows:

PART I

DEFINITIONS

ARTICLE I

For purposes of this Treaty:

(a) "Requesting State"or "Sentencing State" means the party which requests the recognition of he validity and the enforcement of a penal judgment involving deprivation of liberty, confiscation, measures of supervision, or disqualification pronounced against the sentenced person and the party from which the sentenced person may be transferred to the requested state.

(b) "Requested State" mans the party which is asked to recognize the validity of and to enforce a penal judgment involving deprivation of liberty, confiscation, measures of supervision, or disqualification pronounced against a sentenced person by the requested state.

(c) "Penal Judgment" or "Judgment" means any final decision delivered by a criminal court of the requesting state as a result of criminal proceedings involving deprivation of liberty, confiscation, measures of supervision, or disqualification.

(d) "Sentenced Person" means any offender who, in the territory of one of the parties, has been sentenced either to a sanction involving deprivation of liberty, confiscation, measures of supervision, or disqualification, or an offender who has been conditionally released or whose sentence has been suspended.

(e) "Disqualification" means any loss or suspension of a right or any loss of legal capacity imposed by a penal judgment.

(f) "Domiciliary" means a national of one Party who has resided in the territory of the other Party for at least five years with an intention to remain therein.

(g) "Conditional Release" means any form of release of an offender from imprisonment to the community by a releasing authority prior to the expiration of the term, subject to conditions and supervision.

PART II

RECOGNITION AND ENFORCEMENT OF PENAL JUDGMENTS

SECTION I
GENERAL PROVISIONS

ARTICLE II

RECOGNITION AND ENFORCEMENT

(1) Each Party in the cases and under the conditions provided for in this treaty recognizes the validity and shall enforce against its national in its territory a penal judgment involving deprivation of liberty, confiscation, measures of supervision, or disqualification imposed by the other party as if the judgment had been rendered by one of its courts.

(2) Such recognition and enforcement can be exercised only following an acceptance by the requested state of a request for enforcement under this Treaty.

ARTICLE III

CONDITIONS OF ENFORCEMENT

(1) A judgment shall not be enforced by the requested state unless under its laws the act for which the judgment was rendered would be an offense if committed on its territory and the person with respect to whom the judgment was rendered would be liable to punishment if the act had been committed there. This condition shall not be interpreted so as to require that the constituent elements and circumstances of

the crimes described in the laws of the two states be in all respects identical.

(2) If the judgment relates to more than one offense not all of which fulfill the requirements of paragraph 1, the requesting state shall specify the portions of the judgment which apply to the offenses that satisfy those requirements.

(3) When a request for enforcement concerns the confiscation of a specific object, a measure of supervision, or disqualification, a court in the requested state may order such confiscation, measure of supervision, or disqualification only insofar as authorized by the law of the requested state for the same offense.

ARTICLE IV

CONDITIONS FOR REQUEST

The requesting state may request the other state to enforce the judgment only if the following conditions are fulfilled:

(a) The sentenced person is at the time of the request present in the territory of either state;

(b) The sentenced person is a national of the requested state;

(c) The sentenced person is not a domiciliary of the requesting state;

(d) At least six months of the offender's sentence remains to be served at the time of the request;

(e) The enforcement of the judgment in the requested state is likely to improve the prospects for the social rehabilitation of the sentenced person;

(f) In case the sentenced person is in the territory of the requesting state, there is the consent of the sentenced person; or, if he is a minor or otherwise incompetent to express consent, the consent by his parent or guardian.

ARTICLE V

REFUSAL OF REQUEST

Enforcement requested in accordance with the foregoing provisions may not be refused, in whole or in part, save:

(a)When enforcement would run counter to the fundamental principles of the legal system of the requested state; or

(b) Where the requested state considers the offense for which the sentence was passed to be of a political nature or connected with such an offense or a purely military one; or

(c) Where the enforcement would be contrary to the international undertakings of the requested state; or

(d) Where the act is already the subject of proceedings in the requested state or where the requested state decides to institute proceedings in respect of the act; or

(e) Where the competent authorities in the requested state have decided not to take proceedings or to drop proceedings already begun, in respect of the same act; or

(f) Where the act was committed outside the territory of the requesting state; or

(g) Where the requested state is precluded from satisfying the requirements of its law relating to implementation of this treaty or is otherwise unable to enforce the judgment; or

(h) Where under the law of the requested state the sanction imposed can no longer be enforced because of the lapse of time; or

(i) Where, at the time of the offense, the age of the sentenced person was such that he could not have been proceeded against in the requested state;

(j) Where the enforcement is contrary to the rule "Ne Bis in Idem."

SECTION II
CONDITIONS OF ENFORCEMENT

ARTICLE VI

RULE OF SPECIALTY

(1) With the exception of the enforcement of the sanction for which a sentenced person has been transferred under this Treaty, a requested state may not detail, try, or pun-

ish a sentenced person transferred under this Treaty except for:

(a) Those crimes committed by the sentenced person subsequent to transfer to the requested state; or

(b) Those crimes committed by the sentenced person, prior to transfer to the requested state, except with the consent of the requesting state. Such consent shall not be granted if the requesting state considers the offense to be of a political nature, or connected with such an offense, or a purely military one.

(c) Those crimes committed by the sentenced person prior to transfer to the requested state, for which the consent required by paragraph (b) is not granted, when the sentenced person, having had an unobstructed and unimpeded opportunity to leave the territory of the requested state, has not left such territory within 45 days of final discharge from custody or supervision or has returned to the such territory after having left it.

(2) When a requesting state is asked to consent to a prosecution under paragraph 1(b), that state may ask for any document not included in the request that it deems necessary.

(3) The requested state may take any measure necessary under its law to prevent any legal effects of lapse of time.

ARTICLE VII

THE RIGHT OF ENFORCEMENT

(1) The sentencing state may continue enforcement of a sanction when the sentenced person is already detained within that state at the moment of the presentation of the request until the transfer takes place or the sentence is completed.

(2) The right of enforcement shall revert to the requesting state:

(a) If it withdraws its request before the requested state has informed it of an intention to take action on the request;

(b) If the requested state notifies a refusal to take action on the request;

(c) if the requested state expressly relinquishes its right of enforcement;. Such relinquishment shall only be possible if both states agree. If enforcement is no longer

possible in the requested state, a relinquishment demanded by the requesting state shall be compulsory.

(d) If it is decided by the courts of the requested state that the transfer was not in accordance with this treaty or its laws;

(e) if the transfer of the sentenced person is not accomplished in accordance with Article XXVII;

(f) if the sentenced person escapes from custody or evades supervision and is found in the territory or a third state, and the requested state is unable to obtain by any means, including extradition, return of the sentenced person from the third state; or

(g) If the sentenced person is found in the territory of the requesting state prior to the completion of the enforcement of the judgment by the requested state.

ARTICLE VIII

CESSATION OF ENFORCEMENT

(1) The competent authorities of the requested state shall discontinue enforcement as soon as they have knowledge of any pardon, amnesty, or any other decision of the requesting state by reason of which the sanction ceases to be enforceable.

(2) The requesting state shall without delay inform the requested state of any decision or procedural measure on its territory that causes the right of enforcement to lapse in accordance with the preceding paragraph.

ARTICLE IX

REVIEW OR APPEAL OF SENTENCE AND PARDON

(1) The sentencing state alone shall have the right to decide on any application for review of a sentence, all appeals or any other proceedings seeking to challenge, modify, set aside or otherwise invalidate conviction or sentences rendered by one of its courts.

(2) The sentencing state shall exercise the right of amnesty or pardon.

(3) Notwithstanding paragraph (2), collective pardons promulgated in the requested state shall be applicable to the sentenced person. Likewise, nothing in this treaty shall be construed to limit the power of the appropriate authorities of the requested state to release the sentenced person on grounds of infirmity, old age, or permanent illness.

ARTICLE X

EXPENSES

The requested state shall not be entitled to any reimbursement for the expenses incurred by it in the transfer of a sentenced person or the completion of the sentence.

PART III

REQUEST FOR ENFORCEMENT

SECTION I
PROCEDURE

ARTICLE XI

COMPETENT AUTHORITY

(1) The Department of Justice of the United States of America and the Ministry of Justice of the Republic of Turkey shall be the competent authorities for the purposes of this treaty.

(2) Where the transfer of the enforcement of a judgment is, according to the law of one of the parties, subject to the approval of an authority other than the central government authority of that party, such approval must also be obtained.

ARTICLE XII

IMPLEMENTATION OF PROVISIONS

(1) Request for recognition and enforcement of a penal judgment shall be initiated by the competent authority of the requesting state.

(2) No provision of this treaty shall prevent a sentenced person from asking that the sentencing state initiate such a request.

ARTICLE XIII

FORM OF REQUESTS

All requests specified in this Treaty shall be made in writing. All communications necessary for the application of this Treaty between competent authorities of the parties shall be sent through diplomatic channels.

ARTICLE XIV

DOCUMENTS OF REQUEST

The request for recognition and enforcement shall be accompanied by:

(a) The original, or a certified copy, of the judgment whose recognition and enforcement is requested;

(b) A statement that the sanction is enforceable, and specifying the part of the sentence already served;

(c) The original, or a certified copy, of all or part of the criminal file comprising information about the sentenced person's behavior in the penitentiary institution, including, in particular, all credits earned or accorded to the sentenced person by the requesting state; and,

(d) If the sentenced person is in the territory of the requesting state, a statement verifying the sentenced person's or his parent's or guardian's express consent to the transfer for enforcement.

ARTICLE XV

ADDITIONAL INFORMATION

If the requested state considers that the information supplied by the requesting state is not adequate to enable it to apply the provisions of this treaty, it shall ask for the necessary additional information. The requested state may prescribe a date for the receipt of such information.

ARTICLE XVI

LANGUAGE OF REQUESTS AND DOCUMENTS

(1) No translation of requests for recognition and enforcement or of supporting documents related thereto shall be required.

(2) Translations of the decision of the requested state on the request of the requesting state, and of the supporting documents, shall be transmitted to the requesting state.

(3) In case the sentenced person is in the territory of the requested state, the documents prepared according to this Treaty shall be forwarded to the requested state together with their translated copies in the language of the requested state.

ARTICLE XVII

NOTIFICATIONS

(1) The authorities of the requested state shall promptly inform those of the requesting state of the action taken on a request for enforcement.

(2) If the requested state decides that it is unable to enforce the request, the requesting state shall be informed of the provision of this Treaty under which the request is refused.

(3) The authorities of each Party shall periodically provide the other Party with reports indicating the status of all sentenced persons transferred under this treaty, including, in particular, the parole or release of any such person. Either party may, at any time, request a special report on the status of the execution of an individual sentence.

SECTION II
PROVISIONAL MATTERS

ARTICLE XVIII

DEPRIVATION OF LIBERTY IN THE REQUESTING STATE

If the sentenced person is present in the territory of the requesting state, and is not in

custody after notification of the acceptance of its request for enforcement of a sentence involving deprivation of liberty is received, that state may, if it deems it necessary in order to ensure enforcement, detain him with a view to his transfer.

ARTICLE XIX

DEPRIVATION OF LIBERTY IN THE REQUESTED STATE

(1) When the requesting state has requested enforcement, the requested state may arrest the sentenced person:

(a) If, under the law of the requested state, the offense is one which justifies remand in custody; and

(b) If there is a danger of abscondence.

(2) When the requesting state announces its intention to request enforcement, the requested state may, on application to the requesting state, arrest the sentenced person, provided that requirements under (a) and (b) of the preceding paragraph are satisfied. The application shall state the offense which led to the judgment and the time and place of its perpetration, and contain as accurate a description as possible of the sentenced person. It shall also contain a brief statement of the facts on which the judgment is based.

ARTICLE XX

DURATION OF CUSTODY IN THE REQUESTED STATE

(1) The sentenced person shall be held in custody in accordance with the law of the requested state; the law of that state shall also determine the conditions on which he may be released.

(2) The sentenced person in custody shall in any event be released:

(a) After a period equal to the period of deprivation of liberty imposed in the judgment, except in cases in which such offender's parole or conditional release has been revoked in accordance with the laws of the requested state; or

(b) If he was arrested pursuant to Article XIX(2), and the requested state does not receive, within 30 days from the date of such arrest, the request together with the documents specified in Article XIV.

ARTICLE XXI

SEIZURE UPON REQUEST

(1) If the requesting state has requested the requested state to provisionally seize property, the requested state may do so, on condition that its own law provides for seizure in similar cases.

(2) Provisional seizure shall be carried out in accordance with the law of the requested state. That law shall also determine the conditions on which the seizure may be lifted.

ARTICLE XXII

DISPOSITION OF CONFISCATED PROPERTY

(1) Objects confiscated in accordance with this Treaty shall be the property of the requested state, without prejudice to any rights of third parties.

(2) Property confiscated which is of a special interest may be remitted to The requesting state if it so requests.

PART IV

RECOGNITION AND ENFORCEMENT

SECTION I
GENERAL CLAUSES

ARTICLE XXIII

CONDITIONS TO BE DETERMINED BY THE REQUESTED STATE

The requested state shall, before accepting enforcement satisfy itself and specify in a decision by the competent authority of that state:

(a) That the sanction whose enforcement is requested was imposed in a final criminal judgment,

(b) That the requirements of Articles 3 and 4 are met,

(c) That the enforcement would not run counter to the fundamental principles of the legal system of the requested state,

(d) That, in respect to the offense which is dealt with in the judgment, the person has not been previously acquitted, pardoned, or granted amnesty and that the sanction has not been fully executed or its enforcement barred by the lapse of time,

(e) That the other conditions of enforcement provided for in this Treaty are met.

ARTICLE XXIV

ACTION BY THE REQUESTED STATE

(1) A sanction imposed in the requesting state shall be enforced in the requested state

only after recognition of the validity of the judgment imposing the sanction by the competent authority empowered to do so under the law of the requested state.

(2) In every case of enforcement under this Treaty the requesting state shall furnish to the competent authority of the requested state a copy of the penal judgment. The authority empowered by the law of the requested state to recognize the penal judgment imposed by the requesting state shall affirm the validity of the penal judgment consistent with the provisions of Article IX(1) and shall attach therein a certificate which attests to the recognition of the said judgment. A certified copy of the judgment and of the certificate of recognition shall be filed with an appropriate court of the requested state.

(3) The penal judgment for the sentenced person who is actually in the territory of the requested state at the time of the request shall be enforced in that state under the provisions of this Treaty.

ARTICLE XXV

COURT FINDINGS

The requested state shall be bound by the findings as to the facts insofar as they are state in the sentence of the requesting state or insofar as the sentence is impliedly based on them.

SECTION II
ENFORCEMENT OF SANCTIONS INVOLVING DEPRIVATION OF LIBERTY

ARTICLE XXVI

ENFORCEMENT OF SANCTIONS

(1) The enforcement shall be governed by the law of the requested state and that state shall alone be competent to make all appropriate decisions including those related to conditional release.

(2) The authority competent under the legislation of the requested state, in computing

the duration of the sanction to be enforced, shall take as a basis the duration of the sanction as imposed in the judgment. In executing the enforcement of the sanction, the following may be taken into consideration:

(a) The sanction prescribed by its own law for the same offense,

(b) The minimum duration prescribed by the law of the requesting state for the offense,

(c) Facts and legal causes specified in the judgment as mitigating or aggravating circumstances and any additional information accompanying the request. Nevertheless, the requested state may not convert a sanction involving deprivation of liberty into a fine.

(d) Any other facts and circumstances, particularly those occurring subsequent to conviction which may have a bearing on the manner in which the sentences should be executed.

(3) In enforcing the sanction, the authority competent under the legislation of the requested state shall not aggravate the penal situation of the person sentenced as it results from the decision delivered in the requesting state.

(4) Any form of provisional custody and sentence imposed in the requesting state, served by the sentenced person subsequent to the sentence, shall be deducted in full. The same shall apply in respect of any period during which the person sentenced was in custody with respect to the offense in the requesting state before being sentenced.

PART V

IMPLEMENTATION

ARTICLE XXVII

TRANSFER AFTER THE ACCEPTANCE OF REQUEST

(1) The sentenced person detained in the requesting state shall be transferred to the requested state upon:

(a) Notification of acceptance of the request for recognition and enforcement;

(b) Confirmation of the continuance of the offender's consent to transfer; and

(c) Payment of the fine, in cases where the penal judgment comprises such a fine for the same offense along with the sanction of deprivation of liberty.

(2) The date and place of transfer of the sentenced person shall be determined y the parties on mutual agreement.

ARTICLE XXVIII

IMPLEMENTATION

Each Party shall establish all procedures deemed necessary to give due implementation to this Treaty within its territory and shall take adequate legislative measures to give, for the purposes of this Treaty, legal effect to the recognition of the validity of penal judgments imposed in the requesting state and to designate the competent authority to be empowered with such attributions.

PART VI

FINAL PROVISIONS

ARTICLE XXIX

ENTRY INTO FORCE

(1) This Treaty shall be subject to ratification. The exchange of ratifications shall take place in Washington, D.C..

(2) This Treaty shall enter into force thirty days after the exchange of ratifictions and shall remain in force indefinitely.

(3) Either contracting Party may denounce that Treaty by giving prior written notice to the other contracting Party. Such denunciation shall take effect six months after the receipt of the notification.

IN WITNESS WHEREOF, the respective Plenipotentiaries of the contracting Parties have signed the present treaty and have affixed thereto their seals.

DONE in Ankara in duplicate, this seventh day of June, 1979, in the English and Turkish languages, both texts being equally authentic.

ENCLOSURE 2

TREATY ON EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN THE REPUBLIC OF TURKEY AND THE UNITED STATES OF AMERICA

The United States of America and the Republic of Turkey, desiring to cooperate more effectively in the repression of crime by newly regulating extradition of offenders and by providing for mutual assistance in criminal matters, have decided to conclude a Treaty on Extradition and Mutual Assistance in Criminal Matters and, to that end, have appointed as their Plenipotentiaries:

Ronald I. Spiers, Ambassador of the United States of America by the President of the United States of America,

Ildeniz Divanlioğlu, Director General of the Consular Affairs of the Ministry of Foreign Affairs

by the President of the Republic of Turkey,

Who, having communicated to each other their respective full powers, which were found in good and due form, have agreed as follows:

CHAPTER I
EXTRADITION

SECTION I
GENERAL PROVISIONS

ARTICLE 1

OBLIGATION TO EXTRADITE

(1) The Contracting Parties undertake to surrender to each other in accordance with the provisions and conditions laid down in this Treaty, all persons who are found within the territory of the Requested Party and who are being prosecuted for or have been charged with an offense, or convicted of an offense, or are sought by the other Party for the enforcement of a judicially pronounced penalty for an offense committed within the territory of the Requesting Party.

(2) When the offense has been committed outside the territory of the Requesting Party, the Requested Party shall grant extradition subject to the provisions described in this Treaty if either:

(a) the laws of the Requested Party provide for the punishment of such an offense committed in similar circumstances,

(b) the offense has been committed by a national of the Requesting Party, and that Party has jurisdiction, according to its laws, to try that person.

ARTICLE 2

EXTRADITABLE OFFENSES

(1) Extraditable offenses, pursuant to the Provisions of this Treaty, are:

(a) Offenses, regardless of whether listed in the Appendix to this Treaty or not which are punishable under both the federal laws of the United States and the laws of Turkey by deprivation of liberty at least for a period exceeding one year

or by a more severe penalty.

(b) Offenses listed in the Appendix to this Treaty which are punishable under both the laws of the Requesting Party and the Requested Party for at least a period exceeding one year or by a more severe penalty.

For purposes of extradition, it shall not matter whether the laws of the contracting Parties place the offense within the same category of offenses or describe an offense by the same terminology.

(2) Extradition shall be granted in respect of an extraditable offense for the enforcement of a penalty or prison sentence, if the duration of the penalty or prison sentence still to be served amounts to at least six months.

(3) Subject to the conditions set out in paragraph (1), extradition shall also be granted:

(a) For attempts to commit, or participation as principal, accomplice or accessory in any extraditable offense;

(b) For the offense of association to commit a crime under the laws of Turkey and for conspiracy under the laws of the United States when the facts establish an offense under the laws of both Contracting Parties;

(c) For any extraditable offense when, only for the purpose of granting jurisdiction to the United States Government, transportation, transmission of persons or property, the use of mails or other means of communication or use of other means of carrying out interstate or foreign commerce constitutes an element of the specific offense.

(4) When a request for extradition comprises several separate offenses and extradition has been granted for one of the extraditable offenses, it shall also be granted for other extraditable offenses which could not otherwise fulfill the requirements of paragraphs (1) and (2) above as related to the deprivation of liberty to be served or duration of the penalty to be enforced in the Requesting Party.

ARTICLE 3

CONDITIONS OF REFUSAL

(1) Extradition shall not be granted:

(a) If the offense for which extradition is requested is regarded by the Requested

Party to be of a political character or an offense connected with such an offense; or if the Requested Party concludes that the request for extradition has, in fact, been made to prosecute or punish the person sought for an offense of a political character or on account of his political opinions.

However, any offense committed or attempted against a Head of State or a Head of Government or against a member of their families shall not be deemed to be an offense of a political character.

The provisions of this paragraph shall not affect any obligation of the Contracting Parties which has already been undertaken or may subsequently be undertaken by them under any multilateral international agreement.

(b) If the offense for which extradition is requested constitutes a purely military offense which is not an offense under ordinary criminal law;

(c) If the person whose surrender is sought has, under the laws of either the Requesting or the Requested Party, become immune by reason of lapse of time from prosecution or Punishment for the offense for which extradition is requested;

(d) If the person whose surrender is sought has been tried and acquitted or punished with final and binding effect in the Requested Party for the offense for which extradition is requested;

(e) If the offense for which extradition is requested has, according to the laws of the Requested Party, been committed in its territory and has been or will be submitted to its appropriate judicial authorities for prosecution; or

(f) If the offense for which extradition is requested has been or is subject to amnesty or pardon by either of the Parties.

(2) Extradition may be refused in any of the following circumstances:

(a) If the person whose surrender is sought is being prosecuted in the Requested Party for the same offense;

(b) If the Requested Party has decided either not to prosecute or to terminate prosecution for the same offense; or

(c) If the person whose surrender is sought has been tried and acquitted or punished In the territory of a third State for the same offense.

ARTICLE 4

NATIONALS

(1) Neither of the Contracting Parties shall be bound to extradite its own nationals. The competent executive authority of the United States, however, shall have the power to grant the extradition of its own nationals, if in its discretion this is deemed proper to do.

(2) If the Requested Party does not-extradite its own national, it shall, at the request of the Requesting Party submit the case to its competent authorities in order that proceedings may be taken if its law so provides. If the Requested Party requires additional documents or evidence, such documents or evidence shall be submitted without charge to that Party. The Requesting Party shall be informed of the results of its request.

(3) Requests for the surrender of persons sought for offenses committed prior to the entry into force of the present Treaty shall not be granted by the Requested Party for nationals of that Party.

ARTICLE 5.

DETERMINATION

The right to determine the nature of the offense which entails the refusal of extradition as enumerated in Article 3 rests solely within the authority of the Requested Party.

ARTICLE 6

CHANNELS AND LANGUAGE OF COMMUNICATION

(1) The request for extradition shall be made-in writing through diplomatic channels.

(2) The request-for extradition is to be written in the language of the Requesting Party. However, such a request and its supporting documents shall be accompanied by certified translations in the language of the Requested Party.

SECTION II
REQUESTS

ARTICLE 7

CONTENTS OF THE REQUEST

(1) A request relating to a person being prosecuted or who is charged with an offense, and who has yet to be convicted, shall be accompanied by the following:

(a) A warrant of arrest issued by a judge or other competent judicial officer;

(b) A statement of the facts of the case;

(c) Such evidence as, according to the laws of the Requested Party, would justify arrest and committal for trial of the person sought if the offense had been committed in the territory of the Requested Party;

(d) Evidence proving that the person sought is the person to whom the warrant of arrest refers, including information, if available, on nationality; and

(e) The text of the applicable laws of the Requesting Party, including the law defining the offense, the law prescribing the punishment for the offense, and the law relating to the limitation of legal proceedings or the enforcement of the penalty for the offense.

(2) A request relating to a person who has been convicted but against whom there is no final judgment or sentence, shall be accompanied by the following;

(a) The record of the judgment or conviction;

(b) A statement of the facts of the case;

(c) A warrant of arrest issued by a judge or other competent judicial officer;

(d) Evidence proving that the person sought is the person to whom the judgment or conviction refers, including information, if available, an nationality; and

(e) The text of the applicable laws of the Requesting Party, including the law defining the offense, the law prescribing the punishment for the offense, and the law relating to the limitation of legal proceedings or the enforcement of the penalty for the offense.

(3) A request relating to a person against whom there is a final judgment or sentence shall be accompanied by the following:

(a) The record of the judgment or sentence;

(b) A statement of the facts of the case;

(c) A warrant of arrest or detention order issued by a judge or other competent judicial officer;

(d) A statement showing how much of the sentence has been served;

(e) Evidence proving that the person sought is the person to whom the judgment or conviction refers, including information, if available, an nationality; and

(f) The text of the applicable laws of the Requesting Party, including the law defining the offense, the law prescribing the punishment for the offense, and the law relating to the limitation of legal proceedings or the enforcement of the penalty for the offense.

(4) A request relating to a person who has been convicted in his absence or in contumacy shall be accompanied by the following:

(a) The record of the judgment or conviction;

(b) A statement of the facts of the case;

(c) A warrant of arrest or detention order issued, by a judge or other competent judicial officer;

(d) Such evidence as, according to the laws of the Requested Party, would justify arrest and committal for trial of the person sought if the offense had been committed in the territory of the Requested Party;

(e) Evidence proving that the person sought is the person to whom the judgment or conviction refers, including information, if available, on nationality; and

(f) The text of the applicable laws of the Requesting Party, including the law defining the offense, the law prescribing the punishment for the offense, and the law relating to the limitation and legal proceedings or the enforcement of the penalty for the offense.

Such convictions may be treated as final convictions if the law of the Requesting Party so provides.

ARTICLE 8

ADDITIONAL EVIDENCE AND INFORMATION

(1) If the Requested Party considers that the evidence and information submitted in support of the request for the extradition of a person is not sufficient to fulfill the requirements of this Treaty, that Party shall request necessary additional evidence and information. That Party may fix a time limit for the submission of such evidence and information and, upon the Requesting Party's application, for which reasons shall be given, may grant a reasonable extension of the time limit.

(2) If the person sought is under arrest and the additional evidence and information submitted is not sufficient, or if such evidence or information is not received within the period specified by the Requested Party, the person sought shall be discharged from custody. However, such discharge shall not prevent a subsequent request for extradition for the same offense. In this connection it shall be sufficient if reference is made in the subsequent request to the supporting documents already submitted.

ARTICLE 9

MEASURES TO BE TAKEN

The Contracting Parties shall take all necessary measures after the information and documents related to the request for extradition have been received, including a search for the person sought. When located, the person sought shall be detained until the competent authorities of the Requested Party reach their decision. If the request for extradition is granted, the detention shall be continued until surrender.

ARTICLE 10

PROVISIONAL ARREST OR DETENTION

(1) In cases of urgency, either Contracting Party may apply for the provisional arrest or detention of the person sought before the request for extradition has been submitted to the Requested Party through diplomatic channels. The request for provisional arrest or detention may be made either through diplomatic channels or directly between the Department of Justice of the United States and the Ministry of Justice of Turkey.

(2) The application for provisional arrest or detention shall state that a warrant of arrest or a judgment exists and that it is intended to make a request for extradition. It shall also state the offense for which extradition will be requested and when and where such offense was committed and shall give all available information concerning the description of the person sought and nationality. The application shall also contain such further information, if any, necessary to justify the issuance of a warrant of arrest in the Requested Party had the offense been committed, or the person sought convicted, in that Party.

(3) The Requested Party shall make the necessary arrangements for the provisional arrest or detention and shall notify the other Party when the person sought has been arrested or detained specifying that the person sought will be released if the mentioned in Article 7 are not submitted within a period of 60 days from the date of arrest or detention.

(4) If the documents for extradition are submitted to the executive authority of the Requested Party within the 60 day time limit, the arrest or detention shall continue until a decision on the request for extradition has been reached by the competent authorities of the Requested Party. If the request for extradition is granted, the arrest or detention may be extended to the extent permitted by the laws of the requested Party.

(5) If the person sought is released from arrest or detention because the extradition documents have not been received by the executive authority of the Requested Party within the 60 day time limit, the Requesting Party may make a new request for extradition when the documents are subsequently received.

SECTION III
DECISIONS

ARTICLE 11

DECISION ON EXTRADITION AND SURRENDER

(1) The Requested Party shall promptly communicate to the Requesting Party the decision on the request for extradition. The Requested Party shall give the reasons for any complete or partial rejection of the request for extradition.

(2) If the request for extradition is granted, the competent authorities of the Contracting Parties shall agree on the time and place of surrender of the person sought. Surrender shall take place within such time as may be prescribed by the laws of the Requested Party.

(3) If the person sought is not removed from the territory of the Requested Party within the time required under paragraph (2), that person may be set at liberty. The Requested Party may subsequently refuse to extradite that person for the same offense.

(4) If circumstances beyond its control prevent a Contracting Party within the time required under paragraph (2) from surrendering or taking delivery of the person to be extradited, it shall notify, the other Contracting Party before the expiration of the specified time. In such a case the competent authorities of the Contracting Parties may agree on a new time for the surrender.

(5) If the-person sought flees prior to surrender, a new request for extradition need not be accompanied by the documents specified in Article 7 when that person is located.

ARTICLE 12

CONCURRENT REQUESTS

(1) If extradition is requested by more than one State, either for the same offense or different offenses, the Requested Party shall freely decide on these requests, taking into consideration all the circumstances and especially, the nationality of the person sought, the place where the offense or offenses were committed, the seriousness of the offense or offenses and the respective dates of the requests for extradition.

(2) The Requested Party, while granting extradition in such a case, may authorize the Requesting Party to surrender subsequently the person sought to a third State which also requested extradition.

ARTICLE 13

DEFERRED SURRENDER

When the person whose surrender is sought is being prosecuted or is serving a sentence in the territory of the Requested Party for an offense, other than that for which extradition has been requested, surrender of this person may be deferred by, the Requested

Party until the conclusion of the prosecution and the full execution of any punishment that may, be or may have been awarded. In this case, the Requested Party shall inform the Requesting Party accordingly.

ARTICLE 14

INFORMATION ON THE RESULTS OF PROCEEDINGS

(1) The Contracting Party to which the person sought has been surrendered shall inform the other Party of the results of the criminal proceedings initiated against this person.

(2) In case of conviction, a certified copy of the final judgment shall be transmitted to the other Contracting Party.

ARTICLE 15

DELIVERY OF PROPERTY AND VALUABLES

(1) Upon the request of the Requesting Party, the Requested Party, subject to its laws and the interests of third parties, shall seize and deliver the following property and valuables:

(a) Property which has been used in committing the crime or which may be required as evidence;

(b) Property and valuables which have been acquired as a result of theoffense and were found in the possession of the person sought at the time of arrest or detention, or which are discovered subsequently;

(c) Articles subsequently acquired from the property, and valuables connected with the offense.

(2) If possible, the property specified in paragraph (1) shall be delivered to the Requesting Party at the same time as the surrender of the person extradited. Property and valuables seized under paragraph (1) shall be delivered even if extrextradition already granted cannot be carried out owing to the death or escape of the person sought.

(3) The said property and valuables can be temporarily retained for proceedings pending in the territory of the Requested Party or they can be delivered under the condition of restitution.

(4) However, the rights of the Requested Party or a third State concerning the said property and valuables are reserved. Where there are such rights, the property and valuables shall be returned to the Requested Party free of charge and as soon as possible after the proceedings.

SECTION IV
SPECIAL PROVISIONS

ARTICLE 16
RULE OF SPECIALITY

(1) A person who has been extradited in accordance with the present Treaty shall not be prosecuted, punished or detained for the enforcement of a sentence or subjected to any other restriction on personal freedom or delivered to a third State for any offense committed prior to surrender from the territory: of the Requested Party other than that for which extradition was granted, except in the following cases:

(a) If the person extradited, having had for a period of 60 days from the date of final release an opportunity to leave the territory of the Party to which the person has been surrendered still remains in the territory of that Party. This period does not include the time during which the released person could not voluntarily leave the territory of that Party;

(b) If, after having left, the person has returned voluntarily to the territory of the Party to which surrender was granted; or

(c) If there is an express consent of the Requested Party.

(2) When the consent of the Requested Party is requested for the purposes of prosecution or for the execution of a sentence concerning an offense committed prior to the surrender other than that for which extradition was granted, the Requesting Party shall comply with the procedure provided in Article 7 of the present Treaty, and provide a record established by a judge or competent officer of the statement made by the extradited person in respect of the request for consent.

ARTICLE 17

RE-EXTRADITION TO A THIRD STATE

(1) Except as provided in Article 16, paragraph (1), the Requesting Party shall not, without the consent of the Requested Party, re-extradite to a third State a person extradited to the Requesting Party and sought by the third State for an offense committed prior to surrender.

(2) A request for consent to re-extradition to a third State shall be accompanied by the documents supporting the request for extradition made by the third State, if the Requested Party requires these documents for its decision. These documents shall conform to the documents mentioned in Article 7 of this Treaty.

ARTICLE 18

TRANSIT

(1) The transit of a person who is the subject of extradition from a third State through the territory of one Contracting Party to the territory of the other Contracting Party shall be granted upon submission of a request, provided the offense involved is an extraditable offense under Article 2 and that the Contracting Party requested to permit transit does not consider the offense to be one covered by Article 3. The request for transit shall be accompanied by a copy of a warrant of arrest, final judgment or detention order. In addition, the request shall contain a statement as mentioned in Article 7.

(2) The Requested Party shall not be Bound to permit the transit of its nationals, nor Persons who may be prosecuted or required to serve a sentence in its territory.

(3) If air transport is to be used, the following provisions shall apply:

(a) When no intermediate stop is scheduled, the Contracting Party shall notify the other Contracting Party that transit will occur, certify that a warrant of arrest, final judgment or detention order exists and state the name and nationality of the person in transit.

(b) When an unscheduled landing occurs, notification as provided in (a) shall have the effect of a request for provisional arrest as provided in Article 10. Thereafter, a request for transit as provided in paragraph (1) shall be made.

(c) When an intermediate stop is required, the Contracting Party requesting transit shall

submit a request as provided in paragraph (1).

(4) If the circumstances require detention pending transit, the Contracting Party requesting transit may be required to follow the provisions of Article 10.

ARTICLE 19

ADMINISTRATIVE MATTERS

(1) Expenses in the territory of the Requested Party for processing the extradition request for the person sought shall be borne by that Party until surrender. The expenses after surrender shall be borne by the Requesting Party.

(2) The expenses incurred by reason of transit shall be borne by the Requesting-Party.

(3) Documents submitted as required by Article 7 shall be admitted into evidence by the courts of the Requested Party provided they are sealed with the official seal of the Department of State of the United States or the Ministry of Justice of Turkey and are otherwise in compliance with the laws of the respective Parties.

(4) The appropriate legal officers of the Requested Party shall, by legal means provided under its laws, assist the Requesting Party before its respective judicial authorities.

CHAPTER II
MUTUAL ASSISTANCE IN CRIMINAL MATTERS

SECTION I
GENERAL PROVISIONS

ARTICLE 20

MUTUAL ASSISTANCE

The Contracting Parties undertake to afford each other, in accordance with the provisions of Chapter II of this Treaty, mutual assistance in criminal matters.

ARTICLE 21

SCOPE OF ASSISTANCE

(1) Each of the Contracting Parties may submit to the other Party requests for assistance in criminal matters.

(2) Criminal matters for which mutual assistance shall be afforded include investigations and criminal proceedings in respect of offenses, the punishment of which falls or would fall within the jurisdiction of, the judicial authorities of the Requesting Party under-its law.

(3) Mutual assistance shall include:

(a) Execution of requests related to criminal matters;

(b) Effecting the taking of testimony or statements of persons;

(c) Effecting the production, preservation and authentication of documents, records, or articles of evidence;

(d) Effecting the return to the Requesting Party of any objects, articles or other property or assets belonging to it or obtained through such offenses;

(e) Service of all judicial documents, writs, summonses, records of judicial verdicts and court judgments or decisions;

(f) Effecting the appearance of a witness or expert before a court of the Requesting Party;

(g) Location of persons; and

(h) Providing judicial records, evidence and information.

(4) For the purposes of Chapter II of this Treaty, punishment of an offense is within the jurisdiction of the judicial authorities of the Requesting Party if the offense is deemed by its laws to have -been committed in the territory of that Party, or, if committed outside the territory, the laws of the Requesting Party provide for prosecution of the offense.

ARTICLE 22

REFUSAL OF MUTUAL ASSISTANCE

(1) Judicial assistance may be refused:

(a) If the investigation or proceedings concerns:

1. an offense which the Requested Party considers to be a political offense or an offense connected with a political offense; or
2. a purely military offense which does not constitute an offense under ordinary criminal law.

(b) If the Requested Party considers that execution of the request is likely to prejudice its sovereignty, security, or similar essential interests.

(2) For the purposes of Chapter II of this Treaty, the following offenses shall not be considered political offenses or offenses connected with a political offense:

(a) Offenses for which investigations and proceedings are obligatory for the Contracting Parties under multilateral international agreements; and

(b) Offenses against a Head of State or a Head of Government or members of their families.

ARTICLE 23

SCOPE OF USE

(1) Use of any testimony, statements, documents, records or articles of evidence obtained by the Requesting Party under Chapter II, Section I, is limited to the purposes of investigations or criminal proceedings and adjudications of claims for damages connected with the offense which is the subject of the investigation or proceedings in the Requesting Party.

(2) Furthermore, the material mentioned in paragraph (1) above may also be used in an investigation or prosecution relating to an offense other than the offense for which assistance was granted, provided the purpose falls within the Scope of Chapter II Section I.

SECTION II
REQUESTS

ARTICLE 24

CONTENTS OF REQUESTS

(1) A request for the taking of testimony or statements of persons, or for effecting the production, preservation and authentication of documents, records, or articles of evidence shall specify the name of the authority conducting the investigation or proceedings to which the request relates and, insofar as possible, shall also indicate,

(a) the subject matter and nature of the investigation or proceeding;

(b) the principal need for the evidence or information sought;

(c) the full name, place and date of birth, address and any other available informa-

tion, such as nationality, which may aid in the identification of the person or persons who are the subjects of the investigation or proceeding;

(d) the name, address and nationality of the person whose testimony or statement is sought, or from whom documents, records or articles of evidence are requested; and

(e) a description of the documents, records or articles of evidence to be produced or preserved, and of the manner in which they should be reproduced and authenticated.

(2) The requests, insofar as possible and to the extent necessary, shall also include:

(a) a description of the particular procedure to be followed, if any;

(b) a statement as to whether sworn or affirmed testimony or statements are required; and

(c) a description of the information, statement or testimony sought.

ARTICLE 25

EXECUTION OF REQUESTS

(1) Except as otherwise provided in this Chapter, requests shall be executed in accordance with the usual procedure under the laws of the Requested Party.

(2) The Requested Party may consent to a request to apply the procedure of the Requesting Party, to the extent that such procedures are not incompatible with the laws of the Requested Party.

(3) A person in the Requested Party from whom evidence is sought shall be bound to testify and produce documents, records, or articles of evidence in the same manner and to the same extent as in criminal investigations or proceedings in the Requested Party, unless such person has a right to refuse to do so under the laws of that Party.

(4) The appropriate judicial officers and other officials of the Requested Party shall use all means within their power under the laws of the Requested Party to execute requests. When the execution of a request requires judicial actions, the officials of the Requested Party shall present the requests to the appropriate court at no expense to the Requesting Party.

(5) On the express request of the Requesting Party, the Requested Party shall state the date and place of execution of the request. Under the requirements and provisions of the laws of either Party, appropriate officers of the Requesting Party, or other interested persons, may be present at the execution of the requests.

ARTICLE 26

RECORDS AND DOCUMENTS IN POSSESSION OF CONTRACTING PARTIES

Upon request, the Requested Party shall provide to the Requesting Party, on the same conditions and to the same extent as they would be available to authorities performing comparable functions in the Requested Party, the original or certified copies of:

(a) Judgments and decisions of courts, and

(b) Documents, records, and articles of evidence, including transcripts and official summaries of testimony, contained in the files of a court or investigative authority, if the Requested Party determines it is appropriate.

ARTICLE 27

SEARCHES AND SEIZURES OF PROPERTY AND ARTICLES

When the request seeks the handing over of any property or articles to be used in a criminal investigation or proceeding, and when this requires the execution of a search warrant, a search, and seizure shall be made only in accordance with the laws of the Requested Party.

ARTICLE 28

DELIVERY AND RETURN OF DOCUMENTS, RECORDS, OR ARTICLES OF EVIDENCE

(1) The Requested Party may postpone the delivery of original documents or records, or articles of evidence requested if they are needed in connection with pending proceedings by the Requested Party.

(2) Any original documents, records or articles of evidence delivered in execution of requests shall be returned by the Requesting Party to the other Party as soon as pos-

sible unless the Requested Party waives their return.

(3) However, the competent authority of the Requesting Party shall be entitled to retain articles for disposition in accordance with its laws if such articles belong to persons in that Party and no title or other secured rights are claimed by a person in the Requested Party.

SECTION III
SERVICE OF DOCUMENTS

ARTICLE 29

REQUESTS FOR SERVICE OF DOCUMENTS

(1) A request for the service of documents, including court judgments, records of verdicts, writs, summonses or other documents which are transmitted to the Requested Party, shall include

(a) the name of the authority requesting service;

(b) the name, address, and, if known, nationality of the person to be served; and

(c) the approximate allowances, travel and subsistent c expenses payable to the witness or expert whose appearance is sought in the Requesting Party.

(2) If the Requesting Party specifies in its request of service a date for any personal appearance, it should take into consideration, when setting the date for the appearance and forwarding the request, that the request must be received by the Requested Party at least 30 days before that date.

ARTICLE 30

EXECUTIONS OF REQUESTS FOR SERVICE OF DOCUMENTS

(1) The Competent authority of the Requested Party shall effect service of any docu-

ment which is transmitted for this purpose by the Competent Authority of the Requesting Party, in the manner provided by its own laws and procedure for the service of similar procedural documents.

(2) Proof of service shall be-made by means of a receipt, dated and signed by the person served or by means of a declaration specifying the form and date of service and signed by the person effecting it.

(3) The Requested Party shall promptly transmit to the Requesting, Party the receipt of service or the declaration.

(4) If service cannot be affected, the reasons shall be communicated to the Requesting Party with the documents sought to be served.

(5) Service of a document under this Article on a person other than a national of the Requesting Party does not confer jurisdiction in the Requesting Party.

(6) Each Contracting Party shall retain the right to serve documents on its own nationals in the Requested Party through its diplomatic or consular officials.

ARTICLE 31

APPEARANCE OF WITNESSES AND EXPERTS IN THE REQUESTING PARTY

(1) If the Requesting Party considers the personal appearance of a witness or expert before its judicial authorities especially necessary, that Party shall so indicate in its request for service of a summons. The Requested Party shall invite the witness or expert served to appear before the relevant judicial authority of the Requesting Party and ask whether the person agrees to the appearance.

The Requested Party shall promptly notify the Requesting Party of the reply of the witness or expert.

(2) A witness or expert who fails to answer a summons to appear before a judicial authority of the Requesting Party shall not, even if the summons contains a notice of penalty, be subjected to any civil or criminal forfeiture, measure of restraint of restraint or legal sanction unless subsequently the person enters the territory of the Requesting Party and is there again duly summoned

ARTICLE 32

TRANSFER AND APPEARANCE OF DETAINED PERSONS

(1) If the appearance of a person held in Custody is needed and requested by the Requesting Party as a witness or for purposes of confrontation before a judicial authority of that Party, the person in custody may temporarily be transferred to the territory of that Party if:

(a) The person in custody consents thereto;

(b) The transfer shall not prolong the custody; and

(c) The Requested Party determines that there are no other important reasons against the transfer.

(2) Execution of the request for transfer of the person in custody may be postponed as long as the presence of the person is necessary for an investigation or proceeding in the Requested Party.

(3) The Requesting Party shall have the authority and obligation to keep the person in custody unless the other party authorizes release. When no longer needed, the person in custody shall be returned as soon as circumstances permit.

(4) The Requested Party shall not decline to return a transferred person solely because be is a national of that Party.

ARTICLE 33

TRANSFER OF AN ACCUSED PERSON

(1) When, in connection with a request for assistance under this Chapter, the Requesting Party requires the transfer to the other Party of an accused person for purposes of confrontation, the request shall so state. Upon transfer, the Requested Party shall hold him in custody as long as necessary and shall return him immediately thereafter.

(2) If the law of the Requested Party requires proof that the Requesting Party has the accused in custody, the Requesting Party shall attach to its request any judicial orders or other documents the Requested Party requires.

(3) On receipt of the request, the Competent Authority of the Requested Party will

promptly seek from the appropriate authorities any Legal process necessary to keep the accused in custody. The Requested Party will notify the Requesting Party that custody is authorized before the transfer takes place.

ARTICLE 34

SAFE CONDUCT

(1) A witness or expert, whatever his nationality, appearing before a judicial authority in the Requesting Party pursuant to a request made under this Treaty, shall not be prosecuted, except as provided in paragraph (3) of Article 32 or paragraph (1) of Article 33, be detained or subjected to any other restriction of personal liberty in the territory of that Party with respect to any act or conviction which preceded his departure from the territory of the Requested Party.

(2) A person, whatever his nationality, summoned before a judicial authority in the Requesting Party to answer for acts forming the subject of proceedings against him, shall not be prosecuted or detained or subjected to any other restriction of his personal liberty for acts or convictions which preceded his departure from the territory of the Requested Party and which are not specified in the request.

(3) The safe conduct provided in this Article shall cease if 10 days after the person receives official notification that his presence is no longer required, the person, being free to leave the territory of the Requesting Party, has not done so, or after having left, has voluntarily returned.

SECTION IV
INFORMATION

ARTICLE 35

EXCHANGE OF INFORMATION

(1) With a view to furthering the purposes of this Treaty, the authorities of either Party are authorized to furnish any information, documents, records or evidence which may be of interest to the other in pertinent matters including investigations or pro-

ceedings in either Party, to the extent permitted by their laws and under such conditions as are appropriate.

(2) Where appropriate, the Parties will provide each other relevant information relating to their laws, regulations, statutes and international practices in criminal matters.

ARTICLE 36

RECORDS

(1) To the maximum extent possible, the appropriate authorities of the Contracting Parties shall inform each other of criminal convictions and subsequent measures concerning nationals of the other Party.

(2) On request, the Parties shall provide copies of judicial records relating to criminal proceedings against a national of the Requesting Party to the same extent as those records are available to judicial authorities in the Requested Party.

ARTICLE 37

LOCATION OF PERSONS

If the Requesting Party requests information as to the location of persons who are believed to be within the Requested Party, the Requested Party shall make every effort to ascertain the whereabouts and addresses of such persons in its territory. Such requests shall include all available information on -identity and location.

SECTION V
PROCEDURE

ARTICLE 38

COMPETENT AUTHORITIES

(1) The Competent Authorities under Chapter II of this Treaty shall be the Department

of Justice of the United States of America and the Ministry of Justice of the Republic of Turkey.

(2) Requests under this Chapter shall be made only by the Competent Authorities and may be transmitted directly between them or through diplomatic channels.

(3) The Competent Authority of the Requested Party shall promptly transmit requests to the appropriate authorities far execution.

ARTICLE 39

ACTION ON THE REQUEST

(1) If the Requested Party determines that the requested assistance is not consistent with the provisions of this Chapter, or that it cannot be executed, that Party shall immediately inform the Requesting Party and specify the reasons.

(2) Upon completion of a request for assistance, the Requested Party shall return the original request to the Requesting Party together with all the documents, information and evidence obtained.

ARTICLE 40

LANGUAGE

(1) Requests for mutual assistance and all supporting documents shall be prepared in the language of the Requesting Party.

(2) These requests and their supporting documents shall be accompanied by true and complete translations in the language of the Requested Party.

(3) Translation of all transcripts, statements, documents, or records obtained through a request shall be incumbent upon the Requesting Party.

ARTICLE 41

EXPENSES

Requests under this Chapter shall be executed by the Requested Party without any

expense to the Requesting Party, except for the following:

(a) Allowances, including subsistence and travel expenses, for a witness or expert invited to appear in the Requesting Party under Article 31. These allowances and expenses shall be calculated as from the place of residence in the Requested Party and shall be at rates equal to those provided in the schedules and rules in force in the Requesting Party;

(b) Expenses involved in the transfer and return of detained persons transferred under Article 32 or Article 33; and

(c) Fees of private experts specified by name in the request

CHAPTER III
FINAL PROVISIONS

ARTICLE 42

TERRITORIAL APPLICATION

(1) A reference in this Treaty to the territory of either Contracting Party is a reference to all territory under its jurisdiction.

(2) This Treaty shall not affect obligations which the Contracting Parties have undertaken or will undertake under any multilateral international agreement.

ARTICLE 43

SCOPE OF EFFECT

This Treaty shall apply to offenses encompassed by Article 2 committed before and after the date this Treaty, enters into force. Extradition shall not be granted, however, for an offense committed before this Treaty enters into force which was not an extraditable offense under previous agreements.

ARTICLE 44

ENTRY INTO FORCE AND DENUNCIATION

(1) The present Treaty shall be subject to ratification and the exchange of the instruments of ratification shall take place in Washington.

(2) The present Treaty shall enter into force 30 days after the exchange of the instruments of ratification and shall remain in force indefinitely.

(3) Upon entry into force of this Treaty, the Treaty of Extradition, between the United States and Turkey signed at Lausanne, Switzerland on August 6, 1923, shall cease to have effect, except that requests presented prior to entry into force of the present Treaty shall be processed according to the provisions of the Treaty of 1923.

(4) Either Contracting. Party may denounce and terminate this Treaty by giving prior written notice to the other Party. Such denunciation shall take effect six mouths after the receipt of the notice.

IN WITNESS WHEREOF the respective Plenipotentiaries of the Contracting Parties have signed the present Treaty and have affixed hereunto their seals.

DONE at Ankara in duplicate, this seventh day of June, 1979, in the English and Turkish languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA

FOR THE GOVERNMENT
OF THE REPUBLIC OF TURKEY.

APPENDIX

1. Murder.
2. Manslaughter.
3. Aggravated wounding, injury, or assault, even when lose of life results; wounding or injuring with intent to cause grievous bodily harm.
4. Illegal abortion.
5. Kidnapping; abduction; false imprisonment, child-stealing.
6. Rape; indecent assault, incest, bigamy.
7. Unlawful sexual acts with or upon children under the age specified by the laws both of the Requesting and Requested Parties.
8. Procuration.
9. Libel.
10. Willful non-support or willful abandonment of a minor or other dependent person when by reason of such non-support or abandonment the life of that minor or other dependent person is or is likely to be endangered.
11. Robbery; larceny; burglary; embezzlement, extortion.
12. Malicious damage to property.
13. Fraud, including breach of trust and offenses against the laws relating to the unlawful obtaining of money, property or securities.
14. Offenses against the laws relating to forgery, including the making of forged docu-

ments or records, whether official or private, or the uttering or fraudulent use of documents or records.

15. Receiving, possessing, or transporting for personal benefit any money, valuable securities, or other property, knowing the same to have been unlawfully obtained.
16. Offenses relating to counterfeiting.
17. Perjury, including subornation of perjury; false swearing; false statements, either written or oral, made to a judicial authority or to a government agency or office.
18. Arson.
19. Unlawful obstruction of judicial proceedings or proceedings before governmental bodies or interference with an investigation of a violation of a criminal statute by influencing, bribing, -impeding, threatening, or injuring by any means any officer of the court, juror, witness, or duly authorized criminal investigator.
    a. Unlawful abuse of official authority which results in bodily injury or deprivation of life, liberty or property of any person.
    b. Unlawful injury or intimidation in connection with, or interference with, voting or candidacy for public office, jury service, government employment, or the receipt or enjoyment of benefits provided by government agencies.
21. Facilitating or permitting the escape of a person from custody; prison mutiny.
22. Offenses against the laws relating to bribery.
23. Offenses against the laws relating to civil disorders.
24. Offenses against the laws relating to organized criminal enterprises or associations.
25. Any act willfully jeopardizing the safety of any person traveling upon a railway, or in any aircraft or vessel or other means of transportation.
26. Piracy, by statute or by the law of nations; mutiny, or revolt aboard an aircraft or vessel against the authority of the captain or commander of such aircraft or vessel; any seizure or exercise of control, by force or violence, or threat of force or violence, of an aircraft or vessel.
27.
    a. Offenses against the laws relating to importation, exportation, or transit of goods, articles, or merchandise, including smuggling.

b. Offenses relating to willful evasion of taxes and duties.

c. Offenses against the laws relating to international transfers of funds.

28. Offenses against the bankruptcy laws.
29. Offenses against the laws relating to the illicit manufacture of narcotic drugs, Cannabis sativa L., hallucinogenic drugs, cocaine and its derivatives, and other dangerous drugs and chemicals.
30. Offenses against the laws relating to the illicit manufacture of or traffic in poisonous chemicals or substances injurious to health.
31. Offenses against the laws relating to firearms, ammunition, explosives, incendiary devices or nuclear materials.
32. Offenses against the laws relating to the sale or transportation or purchase of securities or commodities.
33. Any other act for which extradition many be granted in Accordance with the laws of both Contracting Parties

Dr. Sezer Gökhan Biography

Born in Izmir of parents Colonel Pilot (Ret.Turkish Air Force) and Mrs Osman Korkut Gökhan.

Attended T.E.D Ankara College. On an international scholarship program by American Field Service attended and graduated from Batavia High School, Upstate New York, USA in June 1959.

Her Alma Mater is Ankara University Faculty of Law and is a graduate of June 1963. Following the completion of her apprenticeship admitted to the Ankara Bar Association as attorney-at-law in September 1964 and since then is an active member of the Bar.

On 21 May 1969 she started to work as the Turkish Legal Advisor to the Office of the United States Military Mission to Turkey, and as of 1994 to the Office of Defense Cooperation Turkey. During her tenure of 39 years she attended criminal cases and defended her clients before the Courts in various cities in Turkey. She participated in the conclusion of the two treaties between Turkey and the United States of America on Prisoner Exchange and Judicial Assistance in Criminal Matters during 1979-1980. ……

She has worked on behalf of the ODC Legal office both with the office of the Legal Advisor Turkish General Staff and with various other Turkish Ministries and the Undersecretariat of Customs on issues of law that affect the presence of the US armed forces members in Turkey.

In 1989, she was asked by UNICEF Office in Ankara to translate into Turkish the UN Convention on the Rights of the Child. Her translation was accepted as the official text by the Government of Turkey and submitted to the Parliament and it was approved. Thus the Convention became part and parcel of the Turkish law.

Her academic studies involve her participation in the Salzburg Seminar under the auspices of Harvard Law School in Austria on Comparative Law in July 1974; attended Mc Gill University Institute of Air and Space Law, Montreal, Canada (diploma) in 1975-1976; Air and Space Law Symposium at the Aristotelian University, Thessaloniki Greece, Summer of 1979; The Hague Academy of International Law, the Netherlands, Summer of 1986 and 1989, respectively.

Completed her doctoral thesis on "Aerial Instrusions in Time of Peace" and received her "Doctor of Laws degree" summa cum laude, from the Ankara University Faculty of Law in December 1995.

Dr. Gökhan is the author of Country Law Study for Turkey, April 2004. Due to the substantial changes in the Turkish Criminal-Justice system in 2005; she worked long and hard to write a new Country Law Study for Turkey and just completed it ready for publication in June 2008 before her retirement on 07 July 2008.

Dr. Gökhan is the fifth recipient of Judge Advocate General's Department Service Award; the highest award given to a host nation attorney by the United States Air Force (April 2002).

In 2005 HQ USEUCOM awarded Dr. Gökhan the Civilian Service Medal for her work in publishing the Country Law Study for Turkey 2004.

On 7 july 2008 Dr. Sezer Gökhan retired voluntarily from her post as the Turkish Legal Advisor to the United States Office of Defense Cooperation in Turkey. On 27 June 2008 at her official retirement ceremony Department of the United States Army Meritorious Civilian Service Medal was awarded to Dr. Sezer Gökhan, Attorney-at-Law as official commendation for meritorious performance of duty from 21 May 1969 to 7 July 2008.

A STUDY
ON TURKISH CRIMINAL TRIAL SYSTEM