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I. Introduction

The legal provisions of the International Crimes Section of the New Turkish Penal Code (TPC)¹, Articles 76ff, entitled “Genocide, Crimes against Humanity and Organisation” criminalize the establishment, operation and participation in any organization in which the purpose is to commit genocide and crimes against humanity².

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¹ The New TPC, Act No. 5237, has been adopted by the Turkish Grand National Assembly (hereinafter referred to as “TGNA”) on 26.09.2004, and was published in the Official Gazette dated 12.10.2004 and numbered 25611 and entered into force on 1 June 2005.

² It is worthwhile for the reader to have a translation of the relevant provisions of the Code before proceeding to a fuller analysis.

Genocide

ARTICLE 76- (1) The commission of any of the following acts, against any member of ethnical, racial, or religious group with the intent to destroy such group, in whole or in part, through the execution of a plan shall constitute Genocide:

- a) Intentional killing;
- b) Causing serious harm on the physical or mental integrity of persons;
- c) Forcing the group to live under conditions calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.

(2) Any person who commits genocide shall be sentenced to a penalty of aggravated life imprisonment. However, where the offences of intentional killing and intentional injury are committed in the course of genocide, there shall be an actual aggregation of such offences, in accordance with the number of victims identified.

(3) Legal entities shall also be subject to security measures in respect of these offences.

(4) There shall be no prescriptive period in respect of these offences.

Crimes Against Humanity

ARTICLE 77- (1) The systematic performance of any act described below, against a part of society and in accordance with a plan with a political, philosophical, racial or religious motive shall constitute a crime against humanity:

- a) Intentional killing;
- b) Intentional injury;
- c) Torture or inhuman treatment or slavery;
- d) Depriving one from his/her liberty;
- e) Subjecting persons to scientific experiments;
- f) Sexual assault; sexual abuse of children;
- g) Forced pregnancy;
- h) Forced prostitution.

2. Where the act described in subparagraph (a) of paragraph 1 is committed the offender shall be sentenced to a penalty of aggravated life imprisonment. The acts described in the remaining subparagraphs shall be subject to a penalty of imprisonment for a term of not less than eight years. However, for the acts of intentional killing and intentional injury defined in paragraph 1, subparagraphs (a) and (b) respectively, there shall be an actual aggregation of the offences, in accordance with the number of victims identified.

3. Legal entities shall also be subject to security measures in respect of these offences.

4. There shall be no prescriptive period in respect of these offences.

Organisation

Before we proceed to examine the genocide-related provisions in the TPC, it is worthwhile evaluating the concept of international crimes itself in the TPC. The second chapter of the Turkish Penal Code under the heading of “*Special Provisions*” begins with describing those acts that are called “International Crimes”. International crimes are regulated in the TPC under two main sections: genocide, and crimes against humanity on the one hand, and migrant smuggling and human trafficking on the other. The crime of genocide which constitutes the subject matter of this article, along with crimes against humanity, and the crime of establishing a criminal organization is regulated in the first section, whereas the crimes of migrant smuggling (Art. 79) and human trafficking (Art. 80) are regulated in the second section.

Genocide and crimes against humanity were not regulated by the former TPC.³ Locating them to the initial part of the special provisions of the new TPC demonstrates that the TPC adopts a philosophy which prioritizes the common values of humanity.⁴ The Turkish legislation has regulated these crimes in the very first part of the TPC taking into consideration their character as a threat to humanity as a whole, and as the severest crimes concerning the entire international community because they do not culminate only in the destruction of the target group, but also the values encompassed within the concept of humanity. As already mentioned, the TPC also regulates *human trafficking* and *migrant smuggling* within the section of international crimes. Criticisms were raised regarding their place within the code⁵ on the grounds that these offenses had never been recognized as “international crimes” within the statute of any international tribunal and they could just have been regulated within the corresponding section according to the legally protected interest⁶ while acknowledging the transnational character of these actions, and apart from the fact that the perpetration by international organizations does harm to subjects of more than one country, and it is needed to cooperate internationally.

Indeed, it can be seen that in the statutes of *ad hoc* international criminal tribunals from Nuremberg to the permanent International Criminal Court, these four categories of crime took place: Genocide, crimes against humanity, war crimes and aggression. They are exclusively considered as the most serious crimes which are subversive of peace and order of humanity, cause heavy violations of human rights and concern the international community as a whole, by the international law.⁷

In international legal theory the concept of international crimes refers to a conduct that is contrary to international law, which gives rise to the criminal liability of the individual irrespective of where it takes place.⁸ Despite the doctrinal controversy

ARTICLE 78 – (1) Any person who establishes or directs an organisation which is established for the purpose of committing the offences referred to in the aforementioned articles shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years. Members of such organisations shall be sentenced to a penalty of imprisonment for a term of five to ten years.

(2) Legal entities shall also be subject to security measures in respect of these offences.

(3) There shall be no prescriptive period in respect of these offences.

³ Act No 765.

⁴ **Durmuş Tezcan/Mustafa Ruhan Erdem/R. Murat Onok**, *Teorik ve Pratik Ceza Özel Hukuku*, 6th Edition, Ankara, 2008, p. 58.

⁵ **Tezcan/Erdem/Onok**, (6th), p. 58.

⁶ **Faruk Turhan**, “Yeni Türk Ceza Kanunu’na Göre Uluslararası Suçların Cezalandırılması”, *HPD Hukuki Perspektifler Dergisi*, No: 3, April 2005, p. 10.

⁷ **William A. Schabas**, *An Introduction to the International Criminal Court*, 2nd Edition, Cambridge, 2004, p. 26.

⁸ Within their substantial content, “International crimes” could be described as acts that injure the order of international community, affect the international community as a whole and constitute an assault against humanity as a whole. (**Olgun Degirmenci**, “Uluslararası Ceza Mahkemelerinin Kararları

over the classification of conduct prohibited under international law, it is now widely accepted that offenses punishable anywhere, irrespective of circumstances, constitute international crimes. Whereas offenses conditioned by the nationality of the offender or the *locus delicti commissi*, or the countries that are signatory to a particular treaty criminalizing that conduct, are best classified as transnational crimes.⁹ International crimes give rise to personal criminal liability, they produce direct harm not only to their immediate victims, but also to entire international community. It is now accepted that genocide, crimes against humanity, war crimes and aggression¹⁰ fall squarely within this category. On the other hand, regarding transnational crimes, although they have been prohibited by treaties, the exact modalities of punishment, and liabilities are left to the discretion of States parties.¹¹ These are known as treaty crimes, and include among others, offences against sea and air transport, drug trafficking, terrorism, counterfeiting of currency, environmental crimes, human trafficking, migrant smuggling and others.¹²

Although the new TPC has regulated and encompassed genocide, and crimes against humanity under international crimes, it has failed to regulate war crimes, and the crime of aggression. Even if the absence of the crime of aggression can be justified by the fact that the ambiguity of its definition might contradict the principle of “clarity”,¹³ it is still an important defect that the war crimes have not been regulated in detail in TPC or Military Penal Code (MPC) considering the unanimous agreement on their definition.¹⁴ Furthermore, it is debatable why human trafficking and migrant smuggling were not incorporated in other relevant sections of the TPC since other crimes, such as torture, drug trafficking and crimes against the environment, that have trans-national character are incorporated in other relevant sections of the TPC. On the other hand, it is important that the Turkish legislation which began to consider these offences as violations of not only the personal values of the victims (e.g. right to life, physical and sexual privacy and others), but also the core values of humanity, locates these conducts in that part, in terms of their acknowledgement as crimes against international law. At the present day, migrant smuggling and human trafficking are viewed as being tantamount to slavery, and practices akin to the slave trade, and this approach justifies their treatment as international crimes in the TPC¹⁵.

On the other hand, the provisions of TPC relating to genocide and crimes against humanity can be seen as “dead provisions” in a sense, because they will be rarely put into practice, particularly during peacetime. In fact, there are almost fifty years between Nazi holocaust during WW II and the mass crimes, including genocide, committed in the former Yugoslavia during the 1990s. Under the belief that these crimes will never materialize on their territory, many countries, including Turkey, do not consider the lack of regulation of some international crimes as a particular legislative deficiency. As a

Işığında Mukayeseli Hukukta ve Türk Hukukunda Soykırım Suçu (TCK m. 76)”, Türkiye Barolar Birliği Dergisi, (“TBDD”), No: 70, 2007, p. 53).

⁹ **Turhan**, HPD Nisan 2005, p. 9; for the classification in the same direction, see, **Tezcan/Erdem/Onok**, (6), p 59; in the matter of the other classifications, also see, **Degirmenci**, TBDD, 2007/70, p. 54-55.

¹⁰ For a wide evaluation on the development of the crimes of aggression in international law, see **R. Murat Onok**, “Savaşın Yasaklanma ve Cezalandırılma Süreci”, HPD Hukuki Perspektifler Dergisi, No: 3, April 2005, p. 21 et seq.

¹¹ **Schabas**, An Introduction to the International Criminal Court, p. 26.

¹² See **Turhan**, HPD April 2005, p. 9.

¹³ **Tezcan/Erdem/Onok**, (6), p. 61, fn. 17; for the opinion that there is an uncertainty on the definition of this concept see **Ezeli Azarkan**, Nuremberg’ten La Haye’ye: Uluslararası Ceza Mahkemeleri, Istanbul, 2003, p. 32.

¹⁴ **Turhan**, HPD April 2005, p. 9; **Tezcan/Erdem/Onok**, (6), p. 62.

¹⁵ **Azarkan**, p. 24.

matter of fact, since these actions can be punished according to classical types of crime, such as murder, assault & battery and torture, it may be unnecessary to regulate them in national penal codes. Nonetheless, by defining these crimes, Turkey aims to fulfil its obligations under the 1948 Genocide Convention and to pre-empt any future ratification of the ICC Statute. Furthermore, Turkish law-makers are keen to codify these crimes because of the sensitivity of the international community in the past twenty years and the creation of numerous international criminal tribunals. As a result, they have been incorporated in the Code with a view to achieving a definition that was accurate in accordance with international legal developments.

II- Definition and Characteristics of the Crime of Genocide

The first definition of the crime of genocide¹⁶ in an international text took place with the adoption of the "Convention of the Prevention and Punishment of the Crime of Genocide" (Genocide Convention) by the United Nations General Assembly¹⁷. Turkey has ratified this convention with the Law No. 5630 dated 23.3.1950 with no reservations¹⁸. Article 1 of the Genocide Convention urges State Parties to committing themselves to recognize genocide as an international crime, in order to prevent and punish the criminals who commit this crime whether it takes place in time of peace or war. Article 2 of the Convention describes which acts constitute the crime of genocide and Article 3 provides that attempt, and participation in committing genocide should also be punished in addition to the commission of genocide itself. Article 5 obliges State Parties to duly put in force within their constitutional framework necessary laws and regulations for the implementation of the provisions of the Convention and effective punishment of those who committed this crime and their collaborators¹⁹.

Turkey has managed to fulfil this obligation, arising from the Genocide Convention, only fifty-five years later, with the regulations in the new TPC, which entered into force on June 1, 2005.²⁰ The provision which describes the crime of genocide in article 76 of TPC, was drafted in line with the definition stipulated in Article 2 of the Genocide Convention²¹. It should also be noted that, subsequent to its adoption, the definition of the crime of genocide set out in the Genocide Convention has been wholly adopted, without any changes, by the Statute of the International Criminal

¹⁶ The word of genocide has been used at first in 1944 by *Raphel Lemkin* in his book which was written about the crimes that were committed during the Nazi occupation of Europe (*Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944), (cited by **Schabas**, *An Introduction to the International Criminal Court*, p. 36).

¹⁷ *Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948*. See **Faruk Turhan**, "Soykırım Suçunda Bir Grubu Tamamen veya Kısmen Yok Etme Amacı ve Ermeni Tehciri Olayı", in: HPD Hukuki Perspektifler Dergisi, No: 9, December 2006, p. 48; **Degirmenci**, *TBBD*, 2007/70, p. 52; **Adem Sozuer**, "Soykırım değil, çünkü...", in: HPD Hukuki Perspektifler Dergisi, Vol: 9, December 2006, p. 8; **Veli Ozer Ozbek**, *TCK İzmir Şerhi, Yeni Türk Ceza Kanununun Anlamı (Açıklamalı-Gerekçeli-İçtihatlı)*, Vol: 2, Özel Hükümler (Madde 76-169), Uluslar arası Suçlar ve Kişilere Karşı Suçlar, Ankara, 2008, p. 78; **Azarkan**, p. 34.

¹⁸ *Published in the Official Gazette dated 29 March 1950 and numbered 7469*

¹⁹ See for the opinion that the convention obliges the States Parties solely for punishing the perpetrators of genocide but this obligation remains limited as it is only valid for the State where the crime took place, **Turhan**, *HPD* April 2005, p. 10.

²⁰ See **Sozuer**, *Soykırım değil, çünkü...*, p. 9; **Degirmenci**, *TBBD*, 2007/70, p. 52; **Timucin Koprulu**, "Soykırım Suçu Üzerine Tartışmalar", in: HPD Hukuki Perspektifler Dergisi, No: 6, May 2006, p. 98

²¹ Crime of genocide was not regulated as an independent crime in the Statute of Nuremberg Military Court but as a means of committing crimes against humanity.

Tribunal for the Former Yugoslavia (ICTY) (Art. 4/2), the Statute of the International Criminal Tribunal for Rwanda (ICTR) (Art. 2/2), and most recently the Statute of the International Criminal Court (ICC) (Art. 6), which entered into force on 1 July 2002.²² The decisions by the above-mentioned international criminal courts have a very significant function to facilitate understanding the elements of the crime described in TPC, since Turkish domestic jurisprudence concerning genocide does not exist yet.

Today, it is accepted that the crime of genocide is the most serious type of international crime. This was confirmed, inter alia, in the *Kambanda* case by the ICTR when the Court identified genocide as “*the ultimate crime*” and “*the crime of crimes*”²³. Prohibition of genocide is recognised as a *jus cogens* rule of international law²⁴. Hence, all States, notwithstanding the fact of being a Party to it or not, are bound with the obligations stipulated in the Genocide Convention²⁵. Article 1 of the Genocide Convention classifies this crime as an international crime whether it is committed in time of peace or war. Pursuant to Article 2 of the Convention, genocide:

“*means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.*”

III- The Legally Protected Interest

The place of the crime within the Code is important in determining which legal interest is protected by regulating the crime. The legal protection has not been directed to individual values, since the crime of genocide is regulated, within the section of “International Crimes” and before the section of “Crimes. Against Individuals”. Genocide was defined as “*denial of the right to exist of all human groups*” in the preamble of the Resolution No. 96(I) of United Nations General Assembly²⁶. The crime of genocide is indeed not a mere violation of the individual victim’s right to life, physical privacy, sexual freedom, personal freedom, and dignity. Besides, victims are not exposed to genocide because of personal reasons, but for being members of a certain ethnic

²² **Turhan**, HPD December 2006, p. 48; **Schabas**, An Introduction to the International Criminal Court, p. 37; **Verda Neslihan Akun**, “Uluslararası Hukukta ve Türk Hukuku’nda Soykırım (Jenosid) Suçu”, MHB Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Prof. Dr. Sevin Toluner’e Armağan, Year 24, No 1-2, 2004, p. 56.

²³ **Schabas**, An Introduction to the International Criminal Court, p. 37; **Ilias Bantekas/Susan Nash**, International Criminal Law, Second Edition, London, Sydney, Portland, Oregon, 2003, p. 358.

²⁴ For a confirming view see the Case of *Jorgic v. Germany* (Application no. 74613/01, Judgement Date: 12 July 2007) where the ECtHR states that “pursuant to Article I of the Genocide Convention, the Contracting Parties were under an *erga omnes* obligation to prevent and punish genocide, the prohibition of which forms part of the *jus cogens*. See para. 68 et seq.

²⁵ The International Court of Justice has also upheld that, the prohibition of genocide is binding on non-Party States and preventing genocide has a *jus cogens* nature. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) dated 26 February 2007, parag. 161-185; See also Degirmenci, TBBD, 2007/70, p. 54; Akun, p. 56.

²⁶ See **William A. Schabas**, Genocide in International Law, Cambridge University Press, Cambridge, 2000, p. 152; **Sinan Kocaoglu**, “Uluslararası Ceza Hukuku ve 5237 sayılı Türk Ceza Kanunu Bağlamında Soykırım Suçu”, Ankara Barosu Dergisi, No: 3, 2005, p. 149.

group. Hence, it would be correct to say the legally protected interest is the right to exist of national, ethnical, racial or religious groups, within the family of mankind.

It shall be noted that, if commission of such acts on the soil of any State gives the people living in another corner of the world the feeling that their humanity is being attacked, and raises concerns regarding the continuity of their existence as human beings, the criminalization of such acts is indeed intended to preserve the international existence of humanity.

IV- Elements of the Crime

A-Material Elements:

1-Perpetrator of the Crime

Anyone could be the perpetrator as Article 76 does not seek any particular characteristic or profile for being a perpetrator. Therefore, although the perpetrators of this crime might in general be those who exercise official powers such as rulers, soldiers, and policemen; members of paramilitary units, members of guerrilla groups, and terrorist organizations may also be the perpetrators. This was also confirmed by Article 4 of the Genocide Convention as it states: “*Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals*”.

It is theoretically possible to perpetrate this crime individually as Article 78 of TPC foresees a separate penalty for establishing an organization for perpetrating these crimes. However, in practice, both the seriousness of the acts constituting the crime as quantity and quality, and the requirement of these acts to be committed with the aim of destroying a particular group in the course of execution of a plan force the perpetrator(s) to act within a group. In other words, it is difficult for an individual to perpetrate this crime only with his/her own strength and faculties.

2- Victims of the Crime

There are two types of victims of this crime in the broad and limited sense. Victims in the broad sense is all people who constitute the international society. The *ad hoc* courts established by the United Nations in the past and the ICC find their legitimacy in this fact. Victims in the limited sense are members who are exposed by *national, ethnical, racial or religious* groups to acts which constitute genocide. The most important point that should be taken into consideration in respect of this crime is although the attack occurs on individuals; the actual target of the acts that constitute genocide is the group of which the victim is a member²⁷. In other words, for materialization of this crime, victim or victims shall be targeted merely for being a member of a certain national, ethnical, racial or religious group. The groups, members of which could be subjected to genocide are counted in the Code exhaustively which implies that any act against a person who is not a member of any of these groups would not constitute that crime. This aspect makes the crime of genocide, a *peculiar* crime in respect of its victim²⁸.

²⁷ Akun, p. 58; Degirmenci, TBBD 2007, p. 80.

²⁸ Similarly, in *Akayesu case*, the Court has upheld that, murder of a member of *Hutu* Clan during killings of members of *Tutsi* Clan in the context of genocide did not constitute the crime of genocide. (see *Prosecutor v. Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, par. 710; Schabas, *Genocide in International Law*, p. 158.). Actually, the same conclusion could have been reached in line with the provisions of error in the objective elements of crime (See TPC Art. 30/1).since the knowledge

These groups are identified as groups having *national, ethnical, racial or religious* common values in the Genocide Convention, other international conventions, and the TPC. Although the Draft of the TPC as approved by the Justice Commission of Turkish Grand National Assembly (TGNA), extended the scope of protection over the groups which could be “*determined by a feature except these*”, this expression was later removed by a motion raised in the TGNA. The common feature of these groups counted exhaustively is the fact that the bond with the group occurs automatically by birth and hence it has an undeniable, permanent, and continuous character²⁹. Thus, murdering people, for example, who are members of groups from which departure is possible with the will of individuals such as the political and economical groups, does not constitute that crime³⁰.

Among those, *national group* is the group constituted by people who have common values such as the same citizenship, common history, culture, language, customs, and traditions.³¹ *Ethnical groups* are established in the course of time and have a certain cultural custom and life style. Although it is not necessary for the members constituting the ethnical group to be members of the same race, they should speak the same language, and have common customs and life style. *Racial groups* are the social groups of members of which have the same genetics (i.e physical features such as skin color, body shape, etc.). The *religious groups* have the same belief, believe in the same guide or founder, have common spiritual ideas or practice the same form of worshipping. Blasphemous people are not included in that group.³²

3- Act

The crime of genocide, in principle, is separately and independently criminalization and perpetration of certain crimes that have already been described in various articles of the TPC with the aim of annihilating a particular group. Therefore, it would still be possible to punish the perpetrators for their acts on account of crimes such as intentional killings, intentional battery, sexual assault, forcible abortion, depriving people from freedom even if "the crime of genocide" was not regulated in the TPC. In harmony with the developments in international law, the TPC described these acts separately as "the crime of genocide" similar to its contemporaries in other countries.

The acts constituting genocide are all stipulated in five sub-paragraphs of Article 76 Paragraph (1). The *numerous clausus* principle is to be applied here and committing the crime of genocide is not possible through other types of acts. In respect of these characteristics, it is a *crime with alternative acts*. Because numerous acts constituting this type of crime alternatively are provided in the Code. Commission of merely one of the alternative acts is sufficient for the occurrence of the crime³³. The perpetrator might

on the victim's membership to a particular group should constitute a part of the intent. Should the perpetrator not know this, the crime of genocide does not occur. In such a case, the perpetrator shall be tried on charges of intentional killing instead of genocide.

²⁹ *Prosecutor v. Akayesu*, par. 511; **Turhan**, HPD April 2005, p. 13; **Akun**, p. 57; **Degirmenci**, TBBD 2007/70, p. 62; **Tezcan/Erdem/Onok**, (6th Edition), p. 65-66.

³⁰ **Akun**, p. 57. For the opinion that economic and social groups should also be accepted as the victim of the crime, and the criticism of Genocide Convention in this respect, see **Kocaoglu**, p. 154.

³¹ ICTR has defined the national group in its *Decision on Akayesu* as the “*a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.*” (**Kocaoglu**, p. 153).

³² For definitions of the concepts, see **Turhan**, HPD April 2005, p. 13; at the same direction, **Tezcan/Erdem/Onok**, (6), p. 67- 68.

³³ **Degirmenci**, TBBD 2007, p. 86; **Kocaoglu**, p. 151; **Tezcan/Erdem/Onok**, (6th Edition), p. 68.

commit some or all of them at once and there would still be one single crime of genocide. For instance, it would be a single genocide crime to force a national group to live under exterminating circumstances and then intentionally kill group members.

In line with the definition provided by the Code, crimes can either be committed by only committing acts or materialization of the results might also be considered necessary as a material element of the crime. Likewise, two of five acts described in Article 76 necessitate the materialization of the result. These are intentional killing which causes serious harm to the physical and mental integrity of persons. On the other hand, materialization of a result is not necessary for the remaining three acts. In terms of these actions, genocide is a *conduct crime* (in opposition to *result crime*).³⁴

In addition, those acts which constitute the crime of genocide can be committed by commission and also omission³⁵.

It should be highlighted that the acts stipulated in TPC are parallel to the Genocide Convention and the statutes of international criminal courts. Common feature of acts constituting the crime of genocide is the physical annihilation of the groups specified in the Article³⁶. The acts that destroy culture, religion or language of a group will not constitute this crime³⁷. However, the element of execution of a plan while committing these acts is also a requirement for the occurrence of the crime in terms of TPC.

a) Intentional Killing

Intentional killing refers to intentionally terminating the lives of people belonging to a national, ethnical racial or religious group. A plural expression, , "*against members of these groups*", is used in the Code. This expression shall not be interpreted in a way to set the requirement of committing intentional killings or any of the others against at least two members of the group for the occurrence of the crime. In this context, it is not necessary to kill all or a significant portion of the members of the group but murdering a single group member with the purpose of genocide would be sufficient to constitute the crime³⁸. However, the plural expression in the definition of crime indicates that a single crime of genocide would occur even if more than one group member is killed³⁹. But the Code, in the second paragraph of Article 76, provides that where the offenses of intentional killing and intentional injury are committed in the course of genocide, there shall be an actual aggregation of such offenses, in accordance with the number of victims identified. If such an exception had not been included in the Code, the perpetrator would be sentenced on a single account as the sheer number of victims is defined as an element in the definition of crime.

The crime of genocide may occur if an intentional killing is committed by omission if there exists a legal obligation for the offender to act. (see Art. 83, TPC). For instance, if an officer does not take necessary precautions to protect people who are under threat of

³⁴ Compare **Schabas**, *Genocide in International Law*, p. 155.

³⁵ **Schabas**, *Genocide in International Law*, p. 156.

³⁶ See and compare judgement of the ECtHR in the case of *Jorgic v. Germany* (Application no. 74613/01, Judgement Date: 12 July 2007), where the Court states that "Article II of the Genocide Convention, did not necessitate an intent to destroy that group in a physical or biological sense. It was sufficient that the perpetrator aimed at destroying the group in question as a social unit". See para. 103 *et seq.*

³⁷ **Akun**, p. 60.

³⁸ **Schabas**, *Genocide in International Law*, p. 158.

³⁹ This issue was dealt with in the *Jorgic v. Germany* case when a decision of the Düsseldorf Court of Appeal convicting Nikola Jorgic of eleven counts of genocide was amended by the Federal Court of Justice and Jorgic was only convicted of one count of genocide. See paras. 15 ve 23.

being killed and this leads to their extermination, a crime by omission would occur. This was upheld clearly by the ICTR in *Kambanda case*⁴⁰.

b) Causing Serious Harm on the Physical or Mental Integrity of Persons

This act constitutes the aggravated form of wilful injury in the classical sense. This refers to torture or inhuman degrading or ill treatment of people which brings physical or psychological effects. The perpetrator shall inflict severe physical or psychological harm on group members as a result of such acts. However, ICTR upheld that the severe physical or psychological impact on group members shall not necessarily be of a permanent and irrevocable nature.⁴¹ In another ICTR decision it was upheld that the concept of severe physical and psychological harm in the Statute includes severe and serious damage to the health, internal and external organs, mutilation of body parts, hitting with the butt of a rifle, sexual assaults, and administering drugs⁴². The Court has concluded that the severe psychological harm shall be examined in every individual case, and shall not necessarily be a result of physical damage while upholding that non-physical assaults such as heavy fear, threats and intimidation could also result in severe psychological harm.⁴³ Physical or mental harm inflicted on the members of the group, should carry the threat of complete or partial annihilation of the group.⁴⁴

c) Forcing the group to live under conditions calculated to bring about its physical destruction in whole or in part

This act, ultimately aims at the mass annihilation of the physical existence of group members. This act can be committed by impairing the life conditions of the group members which would eventually cause their gradual extermination. The group members are intended to be annihilated through such indirect attacks targeting their bodies. For instance, imprisoning them in concentration camps, depriving them of clothes, shelter and medical needs or subjecting them to involuntary labour beyond their strength.⁴⁵ While the factor of omission remains valid for all acts that constitutes the crime of genocide, the clearest field of application lies with this sub-paragraph. Hence, this act can be committed by deprivation of minimum nutrition, sheltering, and medical care. Likewise, Nazi authorities reduced the amount of daily nutrition to 400 and even 250 calories in Nazi occupied countries. Such acts are also called “*negative violence*”⁴⁶. Systematic forced exile carried out under severe conditions and with a view to exterminate the group may also constitute genocide if only the conditions would result at least to partial annihilation of the group⁴⁷.

d) Imposing measures intended to prevent births within the group

⁴⁰ See **Schabas**, *Genocide in International Law*, p. 156.

⁴¹ *Prosecutor v. Akayesu*, par. 501, 503; similarly see ICTY, *Prosecutor v. Karadzic and Mladic*, (Case Nos. IT-95-5-R61, IT-95-18-R61), 11 July 1996, par. 93; **Schabas**, *Genocide in International Law*, P. 160, 161.

⁴² *Prosecutor v. Kayishema and Ruzindana*, (Case No. ICTR-95-1-T), Judgment, 21 May 1999, par. 109.

⁴³ *Prosecutor v. Akayesu*, par. 502; **Akun**, p. 61; **Turhan**, HPD April 2005, p. 14.

⁴⁴ **Akun**, p. 61.

⁴⁵ **Turhan**, HPD April 2005, p. 14; **Akun**, p. 61; **Tezcan/Erdem/Onok**, (6), p. 69.

⁴⁶ **Schabas**, *Genocide in International Law*, p. 156.

⁴⁷ **Turhan**, HPD April 2005, p. 14; **Akun**, p. 61; **Tezcan/Erdem/Onok**, (6), p. 69.

This act, also known as “biological genocide”, refers to taking measures which would in the long term cause the annihilation of a group in whole or in part. It is accepted that, this act contains three sub-category acts. These are *sterilization and / or compulsory birth control (abortion), keeping women and men separated and preventing marriages*. Acts of sexual assault which aim to change the ethnical structure of a group are also accepted in this scope. Likewise, in the decisions of ICTY and ICTR, impregnation of women belonging to a group by men from another group through systematic rapes, and traumas which results in group member to lose their reproduction desires, and sexual injuries are upheld to be in this scope. Besides, it shall be noted that implementation of measures to prevent births within the group would be sufficient for the occurrence of the crime, and materialisation of the perpetrator’s purpose is not sought.⁴⁸

e) Forcibly transferring children of the group to another group

This act is also accepted as “biological genocide”, by the International Law Commission. According to the Commission, transferring children by force will cause serious effects particularly on the future life of a group⁴⁹. However, distinct from other *crimes with alternative acts* constituted genocide, here, material (physical) extermination of group members is not the matter⁵⁰. For occurrence of the crime, the children should be transferred from a victim group to the other group. If the act of transfer could not be completed, with causes beyond the control of the perpetrator, the crime remains at the attempt stage. However, ICTR upheld in *Akayesu* case that such a threat of transfer is sufficient⁵¹. In our opinion, if threat of transfer reaches the seriousness that could be interpreted as initiating the commissioning of the crime, it could at most be classified as an attempt for the crime.

The concept of “*forcibly*” stipulated in the article, refers not only to transfers carried out by using physical force (*under duress*), but also includes the transfers by use of immaterial force (*by threat*)⁵².

In the scope of this act, the children belonging to a particular group are taken away from the group which their families belong to, and forced to grow up in another group in line with the social and cultural features of the latter group. This act causes the child’s original group to become extinct, and cuts social and cultural bonds between the child and the group. The child becomes alienated from his own cultural community.. Ultimately, these acts prevent the growth of the victim group and cause their gradual biological destruction. Transfer by force can be carried out by using physical duress as well as via threatening or pressure. However, the transfer should have a constant character and the purpose of destroying the existence of the group⁵³.

4- Committing the Acts through the Execution of a Plan

⁴⁸ **Schabas**, *Genocide in International Law*, p. 172, 173; **Tezcan/Erdem/Onok**, (6), p. 69; **Degirmenci**, *TBBD 2007/70*, p. 92.

⁴⁹ **Schabas**, *Genocide in International Law*, p. 176.

⁵⁰ **Akun**, p. 63.

⁵¹ *Prosecutor v. Akayesu*, par. 505.

⁵² **Schabas**, *Genocide in International Law*, p. 177.

⁵³ **Turhan**, *HPD April 2005*, p. 14; **Tezcan/Erdem/Onok**, (6), p. 69; **Schabas**, *Genocide in International Law*, p. 176.

It should be emphasised, for the occurrence of the crime, that the acts constituting the crime of genocide should be committed “*through execution of a plan*”. As stated in the reasoning of the Article, “by using this expression, the Genocide Convention was abandoned and a regulation was drafted in line with Article 6 of the Statute of the Nuremberg Court, as was done in the French Criminal Code. Because, Article 2 of the Convention sought the commission of genocide “*with intent to destroy a group*” and established a subjective criterion whereas the TPC introduced an objective criterion by seeking “*execution of a plan*”.” It has also been expressed in the reasoning that the planned and systematic character of the attempted crime was emphasised by the use of this expression.

However, in the doctrine it is asserted that the Convention and remaining Statutes do not seek the existence of a plan, the crime can be committed through a spontaneous decision following no plans⁵⁴, and the wording of TPC narrows down the contents of the crime and contended that existence of a plan shall not be considered as an element of the crime but as concrete proof of the intention of the perpetrator towards destruction⁵⁵. It shall yet be said that, also those authors favouring this view accepts that a plan exists in typical genocides as the intention of destroying a group in part, or in whole can only be achieved through a systematic and planned assault.

We shall note that the acts except intentional killings regulated under sub-paragraph (a) can mainly be committed in a planned, and systematic manner as a result of their natures. Killings through the execution of a plan has a distinctive role to differentiate the killings that constitute genocide from ordinary intentional killing. The subjective elements of the crime shall also be taken into consideration. It would not be practical or possible to commit genocide without a plan. Execution of such plans as a part of state policies is of course not necessary⁵⁶. In addition, the perpetrator does not necessarily have to be aware of all the details regarding the plan or relevant policies.⁵⁷ Similarly, the existence of a plan does not necessitate detailed description of all steps in advance. The focus shall be on the fact that the acts that fall in the scope of genocide were carried out not by coincidence but within a plan which is developed in general terms, and with the intentions of destroying a certain group.

5- Subjective Elements

The crime of genocide can only be committed intentionally and can not be committed by negligence. Intention is acting knowingly and wilfully in respect of all the objective elements in the description of a crime (TPC A. 21/1). In order for the occurrence of the crime of genocide, the perpetrator shall be aware of all objective elements that are identified in description of the Code which are explained above. In this context, the perpetrator should be aware of the fact that, he/she is committing the acts, stipulated in Art. 76, against members of a national, ethnical, racial or religious group through the execution of a plan. However, one’s awareness of being the perpetrator of these acts alone is not sufficient for the occurrence of the crime of genocide.

⁵⁴ Likewise, in its judgment on *General Krstic* where the defendant was found liable for the Massacre in Srebrenica and guilty, ICTY upheld that existence of such a plan would be considered as a material evidence for the intent to destroy. (See **Akun**, p.66). Likewise, ICTR, in the case of *Akayesu*, took the existence of a genocide plan into consideration for proving the defendant’s intent for genocide (See **Bantekas/Nash**, p.360).

⁵⁵ **Akun**, p. 66; in the same direction **Degirmenci**, TBBD 2007/70, p. 97; **Kocaoglu**, p. 164.

⁵⁶ **Tezcan/Erdem/Onok**, (6), p. 71.

⁵⁷ **Turhan**, HPD April 2005, p. 13.

The element of *purpose* was also included in the Article as a subjective element in addition to *intention*. The perpetrator shall commit these acts *for the purpose of destroying a group in whole or in part*. Hence, committing the identified acts intentionally alone is not sufficient to classify an act as genocide. In addition, it shall be certain that the perpetrator commits the acts with the purpose of destroying a national, ethnical, racial or religious group in whole or in part. Those crimes which contain the element of *purpose* could only be committed *intentionally*, and cannot be committed by *recklessness (dolus eventualis)*. As the occurrence of the crime of genocide requires the perpetrator to act with a certain purpose, this crime can only be committed with *direct intent (dolus directus)*.⁵⁸

The most important element differentiating the crime of genocide from others and particularly crimes against humanity is the existence of the purpose to destroy a certain group in whole or in part⁵⁹. The *purpose* as one of the subjective elements of genocide is the idea preceding and developing the intention which demonstrates the perpetrator's objective for his/her acts⁶⁰. Concerning the crime of genocide, the purpose of the perpetrator is not only killing the people belonging to a group, but also destroying that group in whole or in part by this act and also eliminating the existence of future generations of that group⁶¹. However, for occurrence of the crime of genocide, the perpetrator's action with this purpose is sufficient and materialization of him/her is not to be sought. It is highly possible that a perpetrator's commissioning of acts that are counted among the objective elements of the crime against a group through execution of a plan would expose his/her purpose. This is confirmed in *Krstic* and *Jelusic* cases where the ICTY upheld the existence of a plan of genocide as a strong basis for proving the element of purpose although it is not a legal element of the crime⁶².

The acts that constitute genocide shall be committed against the members of a national, racial, ethnical or religious group for the purpose of destroying that group in whole or in part. In this context, the perpetrator should also be aware of the fact that the victim is a member of a national, racial, ethnical or religious group. Victim's memberships to the mentioned groups constitute the normative element of the typicality of the group. Therefore, it is necessary and sufficient for the perpetrator to have conceptual knowledge about the groups that the victim is a member of. In other words, it would be necessary and sufficient if the perpetrator is aware of the social meaning of these concepts. Other than that, the perpetrator's possession or lack of knowledge about the legal meanings and borders of these concepts is not important in respect of *intention*⁶³. Actually, if there are no people that are members of a national, racial, ethnical or religious group, the act cannot be physically accomplished on the grounds of lack of subject for the crime (*impossible crime*). An assumption of the perpetrator in

⁵⁸ The perpetrator's knowledge regarding the objective elements of the crime is full in terms of *direct intention*. If the perpetrator predicts *definitely* that the objective elements in the legal definition of the crime exist or will exist during the commissioning of the act and particularly that the result sought for that type of crime, it is to be said that he or she acts with direct intention. On the contrary, in terms of *eventual intent*, the perpetrator's knowledge regarding the objective elements is not complete. The perpetrator *considers possible* that the elements in the legal definition of the crime yet commits the act and *accepts* the outcomes. See **Mahmut Koca/Ilhan Uzulmez**, *Türk Ceza Hukuku Genel Hükümler*, 2nd Edition, Ankara, 2009, p. 193 et seq.

⁵⁹ **Bantekas/Nash**, p. 360.

⁶⁰ See **Koca/Uzulmez**, p. 240 et seq.

⁶¹ **Akun**, p. 60.

⁶² **Schabas**, *An Introduction to the International Criminal Court*, p. 39; **Bantekas/Nash**, p. 360-361, fn. 138.

⁶³ **Koca/Uzulmez**, *Türk Ceza Hukuku*, p. 187.

believing that a certain group of people have the particularities (*mistake of fact*) does not result in punishment on the account of genocide. However, lack of knowledge on the perpetrator's side regarding the identity of the group does not lift the *direct intent* while there exists a group with objectively defined particularities and the perpetrator is aware of their existence. The perpetrator's comprehension regarding the normative elements of typicality proves sufficient.⁶⁴

Hence, the decision given by ICTY's Appeals Chamber, dated 22.3.2006⁶⁵, is inaccurate in respect of basic principles of the crime theory. The Court did not classify the actions of the perpetrator who aimed at annihilation of all non-Serbs as genocide. Because, according to the Court, the perpetrator had not committed his or her acts aiming at a particular group. It was upheld that the killing of the victim did not constitute genocide as the victim was not a member of a particular group⁶⁶. Likewise, the International Court of Justice in its decision dated 26.2.2007, again on a case filed by Bosnia Herzegovina against Serbia, has upheld that the crime of genocide had not occurred, relying on the same reasoning. In this decision, it was stated that the negative definition with the Bosnian assertion that "non-Serbs" were targeted shall not be taken into consideration in the identification of the group benefiting from criminalization of the action⁶⁷.

Both international judicial authorities have failed in terms of interpreting the element of awareness on the side of the perpetrator regarding the fact that his/her actions were committed against a particular group. In addition, they missed that the victim's membership in a particular group constituted the element of normative typicality which was provided in the description of the crime, and they failed to establish a link between this element and *intention*. In fact, the cases should have been decided as follows: The perpetrator in the present case committed his/her actions against a national group (Bosnians) the existence of which are objectively identified. There are no doubts on this aspect of the matter. The focal point of the problem lies with the question of whether the perpetrator was aware that he/she was committing the actions against a particular group. The perpetrator was aware that he/she was killing non-Serb people living in a certain territory. This reveals that the perpetrator was also aware of the fact that a national group other than Serbs also habituate in the region. This knowledge on the side of the perpetrator is sufficient for the existence of direct intent. Since these groups constitutes the normative element of typicality it is sufficient for the perpetrator to be aware of the fact that he/she is assaulting a national, ethnical, racial or religious group and the perpetrator shall not necessarily know all the peculiarities of the group such as being Bosnian, Croatian, Muslim, or Jewish, and such lack of knowledge does not lift the perpetrator's intentions. As the perpetrator was aware of the fact that he/she targeted "non-Serbs" it is safe to conclude that the perpetrator was also aware that he/she was assaulting a particular group. In addition, the perpetrator had acted with the purpose of destroying the group which are classified as "non-Serbs" and hence the element of purpose exists in the present case. Consequently, it is observed that all objective and subjective elements of the crime of genocide have occurred in the case.

⁶⁴ See **Mahmut Koca**, "Türk Ceza Hukukunda Hata", in: 3. Yılında Yeni Ceza Adaleti Sistemi, Editör: Prof. Dr. Bahri Öztürk, Ankara, 2009, p. 85.

⁶⁵ Prosecutor vs Milomir Stakić, Case IT-97-24-T.

⁶⁶ For the opinion on the same direction, see **Tezcan/Erdem/Onok**, (6), p. 67.

⁶⁷ Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) dated 26 February 2007; **Tezcan/Erdem/Onok**, (6), p. 67.

The perpetrator's intention does not necessarily have to be destroying the group in whole. Acting with the purpose of destroying the group in part also constitutes the crime of genocide. The terms "*in whole or in part*" in the definition of the crime refer to a quantitative aspect. The number foreseen by the offender has to be important. Hence, in case of the purpose of killing only a few of the group members does not constitute genocide.⁶⁸ The element of "*in part*" refers to the probability of the perpetrator acting with the intention to destroy the group that resides within a certain geographic territory. Therefore, if a perpetrator has the intentions of destroying a certain portion of a group within a certain geographic territory, his/her liability based on the grounds of genocide may occur. Consequently, the ICTY has convicted *General Krstic* on the account of genocide, for his participation in mass destruction of thousands of Muslim Bosnians' in 1995 in Srebrenica.

The case-law of ICTY and ICTR upheld that, destruction of a group quantitatively *in part* refers to a situation where the intent of destroying the group *in part* affects a significant number of people who constitutes a considerable part of the group. In other words, the perpetrator's purpose to destroy a quantitatively significant part of a particular group is sufficient⁶⁹. In such cases, the prosecutor has to prove the existence of the intention to destroy the targeted group in a particular geographical area as well as the existence of the intention to destroy the group as a whole⁷⁰. As stated in *Jelisc* case, even if the targeted group does not constitute a quantitatively significant part of the group, the existence of the intention to destroy important people such as the leaders representing the group is sufficient in terms of the element of purpose⁷¹.

It should be noted that the reference to quantity (*in whole or in part*) lies within the subjective elements of the crime. Thus, in essence it is not the actual number of victims but the existence of the purpose to destroy a significant part of the group. The quantity and number of victims constitutes evidence for the existence of the intention for genocide. The bigger the number of actual victims, the easier it would be to logically conclude that the purpose to destroy a group in whole or in part exists⁷². Besides, the crime of genocide would occur in case of the murder of even one person. It is possible to sentence the perpetrators for attempt even when no one is killed.

One should also add that the Genocide Convention identifies genocide as the actions committed with the intent of destroying "*as a group*" a "national, ethnical, racial or religious group" in part or in whole whereas the TPC does not include the phrase "*as a group*", yet this does not constitute a defect on the side of the latter⁷³ since the TPC refers to actions to be commissioned "against *any member of* national, ethnical, racial, or religious group with the intent to destroy *such group*, in whole or in part". This definition clearly sets that, members of the group shall be targeted solely for their membership in that group; namely, the intent of the perpetrator shall be destroying the group which the victim belongs.

C- Unlawfulness

⁶⁸ Schabas, An Introduction to the International Criminal Court, p. 39.

⁶⁹ Bantekas/Nash, p. 362; Tezcan/Erdem/Onok, (6), p. 71; Schabas, An Introduction to the International Criminal Court, p. 40.

⁷⁰ Bantekas/Nash, p. 362.

⁷¹ Turhan, HPD April 2005, p. 15.

⁷² Schabas, An Introduction to the International Criminal Court, p. 39.

⁷³ For an opposite opinion, see Akun, p. 68.

The legal nature of the crime of genocide and the legally protected interest not only belong to one person, but to all international societies. Therefore, the existence of any reason which makes this crime lawful is unacceptable. Hence, the reasons of the lawfulness such as self-defense, performing the provision of a law, consent of the victim or exercise of a right cannot make genocide lawful. Even committing genocide in situations such as wartime, defense of the country or orders from a superior would not transform acts of genocide into lawful acts. However, the degree of *culpability (blameworthiness)* of the people who are forced to participate in the crime due to strict hierarchical structure of the organization, , should be considered while evaluating the scope of liability.

VI- Particular Aspects of the Crime

A- Attempt

The crime of genocide is completed upon the committal of any of the acts stipulated in Article 76 sub-paragraph (1) which constitute the objective element of the crime. It is not necessary that the perpetrator reaches his/her purpose, namely destruction of the group in part or in whole. A distinction shall be made between those acts constituting genocide regarding attempt. Attempt is a possibility in respect of the acts of intentional killing, causing serious harm on the physical or mental integrity of persons, and forcibly transferring children of the group to another group since the occurrence of genocide arising from these actions is completed when the results, namely death, injury or transportation are fully in place. For instance, the crime of genocide remains at the state of attempt in case a city is bombed with the intent of destroying an ethnic group, yet no person is killed or injured. On the other hand, attempt is impossible regarding the acts of forcing the group to live under conditions calculated to bring about its physical destruction in whole or in part, and imposing measures intended to prevent births within the group since the occurrence of the crime will be completed upon mere committal of these acts and no other outcome than their committal is necessary⁷⁴.

B- Concurrence (Joinder of Crimes)

An exceptional provision of *concurrence* stands out in the second sub-paragraph of the Article . According to the provisions added by a motion during the discussions in TGNA “*where the offenses of intentional murder and intentional battery are committed in the course of genocide, the rule of “real concurrence” shall be applied, in accordance with the number of victims identified*”. This regulation is parallel with Article 43/3 of the TPC which prevents the application of the rule of *successive crime* for the crimes of murder and battery. But for this provision, one single crime of genocide would occur and one single sentence would be imposed after the committal of the acts “against members of the group”. However, as a result of the provision enshrined in the second sub-paragraph of the Article, the number of aggravated life sentences will be in correlation with the number of killed or injured victims. The motive of this amendment is to prevent the perpetrators of genocide and crimes against humanity to be in a more advantageous position when receiving sentences in comparison with ordinary criminals committing murder or battery.⁷⁵ As a consequence, if the perpetrator kills or injures ten people,

⁷⁴ Tezcan/Erдем/Onok, (6), p. 75; Degirmenci, TBBD, 2007/70, p. 102.

⁷⁵ Turhan criticises this regulation, on the grounds that it brings extremely heavier penalties in respect of acts except intentional killing (Turhan, HPD 2005, p. 15). In our opinion, this view is accurate. It could be more appropriate to apply the special aggregation provision only on intentional killing.

he/she would be sentenced to ten times aggravated life sentences. Yet in accordance with *release on probation* rules, a perpetrator having murdered or injured more than one person will be eligible for probation after serving thirty-six years in prison (The Code on the Execution of Penalties and Security Measures [CEPS], Art. 107/3-a). As a result, the difference between killing one person and and killing one-hundred persons with the purpose of genocide is six years prison term.

C- Participation

This crime does not have any peculiarity in respect of participation. The status of those who participated in the crime (whether they are accomplice, accessory, aider or abettor) shall be identified in line with the general provisions of TPC. “*Incitement of genocide*” and “*conspiracy to commit genocide*” is regulated as independent crimes in the Statute of ICC. As a consequence, even if any of the acts constituting genocide is not attempted, public and direct incitement of genocide is punishable. In our legal system, such actions would be considered in the context of “incitement to commit crime” that is regulated under Article 214 of TPC. The crime of conspiracy stipulated in the Statute of ICC would correspond to the crime of establishing a criminal organization stipulated under Article 78 of TPC. Establishing, directing or being a member of a criminal organization which is established for the purpose of committing genocide or crimes against humanity are identified as independent crimes under the mentioned article. In case those who had established or directed the organization also commit genocide or crimes against humanity, they would receive sentences separately for those offenses.

VII- Sanction

In the second sub-paragraph of the article, it is mentioned that aggravated life imprisonment, the heaviest penalty, will be imposed on the offender. However, *where the offenses of intentional killing and intentional injury are committed in the course of genocide, there shall be an real concurrence of such offenses, in accordance with the number of victims identified.* As a consequence, had the perpetrator killed or injured ten people, he/she would be sentenced to ten times aggravated life sentences. .

According to our Code, legal entities shall also be subjected to security measures for these offences (TPC Art. 76/3).

In the last sub-paragraph of Art. 76, it is adopted that no prescriptive period would apply to these crimes like the international law (Statute of ICC, Art. 29). As the Code reads only prescriptive period, it shall be acknowledged that it includes prescriptive periods both for indicting and sentencing.

VIII- Prosecution and Trials in Turkey for a Crime of Genocide Committed Abroad

By providing the rule of *extradite or punish (aut dedere/aut punire)*, various international conventions to which Turkey is a party, set the obligation to extradite the perpetrators to the country where the crime had taken place, or to prosecute them when extradition is not possible, notwithstanding them being nationals of the obliged country or aliens. Hence, Article 13 of the TPC provides that perpetrators of certain crimes including genocide shall be subject to Turkish Law as a result of Turkey’s obligations arising from international conventions to which Turkey is a party. In this context, while

the Genocide Convention obliges State Parties to punish perpetrators of genocide yet attributing such obligation only to the State where the crime took place⁷⁶, Turkey has adopted the *principle of universality* for prosecution and trial of these crimes taking into consideration both the nature of genocide and crimes against humanity as the severest crimes and her undertaking under the genocide crime as regards punishing the perpetrators. Article 13 of TPC provides that perpetrator of genocide or crimes against humanity who committed the crime abroad should be tried in Turkey notwithstanding with them being Turkish nationals or aliens.

While the early version of Article 13 of TPC had adopted the “*principle of mandatory prosecution*” and foreseen direct prosecution against the perpetrators, an amendment was made later by Law No 2377 dated 06.29.2005 with the belief that this would cause political problems in some situations. The prosecution in Turkey for crimes falling in the scope of principle of universality and stipulated under Article 13 (including genocide and crimes against humanity) was subjected to the request of Minister of Justice. A major reason for such an amendment was the necessity of considering whether prosecuting and trying those crimes in Turkey would be counterproductive for the diplomatic relations of Turkey, which finds their history and roots in peace.

As a consequence, the perpetrator shall be in Turkey in the first place to be subjected to prosecution or trial in Turkey regarding genocide or crimes against humanity committed abroad. Secondly, Turkey is obliged by international conventions to prosecute and try those crimes in her country. Finally, the Minister of Justice shall lodge a request. Besides, even if a conviction or acquittal is reached regarding those crimes in another country, a re-trial would take place upon the request by the Minister of Justice (TPC Art. 13/3). Hence, it shall be said that the principle of “*non bis in idem*” does not apply to these crimes.

Conclusion

1. Genocide is among the crimes (such as crimes against humanity, war crimes and crimes of assault) that are a common source of interest for the whole of humanity and causes the most serious violation of human rights. The fact that this crime is regulated at the beginning of the special provisions under the new TPC is a clear sign that the law makers considered the legally protected interest by the criminalization of this act to be at the top of the hierarchy of values.
2. Although Turkey did not ratify the Rome Statute an international convention as foreseen in the Constitution, she provided by Art. 38 of the Constitution and Art. 18/2 of TPC that the perpetrators of these crimes shall be given to the ICC even if they are Turkish nationals. There exists no legal constraint for Turkey to deliver the perpetrators of any of these crimes to ICC when found in Turkey. However, as Turkey is not a party to the Rome Statute yet, she is also not under such an obligation.

⁷⁶ In Genocide Convention, international criminal court which has jurisdiction is entitled for trying the genocide alongside the State where genocide crime takes place.

3. In addition, by accepting universal jurisdiction in respect of these crimes, TPC has provided that the perpetrators who committed these crimes abroad shall be tried according to the Turkish Law upon request by the Minister of Justice and notwithstanding their nationality.
4. The main sources were the Genocide Convention, Statute of Nuremberg Tribunal and Rome Statute when the crime of genocide was described under TPC. Although the Genocide Convention and Rome Statute did not seek the committal of the acts constituting genocide to have taken place “through the execution of a plan”, the new TPC accurately sought this element.